

Creating a Composite Justice Index: Better Measures for Change

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The ability to access courts, the speed at which cases are resolved and public opinion are three of the most common measures by which Canadians assess the effectiveness of their civil justice systems.¹ These measures, however, do not tell the whole story. It is a story that is important to understand because the success of our civil justice system, or lack thereof, has larger economic and social ramifications. Accurate and comprehensive measures of a system's success are important keys to being able to make meaningful improvements to that system.² One such comprehensive measure is the composite indicator. This paper explores the potential benefits and limitations of composite indices as performance measures and begins to examine how such an indicator could be used to evaluate the civil justice systems of Canada.

What is a Composite Index?

Many recognize the modern origins of composite indices in the development of the social performance indicators of the 1930s including the Gross National Product.³ Recently, composite indices have experienced a resurgence of use in areas where economic data, such as market success, do not provide sufficient measures of performance. These areas include the environment, health, sustainable development and education. The aim of an index is to provide a measure by which change can be made and evaluated in a particular form of institutional behavior. Such change, in turn, affects the broader social environment and the lives of individuals.⁴

Composite indices are made up of many individual indicators that are combined to form one global assessment of performance⁵. It is common to individually assess the strength of 10-20 different aspects or indicators of performance of an overall system. The individual results are then combined according to pre-determined selection and weighting criteria. The end product is one summary number, sometimes referred to

¹ See for example: The Canadian Bar Association Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: The Canadian Bar Association, 1996) at 11-12; Sandra Wain "Public Perceptions of the Civil Justice System" in *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1996) vol. 1 at 41; John Twohig et al. "Empirical Analyses of Civil Cases Commenced and Cases Tried in Toronto" in *Rethinking Civil Justice: Research Studies for the Civil Justice Review* (Toronto: Ontario Law Reform Commission, 1996) vol. 1 77 at 79-80 and 129-130; Manitoba Civil Justice Review Task Force *Manitoba Civil Justice Review Task Force Report* (Manitoba?: 1996) at 1-2.

² Peter Smith, "A Framework for Analysing the Measurement of Outcome" in Peter Smith, ed. *Measuring Outcome in the Public Sector* (London: Taylor and Francis, 1996)1 at 4-5; John Twohig et al. *supra* note 1 at 79.

³ Karen Frecker, *Beyond GDP: Enabling Democracy with Better Measures of Social Well-Being* (Trudeau Centre for Peace and Conflict Studies:2005) at 9.

⁴ *Ibid.* at 3.

⁵ Rowena Jacobs with Maria Goddard and Peter Smith "Public Services: Are Composite Measures a Robust Reflection of Performance?" Online: The Public Services Programme <http://www.publicservices.ac.uk/projects/Jacobs.asp> .

as a “score” or “rate of success”. In many cases, indicators for several different regions or countries are created and are, in turn, combined into a larger, composite index. By integrating large amounts of complex information into a format that is clear and understandable, indicators are often used to analyze trends over time and across regions in a manner that will be meaningful for the public and policy makers.⁶

Recently, there have been several efforts to create composite indicators which measure Canada’s performance in important areas. The Canadian Council on Learning has just developed the Composite Learning Index. The Atkinson Charitable Foundation is in the process of creating a Canadian Index of Well-Being. We propose that civil justice system performance is another crucial area for which it would be very useful to develop this kind of measure.

Potential Benefits of Creating a Civil Justice Index:

- **Bringing public attention to the issue:** Reform is not a popular political rallying point, yet a healthy justice system is important for a well-functioning society.⁷ While people working within the field recognize that the civil justice systems of Canada are in need of further improvements, civil justice reform is not a top priority for the public.⁸ A civil justice index has the potential to help bring public attention to, and therefore public impetus for, civil justice reform.⁹
- **Motivating policy makers:** One of the strengths of many composite indicators is that they provide end data in clear and unambiguous format: the “final score”. Such a simple and straightforward number evaluation could become a powerful motivational factor or rationale for policy shifts in areas of performance that may be lagging behind.
- **Providing a measure by which future reform initiatives can be evaluated and modified as needed:** While we can often intuitively recognize that something is not right within a system, it is much harder for us to identify which parts of that system need to be altered in order to produce improved results.¹⁰ A composite index provides a base measure from which to determine what areas require improvement; it also provides on-going measures by which we can assess the success of any changes. There is, at present, no market in which “consumers” of the civil justice system can effectively express their preferences. Ensuring allocative efficiency, deciding where to put resources and determining what will produce the best results,

⁶ *Ibid.*

⁷ The World Bank, “Governance and Development” (Washington, DC: The World Bank, 1992) at 1.

⁸ Wain, *supra* note 1 at 41-42.

⁹ Nardo et al., *Handbook on Constructing Composite Indicators: Methodology and Users Guide* (Organization for Economic Cooperation and Development: 2005) online: OECD Statistics Working Papers

[http://www.oalis.oecd.org/oalis/2005doc.nsf/43bb6130e5e86e5fc12569fa005d004c/7bef27ea932895d4c1257058004bcdeb/\\$FILE/JT00188147.PDF](http://www.oalis.oecd.org/oalis/2005doc.nsf/43bb6130e5e86e5fc12569fa005d004c/7bef27ea932895d4c1257058004bcdeb/$FILE/JT00188147.PDF) at 8.

¹⁰ Donella Meadows, *Leverage Points: Places to Intervene in the System* (Sustainability Institute: Hartland, VT, 1999) at 1-2.

can therefore be a complex process.¹¹ An index can be a very powerful tool in such a process.

Limitations to Guard Against When Creating a Civil Justice Index:

- **Oversimplifying a complex issue:** There is a paradox inherent in composite index creation. On the one hand, indicators must be comprehensive so as to represent, to the greatest degree possible, important issues. Indicators that are too narrow will give an inaccurate picture of the functioning of a system as a whole. Public dialogue and policymaking are thus impoverished and may even be led astray. The more comprehensive a composite index, however, the more likely it is that the indicator will give an inaccurate or meaningless picture because too many different things are being measured together.¹² Defining a manageable scope for the “what” being measured, as well as honing in on the most valuable indicators are thus crucial in successful composite index creation.
- **Creating misleading results:** Consistent collection and analysis of indicator data has proven to be a problem.¹³ Further complicating things, researchers have shown that indices which have not been very carefully crafted may not accurately measure changes over time. For instance, small and random changes in statistical data can have an effect on measures within an index or even index results without any actual performance variation.¹⁴
- **Denying legitimate difference:** We live in a heterogeneous society and an index with its particular values and methods of analysis implies ideological hegemony.¹⁵ An index, to a greater or lesser extent, reflects the values of its constructors. With its calculations and scientific measurements an index can give the appearance of objectivity, denying the value-based decisions made in choosing indicators and pre-determining their relative importance or weight. Even small changes in aggregation methods can have substantial impacts on index results.¹⁶ Different goals or outcomes, tailored to meet the needs of different communities or provinces, may be pursued by civil justice systems. These differences may not be fully recognized by one index.
- **Creating Competition:** As the Canadian Council on Learning has identified, it is important that an indicator which compares performance across provinces does not pit regions against one another, but rather allows them to learn from one another’s strengths.¹⁷
- **Identifying future success unlikely:** It is worth noting that while composite indices can be useful tools for identifying areas that need improvement, and

¹¹ Smith , *supra* note 2 at 4.

¹² Frecker, *supra* note 3 at 7.

¹³ Smith, *supra* at 12-13; Jacobs, *supra* note 5.

¹⁴ *Ibid*

¹⁵ Frecker, *supra* note 3 at 15.

¹⁶ Jacobs, *supra* note 5.

¹⁷ Canadian Council on Learning, “The 2006 Composite Learning Index – Putting Lifelong Learning on the Map” online: Canadian Council on Learning: Composite Learning Index <http://www.ccl-cca.ca/CCL/Reports/CompositeLearningIndex2/?Language=EN>.

for measuring the success of reform initiatives, they do not offer any answers as to what types of reforms are most likely to be successful.

Why Do We Need A Civil Justice Index?

Reports such as the Canadian Bar Association's *Systems of Civil Justice Task Force Report* or the Ontario Law Reform Commission's *Rethinking Civil Justice* acknowledge the need for change within Canada's civil justice systems. These reports reflect an experiential and intuitive sense that things are not right. A healthy civil justice system is clearly an important requisite of a well-functioning state. According to the World Bank, governance is key to the economic and social development of a country. The organization identified a healthy legal system as one of four main components of governance.¹⁸

Economic Rationale for a High-functioning Civil Justice System:

While more concerned with the costs of crime, in 2001 the federal government nonetheless recognized the value of assessing the economic costs of civil litigation in Canada.¹⁹ It is easy to see why. A more economically efficient civil justice system will not only have positive effects on the personal finances of Canadians facing litigation, but also benefits for government spending and companies doing business in Canada.

- *For government:* It is impossible for governments to spend unlimited amounts of money on justice. In a high-functioning justice system, however, governments are able to make wise decisions about the amount of money which should be spent on justice, as well as where spending will be most beneficial, thus maximizing resources.²⁰
- *For companies:* An efficient civil justice system leads to a reduction in transaction costs²¹ and certainty about enforcement if agreements are broken. A healthy system will also provide reasonable time delays and an availability of desirable dispute resolving methods.²² The above considerations encourage business to come to, and stay in, Canada, producing far-reaching economic benefits.
- *For citizens:* For many families, economic strain is synonymous with civil litigation.²³ A healthy justice system entails more effective decisions about what areas of law should be subject to administrative tribunals or case-management, minimizing financial strain on families.

¹⁸ The World Bank, *supra* note 7 at 1.

¹⁹ Department of Justice Canada, Research and Statistics Division *Lessons Learned* (Research and Statistics Division: 2001) at 9.

²⁰ John J. Dilulio, "Rethinking the Criminal Justice System: Towards a New Paradigm" in *Performance Measures for the Criminal Justice System* (Bureau of Justice Statistics- Princeton University: 1993)1 at 3-4.

²¹ Robert Howse and Michael Trebilcock, "The Role of the Civil Justice System in the Choice of Governing Instrument" in *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, *supra* note 1 at 246.

²² *Ibid.*

²³ Mary Stratton and Travis Anderson, *Social, Economic and Health Problems Associated with a lack of Access to the Courts* (2006) [unpublished, archived at Canadian Forum on Civil Justice] 7-8.

A Canadian Civil Justice index would offer important measurements by which a more economically efficient justice system can be created. The cost of justice programs can be compared with their success rates producing more effective government spending choices. Methods of dispute resolution can be measured against satisfaction rates, settlement rates and party costs in order to determine what methods of dispute resolution will be most effective and affordable for citizens and companies, while still leading to satisfactory results. The benefits of such outcomes, of course, go far beyond economics.

Social Benefits of a high-functioning Civil Justice System:

There is evidence to suggest that legal and social issues tend to cluster together. Of even greater concern, the evidence also points to the fact that this clustering phenomenon may be tied to an inability to resolve legal issues in an effective and timely manner. An individual's social problems have a negative impact on family members, the community at large and the economy.²⁴ A civil justice system that functions poorly increases the likelihood of negative impacts. Two important social consequences of an ineffective civil justice system are particularly worth noting:

- *Health problems:* In the unpublished report "*The Social, Economic and Health Problems Associated with a Lack of Access to the Courts*", over 60% of the participants interviewed reported various negative mental health effects as a result of their involvement in litigation. While some of these problems were unrelated to the participant's legal dispute or pre-dated it, many identified stress as a result of their legal problems as the cause of their declining mental health.²⁵ Drawn out and mishandled dispute resolution enhances and prolongs this stress, which in turn has negative social and economic effects including reduced involvement in society, strain on families and long-term health problems.²⁶ It is important that Canadians have civil justice systems that resolve their disputes effectively in order to minimize the negative health effects of conflict.
- *On-going conflict:* If a civil justice system is ineffective, people may choose to avoid it. Alternatively, an unhealthy civil justice system may pose barriers to access that disputants cannot surmount. Either way, the consequence is that people cannot use the formal mechanisms of the state to resolve their disputes. Without these formal measures, some disputes are more likely to go unresolved or to be resolved in unsatisfactory ways. Parties are also less likely to follow through on agreements.²⁷ Unsatisfactory resolution of disputes increases the likelihood of mental health issues, ongoing conflicts, violence and economic hardships.²⁸

²⁴ Stratton, *supra*, note 23 at i; Pascoe Pleasence with Nigel Balmer and Alexy Buck *Causes of Action: Civil Law and Social Justice* (United Kingdom: Legal Services Commission, 2006) at 60.

²⁵ Stratton, *supra*, note 23 at 10.

²⁶ Laura Nader, "Disputing Without the Force of Law" in Michael Freeman ed. *Alternative Dispute Resolution* (New York: New York University Press, 1995) 169 at 189; Ross Cranston, "What Do Courts Do?" in Michael Freeman ed. 61 at 72.

²⁷ Tom Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990) at 102, 106.

²⁸ Pleasence, *supra*, note 24 at 155. James S. Bruner, Foreword Oscar G. Chase *Law, Culture and Ritual* (New York, New York University Press, 2005) at xi.

A Civil Justice Index would permit a more accurate understanding of the negative social consequences of litigation. It could also serve as a potential measure by which civil justice programs can be assessed to determine which ones best serve to minimize these negative consequences.

What Should We Be Measuring?

Factors in Data Selection Generally:

In their *Handbook on Constructing Composite Indicators*, the European Joint Research Centre lists the following criteria as some of the most obvious for data selection²⁹:

- **Policy relevance** – Indicators must be associated with one or more issues around which key policies are formulated. Unless users of a civil justice index can link the key areas being measured to critical decisions and policies, a civil justice index is unlikely to motivate action or be capable of measuring the success of reform initiatives.
- **Simplicity** – When deciding what should be measured, index creators should ensure that final information about a chosen indicator can be presented in a readable and easily understandable format. Complex calculations must be presented in a format which the public will understand.
- **Validity** – Individual indicators must reflect facts. Data used in the creation of the index must meet standards of scientific rigor. Indicators must be verifiable and reproducible.
- **Availability of data over time** - Time series data must be available which will reflect shifts in individual indicators over time. If results are only available or measured at one or two data points, it will not be possible to identify where we have been in the past, predict where we will be in the future or measure the on-going effects of policy shifts.
- **Availability of affordable data** – Sufficient good quality data must be available at a reasonable cost. Alternatively, it must be possible to create a measuring process that will produce quality data in the near future at an acceptable cost, both in terms of financial and human resources.
- **Sensitivity** – Indicators must be capable of accurately detecting changes, even small ones, in the system.
- **Reliability** – The ways in which the indicators measure performance must be methodologically sound. In other words, similar results and conclusions for a given indicator should be attainable by different measures or different researchers.

The Canadian Application:

Keeping in mind the above data selection criteria, as well as the nature of civil justice systems in Canada, the following are a few of the preliminary questions which need to be addressed in the creation of a civil justice index:

²⁹ Nardo, *supra* note 9 at 9-10.

- **What is a Civil Justice System?** It is crucial to define a clear vision of what a civil justice system is³⁰ in order for both index creators and users to understand what is being measured. Creating a definition of “civil justice systems” will also help focus and narrow the search for relevant indicators. While crucial, this definition will not be easy to obtain: how do we capture the complexity and differences amongst all of Canada’s civil justice systems in one definition?
- **What is the end goal of civil justice reform? What kinds of things should we be measuring in order to determine whether we are moving towards that goal?** Measurement necessarily implies end objectives: we must decide which objectives will be measured.³¹ Such choices involve not only tough decisions about inclusion of indicators but also weighting of those indicators selected. As an example, how will we decide to value and weigh efficiency or speed of resolution as compared with quality of resolutions? By what standards will we measure quality of resolutions? Such decisions will have significant effects on the final “score” of our civil justice systems.
- **What are we measuring already? And what will be feasible to measure in the future?** We must recognize, as the Canadian Council on Learning has, that when choosing indicators we will be forced to make compromises between desirable theoretical framework and the availability of data.³² Certain court measures are already available or could easily be obtained and deserve consideration for inclusion in a composite index. Examples include:
 - *Data available on awards and costs:* This would provide information on proportionality, as well as more accurate information on who lacks access to justice for financial reasons.
 - *Length of time between filing of motion and resolution of case in various streams of the civil justice system:* Such measurements will help us to begin answering questions such as which case management initiatives across Canada induce settlement? When does settlement happen during the process? Are certain types of cases more likely to be subject to full court processes?
 - *Enforcement rate for judgments:* From such information we can begin to decide what kinds of judgments and enforcement measures are most effective.

Other potential measures such as client satisfaction, the satisfaction of employees within the justice system, the user-friendliness of the system or the quality of settlements are more complicated. These measurements require value judgments and qualitative research. As such, we need to choose these “more complicated” measures with extreme care, ensuring they will give us significant, sound results at a proportional cost.

³⁰ Smith, *supra* note 2 at 9; Nardo, *supra* note 9 at 12.

³¹ Smith, *ibid.*; Nardo, *ibid.*.

³² Nardo, *ibid.* at 13; Canadian Council on Learning, *supra* note 17.

A healthy civil justice system is an important component of good governance and a safeguard against the potential negative social and economic effects of disputes. The number of civil justice reviews conducted in Canada over the past ten years is a testament to the fact that we recognize some reform of our systems is needed. Well-constructed composite indices can offer a measure by which change can be both motivated and evaluated. While we must guard against limitations such as the oversimplification of a complex problem or misleading results, a civil justice index can encourage the public and policy makers to participate in construing effective changes.