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### Acknowledgments

Please contact us to share your thoughts on any of the issues raised in our newsletter or to suggest topics you would like us to include in future issues. We also welcome contributions of articles for future issues. Submissions may be in French or English; however we ask that all contributions be written in plain language. We reserve the right to edit. For more detailed information, please contact the editors: Diana Lowe and June Ross.


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# Publications

## News and Views Issue 3: Spring 2000

### An Overview of Civil Case Processing in Ottawa

By Bob Kingsley, Senior Advisor, Canadian Centre for Justice Statistics

Over the past several years in Canada, there have been a number of calls for statistical information in the area of civil justice. In addition to the recent work of the Canadian Bar Association Systems of Civil Justice Task Force, several Canadian provinces have undertaken independent reviews of the justice system; all have discussed the need for management information in the civil courts as a prerequisite to introducing appropriate and effective court reforms. There has been a handful of empirical studies in Canada focussing on various aspects of civil justice. To date, however, the need for civil justice statistical information has not been completely defined. In 1995, in an introductory work prepared for the Ontario Civil Justice Review, Professor Rod Macdonald stated: "We really don't know what most citizens expect of the civil justice system across the various fields of law that are currently managed through the courts. And we really don't know much about overall patterns and rates of civil litigation." The study findings reported here contribute to Canadian civil justice information, and help establish a framework for examining some of the questions surrounding the nature of cases in the civil system and their progress through the courts.

Located within Statistics Canada, the Canadian Centre for Justice Statistics (CCJS) is a federal-provincial enterprise responsible for collecting and publishing information on the administration of criminal and civil justice in Canada. While the CCJS does not currently conduct ongoing data collection in the civil courts area, the topic has been identified as an emerging priority. As such, various options for the establishment of a civil court survey are being explored. As part of this work, a pilot survey in the Ottawa Civil Court (General Division) was undertaken. One of the main objectives of the Ottawa study was to contribute to the development of an ongoing national civil court survey by helping to define survey scope, variable definitions, data collection methods and costs. This article presents a brief summary of some of the important findings from the Ottawa study.

### Ottawa Study

Data collection for the Ottawa study included all Superior Court general civil and divorce cases, but excluded probate and family cases. At the time of the study, custody, maintenance and other family issues were generally dealt with in Provincial Court Family Division. The civil court data were split into three categories based on the type of process used to initiate the case. Thus the study looked at cases initiated by: 1) statement of claim; 2) application; and 3) divorce petition. These case types were separated because the nature of the civil process and the details surrounding final dispositions are quite different for each category.

The study drew two different samples. It collected a census of all 212 "trial ready cases" (cases that

had been placed on a trial ready list when a certificate of readiness for trial was filed), and 46 "trial cases" (cases that had actually proceeded to trial). The study also collected a randomly generated sample of 601 of a total of 10,585 cases that were initiated in 1994 but did not proceed to a trial ready list by July 1997. These are referred to as "non-trial ready cases." The non-trial ready data have a margin of sampling error of 5% for the statement of claim and application cases, and 10% for the divorce cases.

## Findings

The main findings of the Ottawa study are presented below. When examining these results, the reader should keep in mind several important points. First, the study examined civil cases that were initiated in 1994, which is referred to throughout this article as the "reference year." The study tracked the progress of reference year civil cases until July 1997. The three and one-half year period between January 1994 and July 1997 is referred to as the "survey period." Also, it is important to note that reference year cases that were not disposed of by July 1997 were excluded from all analysis referring to completed cases.

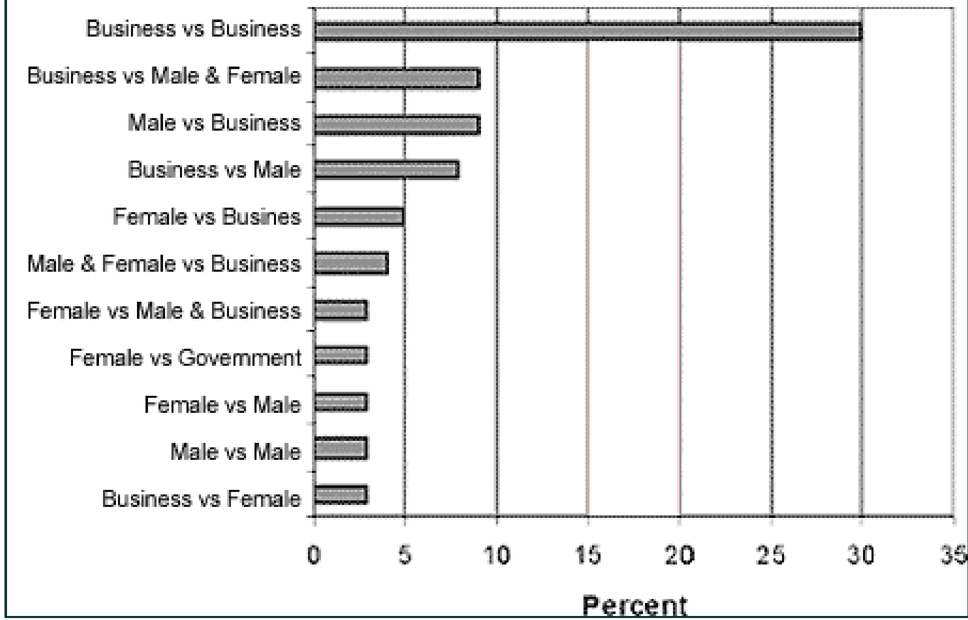
Of the 10,843 civil cases initiated in Ottawa in 1994, 33% were initiated by statement of claim, 44% by application, and 23% by divorce petition. The statement of claim cases comprised debt collection (50%), contract (23%), malpractice (7%), motor vehicle (1%), and other civil matters (19%). Almost 80% of application cases concerned landlord and tenant matters.

## Plaintiffs and Defendants

The study data help to illustrate the types of parties that sought dispute resolution in Ottawa's civil courts in 1994. They show that businesses comprised more than half (54%) of all plaintiffs in cases initiated by statement of claim. The remaining statement of claim cases were initiated by males (16%), females (16%), and by males and females (10%). Governments initiated 3.5% of statement of claim cases. Cases initiated by application showed a slightly different pattern. The difference between males and females filing applications was greater (21% male versus 3% female), and businesses initiated a higher proportion (63%) of cases. Governments initiated 10% of application cases. Divorce petitions were initiated by females in 58% of cases, by men in 31% of cases, and by men and women in 11% of cases.

To examine more closely litigation patterns between plaintiff and defendant in statement of claim cases, these data were cross-tabulated. The chart below highlights the most common litigant combinations representing 80% of all such cases. It shows that 30% of all statement of claim cases initiated in 1994 involved businesses in dispute with other businesses. Indeed, 72% of all statement of claim cases involved businesses as either plaintiff or defendant, or both. Other frequent litigant combinations included businesses versus males and females (9%), males versus businesses (9%), businesses versus males (8%), and females versus businesses (5%).

## Chart 1: Plaintiffs vs Defendants for Statement of Claim Cases




| **Plaintiff By Defendant**<br><br>Business vs Female | 3 |
|---|---|
| Male vs Male | 3 |
| Female vs Male | 3 |
| Female vs Government | 3 |
| Female vs Male & Female | 3 |
| Male & Female vs Business | 4 |
| Female vs Business | 5 |
| Business vs Male | 8 |
| Male vs Business | 9 |
| Business vs Male & Female | 9 |
| Business vs Business | 30 |
| | **80** |

## Legal Representation

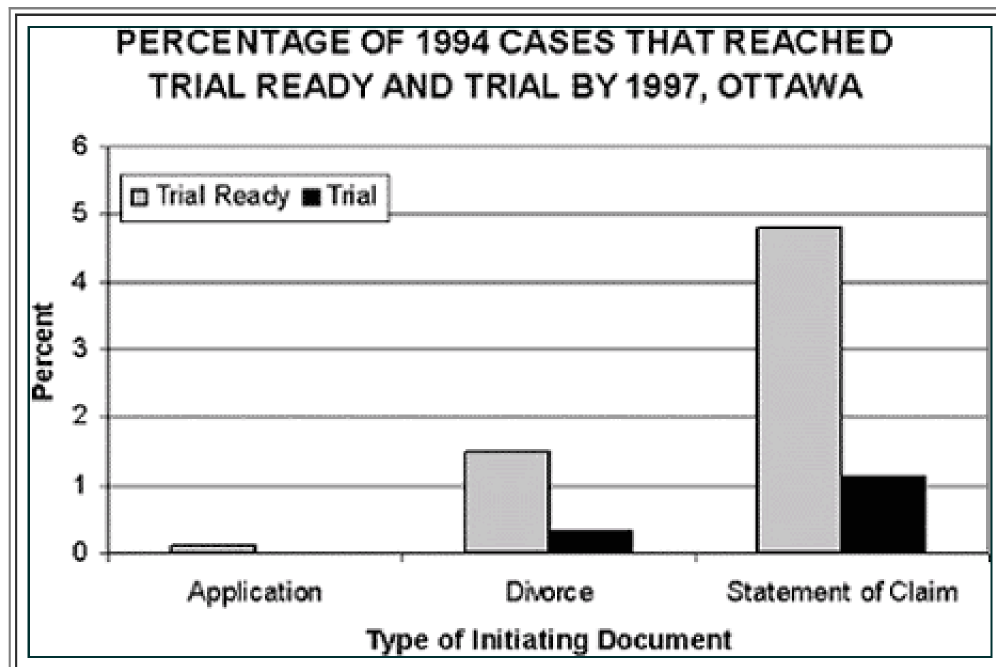
Data collected from the Ottawa court indicated that virtually all plaintiffs had legal representation at some point in the life of statement of claim and divorce cases. The exception was in application cases where only 60% of plaintiffs had legal representation in non-trial ready and trial ready cases. Only one application went to trial, and in this case, no legal representation was indicated.

The data showed some variability in defendant legal representation among case types. As with plaintiff legal representation, virtually all defendants had legal representation in statement of claim and divorce cases that proceeded to trial ready and trial. However, fewer than 60% of defendants had legal representation indicated in non-trial ready statement of claim cases, and fewer than 20% of defendants had legal representation in non-trial ready divorce cases. Again, applications showed significant variation with only 7% of defendants securing legal representation for non-trial ready application cases, and 40% with legal representation in trial ready application cases.

## Trials

Because they are settled or abandoned, most civil cases never reach the trial ready or trial stage. For matters initiated by application in 1994, only 5 cases (0.1%) proceeded to the trial ready stage, and just one case (0.02%) went to trial during the entire survey period. In divorce matters, 1.5% of cases reached the trial ready stage and 0.3% proceeded to trial. Civil matters initiated by statement of claim displayed the highest rate of progression to trial ready and trial. During the survey period, 169 cases or 4.8% of total statement of claim cases initiated in 1994 reached the trial ready stage, while 38 cases (1.1%) went to trial.

## Chart 2: Percentage of Cases that Reached Trial Ready and Trial



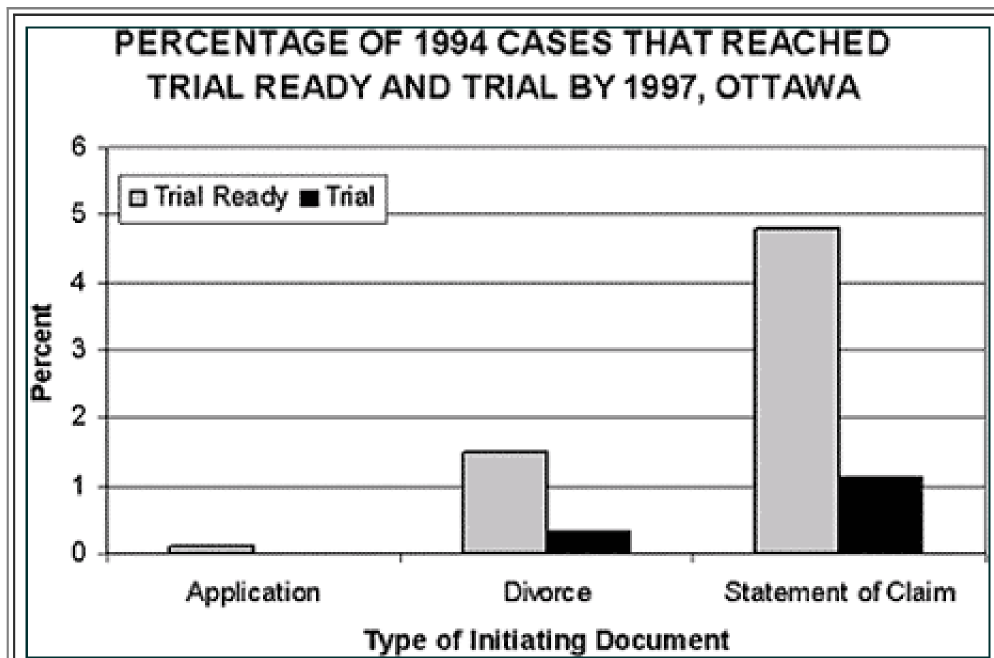

| Chart 2 | Trial Ready | Trial |
|---|---|---|
| Application | 0.1 | 0 |
| Divorce | 1.5 | 0.3 |
| Statement of Claim | 4.8 | 1.1 |

## Disposition Patterns

To be disposed of or completed, a case must be formally removed from the pending inventory of the court. The types of dispositions that can remove a case from a court's pending inventory include settled, discontinued, dismissed, default judgment, and final judgment. During the three and one-half year survey period, civil cases were disposed of at different rates. Just over 50% of statement of claim cases initiated in 1994 resulted in disposition during the survey period, compared to a 92% disposition rate for applications and a 94% disposition rate for divorce matters.

The way in which civil cases were disposed of varied by type of action. For instance, statement of claim cases were most likely to be disposed of through settlement (36%) or default judgment (30%). In contrast, applications and divorce cases were more likely to be disposed of by default or final judgment. For cases initiated in the 1994 reference year, 69% of applications and 63% of divorce cases were disposed of by default judgment.

## Chart 3: Completed Cases By Type of Disposition




| Chart 3 | Statement of Claim | Application | Divorce |
|---|---|---|---|
| Settle | 35.8 | 8.2 | 6.9 |
| Discontinue | 13.8 | 3.1 | 0 |
| Dismiss | 6.7 | 0.1 | 0 |
| Default Jud. | 30.3 | 69.3 | 63.4 |
| Judgment | 12.2 | 19.1 | 28.9 |

## Judgments

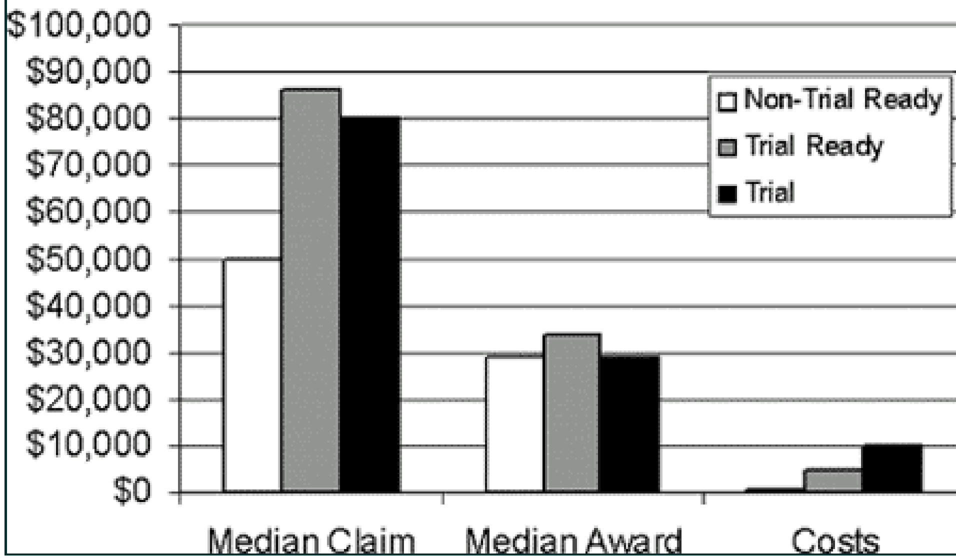
Of the 10,843 civil cases initiated in the reference year, 61% resulted in some type of court judgment (default or final judgment) during the survey period. Most of these judgments were in favour of the plaintiff. For example, judgments in favour of plaintiffs were rendered in 84% of statement of claim cases, 99% of applications, and 91% of divorce matters. The majority of these judgments were rendered in non-trial ready cases, with most being default judgments in cases where the defendant did not file a defence. Judgments in favour of plaintiffs declined slightly in cases that proceeded to trial. Just under 80% of statement of claim trial judgments and 75% of divorce trial judgments were in favour of the plaintiff.

In some divorce cases, custody or maintenance issues were addressed as part of the judgment. Of the 419 divorce cases that included a custody judgment, 56% were for joint custody, 41% sole custody for the mother, and 0.7% sole custody for the father. Of the 421 divorce cases that included a maintenance judgment, 43% were for children only, while 40% were for both spouse and children. The remainder were for a spouse only.

## Claims, Awards and Costs

For statement of claim cases disposed of during the survey period, median monetary awards were generally less than median claims. In non-trial ready cases, the median claim was $50,000 compared to a median award of $28,900. In contrast, the median claim in trial ready and trial cases was around $80,000 compared to median awards in the $30,000 range. It is interesting to note that the median award for cases that proceeded to trial was no higher than for cases that were disposed of at the non-trial ready stage. On the other hand, court costs rose as the case progressed further through the civil process. They ranged from $308 for non-trial ready cases to $10,000 for trial cases. Application cases, which are dominated by landlord and tenant matters, were far more likely to obtain awards that were comparable to original claims. For applications disposed of during the survey period, the median claim was for $767 compared to a median award of $740. Median costs in application cases were $125.

## Chart 4: Statement of Claim Cases By Median Claim, Award, and Costs

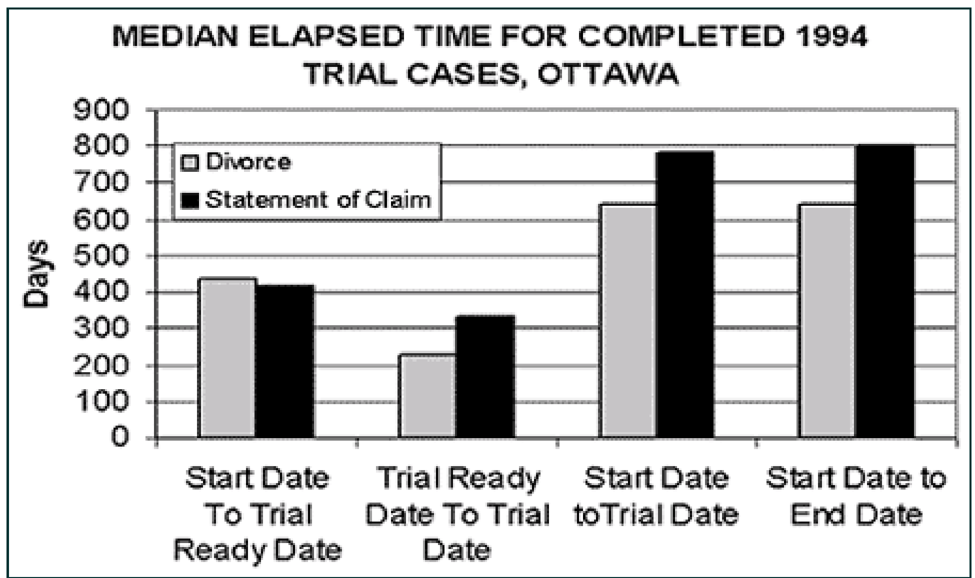



| Chart 4 | Non-Trial Ready | Trial Ready | Trial |
|---|---|---|---|
| Median Claim | 50,000 | 86,207 | 80,055 |
| Median Award | 28,920 | 33,500 | 28,939 |
| Costs | 308 | 4,750 | 10,000 |

## Case Processing

Calculating case elapsed times permits analysis of the amount of time required for cases to reach various points in the civil process. In Ottawa, the elapsed times for different case types depended on how far they proceeded in the civil process. For instance, the median elapsed time, from start date to end date, for all non-trial ready statement of claim cases was 160 days compared to an elapsed time of 83 days for all completed divorce cases. However, cases that proceeded to trial had much longer elapsed times. The median elapsed time from start date to trial ready date was 415 days for statement of claim cases, and 434 days for divorce cases. The median elapsed time from trial ready date to trial date was 329 days for statement of claim cases and 227 for divorce cases. The overall elapsed time from start date to end date was 800 days for statement of claim cases, and 644 days for divorce matters.

## Chart 5: Elapsed Time By Process Points




| Chart 5 | Divorce | Statement of Claim |
|---|---|---|
| Start Date To Trial Ready Date | 434 | 415 |
| Trial Ready Date To Trial Date | 227 | 329 |
| Start Date toTrial Date | 644 | 780 |
| Start Date to End Date | 644 | 800 |

The Ottawa data also showed variation among different subject areas within case types. For statement of claim cases that reached the trial ready stage during the survey period, malpractice cases had the shortest median elapsed time (696 days), while trial ready motor vehicle cases had the longest median elapsed time (890 days). Even more variation was evident among cases that went to trial. The median elapsed time for malpractice trial cases (1,206 days) was almost twice as long as the median elapsed time for debt collection cases (682 days).

## Conclusions

The data presented here allow an exploration of case processing and disposition patterns for different types of subject matter and litigants that come to court. In doing so, they offer a brief demonstration of some of the analytic possibilities in the civil justice area.Further information can be found in the Canadian Centre for Justice Statistics *Civil Courts Study Report*, 1999, Catalogue no. 85-549-XIE.

# Publications

## News and Views Issue 3: Spring 2000

### Is There a Constitutional Right to Paid Legal Counsel in a Civil Law Matter?: An Analysis of the Supreme Court of Canada's Findings in New Brunswick (Minister of Health and Community Services) v. G. (J.).

By Barbara Billingsley, Assistant Professor, Faculty of Law, University of Alberta

According to recent reports, the number of self-represented litigants coming before Canadian courts is on the rise [ 1 ]. Although this trend can be attributed to a number of factors, at least some of the people who appear in civil court proceedings without a lawyer do so because they don't qualify for legal aid [ 2 ]. Do such litigants have a constitutional right to paid legal counsel? According to the Supreme Court of Canada's September 10, 1999, ruling in *New Brunswick (Minister of Health and Community Services)* v. *G.(J.)* [ 3 ], the answer to this question is a carefully qualified "yes". The Supreme Court found that, in certain circumstances, Section 7 of the *Canadian Charter of Rights and Freedoms* [ 4 ] obligates the government to provide a private litigant with paid legal counsel. But how far does this finding go in genuinely advancing the cause of indigent litigants for state-funded counsel? Arguably, the decision in *J.G.* does not make great strides toward alleviating the systemic funding problems encountered by poor litigants. Nevertheless, the decision probably does go as far as possible in providing such litigants with a constitutional avenue for obtaining state-funded counsel without radically changing the Court's traditional interpretation of *Charter* rights.

### The Facts in *J.G.*

*J.G.* arose from an application by the New Brunswick Minister of Health and Community Services to extend an existing order granting the Minister custody over the Appellant's children for six months. At the request of duty counsel who appeared for the Appellant, the Court set the matter down for a full hearing in order to allow the Appellant to challenge the application. The Appellant, who was indigent and receiving social assistance, applied for legal aid in order to retain counsel for the custody hearing. This request was denied because custody applications were not covered by the existing legal aid guidelines. The Appellant then brought an application for an order to compel the provincial government to provide paid counsel to represent her in the custody proceedings. The Appellant's application was based on the argument that any custody finding made against her in the absence of paid legal representation on her behalf would constitute a denial of her right to liberty or security of the person contrary to Section 7 of the *Charter*. Both the Court of Queen's Bench motions judge and a majority of the New Brunswick Court of Appeal dismissed the Appellant's application, concluding that the government's failure to provide the Appellant with legal aid for the custody hearing did not violate Section 7 of the *Charter* [ 5 ].

### The Supreme Court's Ruling in *J.G.*

The Supreme Court of Canada's decision in *J.G.* is provided by two judgments, with the principal judgment written by Chief Justice Lamer (as he then was) and a concurring judgment written by Madame Justice L'Heureux-Dubé. With respect to the alleged infringement of Section 7, Lamer C.J. focussed on the Appellant's right to security of the person and concluded that, while this right does not protect an individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action [ 6 ], security of the person does come into play where state action has a serious and profound effect on a person's psychological integrity [ 7 ]. The state's attempt to remove a child from parental custody constitutes a serious interference with the parent's psychological integrity because of the potential loss of companionship for the parent, the obvious loss of privacy and intimacy for the parent, and the social stigma which is likely to be imposed upon any parent by the removal of a child [ 8 ]. Lamer C.J. declined to determine whether the Appellant's right to liberty was engaged on the facts given the "differing views expressed about the scope of the right to liberty in the Court's previous judgments" [ 9 ].

Madame Justice L'Heureux-Dubé agreed with Chief Justice Lamer's findings on the right to security but went on to find that state interference in parental decision-making and custody also impacts upon the right to liberty guaranteed by Section 7. Relying upon Justice LaForest's comments in *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto* [ 10 ], L'Heureux-Dubé J. held that nurturing, caring for, and making decisions for a child are part of the liberty interests of a parent which are clearly implicated in custody proceedings [ 11 ].

Having found that a child custody hearing seriously impacts upon at least a parent's right to security of the person, the Court next considered whether fundamental justice requires that a parent have access to legal counsel at such a hearing. On this point, both Lamer C.J. and L'Heureux-Dubé J. found that fundamental justice requires a custody hearing to be fair and that fairness in turn mandates that the parent be provided with an opportunity to present his or her case effectively [ 12 ]. In some circumstances, the effective presentation of the parent's case will require the parent to be represented by counsel [ 13 ]. Circumstances to be considered include the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent [ 14 ]. Applying these considerations to the case at bar, both Justices found that principles of fundamental justice entitled the Appellant in the case at bar to be represented by legal counsel paid for by the state since the Appellant could not afford counsel on her own.

Looking at the specific circumstances of the Appellant's case, Lamer C.J. noted that the custody hearing seriously affected the parent's interests, especially given the fact that the Minister was seeking to extend a custody order when the Appellant had already been separated from her children for over a year. Further, the hearing was scheduled for three days and was expected to be legally complex, with the Minister planning to produce 15 affidavits plus expert reports and with all other parties being represented by counsel. Finally, the record did not indicate that the Appellant possessed the superior intelligence, education, communication skills, composure and familiarity with the legal system which an unrepresented parent would require in order to effectively represent his or her case [ 15 ].

Generally, L'Heureux-Dubé agreed with these reasons for finding that the circumstances of the case required the Appellant to be provided with legal counsel. Nevertheless, she also added several caveats and comments. First, L'Heureux-Dubé J. emphasized that Section 7 must be interpreted in accordance with other *Charter* rights, and in particular, with regard to the equality rights set out in Section 15 [ 16 ]. She noted that custody issues disproportionately involve women and single mothers and therefore raise questions of gender equality. This called for an interpretation which "takes into account the principle and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15" [ 17 ]. Second, L'Heureux-Dubé J. stressed that, in assessing the seriousness of the interests at stake in a child custody application, the court should not place undue weight on whether the application is for temporary or permanent custody and instead should be attentive to the fact that temporary applications are often part of a process that leads to permanent custody orders, such that the seriousness of the proceeding must be considered in relation to both short term and longer term parental interests [ 18 ]. Third, with respect to the court's consideration of

a parent's ability to represent himself or herself, L'Heureux-Dubé J. stressed that the personal capabilities in question should not be the same capabilities which are assessed in determining the parent's fitness as a parent [ 19 ]. The capabilities under consideration on the legal representation question should include the parent's education level, linguistic abilities, facility in communicating, age, and similar indicators. These characteristics "will vary among those whose liberty and security interests are affected by child protection proceedings, but none of them will have considerable effects on the determination of the ultimate result of the Minister's application" [ 20 ].

Finally, with respect to the second constitutional question, the Court unanimously concluded that the Section 7 *Charter* breach was not justifiable under Section 1. In particular, the Court found that the government's objective in limiting legal aid expenditures is not of sufficient importance to justify the denial of a parent's right to a fair hearing in a custody matter [ 21 ]. The "deleterious effects of the policy far outweigh the salutary effects of any potential budgetary savings" [ 22 ].

## How Does *J.G.* Impact on a Litigant's Ability to Obtain State-Funded Legal Counsel?

The Supreme Court's ruling in *J.G.* can be characterized as both a loss and a victory for the advocates of a right to state-funded legal counsel for indigent litigants. Since the advent of the *Charter*, Canadian courts have been clear and consistent in concluding that none of the rights or freedoms delineated in the *Charter* provides a positive right to paid legal counsel [ 23 ]. To the extent that *J.G.* reiterates this fundamental position, this case may be viewed as a loss for the cause of state-funded counsel. On the other hand, the ruling in *J.G.* does break new ground by definitively establishing that, in certain circumstances, the right to a fair hearing implicit in Section 7 of the *Charter* mandates the provision of state-funded legal counsel even in the absence of an express, substantive right to paid legal counsel. While this interpretation of Section 7 has been previously employed by Canadian courts in the context of criminal cases [ 24 ], *J.G.* is the first Supreme Court case to apply this interpretation to a civil proceeding [ 25 ]. Thus, albeit in a limited way, the *J.G.* ruling is arguably a victory for the proponents of state-funded counsel.

Still, from a practical perspective, although the ruling in *J.G.* does provide indigent litigants with a constitutional basis for seeking state-funded legal counsel where no such basis existed before, the decision also appears to impose serious limits on the situations in which this constitutional argument may be successfully invoked. At minimum, the decision certainly establishes that an indigent parent facing a custody hearing initiated by the state is entitled to paid legal counsel if the circumstances of the case indicate that the parent would not receive a fair hearing without legal representation. However, the extent to which this entitlement can be expanded beyond the specific facts of *J.G.* or beyond the realm of custody matters in general is significantly curtailed by the implied and express limits of the Court's ruling.

The first implicit limitation on the scope the *J.G.* ruling arises from the fact that *J.G.* is a *Charter* case. Canadian law clearly indicates that, in order for the *Charter* to apply to any case, the matter must involve an impugned government action [ 26 ]. In *J.G.*, the Supreme Court does not specifically address the need for a government actor but proceeds on the assumption that the Minister's application for custody constitutes such an action. Significantly, in analysing the Section 7 right to security of the person, the Court focuses on the potential results of the child custody application brought by the Minister and not on the state's decision to deny legal aid funding to the Appellant. This approach appears to verify the finding of previous courts that the *Charter* does not directly obligate the state to provide legal funding for indigent persons. In other words, the failure of the government to provide legal aid coverage does not itself constitute "government action" of a type to merit *Charter* review. Instead, the obligation to provide funding arises only if the funding is being sought by an individual who is involved in litigation which concerns a government action [ 27 ]. Accordingly, in order to successfully rely upon *J.G.* to bring an application for state-funding under the *Charter*, a litigant apparently must first establish that the litigation in question involves some sort of impugned

government action independent of the funding issue.

A second and more explicit limitation on an applicant's ability to successfully apply for state-funded counsel arises from the Court's definition and description of the right to security of the person. In *J.G.*, the court is careful to note that child custody matters raise questions of personal security for the parent because of the deeply intimate emotional and social elements which are involved in parenting and which adversely impact upon a parent whose children are taken away by the state. Although the court does not expressly limit security of the person to situations of child custody, the court's comments do indicate that, in order for security of the person to be called into question, an individual's personal integrity must be at risk. Accordingly, in keeping with previous case law, the court in *J.G.* refuses to interpret the Section 7 security right as protecting purely economic interests [ 28 ]. Since the vast majority of civil litigation cases revolve around economic considerations, *J.G.* probably cannot be successfully relied upon to obtain state-funded counsel for most litigants. Nevertheless, *J.G.* arguably does open the door to the provision of state-funded legal counsel in civil litigation matters which impact on personal matters outside of the economic realm. Examples which come to mind include administrative law matters such as immigration hearings, professional disciplinary hearings, human rights cases and possibly even landlord and tenant matters [ 29 ].

Finally, the most direct and obvious limitation which the *J.G.* decision places on a litigant's ability to obtain state-funded counsel under the *Charter* arises from the Court's conclusion that the requirement of paid counsel is ultimately a matter of court discretion. This finding means that the ability of a litigant to successfully obtain state-funded counsel depends upon the facts of the case in question. Again, while some might argue that this fact dependent right to paid counsel at least opens the door to state-funded counsel for private litigants, others would point out that this approach also leaves the court with the ability to slam the door shut. At the very least, it must be conceded that this discretionary approach does little to resolve systemic funding access problems because it does not consider inherent problems with the funding system, but focuses on the problems which might be encountered if a given proceeding continues without state-funded counsel being provided.

## Conclusions: *J.G.*-Not the Answer to Legal Aid Funding Problems

Undoubtedly, the Supreme Court's ruling in *J.G.* falls severely short of fulfilling the hopes of indigent litigants for state-funded legal counsel. The decision fails to provide an answer to the systemic funding problems associated with legal aid because the decision does not mandate or advocate a wholesale revision to government funding programs under the banner of the *Charter*. On the contrary, the decision follows previous case law in finding that the *Charter* does not provide individuals with a positive guarantee of paid legal counsel and in refusing to interpret Section 7 of the *Charter* as protecting purely economic interests. Nevertheless, this case does offer indigent litigants some hope of successfully applying for paid counsel under Section 7 of the *Charter* if security of the person is at issue and if circumstances indicate that the litigant will not receive a fair hearing without paid counsel. Outside of these parameters, it appears that indigent litigants must look to legislators and to government policy-makers for relief rather than relying upon the courts.

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1. See for example, J. Middlemiss, "Who Needs a Lawyer" (October 1999) 8:6 *National* (Canadian Bar Association) 12 and Czutrin, Coo and Chapnik, JJ., *Judicial Committee Report on Self-Represented Litigants*, (Ontario Superior Court), October 8, 1999. Note that this report and this paper are restricted to a discussion of civil court proceedings and do not deal with the criminal law realm. Return to Article

2. Middlemiss, *ibid*. at 14. Return to Article

3. [1999] S.C.J. No. 47 (QL) [hereinafter "*J.G.*"]. Return to Article

4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11. Return to Article

5. The motions judge was unable to decide the funding issue prior to the date set for the custody hearing. Given the nature of the hearing and considering the best interests of the children, however, all parties agreed that the custody hearing should proceed as scheduled and without prejudice to the Appellant's right to retroactively pursue her application for state-funding. Duty counsel represented the Appellant at the custody hearing on a pro bono basis. Ultimately, the Court granted the Minister's request for an extension of the custody order. (*Supra* note 3 at Para. 8 & 9).

   Given the Court's finding in the custody hearing, the Appellant's application for state-funded legal counsel was technically moot by the time this application was heard by the Court. The issue of mootness did not arise in argument, however, because of the parties' agreement that the custody hearing would not prejudice the Appellant's right to proceed with her *Charter* challenge. Nevertheless, the Supreme Court of Canada did address the mootness issue, concluding that this was an appropriate case for the court to exercise its discretion in favour of hearing the matter. Applying the three part test established by the Supreme Court of Canada in *Borowski* v. *A.G. Canada* [1989] 1 S.C.R. 342, Chief Justice Lamer held that the present case satisfied the three criteria relevant to the Court's exercise of its discretion in favour of hearing a moot issue. First, the case had an appropriate adversarial context, with vigorous argument being made by both sides. Second, hearing the case was an appropriate expenditure of judicial resources because the question of whether a parent has a right to state-funded counsel at a custody hearing is of national importance. Further, in order to decide the funding question, the court would inevitably have to consider a moot case since any custody matter is likely to be heard by a court before the funding issue can be considered. Finally, the Court was not overstepping its institutional role in deciding the case because the issue raised was not abstract and was founded upon concrete government action. (*Supra* note 3 at Para. 41-48). Return to Article

6. *Ibid*. at Para. 59. Return to Article

7. *Ibid.* at Para. 60. Return to Article

8. *Ibid.* at Para. 61. In making this finding regarding a parent's right to security of the person, Chief Justice Lamer was careful to expressly point out that only state action which directly interferes with the psychological integrity of the parent qua parent will impact on the right to security (Para. 63-64):

   Not every state action which interferes with the parent-child relationship will restrict a parent's right to security of the person. For example, a parent's security of the person is not restricted when, without more, his or her child is sentenced to jail or conscripted into the army. Nor is it restricted when the child is negligently shot and killed by a police officer . . .

   While the parent may suffer significant stress and anxiety as a result of the interference with the relationship occasioned by these actions, the quality of the "injury" to the parent is distinguishable from that in the present case. In the aforementioned examples, the state is making no pronouncement as to the parent's fitness or parental status, nor is it usurping the parental role or prying into the intimacies of the relationship. In short, the state is not directly interfering with the psychological integrity of the parent qua parent. The different effect on the psychological integrity of the parent in the above examples leads me to the conclusion that no constitutional rights of the parent are engaged. Return to Article

9. *Ibid.* at Para. 56. Return to Article

10. [1995] 1 S.C.R. 315. Return to Article

11. *Supra* note 3 at Para. 117-118. As noted by Madame Justice L'Heureux-Dubé, this expanded interpretation of liberty beyond the idea of freedom from physical restraint has periodically been adopted by portions of the Supreme Court of Canada but to date has not been endorsed by a majority of the Court. For further discussion on this point, see P. Hogg, *Constitutional Law of Canada*, 4th Student Ed., (1996) at 830-833. Return to Article

12. *Ibid*. at Para. 73 (Chief Justice Lamer) and at Para. 119 (Justice L'Heureux-Dubé). Return to Article

13. *Ibid*. at Para. 73-75 (Chief Justice Lamer) and at Para. 119-120 (Justice L'Heureux-Dubé). Return to Article

14. *Ibid*. at Para. 75 (Chief Justice Lamer) and at Para. 120 (Justice L'Heureux-Dubé). Return to Article

15. *Ibid*. at Para. 75-80. Return to Article

16. *Ibid*. at Para. 112-115. Return to Article

17. *Ibid*. at Para. 115. Return to Article

18. *Ibid*. at Para. 121. Return to Article

19. *Ibid*. at Para. 123. Return to Article

20. *Ibid*. at Para. 124. Return to Article

21. *Ibid*. at Para. 100. Return to Article

22. *Ibid*. at Para. 98. Return to Article

23. See for example *Fowler* v. *Fowler* [1997] 35 O.R. (3d) 243 (Ont. Gen. Div.); *R*. v. *Prosper* [1994] 3 S.C.R. 236; *Mireau* v. *Canada* (1991) 96 Sask. R. 197 (Sask. Q.B.); *Gochanour* v. *Solicitor General of Alberta* (1990) A.J. No. 378 (Alta. Q.B.)(QL); *R*. v. *Rowbotham* (1988) 41 C.C.C. (3d) 10 (Ont. C.A.); and *Deutsch* v. *Law Society of Upper Canada Legal Aid Fund* (1985) O.J. No. 1282 (Ont. S.C.)(QL). Cases such as these take specific note of the fact that a right to state-funded counsel was specifically and deliberately excluded from the *Charter*. Return to Article

24. In *R.* v. *Rowbotham*, *ibid*., the Ontario Court of Appeal held that, while the *Charter* does not provide a positive right to paid counsel, the denial of state-funded counsel to an indigent accused charged with a serious and complex criminal offence violated the accused's right to a fair trial as guaranteed by sections 7 and 11(d) of the *Charter*. Accordingly, the Court granted a conditional stay of the charge pending the appointment of state-funded counsel for the accused in the case. The decision in *Rowbotham* has provided indigent persons charged with criminal offences with a constitutional avenue for pursuing state-funded counsel. For a thorough discussion of the application of the *Rowbotham* principle in criminal cases, see M. Benton and M.D. Smith, "The Right to State-Funded Counsel at Trial", (May 1998) 56:3 *The Advocate* 373. Return to Article

25. Canadian courts have previously had occasions to consider applications to extend the *Rowbotham* principle into the realm of civil proceedings. Generally speaking, prior to *J.G.*, these applications were refused. See for example, *Sanderson* v. *Sasknative Rentals Inc.* (1999) S.J. No. 178 (Sask Q.B.)(QL); *Fowler* v. *Fowler*, *supra* note 23; *Alberta* v. *Canada* (1997) F.C.J. No. 1528 (Fed. Ct. Trial Div.)(QL); *Mireau* v. *Canada*, *supra* note 23; *Gochanour* v. *Solicitor General of Alberta*, *supra* note 23; *Deutsch* v. *Law Society of Upper Canada Legal Aid Fund*, *supra* note 23. *J.G.* finally does bring the *Rowbotham* doctrine into the civil law arena and even expands upon the *Rowbotham* remedy by actually ordering the government to provide state-funded counsel rather

than merely staying proceedings pending same: "a significant departure from the Rowbotham conditional stay of proceedings." (M. Benton and M.D. Smith, *supra* note 24, at 382). Return to Article

26. A review of the relevant case law and a thorough discussion of this principle can be found in Hogg, *supra* note 11 at 645-662. Return to Article

27. *J.G.* does not provide any assistance in determining exactly how much government involvement in the litigation is required in order to justify reliance on the *Charter*. In *J.G.* the government involvement was direct and obvious since the Minister was bringing an application for custody of the Appellant's children. Presumably, government involvement would not always have to be so direct, however the resolution of this issue would depend on previous case law interpreting "government action" under the *Charter*. See Hogg, *ibid*. Still, one might reasonably expect the "government action" requirement to be relatively easy to satisfy in family law matters because most of these matters are determined on the basis of some sort of legislation. See for example, Young v. Young [1993] 4 S.C.R.3 wherein the Supreme Court of Canada suggested at least that Charter values must be taken into account when applying and interpreting the Divorce Act. R.S.C. 1985 (2d Supp). c.3. McLauchlin J. went further in her reasoning and assumed, without deciding, that the Charter applied to courts making custody and access orders under the Divorce Act. Return to Article

28. Again, a thorough discussion of this point can be found in Hogg, *ibid*. at 832-837. Return to Article

29. Prior to the Supreme Court of Canada actually issuing its decision in *J.G.*, it was suggested that if the Supreme Court expanded the *Rowbotham* principle to civil proceedings, the decision would have a serious impact on a variety of non-criminal proceedings such as "proceedings involving committal or non-consensual administration of treatment pursuant to mental health legislation, immigration proceedings where deportation is a potential outcome, disciplinary proceedings within prisons that involve a loss of liberty and, possibly, family matters where one spouse is confined to the home by violence or threats of violence." (M. Benton and M.D. Smith, *supra* note 24 at 382). Return to Article

# Publications

## News and Views Issue 3: Spring 2000

### Civil Justice Reform Update

In future issues, we will be reporting on developments in the civil justice systems of each province and territory. We appreciate the help of our contacts in each jurisdiction who have responded to our requests for updates, and we will be expanding our contacts to ensure that we are able to provide a complete and accurate picture of what is taking place throughout the country.

# Publications

## News and Views Issue 3: Spring 2000

### Continuing Legal Education

In August 1999 the Forum organized a Continuing Legal Education panel called "What's New in Alternative Dispute Resolution in the Courts?" as part of the Canadian Bar Association Annual Conference. We enjoyed informative presentations from our four panel members, each of whom has been directly involved in the development of court annexed ADR in their jurisdictions. Papers were made available to those registered at the CBA Annual Conference, and can be obtained by contacting the CBA directly.

From left to right: Gwen Harris, Ron Hewitt, QC, M. Jerry McHale, The Hournable Mr. Justice James B. Chadwick

# Publications

## News and Views Issue 3: Spring 2000

### Civil Justice Clearinghouse Projects

The development of a Civil Justice Clearinghouse is a priority for the Forum, and while we continue to broaden the links on our website and to expand our database of published civil justice materials, our focus now is to bring in unpublished or not widely available materials. To achieve this last goal, Diana Lowe has begun meeting with key contacts in four jurisdictions: the federal jurisdiction, British Columbia, Alberta and Nova Scotia. The interest and commitment to the Clearinghouse has been great, and we are beginning to receive materials which we will be incorporating full-text into the Clearinghouse. At the same time, we are developing our collections policy, refining our subject headings and seeking funding to allow us to pursue parallel projects with key contacts in each province and territory in the country.

# Publications

## News and Views Issue 3: Spring 2000

### The Civil Justice System and the Public

The Alberta Law Foundation has granted the Forum funding to begin our interdisciplinary study of the relationship between the civil justice system and the public. The focus of the research will be on communication, with the goal of understanding and ultimately improving communication between the courts and the public. We reported last fall that we were applying to the Social Sciences and Humanities Research Council (SSHRC), and although our proposal was approved, we did not receive the grant because SSHRC is limiting each university to one grant under the pilot phase of their new "Community-University Research Alliance" grants. We are applying to SSHRC again in partnership with academics, the judiciary, court administration, the legal profession and representatives of the public from across Canada, and we believe that our success in obtaining funding for the Alberta project will strengthen our application this year.

# Publications

## News and Views Issue 3: Spring 2000

### Language and Civil Justice

The keynote address at the opening ceremony of the Canadian Bar Association Annual Conference in Edmonton on August 22, 1999, was given by John Ralston Saul. At the conclusion of his address, the Chair of the Forum, Doug F. Robinson, QC, and the Executive Director, Diana Lowe, spoke with Mr. Saul about his compelling comments and the relevance of his address to the Forum goal of bringing together "the public, the courts, the legal profession and government to strive to ensure that civil justice is accessible, effective, fair and efficient". Limitations of space prevent us from publishing the full text of his address; however, Mr. Saul has generously allowed the Forum to publish the following excerpts. We chose these excerpts in particular because they speak to the need to clarify our laws and our legal system so that all Canadians can understand and participate in both the justice system and in efforts occurring in every Canadian jurisdiction to reform the civil justice system.

[But caution does not mean time wasted. Caution does not mean useless complexity; it does not mean money spent foolishly by citizens for you; it does not mean debates in our law courts that are incomprehensible to the people, the citizens. It is very, very important.] If the citizens don't understand the legal debate, then the legal debate has lost its purpose in a democracy. [Caution, on the contrary, means the search for clarity, for the long term direction of justice in society]. . . . [Translation]

And secondly, at the receiving end, the sheer weight that I have talked about, the quantity of laws leads inevitably to the rise of specialist language, your specialist language and there are several of them within the legal profession. And that, of course, that specialist language-what I call the dialects of modern corporate specialization, we have thousands of them in different areas-separates the citizen from their law because they simply don't understand what you are talking about out there.

It is the same in medicine. It is the same in philosophy. It is the same in post-modern fiction. The same in almost every area. The modern elites have in a sense defended themselves by giving themselves a dialect which allows them to say, "This is so complicated, my dears, you couldn't possibly understand it." And it simply isn't true.

I was in the Outback in Australia about six months ago and I was talking to an Aboriginal, a Walpre man, and out of the blue he suddenly said that in English there were three types of language: formal language which is sort of polite, rough language and then political language. And what was interesting was what he meant by political language wasn't traditionally what we mean by political language. What he meant by political language was legal, technocratic language. The same is true in French.

And the one that he found the most difficult with and felt was the most destructive was that kind of political language. The language of a managerial, corporatist society in which every corporation - I am using it in the medieval sense, in which each corporation, the lawyers, the writers, the doctors, the businessmen, the economists-are driven to develop their own dialects so that they are incomprehensible to outsiders.

Language is central to the functioning of a democracy. Civilizations work when language means communication. Civilizations are in deep degeneracy, if you will forgive a strong word, when language is used to obscure and prevent comprehension. . . .

And on top of that, citizens know a great deal more. This is the best educated public we have seen in the history of the world. They know a great deal more. They are ready to take part if they can find ways to take part.

But the reality is that this new participation, this new involvement by different kinds of lawyers and interested citizens, it is wonderful but it is outstripped on a daily basis by the growing quantity, the growing complexity and the growing dialects. . . .

. . . [Y]ou have an enormous obligation to help break the myth of inevitability which hangs over our society. The inevitability of the big events and of our necessity to adjust to them. You have an obligation to clarify how law works, to give meaning to the words "legal reform".

***John Ralston Saul***

The full text of this address is available in the Canadian Bar Association *1999 Year Book*. To order, contact Monique Cassidy, Publications Coordinator, at 1-800-267-8860 or nickiec@cba.org