



## Public Perceptions of the Role of the Canadian Judiciary

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## Executive Summary

This report is designed to provide a better understanding of available evidence concerning public perceptions of the role of the judiciary in the administration of justice. Discussion in the report is presented in four main discussion areas that reflect the content and contribution of available sources of information. Conclusions are based on examination of 244 Canadian and international published information items and a special analysis of relevant data from the recently conducted *Civil Justice System and the Public* project.

### **1. What we think that the public thinks: personal experiences and reflections**

The most numerous sources of discussion about public perceptions of the judiciary are, at core, opinion-based commentary that is more concerned with “what we think the public thinks” than in investigating the views the public hold. Although such commentary can result in constructive action for change, much opinion-based material presents negative and sensationalized personal views. Distorted perspectives are fed by media coverage of extraordinary cases involving controversial decisions or actions by individual members of the judiciary and sensationalized coverage in the popular media is widely thought to be a main informant of public opinion. The questions that need to be asked are: from what, if any, evidence do sensationalized distortions derive, and is there solid evidence to support even the more reasoned commentary that assumes a crisis of public confidence in the role of the judiciary?

### **2. The ‘evidence’ of public opinion: large scale polls and surveys.**

Opinion polls and other large-scale surveys are generally relied on as the primary sources of evidence about public views of the justice system in Canada and internationally. Reviewers, however, repeatedly point to persistent methodological weaknesses in these surveys, beginning with the failure to define what is meant by “justice system.” Close review reveals very few questions that directly asked about public opinion of the judiciary. Such results as are available are mixed, but usually more positive than negative and do not support the perception that there is significant and increasing dissatisfaction with the judiciary. When more in-depth questions are posed, indications are that different groups of public hold varying views that are quite nuanced and flexible.

### **3. A more complicated public: insights from smaller research studies.**

The suggestion of a more discriminating public is supported by a number of smaller, diverse projects that consistently find that members of the public are able to reflect on justice issues in a discerning manner. Results tie public satisfaction to being well-informed and having a sense of involvement in and an understanding of, the legal process. There is, however, little consistent topic focus among these studies and most do not pay specific attention to views of the judiciary. The analysis of the data from the *Civil Justice System and the Public* research provides the most direct and detailed

information on public views of the judiciary. In contrast to the disembodied fragments of 'public opinion' produced by poll and survey questions, participants in this study provide rich and complex thoughts about the justice system and the judiciary. They offer positive views about the judiciary with any critique of judges generally situated within a system context and accompanied by suggestions for change. Particular issues voiced by the public are: the encouragement of judicial activism; a need for case management; more accessible and effective procedures for reviews and appeals; and when they do arise, a more transparent process for dealing with complaints against members of the judiciary.

#### **4. What we know; what we don't know; and what to do about it.**

We conclude that there is surprisingly little reliable empirical evidence about public perceptions of the justice system – we know less than we thought we did and there is a lot that we do not know. There is a need to ensure that the justice community, as well as the public, has a better understanding of the state of current knowledge. Developing strategies to gain better information is necessary. Action should be taken to encourage improved design of future polls and large-scale surveys, especially in terms of defining concepts of the justice system and its components. Suggestions are made for research that utilizes a combination of quantitative and qualitative approaches.

## Purpose of the Report

The purpose of this report is to provide a better understanding of public perceptions on the role of the judiciary in the administration of justice. The report is based on an overview of available Canadian and international information sources about related public perceptions, including new research data from the recently conducted *Civil Justice System and the Public* project.<sup>1</sup> The state of current knowledge is evaluated and suggestions are made for addressing identified gaps in available information.

This report examines the following questions:

- On what evidence are inferences about public perceptions of the judiciary based?
- What do we know about the reasons behind public perceptions?
- Has public opinion changed over time?
- Do members of the public have a working understanding of the distinct roles, organization and processes of the civil and criminal systems?
- Is there public understanding of concepts such as: judicial independence; rules of evidence; and prosecutorial discretion?
- What opinions and concerns do members of the public have about issues such as judicial independence and the sentencing process?
- What is the public perception of the relationship (division of responsibilities) between the judiciary and Parliament?
- There are different groups of public: justice system users, the media, and citizens with differing social status, for example. Do answers to the above questions vary across these groups?
- What additional public concerns, if any, arise from the national research on communication conducted by the Canadian Forum on Civil Justice in the *Civil Justice System and the Public* project?
- What implications do answers (or lack of answers) to the above questions have for access to justice?

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<sup>1</sup> The *Civil Justice System and the Public* is a collaborative partnership research project funded by the Alberta Law Foundation and the Social Sciences and Humanities Research Council of Canada. Details of the project are available at [www.cfcj-fcjc.org](http://www.cfcj-fcjc.org). We wish to thank all of the members of our research team for their contributions to the development of this project - our project partners, research participants, field research team, and Research Directors Barbara Billingsley, Lois Gander, Diana Lowe and Teresa Rose.

- If current information does not adequately answer the above questions, how can we gain the knowledge we need?

## Methodology

In order to ensure a systematic overview of available information about public perceptions of the judiciary, a series of electronic searches were conducted in both English and French, of all potentially relevant databases.<sup>2</sup> While Canadian sources were given priority consideration, materials from France, the USA, the UK and Australia were also considered. Search results for 244 (111 English and 133 French) items were assessed and pertinent sources were obtained for review.<sup>3</sup> The bibliographies of major studies and reviews were examined for any additional sources of key relevance. Detailed notes were made on 55 of these items.<sup>4</sup>

Data from 104 public in-depth interview transcripts, collected as part of the *Civil Justice System and the Public* project, were specifically analysed for discussions about the judiciary. All members of the public participating in this research have been involved as plaintiff, defendant, or witness in at least one civil justice case. While one experience-based account can, and should, be considered no more than an anecdote, a systematic collection of personal experiences within a specific research design becomes an important form of empirical evidence.<sup>5</sup>

During the period of conducting the research for this report, members of the research team also contributed examples of relevant media coverage. Although non-systematic and informal, this additional material contributes helpful illustrations to the discussion.<sup>6</sup>

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<sup>2</sup> Although extensive, these searches cannot be considered exhaustive of all potential material related to public opinion of the judiciary. In particular, research conducted or commissioned by government departments is often not listed in any database. Even when identified, it is not necessarily available for review.

<sup>3</sup> While the initial search produced a higher number of results for French language sources, there were not necessarily more *potentially* relevant items. The Research Assistant conducting the English database searches has considerable experience in assessing legal database material and this enabled him to immediately eliminate some initial 'hits.' This was not possible with the French data.

<sup>4</sup> An annotated bibliography of key sources is available on the Forum's website at [www.cfcj-fcjc.org](http://www.cfcj-fcjc.org). Details of the databases accessed, with the search strings applied to identify this material are available from the Forum on request.

<sup>5</sup> The *Civil Justice System and the Public* relied on multiple methodologies, however, a significant part of the data are derived from qualitative interviews. A software package, Atlas.ti, enables the searching of large qualitative databases for specified themes and sub-themes occurring within the interviews.

<sup>6</sup> The material reviewed for this Report repeatedly includes discussion of the role and influence of the media, so it was useful to have current examples on hand. *Beyond the Headlines: The Role of Print Media in Public Understanding of the Civil Justice System*, a report on research conducted as part of the *Civil Justice System and the Public* project is currently being finalized and will be made available on our publications page: <http://www.cfcj-fcjc.org/publications.htm>

## Public Perceptions of the Canadian Judiciary

Despite the number of sources reviewed for this report, we found surprisingly little research specifically about public perceptions of the judiciary or related issues. An overall conclusion is that we actually have very little reliable and valid<sup>7</sup> evidence with which to answer the questions posed in this report about public views of the Canadian judiciary, or even about the justice system in general, in any detail.

The information sources of potential interest fall into three broad categories: commentary based on personal experience and/or opinion; results from large-scale national or provincial research (surveys, opinion polls, major research overviews involving more than 1,000 responses); and smaller scale research studies limited either by number of respondents or narrowness of focus. Each type of information source contributes information of varying degrees of value and limitation. Based on these preliminary observations, this report has been organized into four main discussion areas:

1. What we think that the public thinks: personal experiences and reflections.
2. The ‘evidence’ of public opinion: large scale polls and surveys.
3. A more complicated public: insights from smaller research studies.
4. What we know; what we don’t know; and what to do about it.

### 1. What we think that the public thinks: personal experiences and reflections

Commentary about the public’s perceptions of the justice system and its related components, including the judiciary, comes from a range of sources. These include opinion-based articles in justice community publications, newspaper editorials, lay magazine articles, and justice-related or public opinion websites. Information from such sources varies considerably in quality, ranging from deliberately biased and provocative commentary (Canadian Justice Review Board, 2005; Clark, 2005) to well-informed discussions grounded in knowledge of existing research (Doob, 1995), and perspectives based on extensive personal experience (Silberman Abella 2003; Doyle, 2000; Kaye, 1999; Kopstein, 1985; Martinson, 1995; Mercredi, 1995). The majority of experiential commentary is generated and published by the international justice community and accounts for the largest proportion of identified and attainable information sources. The content reflects a strong concern that the general public hold increasingly negative

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<sup>7</sup> In research, the terms ‘reliable’ and ‘valid’ have distinct technical meanings. Data are reliable if they can be replicated across studies (the same results are obtained by asking different groups the same questions). To be ‘valid’ data must be meaningful and relevant in terms of those who gave the information in the first place. Data can be valid, but for a variety of social context reasons hard to replicate and thus, technically, not ‘reliable.’ Reliability does not, however, guarantee validity and this fact is often a major shortcoming of survey research.

perceptions about systems of justice in general and members of the judiciary in particular.

For example, Martinson (1995, pp.35-55) suggests that the public have eight main perceptions of the judiciary. Her opinions, based on her knowledge and experience as a lawyer and a judge, are mostly in keeping with public polling results, particularly as these are reported by the media. According to Martinson the public think that judges:

- try to find out what the truth is;
- give too many rights to accused persons;
- do not give tough enough sentences;
- contribute to delay, inefficiency and expense;
- contribute to the mystique of the law;
- are not accountable for their actions;
- do not work hard; and
- are aloof and do not understand the community that they serve.

Martinson concludes that some of these public perceptions are reflections of problems already recognized within the justice system that the system is working to address. Others are misconceptions based on a lack of accurate public understanding of the justice process. Numerous other opinion-based commentaries contribute to a useful dialogue by offering constructive suggestions for improving public understanding and, occasionally, important critical observations about just how much is understood about public opinion (Doob, 1995).

Unfortunately, many other examples of opinion-based information are not balanced and well-grounded discussions, but individual views that are designed to gain attention by presenting negative and sensationalized commentary. Because of the controversial content, this kind of material succeeds in attracting attention and is likely to be repeated by others, either by further coverage in some kind of media, or by exchanges of anecdotes both among the public and members of justice system. Through frequent repetition, 'information' presenting a distortion of factual evidence (that may have been quite flimsy in the first place) becomes an 'urban legend', widely accepted as indisputable. Examples of this kind of commentary are easily found in the mass media, but are also present in publications from justice system organizations, and are invariably aggressive in tone.<sup>8</sup>

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<sup>8</sup> It is beyond the scope of this report to discuss in detail the contexts of all the background material. It is worth noting, however, that researchers found particularly insidious in terms of public influence, web-based organizations that assume names that imply the organization is an official public representative of some kind. A little research into the players behind these websites/organizations reveals a particular social and/or political agenda, but it is not explicit. The information provided sounds authoritative and fact-based even though it is often either incomplete or inaccurate. The groups behind such sites also inform the media via press releases. For examples see [www.culturalrenewal.ca](http://www.culturalrenewal.ca) and [www.canadianjusticereviewboard.ca](http://www.canadianjusticereviewboard.ca) .

Addressing a justice community audience, Link Byfield, speaking from the perspective of a media professional, offers the following commentary on public perceptions of the administration of justice:

What explains the tidal wave of dissatisfaction with the justice system these days is something which I think judges can do very little about. After all, laws do not (I hope) originate with judges, nor are criminal sentences carried out by judges. And it is in these two areas that the public seems most upset....If put to a referendum today...hanging and lashing would almost certainly be restored for appropriately serious crimes....And among the public there persists an attitude that "punishment works a lot better than what we've got," which is a per capita crime rate more than triple what it was when the more severe punishment norms were still in place (Byfield, 1995 pp.62-63).

Byfield's perception of extreme public attitudes appears to be one with which he personally agrees. His reference to the crime rate suggests that he lacks familiarity with actual statistics.

While the media attacks the judiciary and other aspects of the justice system, those writing from a system perspective are equally likely to paint negative and unhelpful pictures of the media and the public.<sup>9</sup> Commentary from a justice system perspective can be even more 'unkind' concerning the ability of the public to hold reasoned and reasonable views on the administration of justice. Concerned with the perception that public criticism of judges is increasing, Laplante (1994) points to a record number of complaints made to the Canadian Judicial Council in 1993.<sup>10</sup> Having earlier complained about the nature of media reporting (p. 3) he harshly condemns the "public":

Egged on by countless hotline agitators, a pretentious, punitive, and insecure public opinion now pretends to know what each crime deserves and cares very little about the offender. Thus, it dismisses in a flash an ideal criminology has taken decades to define: the possibility of a justice system which accounts both for crime and for the offender (p.3)

Distorted perspectives are fed by media coverage of extraordinary cases involving controversial decisions or actions by individual members of the judiciary and sensationalized coverage in the popular media is widely thought to be a main informant

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<sup>9</sup> There are many examples, but a particularly interesting publication is "Shall We Dance: The Courts, the Community, and the News Media. *Judicature* 80 (1), 30-42. This is the transcript of a panel debate held at a meeting of the American Judicature Society, 1996. The exchanges demonstrate both the positive and negative aspects of opinion-based dialogue.

<sup>10</sup> It is true that complaints to the Canadian Judicial Council doubled between 1987 and 1992, then increased moderately, but steadily, until 1996. Since 1996, however, they levelled off and have declined overall. (CJC Annual Reports, 1995-1996 and 2004-2005, available at <http://www.cjc-ccm.gc.ca/>). The highest annual number of complaints is 202, which is a very small fraction of the cases heard in the Canadian justice system. It would be interesting to know whether there were specific factors that prompted the above-noted increase.



of public opinion (Lowe, et al, 2005).<sup>11</sup> At the core, information that is opinion-based is more concerned with what we think that the public thinks, than in understanding the views the public actually hold. The question to be asked, therefore, is from what, if any, evidence do sensationalized distortions derive? Furthermore, is there solid evidence to support even the more reasoned commentary that assumes a crisis of public confidence in the role of the judiciary in the administration of justice?

## 2. The ‘evidence’ of public opinion: large scale polls and surveys

Opinion polls and other large-scale surveys are generally relied on as the primary sources of evidence about public views of the justice system in Canada and internationally. As major polls tend to target the general population, most respondents will not have been personally involved with the justice system. Polls and surveys rely on broad questions with limited, predefined answer options. The quality of polling results is tied to the technical and mathematical assumptions of random population representation. All polling results should be subject to cautious interpretation because design assumptions about the social world are inevitably difficult to meet in practice. They are as follows:

- The questions that need to be asked are known; the issues are identified and agreed upon, and there is a shared understanding of the concepts/definitions related to these.
- The range of possible answers to the questions is known;
- The questions posed are neutral and do not encourage any response over another;
- All respondents will understand and interpret the questions in the same way as the researcher;
- All respondents will answer truthfully;
- Those who do answer will be representative of all sectors of the general public.

Although most polls and large surveys fail to meet all of these criteria, if violations are fairly minimal, results can still be useful in understanding notable trends in public views and behaviour. They can also point to differences between various social groups, although they have little potential to explain the reasons behind these trends (Luntz, 1994).

With these issues in mind, we reviewed reports on major polls from Canada, France and the USA. We also considered two in-depth Canadian reviews of opinion polls

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<sup>11</sup> The report *Beyond the Headlines*, by Lowe et al (2005) provides a more detailed discussion of media coverage of the civil justice system. Clark (2005) is an unusual example of a lengthy article about the judiciary and the role of the Canadian Judicial Council in the unlikely medium of *Toro*, a men’s magazine.

(Roberts, 2004; Wain, 1996)<sup>12</sup> and key research from Australia (Parker, 1998) and the UK (Genn, 1999) that discuss poll results in those countries. Our conclusion is that polls and surveys about justice systems, in Canada and elsewhere, fail to meet most of the technical assumptions of polling. Consequently, the degree to which the resulting information can be considered reliable and valid is seriously undermined. Despite the shared focus on public views of the justice system, there is little consistency among these polls and surveys in terms of the questions asked or the results gained. Other researchers have also pointed out problems with the validity of this research (Compas Inc., 2002, Doob, 1995; Kopstein, 1985; Moore, 1981; Parker, 1998; Roberts, 2004; Wain, 1996). As Wain (1996) states, reported perceptions of the justice system vary considerably depending on who is being asked and how they are asked.<sup>13</sup> In addition, there is the matter of who is willing to answer. The following points summarize the problems present in major polls and surveys conducted in the last 25 years that ask about public opinions of the justice system:<sup>14</sup>

- Polls and surveys (regardless of topic) routinely report response rates of less than 50% of the original target group.
- A high number of respondents decline to answer certain questions even though they have agreed to take part in the survey. Non-response rates between 20-50% are common, but generally not noted in reports. Respondents' reasons for not answering questions are seldom investigated.<sup>15</sup>
- As Roberts (2004) notes, there is no central depository for justice system polls and surveys. They are difficult to identify and commonly even harder to obtain. Often all that is available is a report on the research rather than the original results. This raises the questions of what is reported, what is left out, and why?
- There is an absence of clearly identified concepts in research questions about systems of justice and related components. Questions seldom offer any definition of "justice system." The exception is when the research focuses specifically on "civil justice", which even then may not be clearly explained.
- "Courts" is the term generally used as the next level of inquiry after "justice system." It is almost never defined. Results may be interpreted to apply to specific components of the system, such as the judiciary, but the vagueness of the data does not justify such conclusions.

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<sup>12</sup> Both Roberts and Wain had access to some internal government polls and surveys that are not generally available.

<sup>13</sup> It is perturbing that at least some methodological concerns have been repeatedly raised for more than 25 years, often in reports commissioned by justice departments, and yet neither the reliance on, nor the content of survey questions, has changed.

<sup>14</sup> The summary of problems offered here is developed by Stratton specifically for this report, but echoes the previously referenced critique of other researchers.

<sup>15</sup> The poll conducted by Compas Inc. (2002) does draw attention to this issue.

- The same points can be made regarding questions about “the legal profession.”
- For the previous three reasons, it is not possible to know what respondents had in mind when they answered the questions, so the range of possible answers cannot be assumed.
- Most polls/surveys use non-neutral statements to pose several positive and negative versions of a question about the same kind of attitude. Responses to such questions are frequently contradictory. Respondents may tend to agree with a non-neutral statement where there is any reasonable possibility that it is true.<sup>16</sup>
- Few questions ask about specific system components and when they do, the focus is on the criminal system. Variations in who is asked and how they are asked produce different results.
- Specific questions about the judiciary are seldom included. When present they are confined to either asking for ratings among professions, or a rating of perceived ‘fairness’.

In light of these problems with poll and survey results, any conclusions have to be considered tentative. A review of reported results does, however, allow some relevant and probably fairly sound observations about public understanding of the justice system.

- *Poll respondents do not appear to make any clear distinctions between the roles, organization, and processes of the civil and criminal systems.* Generally, major population polls do not ask them to do so (Compas Inc., 2002; Environics, 1987; Ipsos, 2004; Statistics Canada, 2004). If left to define “the justice system” for themselves the public do so in terms of criminal justice (Genn, 1999; Wain, 1996) and most specific poll questions focus on criminal issues (Roberts, 2004). Members of the public do not seem overly concerned about justice issues unless prompted to consider them (Compas Inc., 2002; Wain, 1996). In response to open-ended questions about justice concerns, they do not volunteer civil justice issues and when specifically asked, have difficulty advancing any view of the civil justice system (Wain, 1996).
- *When specifically asked to do so, members of the public voice fairly consistent, but often inaccurate, views about the incidence and consequences of crime in society.* Their concern with crime drives the opinions they express about components of the criminal justice system such as sentencing and the parole and prison system. The public tends to believe that crime is increasing, sentences are too lenient, prison is easy, and parole violations are very high. (Roberts, 1998; St. Amand & Zamble, 2001; Statistics Canada, 2004; Tufts, 2000).

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<sup>16</sup> To use one example, the majority (75%) of the public in the much cited Environics Research Group (1987) poll agree that the law treats the average Canadian fairly and 75% also agree that the law favours the rich. Compas Inc. (2002) report that respondents agreed with all of the attitude statements.

- *Polls infrequently ask the public specific questions about the judiciary.* The few results that are available are mixed, but generally indicate an absence of strongly negative views. They do not support the perception advanced in opinion-based discussions that there is significant and increasing public dissatisfaction with the judiciary. Results tend to suggest that the public thinks judges are generally fair, but rather out of touch with the everyday lives of those who come before them. (Genn, 1999; Roberts, 2004; McCabe, 1999).<sup>17</sup>
- *We do not know from polls and surveys whether there is public understanding of, or concerns about, issues such as judicial independence, rules of evidence, and prosecutorial discretion.* Polls do not address these issues. We do know from the research on sentencing that the public have concerns based on misconceptions, and generally lack understanding of the criminal justice process (Roberts 1998).
- *Large polls and surveys that analyse results by social demographics consistently report differences in opinions among various groups of public.* Ethnicity/race, education, political affiliation, income, age, gender, and geographical location are all reported as having an effect on attitudes and opinions. Age appears to have a linear effect on views with confidence in the police increasing with age, while confidence in the courts diminishes. There is little agreement among studies about the degree or direction of other effects (Compas Inc., 2002; Fletcher & Howe, 2000; Noreau, 2003; Roberts, 1998; Statistics Canada, 2004; Tufts, 2000).<sup>18</sup>

#### Fletcher and Howe (2000)

One Canadian opinion poll merits specific discussion because it stands out from the rest in terms of focus, study design and reported findings. Fletcher and Howe (2000) report on public views of the Supreme Court of Canada (SCC) and compare results between Quebec and the rest of Canada as well as among 11 other common law countries.<sup>19</sup> 1005 respondents were asked about their knowledge of the SCC, the *Charter*, how judicial appointments are made, and their views on the relationship between the SCC and the legislature. Answers were further explored by asking participants to provide opinions of several different high profile SCC decisions. Study findings cannot be assumed to apply to other court levels, but the results about public knowledge and confidence are of interest.<sup>20</sup>

<sup>17</sup> Smaller Canadian studies offer support for the conclusion that public opinion of the judiciary is more positive than negative (Boucher, 2001; Canadian Facts, 1996), but polls in France report high and increased public dissatisfaction with the judiciary (Ipsos, 2000; SOFRES, 2004). The researcher reviewing the French Material commented that this is likely related to highly publicized scandals involving French politicians and other prominent persons.

<sup>18</sup> Compas Inc., 2002 offers a detailed and well-explained analysis of differences by group.

<sup>19</sup> There is often such significant variation between Quebec and the rest of Canada that this effects the overall rankings of Canada against other countries.

<sup>20</sup> The survey conducted for this report is well designed, however, the limitations of polls discussed earlier apply to most of the research upon which Fletcher & Howe draw for their international comparisons. Also, results may not apply to other court levels. Research from the list reports different results according to court level and although Roberts (2004) does not specifically raise the point, the figures and tables he presents show that confidence in a court varies according to whether or not a specific court level is noted: the higher the court, the higher the rate of public confidence.

- *Public knowledge*: Although 89% of respondents were aware of the *Charter*, only 76% said they were very or somewhat aware of the SCC. This level of awareness of the top court in the country ranked 5<sup>th</sup> among the 12 countries considered. However, few Canadians know how judges are appointed: 79% either said they did not know or gave an incorrect answer.
- *Public satisfaction and confidence*: Canada ranked third among common law countries with 77% of respondents being somewhat or very satisfied with the SCC and 73% believing that the SCC can be trusted to make a decision that is right for the country as a whole. A majority (62%) also thought that the SCC and not the legislature should have the final say on whether a law was in conflict with the *Charter*.

Results from the in-depth exploration of public views found that participants held different views on the application of laws and individual rights depending on the type of case considered. The public are not sympathetic to laws, including technical rules of evidence, that protect the rights of the accused when there is evidence of guilt, but do want laws that protect the rights of individuals in civil matters. Despite disagreement with some SCC decisions, participants retained strong general support for the justice system.

### **3. A more complicated public: insights from smaller research studies**

The suggestion of a more discriminating public is supported by findings in a number of smaller research projects, including the interview and focus group sub-components of some larger studies (Boucher, 2001; Cresswell & Stratton, 2005<sup>21</sup>; Genn, 1999; Gibbs, 1996; Lind 1989; Louis Harris Institute, 2001; Matruglio, 1994). Results from this diverse research are encouraging as they consistently demonstrate that given the opportunity to do so, members of the public have the ability to reflect on justice issues in a discerning manner.

On the other hand, these smaller studies have different focal points and are often confined to a relatively small geographical area and/or a specific sub-section of the public. In contrast to the large studies on the opinions of the general population, many of the small studies are concerned with the views of people who have involvement with the justice system, particularly with civil matters. Overall, these studies raise as many questions as they answer, but they do support the few broad conclusions that can be drawn from large-scale study results:

- *Members of the public have at best only a very basic understanding* of the distinct roles, organization and processes of the criminal and civil justice systems and are often misinformed (Canadian Facts, 1996; Gander et al, 2005; Gibbs, 1996).

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<sup>21</sup> Cresswell & Stratton (2005) refers to the unpublished working report generated from the *Civil Justice System and the Public* database specifically for this report.

- *Different sub-groups among the public hold different perceptions about the justice system* which seem to be related to a combination of prior expectations and actual information and experience (Lind, 1989; Louis Harris Institute, 2001; Genn, 1999; Matruglio, 1994; Wain, 1996).
- *The very small amount of research that asks about the judiciary produces mixed results.* Although some criticism is expressed, views are fairly positive (Boucher, 2001;<sup>22</sup> Cresswell & Stratton, 2005; Genn, 1999; Matruglio, 1994).

Several of the smaller studies offer some valuable insights into views the public hold about the processes of justice and are worth considering in more detail, although most do not pay specific attention to views of the judiciary. Because of the diverse focus of the research topics and the interrelated threads within each that have relevance to this report, we divide them only by criminal and civil systems.

#### *Perspectives about criminal justice*

Gibbs (1996) conducted a Canadian study in four cities using eight focus groups (with up to twelve participants in each) to find out more about public perceptions on issues related to crime including sentencing, incarceration, and conditional release. At the outset participants had little understanding of the justice system. They indicated that they gained most of the information that influenced their views from the media. Initially, they expressed generally negative views in keeping with opinion poll results and held several misconceptions about such things as the crime rates and parole violations, but the group discussions revealed important nuances. Participants only wanted incarceration with more severe sentences for certain kinds of offences such as violent or sexual crimes. For other offences they favoured effective alternatives to prison sentences with available resources directed to rehabilitation. Confronted with their misconceptions, participants wanted statistics about successful parolees and re-offenders. Information did not, however, increase their sympathy for re-offenders, especially where violent crimes were involved. Research conducted by Doob (1995) concurs with Gibb's conclusions. Doob, however, cautions that the kind of systematic details that people want and which have been shown to change their views are often not available.

The public also perceives cultural bias as influencing the entire process of criminal justice. Considerable attention has been paid to racial discrimination in the United States (Phipps, 2004) and it is a recognized concern in Canada in relation to Aboriginal peoples (Mercredi, 1995). In an overview of American research on unequal treatment in the justice system, Phipps points out that such perceptions of bias are historically grounded in fact, and that although discrimination may be less overt in the Canadian context, systemic gender and racial bias still exist. Furthermore, research indicates that public perception about unequal treatment tends to mirror reality.

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<sup>22</sup> This Quebec study concludes that the results are far more positive than the judiciary's prior conception of public opinion of their work.

### Perspectives about civil justice

Studies by Lind (1989) in the USA and Matruglio (1994) in Australia are concerned with the perceptions of plaintiffs involved in civil litigation. The participants in the American study were all involved in a personal injury tort case and had legal representation via their insurance companies. Results found that case outcome, cost, and delay were not driving factors in litigants' post-case levels of satisfaction. The relationship between participants' prior expectations of the system and their actual experiences during the process where, however, key. Several perceptions particularly influenced satisfaction levels: perceived fairness; dignity and carefulness of the proceedings; feelings of having some control in the process; and their opinion of their lawyer. Litigants involved in arbitrations or trials reported higher perceptions of fairness than those involved in settlement conferences.

Matruglio (1994) included various types of civil cases. Feelings of fairness and having control during the legal process were pre-defined as measures of satisfaction.<sup>23</sup> Results from 440 respondents confirmed expectations that a higher degree of satisfaction is related to positive perceptions of control in the case. As in Lind (1989), prior expectations were related to satisfaction with the process. The Matruglio study also concludes that there is a relationship between information and perception as the litigants who felt well-informed held generally positive perceptions of the legal process.

Although a mail-out survey was used in this study, participants were asked to write a personal commentary, which was then analysed. Many respondents made critical comments about the law and its operations. Only a few of these comments involved the judiciary (pp.52-54). A particular concern was that a judge who was not skilled in the relevant area of law would hear the matter.

Once again, the review of available research reveals that very little attention has been given to public attitudes about the judiciary. None of the available results indicate particularly negative public views. Of interest, however, is that several diverse studies have found that public satisfaction with legal process is tied to being well-informed and having a sense of involvement in and an understanding of, the legal process itself.

### Perspectives from the "Civil Justice System and the Public" project

Our analysis of the *Civil Justice System and the Public* data has provided by far the greatest amount of direct and detailed information about public views of the judiciary. Members of the public from across Canada were asked to participate in the project by talking to interviewers about their experiences of communication with the civil justice system as they moved through the civil and family justice processes. Their experiences involved many different types of cases at various court levels and they often spoke of their interactions with judges.

The participants in this study came to court in the context of their own social knowledge and understandably with primary concern for the personal circumstances that brought

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<sup>23</sup> This decision was likely based on earlier Australian research as Parker (1998) refers to a Queensland, *Marketshare* (1991) study with similar findings.

them there. They often described difficult negative events, both in terms of personal emotions and the court process. In spite of this, most were able to discern that the judges they came before also acted in a social context, of which the court system with its rules of procedure and law is a part. In contrast to the disembodied fragments of 'public opinion' produced by poll and survey questions, the interview transcripts provide rich and complex thoughts about the justice system and the judiciary. Participants talked about judges within the overall context of court process and what they actually said provides the most powerful illustration of their views, experiences and concerns. We therefore present their experiences and reflections with a minimum of commentary.

Family or small claims cases were the most likely matters to have brought the *Civil Justice System and the Public* participants to the courthouse. Whether represented by a lawyer or attempting to self-represent, by the time they came before a judge they had begun to form reflective views about the civil justice system as "an entity," within which the judge had a particular role to perform and the power, responsibilities and challenges that come with that:

Provincial courts are as arrogant as the federal courts –as an entity... The judge himself and the clerks and whatnot – the persons are people. But the entity of the court itself is arrogant as hell. Cold. [285 Social services professional, plaintiff in divorce and custody case with legal representation]

It's very much an inner culture of the legal system. It's unchangeable. That's the way it is...they've done it that way for so long, anytime you try and change something like that, especially with the individuals that you're changing it with – I mean judges hold a lot of power. [204, Plaintiff in civil action, defendant in divorce case with and without legal representation]

Judges are left to their own devices.... There are tons of things they must know. They must be familiar not only with contemporary society but also major trends, cultural diversity, political movements, social movements, the major issues of society. Judges cannot remain indifferent to those things. [146, Expert witness]

Participants who went to court for the first time as self-representing litigants inevitably recounted how intimidated they felt by the customs and hierarchies of a system they found bewilderingly complex. One participant compares the judge's role to his own business expertise and shortcomings as he describes how it felt to be an 'outsider' trying to penetrate the legal culture:

The judges are, in essence, lawyers who come through the system and are appointed...[but] the average individual has no idea when you walk into a court room whether to stand up or sit down, let alone open your mouth. And the role of the judge is power played far too high. The judge needs to come down to a level and make themselves more in touch with the people he is judging and listen to the complaints on both sides. That doesn't seem to happen as much as you would like. The lawyers are the ones that have the bulk of the say. I mean that in two ways: a) they have the bulk of the say in the court itself, and b) they have the



bulk of the say when it comes to prepping the client....When... [you walk in] to face anything, the judicial system is very cold. People are herded like cattle in and out of courtrooms. When the cases are called there is nothing to soften the blow. You are number XY792 and so and so vs. so and so and then the judge...says "What do you have to say?" It puts people in a very, very embarrassing situation. What they should say, how they should handle themselves. They are not used to it. It would be the same thing if a judge walked into my business and needed to know an answer to a question. He doesn't know the answer to the question. I do because it is my business. In his courtroom he knows the answers to all of the questions. In my business I have achieved the role of management but I am a terrible trainer. I can't reflect what I have inside of me to my employees. A lot of judges are unable to reflect that too. [225, plaintiff and defendant with legal representation, business and family matters]

Participants invariably perceived the justice system as complicated and confusing, but saw the judge as the person who ultimately would make sense of it all. Some participants were very aware of how difficult that must be:

So [the] judge himself has a hard time to which way to go and he has to represent the law there and he has to listen and he has to get the witnesses to listen to this and this and come up with his own opinion with his own knowledge. I think it is really hard. It is always going to be a witness. There is no other way. I don't think so.... But I think most of the judges there are very older people and their experience... they would know what happened without even listening to anything. It's a really hard thing. Actually it is really hard. To be a judge or to be an RCMP person. It's really hard. [207, New Canadian, plaintiff in small claims case without legal representation, witness in criminal case]

It was common for participants involved in custody battles to come before many judges before their case was resolved. Although critical of the system as a whole, most described at least one judge in very positive terms as someone who helped them through a frightening system. One participant at the end of a long and difficult experience, was fiercely defensive of the judiciary:

When someone comes to my home and tells me, "justice is rotten," I say, "look, wait a minute, it's the societal context that's rotten, you're right, but don't tell me the judges are rotten, because I have my child, I can't say that it's rotten"....The context is rotten, but don't tell me there's no justice. [128, Plaintiff and defendant in lengthy custody battle with legal representation]

Other self-represented litigants told us how judges made a positive difference to their first court appearance:

Judges were excellent. Judges, I was actually very impressed. ...I was very impressed how judges were skilled, versed or just being able to understand what's happening. [820, plaintiff without legal representation. provincial and superior courts]

And the judge was very helpful. The judge kind of redirected things a little bit and harder on [the lawyer] I could see. But I had the same judge through the whole proceeding as well....he seized it right from the very beginning. That made it easier I found. [620, plaintiff and defendant with and without legal representation, superior court]

I think that appeal judge who knew my case pretty good and was following it along, I think she read what took place at the trial. I admired her....She was giving me suggestions as to how to carry on but I think she was also trying to tell the other side to stop this nonsense. [209, defendant in small claims court, unrepresented]

Members of the public did voice dissatisfaction about some of their experiences with judges, but for the most part their concerns were accompanied by reflections on the conditions of the justice system and the rules of law and procedure that impact the ability of judges to deal effectively and fairly with the cases before them, as the following comment illustrates:

I think that when we go to court it's because we want to obtain a fair judgment, but what the justice system basically does is to administer laws, financial laws, because two people disagree on a sum of money or a division of it, the court decides in accordance with the rules. It doesn't really take account of justice. [126, self-represented litigant commencing a civil claim; plaintiff and defendant in prior family law case]

As Martinson (1985) correctly perceives, members of the public who are litigants do believe judges should seek the 'truth,' and they equate this with the 'fairness' of the judgement. They also realize that this is not a straightforward task:

It's who's the loudest talker, who's the biggest bullshitter, and that's how they present the information in front of the judge. And the judge is left making the decision....you try to get honesty – no way....At [our lawyers] office [we were] just told basically that you appear at the court and be prepared to answer some questions...just to answer honestly and try to be calm and you know. So you go there and you do that. And [the other] lawyer is firing questions at you, and then trying to make it seem as if either you're lying, or you're not telling the truth because it's your brother, where your sole purpose there is to be honest. And like I say, I didn't feel that he was getting at honesty. [The lawyer]... was trying to pull things out of me to create that picture where he wanted to go. I will say, that at the end the judge did make a comment at him...to word his questions differently. And at the end, she did look at me and ask me if I had anything more to add. Because it was obvious that he was trying to direct me in a certain way. So I give her a lot of credit for doing that. [806, witness]

Participants also felt that some of the system conditions under which judges laboured were difficult for both judge and litigant. Knowledge that a court had a backlog of cases was one concern:

The backlog. I'm not saying it's anybody's fault because they are just employees as well doing the best that they can in the circumstances. Puts the judge right under the gun....No time to listen..... [There is] not enough funding. [302, self-represented respondent, superior court]

A frequently raised concern is really an issue of case management rather than a criticism of the judiciary. Litigants complained that ongoing cases was not assigned to the same judge. Both represented and self-represented litigants pointed to problems that arise when a matter with a lengthy history repeatedly comes before different judges. Issues such as judges not having read lengthy case histories, and the recognition that time constraints make it almost impossible for them to do so, were repeatedly raised. Litigants suspected that lawyers sometimes deliberately try to drag out cases, or manoeuvre them before a particular judge and they point to the time and cost involved. As the following two interview excerpts show, despite the personal frustration involved, participants still articulated positive views about individual judges.

It's really bad faith that tries to drag out the process as much as possible....We always wind up in front of a new judge who doesn't know what's already happened, or at best he has a short summary but he isn't the one who handled the case, doesn't know what's already happened....It's always a new proceeding. We come before one judge....we argue that [a motion from opposing counsel is] inadmissible because of X, Y, and Z...and the judge says, "Fine, it will be heard." But the one who hears the two parties six months later is another judge....There should be only one judge who takes on the whole...case so that he can settle it himself....I think that if it were one judge who had to manage...all the proceedings related to his case, it would expedite the case to an amazing extent, and it would also have the impact that the big boys [in a large] industry, would know that the judge is wise to them. They would probably be less inclined to use stalling tactics, like, what motion we can file to slow the process down. They'd know that the judge would eventually say, "Alright, that's enough of that...because we had a judge who got mad and said, "No, my availability is X, Y and Z. You guys pick one of those dates." And on our side we were like, "Yes! Finally a judge who plays a bit of hardball instead of being a pushover"....The judges are always waiting for the parties to be ready. But they could perfectly well be the ones who say, "Look, my deadline is this. [132, plaintiff, represented in a civil action]

One of the things that I find extremely frustrating is that you're never ever seeing the same judge. For every little thing you're going to a different judge, which is absolutely ludicrous I think because you go into a court and have a trial – you vary an order and then if it's not followed through you're seeing a different judge and they're making some different ruling...So...[court staff] at one point because it was getting frustrating to me and I'm sure probably to them, seeing that I had to come in for every little thing all the time...helped me e-mail one of the judges so that I could actually see the judge to my case.... The judges were really good. Well most of the judges – I've actually seen 13 judges now. And I would say a good portion – there's only been about... 2 out of the 13 that were just jerks...But

most of the judges, if you're doing your trial or whatever it is, your hearing, on your own, they're really quite lenient and my ex and I are doing ours, both of us by ourselves, and on several occasions the judge has actually taken over her case for her and asked questions on her behalf. Which I thought that was kind of, like, oh come on, give me a break. But I can see - I mean he is just trying to be fair about it. [607, plaintiff, provincial family court, previously represented, but self-representing for the past year]

Some members of the public go to court quite often in the course of their professional duties. Their role in the case demands a degree of emotional distance similar to that required of judges and the lawyers, and which parties whose personal lives are involved may lack. Their frequent visits to court provide them with opportunities to reflect on and compare the court process. The following observations come from staff at child protection agencies in two provinces:

A lot of times...the system would seem a lot more one sided because we had all of these resources [but] as defendants, and if you come in unrepresented without a lawyer, you didn't even know what questions to ask ...and ultimately they would have lost. A lot of times, however, what would happen in those situations is that the matters would discontinue....The judge has just said, "You have to have representation or we won't even hear the matter"....I mean, if it's just something where we are going forward to ask for an order and extension and the families may come unrepresented...and if they don't know the system, which often they don't, sometimes the judges are lenient and will hear what they have to say and sometimes not. It really depends on who's sitting and who's hearing the case and how much time they have....In family matters lots of the times it really mattered depending on what was going forward and...our own representative – lawyers or whomever – even our internal representatives that were working with us... a lot of times they'd say, "You're up before this judge and you'll never get that. "They're human right? So...sometimes our lawyers would even say, "let's put it aside because we know so-and-so's sitting"...Another thing to take into account is if you're going to – like a judicial dispute...and if it ends up that you don't come to a decision and it goes to court then that judge can't sit in the court. So it would have to be somebody different. So, I mean, just in those situations it would matter who was sitting to make sure – in terms of getting trial dates and things like that. So it does have an impact.... like some of the judges may really believe that families should be together and the work should be done from inside rather than kids should be out of it ... and you really felt strongly that the kid should be in care while the work was being done, but you knew the judge sitting was probably going to send the kids home under supervision order rather than a temporary guardianship order, that's the kinds of matters that get put over because we knew that the kids wouldn't be safe if they went home but that judge may not hear that. [250, witness, former social worker in process of becoming a lawyer]

I'm older and I think the judges know me by now, and they take me seriously... they know that I have experience at work, that I have life experience and it kind of weighs in your favour....And also you learn to back up your recommendations

more, I think, the more experience you have with work ...And it's easy if you're really convinced.... I'm not saying that I tell a judge what he wants to hear, I don't want this to be misunderstood – you know that I kind of manipulate the situation. But you learn more to pick out what is really important, you know....When I started out...I had absolutely no idea what I was doing....And the same with some of the judges, some of the judges are excellent, and some of the judges you think, they sit there and they look –"Oh my god, I hope this over soon." And there's these families - for them it's the worst experience that they can imagine at the time, you know. And there's somebody there who's not even interested in what they have to say....The majority of judges are good, and are learning to have an understanding. But I think they should....be educated more in family problems, you know. And child abuse, and sexual abuse, physical abuse, and conjugal violence – all of the different reasons why we bring a case to youth court...you have to have an awareness of child development, and how different situations affect a child at the different levels of development...I think that judges need to know that...If you don't – how can you make a proper judgment? [178, witness, experienced social worker]

These participants, while careful not to over-generalize their criticisms observe that parties with the power to do so, work the system – and the judges - in order to improve their chances of gaining a desired decision. Observation notes from the *Civil Justice System and the Public* research team make similar observations about child welfare cases, often noting that judges act to even out the imbalance of power when unrepresented parents face child protection agencies.<sup>24</sup>

Positive perceptions of the judiciary expressed during the *Civil Justice System and the Public* far outweigh the negative, but as our research participants pointed out, judges have tremendous power to impact on the lives of those who come before them. Just one judge who makes unreasonable, unrealistic rulings, or in any way misuses the power entrusted to him or her, can cause considerable distress to court staff as well to members of the public. The consequences to people's lives can be devastating as a few of the participants told us.<sup>25</sup> Even in the face of particularly negative experiences, litigants still tend avoid generalizing criticism to the judiciary as a whole, as the following two examples illustrate:

Well I thought it was pretty outrageous that this judge – an older man, right, with granny glasses, you know, could put them down on his nose and look at me and say, "Where are you when your ex is away that you can't look after your, your son?" Like, implying that it's 365 and 24/7 my responsibility...To me that was a judgment. Like a really serious judgment, which is definitely against women. I was just floored....And then the last time when my ex took me to court, the first appearance, it was a female judge - I don't know if that makes a difference - and when my ex's lawyer stood up and say he wanted the right to not pay any arrears

<sup>24</sup> See Cresswell et al (2004), *Family Court Coast to Coast* for observations regarding this.

<sup>25</sup> Both research team observations and input into follow up focus groups conducted with members of the public and the justice community have underscored this point.

and to not pay future child support. [The judge] was very good on that point. She just said we really can't let that stand because often what happens is the man then goes out, gets a really high paying job again, and arrears are set to zero when in fact payment should be made. So she asked again how much he was willing to pay and again he said he was going to pay nothing. But at least that judge – and I don't know whether it's a difference in point of view of the sexes or, you can get weird people in every field. So that judge who made that statement that it was my responsibility to look after my child is an anomaly...But they make it to the newspapers all the time, right? Judges that make really crazy decisions. [821, Self represented litigant, female plaintiff and defendant, provincial family court]

And then, when the judge arrived, well, he told me, "Mr. [name] we will let you keep your children, but I'm going to ask you something." I said, "What?" "In the next 2, 3 years, you will have to stop working outside the home, stay at home so that you can take care of the children full-time, the time necessary for them to recover their psychosocial stability, their normal psychological atmosphere, so that you can guarantee an around-the-clock presence at home." I said, "Your Honour, what am I going to live on?" ....He said, "That's not my problem, you work it out, you're a man, you'll manage, you can go on welfare if you have to"....I was angry....The judge saw that I was about to explode, he said, "Go on, that's the end of the hearing, the hearing is adjourned." And that's when I understood all the conniving, I call it, it's legal fraud, of courthouses. I saw how it worked, it disgusted me, it made me want to throw up, I was so shocked that they would deprive me of the right to work....Yes, I have [a recommendation]. That there be more women judges...because a woman, female judges and lawyers are much better at detecting fraud [laugh] they kind of have the touch ...I can't express it exactly, they're a bit better at picking out who's bluffing and who isn't, they are clearer on that, and then also there is a much more pronounced and much stronger human sentiment, the ones I've known. [127, male, represented defendant, superior court]

In both of the above cases, the litigants complained that the judges concerned were out of touch with the “real world,” and that gender bias was involved in the rulings and conditions that the litigants found unreasonable, if not impossible to meet.<sup>26</sup> Perceptions of ethnic and cultural discrimination were also raised, usually in the form of recommendations for social context and cultural sensitivity training for the judiciary:

And also, I think there needs to be ongoing education and training between judges and lawyers in terms of racism, that though our Charter of Rights and Freedoms says certain things, they're not applied in the courtroom....The courts are worried about etiquette – so I think etiquette should include the diversity of the people that are accessing the services. [801, plaintiff with legal representation, superior family court]

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<sup>26</sup> It is interesting to note that both a male and female litigant expressed a preference for female judges. Several other litigants advanced the same opinion, but observations by the research team were equally likely to commend male judges.

I find a lot of my clients say “yes” to everything. Are you an addict? “Yes”...”Were you drinking last night and left your children? “Yes”. You know, and it’s their honesty. I think that...the southern culture has to understand that the questions need to be asked differently. And they need to be expanded because if you only ask a question and you want a yes/no answer, you are going to make a judgement. And if you explore the question a little further you will get the story and the real answer.....One of the things that I try and teach anyways, is don’t answer yes/no like that because it works against them. [897, social/court worker with urban Inuit living in the south]

Participants also offered suggestions for possible procedural changes to address areas of dissatisfaction associated with judicial decisions. They argued that their suggestions seemed sensible from the perspective of the court user but recognized that there might be roadblocks to such changes which they were unaware of.

Participants believed that only a small minority of the judiciary made unsound decisions, or otherwise abused the power of their position, but when this did happen it was identified as a serious concern. The point made was that even one such incident is one too many, but that current mechanisms to oversee professional conduct are insufficient. Both in interviews and focus groups, participants expressed the opinion that the Canadian Judicial Council “lacked teeth.” As one man argued:

Get the general public’s input on how things should be as opposed to having a group of judges police themselves and make their own changes....It should be [that] judges [are] more scrutinized than anybody else...[more] open to public scrutiny and being examined. It seems judges are above the law. Judges work for us. Right? [285, Represented litigant, social services professional]

When participants made critical comments about the complaints process, they generally understood the rules requiring them to exhaust their appeal, but were dissatisfied with this and other restrictions that the complaint rules impose. For example, they wanted to be able to complain about the conduct of their original trial, whether they were going to file an appeal or not. Furthermore, they pointed to several system practices that make filing an appeal either impossible or prohibitively expensive and they suggested that there is a need for change:

[The public should be involved by] sharing their experience, by sharing their thoughts, questions, dissatisfactions or even satisfactions so as to provide ideas for possible changes and improvements. I say "ideas" because obviously, as users with no knowledge of how it works... sometimes we think that a certain thing would be much better. For example, I was very angry that I couldn't appeal because I was in small claims court. It was so obvious that the judge had shown bad faith. It was evident from a simple perusal of the judgment. He hadn't used any of the documents I'd brought, nothing. In fact, my lawyers assumed I hadn't filed anything at all whereas I'd filed a large number of documents. So I said, "I've got to be able to appeal this," but I couldn't. [132, Represented plaintiff in civil action]

There is an anomaly that I think is major: the sessions are not recorded. The consequence of that is not trivial. When a...judge behaves or speaks in a way that could be perceived as partial, how can the plaintiff prove it? ....So I'm telling you that I was frustrated by thoroughly inappropriate and partial comments on the part of the...judge that I was unable to prove by using the recordings of the session, so as to file a complaint with the [judicial council].... There are even judges who do not include the court minutes in the judgment...Associate Chief Justice [name], in one case he rendered an oral judgment before me without including the minutes. No minutes. [134, self-represented defendant, multiple court levels]

The same participant explained further why he thought judges should be held to high standards:

In my opinion, judges have the duty...to assist parties in their relations with the justice system. To assist, and not to canon themselves within their position strictly as judges, judging. The judge is also an officer of the law. Just like a lawyer...who must assist the court, a judge...must help the party in getting access to justice.... it isn't enough to thoroughly understand the law; what distinguishes one judge from another is the capacity to apply the law properly. How could it be otherwise?

It must be remembered, that participants in the *Civil Justice System and the Public* research considered the judiciary based on actual personal experience of the civil justice system, something that is lacking among the general population. Overall, their discussions about the judiciary suggest litigants generally have high regard for the *role* of the judge and recognition of the challenges involved in fulfilling that role. There are criticisms of aspects of the justice *process* that impact the judiciary. Participants want a more involved and active role for the judiciary that includes effective case management. It is important to note that these are major issues also identified from within the justice system and advocated in recommendations for reform (Canadian Bar Association, 1996; MacDonald, 2005; Ministry of the Attorney General, BC, 2005). Serious, negative criticism of judges is quite rare and described as an “anomaly,” but as one participant (cited earlier) commented, these are the incidents that make it into the newspapers.

The *Civil Justice System and the Public* and other studies that have taken in-depth approaches demonstrate that public views are far more complex than opinion polls would suggest. Individual knowledge makes a difference, whether it is acquired from involvement as a user of the courts or through some form of education. Among people given an opportunity to offer considered opinion, evidence points to respect for the judiciary rather than high levels of dissatisfaction.



## 6. What we know, what we don't know, and what to do about it

Based on our detailed examination of what we know and don't know about public perceptions of the judiciary and the justice system, we conclude that we have surprisingly little reliable empirical evidence about public perceptions of the justice system – unfortunately, we know less than we thought we did and there remains a lot that we do not know.

Inferences about public perceptions of the judiciary appear to be primarily fed by opinion-based commentary that assumes a crisis of confidence. Available evidence actually refutes rather than confirms such a crisis. Although interesting and useful insight into the reasoning behind public views is provided by a few studies, most of these involve users of the civil system and tell us little about the general public who have no personal experience with either criminal or civil justice. The present state of our knowledge does not provide many reliable answers to the questions posed at the outset of this report; however, the following points summarize what we can reasonably infer based on available evidence:

- Most members of the public do not have a working understanding of the distinct roles, organizations and processes of either the criminal or civil justice systems.<sup>27</sup>
- No research was found that asked members of the public about their understanding of specific terms and concepts such as judicial independence, rules of evidence, and prosecutorial discretion. On the other hand, results from research that engaged in finding out more about public views suggests that people can grasp such concepts fairly quickly given the opportunity to learn about them.
- Similarly, beyond Fletcher and Howe's (2000) consideration of opinions about the *Charter*, researchers have not paid attention to public perceptions of the relationship between parliament and the judiciary.
- Members of the public do have opinions and concerns about the role of criminal justice in the control of crime, but they lack accurate factual information about crime rates and justice processes.
- Users of the civil justice system say that they knew nothing of the system prior to their involvement, but soon develop many varied and often insightful opinions about the system.
- Different groups of the public hold different views, but we have little clear, conclusive evidence about these, in part because so little research has defined what aspect of the justice system is being asked about.

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<sup>27</sup> Other research into public legal education has repeatedly concluded that this is the case, and whenever asked, the public agree that they don't have sufficient understanding.

- There is no evidence of any significant change in public opinion over time. Given the unreliable nature of comparative statistics we are unlikely to be able to answer this question reliably about the past, and will require better base-line information from which to measure in the future.

So, what can be done to improve the current state of knowledge about public opinion concerning the judiciary? A report such as this, that critically considers current evidence is an important starting point. Clearly, a better understanding of the limited amount of available empirical evidence would be helpful to the judiciary, the justice community, the media and the public. The discussion in this report provides a base for both informed on-going discussion about the issues, and the design of much needed future research. We offer several suggestions for future action in both of these areas.

#### Learning from effective practices in place

Some of the commentary we reviewed focuses on taking action in response to a perceived crisis of public confidence in the judiciary. There are recommendations within this international literature that are useful in creating a climate for the exchange and creation of reliable information (Doyle 1997; Kaye, 1999; Stanik, 1999; Schoenbaum, 2001). There are also ongoing initiatives in Canada to improve communication with the public, which it will be useful to identify and share.<sup>28</sup>

#### Actively informing the justice community

Our review shows that members of the justice community, like the public, rely on various media (including their own publications) for a significant portion of information on public opinion. Articles that point out what we do and don't know, and what we need to find out would be helpful.

#### Actively informing the public

There is considerable debate about the role of the media in informing the public. Some commentators suggest that the judiciary should become involved in information activities that bypass the media. We recommend the development of strategies both for stronger collaboration with the media as well as direct communication with the public. Interestingly, public participants in the *Civil Justice System and the Public* research, who were unaware of actual ongoing initiatives, recommended educating children in school as the way to increase future public understanding. This participant was doubtful about short-term change in public understanding of the justice system:

I don't think providing information at this stage will work. Information at the education system would be very wise. In other words, you have changed the way the kids think, not the way we think. We have been brought up with the judicial system being a place you don't really want to be in your life. Where, in essence, it could be one of the best things that ever happened in your life....But I don't think they will ever change it in my mind or your mind, but in our kids, if we could make the judicial system warmer for our kids. If you want to give information, give

<sup>28</sup> It is the mandate of the Canadian Forum on Civil Justice to assist in this process. Dissemination based on the data from the *Civil Justice System and the Public* project is an important part of that.

it to the children. Do things in the schools that make them aware of what the judicial system is all about. Make a judge come down to the school and...put himself at their level – not on his level and standing three feet higher than everybody else. I think it is like anything else. If you are going to change the future, you don't start with us. You start with the children. [225, Represented defendant in divorce case and party in business-related case]

### Designing new research

More research is clearly needed to address the many gaps that exist in current evidence, not just about public opinion of the judiciary, but also about our justice systems in general. All research approaches have advantages and disadvantages and using a combination of methods is beneficial to compiling reliable information. We offer the following suggestions:

- *Improve quantitative designs:* despite inherent limitations, well-designed general population polls and surveys can provide important information. Action should be taken to encourage better design of future polls and large-scale surveys that will be conducted. Defining concepts and designing useful questions about the justice system and its components is vital.<sup>29</sup> Awareness needs to be raised within justice departments across Canada, as well as among academic and commercial researchers. There are two major challenges to achieving this goal which need to be kept in mind: there are few socio-legal researchers within the justice community who can assist in the design of research; and social researchers outside of the justice community have no greater understanding of the system than the public in general. To create good survey questions, both technical research skill and justice community knowledge must be combined. Encouraging partnerships with Statistics Canada and the Canadian Centre for Justice Statistics is recommended.
- *Use qualitative approaches:* The research evidence that is currently available attests to the value of in-depth, qualitative approaches to understanding public perceptions and the reasons behind them. The conduct of this kind of research can simultaneously serve an educative role for participants. In-depth research, especially large numbers of interviews, can however, be expensive and time consuming to conduct and analyse. A series of focus groups discussions can be an effective approach designed to include a representative range of opinions while remaining manageable in terms of time and cost.<sup>30</sup>
- *Combine methods:* If ways can be found to add in-depth components to large scale surveys, as for example with Genn (1999), the outcome is generally significantly enhanced. Similarly, survey style questions may be combined with interviews and

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<sup>29</sup> The Canadian, inter-governmental Institute for Citizen-Centred Service has developed and made available the "Common Measurement Tool" intended to improve the design and consistency of and survey questions used for the purposes of evaluation. Although the items are not directly relevant to justice issues, the tool does provide a guide to research aimed at measuring citizen satisfaction

<sup>30</sup> Frank Luntz (1994), president of an American polling company, provides an excellent discussion of the limitations of polling and the advantages of adding qualitative research, especially the use of focus groups.

focus groups to ensure some systematic background data. A well-designed questionnaire used as an introduction to a focus group discussion, can be a particularly effective tool.

- *Create research partnerships:* Effective research designs require more than technical skills. The community commissioning the research and the community to be researched, both hold knowledge that is vital to effective research design. Creating partnerships to develop research is, in our view, essential to creating reliable and useful empirical evidence.

This has been a valuable inquiry that underlines the need to build capacity for socio-legal research. Increasing such capacity will encourage evaluation of existing knowledge, lead to more research of an improved quality, and strengthen academic, professional, and public discourse.

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