

# News & Views

## ON CIVIL JUSTICE REFORM

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Canadian Forum on Civil JUSTICE  
Forum canadien sur la JUSTICE civile

### ***INTO THE FUTURE:*** The Agenda for Civil Justice Reform

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We welcome your submission of articles (or topics of interest) for publication in *News & Views on Civil Justice Reform*. Tell us about an experience of civil justice reform in your jurisdiction. Provide us with a comparative analysis. Report on what is new in your civil justice system. Let us know what you would like to find out more about. Submissions may be made in French or English; however we ask that contributions be written in plain language. For more detailed information, please contact the editors: Kim Taylor & Diana Lowe.

*News & Views* is intended to serve as an information source on civil justice reform initiatives for lawyers, judges, legal educators, court administrators and members of the public.

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The Canadian Forum on Civil Justice is a non-profit, independent, national organization established in May 1998 to help meet the challenges of modernizing our civil justice systems in Canada. The Forum works collaboratively with all of the sectors and jurisdictions in the justice community in Canada and increasingly, internationally. Serving as a clearinghouse, coordinator and facilitator to share knowledge between jurisdictions in Canada and internationally, the Forum creates new knowledge to address gaps in information and understanding about the civil justice system, acts as a catalyst to transform this into successful reforms, and encourages the evaluation of new initiatives so that we may learn from the reforms that are undertaken. Services are provided in English and French.

### Core Funding

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- Yukon Justice

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### Conference Funding

Funding for our 2006 *Into the Future* conference was generously provided by many organizations, foundations and corporations, as listed on page 4.

For full Forum funding details please visit our website ([www.cfcj-fcj.org](http://www.cfcj-fcj.org)). Under “About the Forum” click on “Funding”.

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# Conference Report

## Origin of the *Into the Future* Conference

### Canadian Bar Association *Systems of Civil Justice Task Force Report*<sup>1</sup>

The *Into the Future* Conference, an ambitious undertaking by a number of Conference partners, took place in 2006. Why 2006? Ten years earlier, in August 1996, the Canadian Bar Association published its *Systems of Civil Justice Task Force Report* containing 53 recommendations for the reform of civil justice systems in Canada. Although civil justice is administered on a jurisdictional basis (provincial, territorial, federal), the CBA Task Force looked at systems from a national perspective and set targets for reform in all jurisdictions. The Task Force account of the civil justice systems as they stood in 1996 provides a useful benchmark from which to assess developments in Canada's civil justice systems over the past decade.



Photo courtesy of Jared Adams, National Magazine

Honourary Conference Co-Chairs Madame Justice Eleanore A. Cronk (l.) and Chief Justice J. J. Michel Robert (centre) and Conference Committee Chair and now Honourary Canadian Forum on Civil Justice Board Member Madame Justice Debra Paulseth (r.). We'd like to express our deepest appreciation to our distinguished and tireless Co-Chairs and Committee Chair for their efforts in making *Into the Future: The Agenda for Civil Justice Reform* such a resounding success.

#### 1996 CBA *Task Force Report* Six Foundational Parameters for Civil Justice Reform

- A considerable voice in reform for members of the public
- Progressive evolution that builds on existing knowledge and experience
- Clearly expressed recommendations
- Preserving both individual and institutional judicial independence
- Preserving the right of lawyers to advance the best interests of the client fully, effectively and efficiently
- A national agenda that respects jurisdictional autonomy

#### 1996 CBA *Task Force Report* Six Reform Themes

- Creating a multi-option civil justice system
- Reducing delay through court supervision of the progress of cases
- Reducing costs and increasing access to the courts
- Appellate reform
- Improving public understanding
- Managing the courts of the twenty-first century

### Conference Goals

The Conference — three years in the making through the collaborative efforts of a committee of representatives of the partner organizations — was convened for the purpose of bringing civil justice into focus as a national justice priority.

With this purpose in view, the committee set three objectives for the Conference:

- 1) to provide an update on the status of civil justice reforms nationwide since the Canadian Bar Association's *Systems of Civil Justice Task Force Report* was issued in 1996;
- 2) to identify those barriers that prevent effective change from occurring; and
- 3) to consider novel approaches to reform that respond to the current and future needs of Canadians.

### Conference Partners

Canadian Forum on Civil Justice (the Forum) [www.cfcj-fcjc.org](http://www.cfcj-fcjc.org)

The Canadian Forum on Civil Justice was established pursuant to recommendation 52 of the CBA Task Force, calling for the creation of an independent national organization on civil justice reform. It is a non-profit, independent organization dedicated to bringing together the public, the courts, the legal profession and government in order to promote a civil justice system that is accessible, effective, fair and efficient.

Association of Canadian Court Administrators (ACCA) [www.acca-ajc.ca](http://www.acca-ajc.ca)

ACCA exists to foster collaboration, the sharing of knowledge and best practices, and the promotion of innovation to improve the Canadian court system to enhance the administration of justice.

Canadian Bar Association (CBA) [www.cba.org](http://www.cba.org)

The mandate of the Canadian Bar Association is:

- to improve the law;
- to improve the administration of justice;
- to improve and promote access to justice;
- to promote equality in the legal profession and in the justice system;
- to improve and promote the knowledge, skills, ethical standards and well-being of members of the legal profession;
- to represent the legal profession nationally and internationally, and
- to promote the interests of the members of the Canadian Bar Association.

Canadian Institute for the Administration of Justice (CIAJ) [www.ciaj-icaj.ca](http://www.ciaj-icaj.ca)

The Canadian Institute for the Administration of Justice is a voluntary, non-profit organization dedicated to improving the quality of justice for all Canadians. Since its inception in 1974, the CIAJ has kept a critical eye on our justice system and explored cutting-edge issues likely to improve the administration of justice and preserve a strong and independent judiciary. CIAJ is a place of meeting and reasoned debate on issues of interest to people and organizations concerned with the administration of justice.

## Additional Funding and Conference Assistance

Sponsors and Exhibitors were essential to the success of the conference. There were four levels of sponsorship and we are very pleased to acknowledge the contributions we have received.

- Platinum - for contributions of \$50,000 or more
- Gold - for contributions of \$25,000 - \$49,999
- Silver - for contributions of \$10,000 - \$24,999
- Bronze - for contributions up to \$10,000



Fasken Martineau provided gold level sponsorship for the conference dinner on May 1, 2006.



Gowling Lafleur Henderson provided gold level sponsorship for translation costs and registration packages.



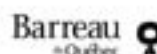
McCarthy Tétrault provided silver level sponsorship for the opening reception on April 30, 2006.

Blake Cassels & Graydon, Fraser Milner Casgrain and Torys all were silver level Conference Sponsors.

Peak Energy Services Trust was our first corporate sponsor, and provided silver level conference sponsorship for the publication of a Special Conference issue of *News & Views on Civil Justice Reform*.



Goodmans and Lax O'Sullivan Scott were bronze level sponsors. Westjet was a friend of the Conference, offering our participants a 10% discount for travel to our Conference.



Funding and assistance for conference coordination and planning was provided by the Alberta Law Foundation, the Ministry of the Attorney General - Ontario (Court Services Division), the Law Society of Upper Canada, Alberta Justice, Québec Justice, Barreau du Québec, The Law Foundation of Ontario, The Law Foundation of British Columbia, the Ontario Bar Association and by the following partners:

- Association of Canadian Court Administrators,
- Canadian Bar Association,
- Canadian Forum on Civil Justice
- Canadian Institute for the Administration of Justice



Funding for research, writing, and analysis was provided by the Canadian Bar Law for the Future Fund.





## A Two-Part Conference

The *Into the Future* Conference was conducted in two Parts. Part I concentrated on the current state of Canada's civil justice systems. Part II of the Conference led to consensus on the need for a national initiative to promote civil justice reform. Every jurisdiction in Canada (province, territory, federal) was represented — by lawyers, judges, government policy makers, politicians, legal service organizations and members of the public, in some combination at both parts of the Conference. Throughout Parts I and II, special emphasis was placed on the needs of users of the civil justice system.

## Conference Research Project

In conjunction with the *Into the Future* Conference, the Forum undertook a research project. “*Into the Future: Civil Justice Reform in Canada, 1996 to 2006 and Beyond*” (2006 and Beyond) was designed to

1. collect information about developments since 1996 in the systems of civil justice in Canada,
2. gather opinions about the appropriateness of the 1996 vision for the years 2006 and beyond, and
3. canvass for ideas about the direction reform of the system of civil justice in Canada could or should take in the future.

The project was conducted in three stages. In the first stage, ACCA Board members arranged for representatives from each jurisdiction to report on developments in the civil justice system in their jurisdictions by completing a “Jurisdictional Questionnaire”. The results of stage one were distributed at Part I of the Conference in an Interim Report. In the second stage, “Recommendation-specific Questionnaires” were directed to individual organizations or groups named in the CBA Task Force recommendations to perform certain tasks (eg, the CBA, ACCA, the judiciary, the Canadian Council of Law Deans, law societies and the Canadian Centre for Justice Statistics). In the third stage, wide distribution was given to a questionnaire asking for ideas and opinions about the direction the systems of civil justice in Canada should take in 2006 and beyond. The “2006 and Beyond Questionnaire” built on the foundational principles and philosophical premises which formed the basis for the 1996 CBA Task Force recommendations. The full project report was distributed at Part II of the Conference. It is available on-line at <http://cfcj-fcjc.org/publications/itf-en.php#1>

## Endnotes

1. The Canadian Bar Association Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, 1996)

### Tracking Civil Justice System Reforms

#### 1996 CBA *Systems of Civil Justice Task Force Report*

... online at [www.cba.org](http://www.cba.org) (click on “Publications”, then click on “Order/Download”. Once you are on the Order/Download page, the Task Force Report is at the bottom under “Free Downloads”)

#### 2006 *Into the Future* Research Project Report: 10-Year Update on Canada's Civil Justice Systems

Stages 1 and 2, Jurisdictional and Recommendation-specific Questionnaires ... online at <http://cfcj-fcjc.org/publications/itf-en.php#1>

#### The Forum Inventory of Reforms: On-going Updates

... online at <http://cfcj-fcjc.org/inventory/>

## *Into the Future* Part I Fingers on the Pulse of Civil Justice Systems Today

Part I of the Conference was held in Montreal from April 30 to May 2, 2006. Attendance was open and there were 285 participants. These included players in the legal system (eg, judges, lawyers, court administrators, legal aid officers), government policy makers (eg, politicians, bureaucrats), and members of the public.

(l-r) On video Allan Seckel, QC, Deputy AG for British Columbia;  
Diana Lowe, Executive Director Canadian Forum on Civil Justice;  
Mr. Justice Thomas Cromwell, Nova Scotia Court of Appeal;  
Robert Patzelt, QC;  
Chief Justice Donald Brenner, Supreme Court of British Columbia



Photo courtesy of Mary Stratton

## Program

The Program for Part I focused on developments in Canada's civil justice systems since the publication in 1996 of the *CBA Task Force Report*. How have the recommendations of the CBA Task Force, and of Working Groups convened to conduct major civil justice reviews within their own jurisdiction, fared? Have they been acted on? Have they been well received? Have they solved the problems?

*There is no doubt that the provision of civil justice is integral to a viable democratic society. As you know, our system of civil justice is premised on the maintenance of the rule of law, the independence of the judiciary and the openness of the courts, and it can be described as having two overarching objectives: (1) to provide Canadians with a means by which they can resolve their disputes peacefully and in a timely way before an independent and impartial decision-maker; and (2) to ensure that this public dispute resolution "machinery" is accessible to all Canadians, both in terms of cost and complexity.*

Associate Chief Justice Dennis R. O'Connor,  
Court of Appeal for Ontario  
Keynote address, *Into the Future* Conference, Part I

The Program covered a wide range of topics such as: barriers to access to civil justice and to civil justice reform; rising costs which make litigation unaffordable for most citizens; legal culture and the role of lawyers in civil justice reform; the adequacy of the changes that have been made to reduce delays, expense and complexity in civil proceedings; the concept of procedural proportionality; and integrating alternative dispute resolution methods into civil litigation.

The opinions of guest speakers, debates among panellists and a dramatization of self-represented litigant issues stimulated many richly-informed and lively discussions among the Conference participants about the current state of civil justice systems in Canada. The presentations and discussions pointed to a significant consensus about the issues facing civil justice in the courts - primarily the continuing issues of cost, delay and complexity.

## Major Civil Justice System Issues

- Accessing justice (an informed public and an understandable process)
- Cost, delay and complexity of court litigation
- Need for procedural proportionality
- Providing dispute resolution alternatives to litigation

Many of the sessions provided Conference participants with opportunities to share information about innovative reform initiatives that have been introduced in their jurisdictions—innovations such as ADR, streamlined procedures, self-help centres and proportionality rules—and to identify promising practices. The sessions also gave rise to discussion about some of the impediments to reform.

Overall, Part I of the Conference confirmed the direction for reform recommended in the *CBA Task Force Report*. Brian A. Tabor, QC, President of the Canadian Bar Association, forecast the conclusion in the title to his opening address: "Ten Years Later: So Much Accomplished, So Much Still To Do in Civil Justice Reform". Conference participants recognized that, while many changes have been made, the systems of civil justice in Canada still attract public criticism as well as concern from within the civil justice community.

Many times during the two-day program, the room was abuzz with conversations about the need for civil justice reforms that will meet the continuing, possibly mounting, crisis in public confidence in the civil justice system. Participants expressed much enthusiasm over the prospect of taking a national approach.



Daphne Dumont, QC

Photo courtesy of Mary Stratton

## Outcome

The final session of the Conference challenged participants to think about the future. What immediate and long-term objectives should be set? What avenues or mechanisms for reform hold the most promise? What is needed in order to move forward with reform at this juncture? Who should take leadership? What are the next steps?

These questions elicited significant talk about the need for more research — for quantitative and qualitative empirical data that will help us to better understand the civil justice system, identify the public needs and expectations, point the direction that reforms should take, garner support for concrete change and evaluate the success of the initiatives that are undertaken.



(l-r) Madame Justice Barbara Hamilton;  
M. Jerry McHale, QC; Professor Rollie Thompson and Jeffrey Leon

Photo courtesy of Jared Adams, National Magazine

# Into the Future Part II

## The Way Ahead – National Coordination of Civil Justice Reform

Part II of the Conference was held in Toronto on December 7 and 8, 2006. Attendance at Part II was limited to 75 participants in order to permit smaller group discussions leading to decisions on a course of action for civil justice reform in Canada. Registration included many leaders in the civil justice system (a Minister of Justice, senior judges, lawyers, court administrators and government policy makers), representatives of law-related organizations (such as legal aid, public legal education, pro bono students) and a few non-lawyers who spoke for the public.

### Program

Part II of the Conference was action oriented, building on the discussions in Part I and seeking to establish a consensus on the national coordination of civil justice reform. One goal was to ensure a more efficient use and allocation of scarce resources through co-ordination and collaboration between jurisdictions on research, information sharing, policy development and pilot projects. Another goal was to help to create a stronger voice to speak for the civil justice system and for civil justice system funding.

The one and a half-day program was comprised of four sessions:

- **Visioning a transformed civil justice system.** This session included an account of the results of Stage 3 of the conference research project, “2006 and Beyond”, discussion of forming a common vision for a national approach to reform, and a “World Café” discussion on how to make a convincing business and social well-being case for civil justice reform to enhance access to justice and public confidence in the justice system. See “Forming a Common Vision” at p. 7 for details.



Photo by Tom Sandler

- **Creating and sharing knowledge about the civil justice system.** Next, conference participants shared information about SRL initiatives, and with the help of our facilitators and a large ball of wool, wove a web representing the interconnections between these stories. With information-sharing in mind, participants were then asked to comment on a template for an online database being developed by the Forum for sharing information among jurisdictions and with the public about civil justice system initiatives and programs. The initial version of

that database is now up and running on the Forum website as an Inventory of Reforms, <http://cfcj-fcjc.org/inventory/>. See “Inventory of Reforms” at p. 13 for details.

- **Measuring change — creating a Civil Justice Index.** Here, an invitation was extended to Conference participants to consider the idea of initiating a project to construct a composite index to measure performance success in Canada’s civil justice systems. See “Building a Civil Justice Index” at p. 10 for details.
- **Adopting a plan for action.** The final session returned to the questions posed at the conclusion of Part I: What is needed in order to move forward with reform at this juncture? Who should take leadership? What are the next steps? See “Ensuring Leadership for a National Approach” at p. 11 for details.

### Outcome

Part II of the Conference produced consensus about taking a national approach to civil justice reform with the help of the Forum, an approach that would include:

- forming a common vision;
- making the business and social well-being case for funding civil justice reform;
- developing a civil justice index or set of indices;
- promoting research on the civil justice system, its strengths and shortcomings;
- facilitating information-sharing among jurisdictions and with the public;
- educating the public about rights, responsibilities and the civil justice system; and
- creating a “steering committee” to consider and coordinate civil justice reform from a national perspective.

### Forming a Common Vision

The Conference began with a recognition that a number of commonalities exist among all of Canada’s civil justice systems. As Chief Justice McMurtry observed in his opening address at Part II, we all share a common goal — “to ensure that the civil justice system serves the public interest as best as it can”. Jurisdictions also face common problems. The combination of shared goals and problems forms the basis for seeking a common vision. A common vision will enable the civil justice community to speak with a collective voice about what has been called a “crisis” in the delivery of civil justice. With a common vision, that collective voice could articulate not only the need for reform in Canada but also the direction that reform should take.

*The search for truth is generally the goal of our civil justice system. However, it should also be noted that the search for truth can also be enormously costly and often impractical. Often the search for an honourable compromise and a quick and timely resolution will better serve the interests of the parties as well as the public interest.*

Honourable R. Roy McMurtry, Chief Justice of Ontario  
Opening Remarks, *Into the Future* Conference, Part II



Forming a common vision will be no mean feat because the civil justice system reflects the values of society ... the kind of life we want to live. Fortunately, the 1996 CBA *Task Force Report* has provided a good foundation. From “2006 and Beyond”, the report of the *Into the Future* Conference research project, it is apparent that support for the Task Force vision is strong. That vision retains the traditional foundation of the civil justice system as upheld in the courts: respect for the rule of law, judicial independence, the independence of the Bar, the right to a trial, the conduct of proceedings in open court. But the vision is not limited to proceedings in court. It embraces an approach to civil justice that offers the public many options for resolving their disputes and emphasizes the importance of their involvement in designing the system as well as improving public understanding of the system and access to it.

### 1996 CBA *Task Force Report* Four Elements of Fundamental Change

- Responsiveness to the needs of users and encouragement of public involvement
- Many options for dispute resolution
- A framework managed by the court
- An incentive structure to reward early settlement and value trials as a last resort

The vision could focus on preventing problems from arising, or providing methods of dispute resolution that keep them out of court when they do arise. It could retain ‘the right to a trial if necessary but not necessarily a trial.’ The adage ‘leave no stone unturned in the search for the truth’ may require compromise in the interests of timely, affordable dispute resolution.

In order to build a meaningful common vision for Canada’s civil justice systems, conceptual clarity is essential ... a common language is needed. For comparison among jurisdictions to be meaningful, agreement should be reached on uniform terms to describe uniform concepts. Other steps preparatory to the formulation of a common vision include: gathering and sharing data on civil justice systems; generating ideas for reform; and evaluating the success of reform initiatives. Conference participants observed that we don’t really know much about the civil justice systems in Canada. We lack reliable information that allows us to compare performance from one jurisdiction to another, one court to another, or practices from region to region within a single court and the employment of uniform evaluative measures to gauge success.

### Preparing for the Articulation of a Common Vision

- Gathering and sharing data on Canada’s civil justice systems
- Generating ideas for future reform  
– see “2006 and Beyond”, Stage 3 of the *Into the Future* Conference research project Report, available online at <http://www.cfcj-fcjc.org/publications/itf-en.php>
- Evaluating the success of reform initiatives

*Most often, people aren’t looking for a judicial decision; they’re looking for a solution to their problem.*

A Conference participant

## Defining the Civil Justice System

One of the most challenging tasks associated with forming a common vision will be to clearly define the “civil justice system”. Central to the definition will be an agreement on the purpose of the civil justice system. During the conference, a two-fold purpose which recognizes both the role of providing the public with knowledge of their rights, as well as the machinery for resolving disputes, was considered essential. “This two-fold purpose underlines that while the system includes the formal dispute resolution function available in our courts, it is also a source of information about rights and responsibilities of individuals, businesses and government. This knowledge gives individuals and businesses the confidence to enter into personal and business relationships, and informs their expectations when disputes arise. ‘[T]he backdrop of norms and principals developed through the courts allow people to resolve problems in what Mnookin and Kornhauser famously termed the ‘shadow of the law’.<sup>1</sup> In this way, the system plays a fundamental role in our society, quite apart from when it is turned to for formal assistance in resolving disputes”.<sup>2</sup>

Much of the discussion at the Conference centred on issues relating to civil justice as administered in the courts. However, the Conference participants expressed support for a broadly inclusive view of civil justice. This broad view of the civil justice system begins with the conflicts that arise in society and lead to discovery of how those conflicts are dealt with, to whom the persons in conflict turn for help, whether the problems are resolved or left to fester and, if resolved, by what means. By contrast, a narrow definition of the civil justice system would be confined to rights enforcement and dispute resolution in the courts. The problem with the narrow view is that it will yield information only about the cases that are litigated; it will not reveal the other problems that are resolved by other means and the reasons why. Options that fall in between these two extremes include consideration of the courts, administrative tribunals, dispute resolution methods alternative to the courts (mediation, arbitration, collaborative law, and so forth). These methods are outside of the narrow definition which focuses on the fundamentals of the court system, and may give new meaning to the traditional concept of “justice”. Their success depends, at least in part, on the court system — the bedrock of our civil justice system — on which people can fall back, if necessary.

*How do we ensure that those other and newer growing parts of the system are equally focussed on justice?*

A Conference participant

## Endnotes

1. As reported in *The Future of Civil Justice: Culture, Communication and Change*, Professor Pascoe Pleasence, Presentation Notes from *Into the Future*, Part I. Available online at: <http://cfcj-fcjc.org/docs/2006/pleasence-en.pdf>
2. *Into the Future: Confirming our Common Vision*, M. Jerry McHale, QC and Diana Lowe, 2006. Available online at: <http://cfcj-fcjc.org/docs/2006/commonvision-en.pdf>



# Making the Business and Social Well-being Case for Civil Justice

Reform of our civil justice systems is not a priority for governments in Canada. How can we move civil justice into the public and political spotlight? What do we need to do to convince Treasury Boards of the importance of a well-designed and properly resourced civil justice system in a free and democratic society? How do we measure the effectiveness of our efforts? These considerations lay at the root of a “World Café” session on making the business and social well-being case for civil justice where Conference participants were invited to discuss their responses to three sets of questions.

## 1) Whose job is it to make the business and social well-being case for the Civil Justice System? Who do we need to engage in this job?

The response encompassed “all those within the gravitational pull of the system”. That “pull” would draw in everyone present at the Conference as well as the justice community sectors they represent: “All of us in this room have a role to play and all of us have a constituency that will listen to us. It may be a different constituency and we all need to consider whether we can take that role on ourselves”. It would include the public at large because the civil justice system reflects what we value in our society and, as such, all members of society benefit from its existence. The closer persons are to the centre of the gravitational pull, the greater the responsibility they carry for making the business and social well-being case.

*We need to make sure that the voice of reform is as loud as the voice of inertia.*

Allan Seckel, QC, Deputy Minister,  
British Columbia Ministry of Attorney General

## 2) What do we need to do or know in order to make the business and social well-being case? What are the impediments to making the case?

These questions produced a fertile flow of thoughts. Conference participants took the view that doing the business of justice is fundamentally about deciding what kind of society we want to build for ourselves and for our children. Justiciable problems — those that have a solution in law — do not occur in isolation. As we heard from Pascoe Pleasence at Part I, problems occur in clusters and have enormous consequences for people’s lives.<sup>1</sup> In Canadian research modelled on the UK studies, Ab Currie has confirmed the clustering of problems and the negative consequences associated with unresolved problems.<sup>2</sup> Participants in the Forum’s *Civil Justice System & the Public* research were already involved in court processes to address their legal disputes, and results suggest that the same set of costs and clustering of legal and social problems occur if litigants do not reach a quick and effective resolution through the courts. Together this research provides important evidence to support the business and social well-being case for civil justice reform.

The discussion fell into five general themes. A sampling of the key points follows:

### A. Work to ensure a common vision or understanding

First we must think long-term. This is not an exercise where “quick -wins” are the aim. We need to agree on a definition of

the civil justice system. With this definition, we will be able to form a clear vision and create consensus in the justice community on the direction for the civil justice system and the reforms we wish to make. This vision may be comprehensive, or it may target specific concerns.

We should emphasize the characteristics of a well-functioning civil justice system — for example: respect for the rule of law; an independent judiciary; unbiased decision makers; public understanding of civil rights and obligations and the role of the civil justice system; competent legal assistance where necessary; dispute resolution processes that maximize litigant participation in the process and control over the issues and outcomes.

### B. Ensure that all of the key players are involved

It is important that we work collaboratively for change. Keep at the forefront of our work the fact that lawyers and the courts are engaged in providing a service to the public. Involve the system users — “there’s a big disconnect between counsel’s appreciation of expectations and outcomes and the client’s expectations of outcomes”. We should develop a forum involving a microcosm of the people who need to be engaged in the conversation.

### C. Focus on gaining evidence, statistics and research data to support the case

We must gather reliable data, including statistics, from both legal and non-legal channels. Establishing a clearinghouse for sharing the gathered data and obtaining more evidence of the positive social implications of an effective justice system would be very helpful to conducting a much needed cost-benefit analysis for the business case.

### D. Education

To capture the interest of the media and the ears of politicians requires more public interest. If we can educate the public about the importance of the civil justice system, this will create a critical mass of informed concern, which in turn will help move reforms forward. We can also change the way we teach law students — stop spending 97% of effort focussed on the processes relevant to the 2-3% of cases that go to trial.

### E. Communication Strategy

Any communication strategy should focus on the peaceful resolution of conflicts before they reach the court-house or the courtroom. Conversations can draw connections between criminal justice, civil justice and family law. Tackling civil justice reform in tandem with criminal justice reform will piggy back on the public interest in the criminal justice system. To make the case emphatically, we can describe the worst case scenario — pointing to the corruption, violence and general chaos that exists in countries where the civil justice system has failed. In Canada, we can point to those pockets of persons in the population who, for a variety of reasons, are unable to access the justice system. Say it again. And again. And again.

## 3) How will we know if our efforts are successful?

In order to gauge the success of our efforts to make the business and social well-being case for civil justice reform, conference participants thought we should identify indices of success and then devise appropriate, effective instruments of measurement. Many suggestions were made about how we will know we have succeeded.

Among them were:

#### A. Action Plan

- we come to a national consensus about our vision, for what the civil justice system should look like for 2006 and beyond
- we have a definite action plan to carry out, with effective collaborative activities
- we agree on the common standards that need to be measured
- we have the means to measure what we are doing and with these measures, can be confident that we are taking steps for the right reasons

#### B. Measurable Results

- positive media coverage
- that the public (most importantly), the media and the politicians value and understand the fundamental importance of the civil justice system
- we live in a world with less litigation, where more alternative avenues are taken and solutions are equitable rather than legal. Perhaps more of a restorative justice world
- we see ongoing relationships (eg, within the work force, between neighbours and within families) continuing more amicably
- everyone who needs a lawyer can get a lawyer
- wait times are reduced
- we are successful in getting more money for the civil justice system and needed reforms.

## Endnotes

1. As reported in *The Future of Civil Justice: Culture, Communication and Change*, Professor Pascoe Pleasence, Presentation Notes from *Into the Future*, Part I. Available online at: <http://cfcj-fcjc.org/docs/2006/pleasence-en.pdf>
2. *A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns*, Ab Currie, Research and Statistics Division of Justice Canada. Available online at: <http://cfcj-fcjc.org/docs/2006/currie-en.pdf>

## Building a Civil Justice Index or Indices

At the heart of much of the discussion was the desire to improve our knowledge and understanding of the civil justice system. Participants asked: How do we know whether Canada's civil justice systems are in crisis? How do we know whether they are functioning well? Can the performances be compared? One possible answer to such questions may lie in building a comprehensive civil justice index, or separate indices for selected areas and this idea was received with enthusiasm by the Conference participants. Marc Lachance of the Canadian Council on Learning opened the discussion by introducing the Learning Index recently developed by his organization: <http://www.ccl-cca.ca/CCL/Reports/CLI2007?Language=EN>. Other composite indices include the Canadian Index of Well-Being.

### What is a composite index?

A composite index is a means of presenting accurate and comprehensive measures of a system's performance success. It is comprised of a selection of individual "indicators" of performance which, when combined, provide a global assessment in one summary number. A composite index is particularly useful to measure performance in areas where economic data is insufficient — areas such as the environment, health, sustainable development, education and, perhaps, the quality of justice. It allows account to be taken of qualitative data (eg, the experiences of system users, lawyers, judges and other members of the justice community) as well as quantitative data (viewed as reliable, objective, fits into government funding, assessment and program evaluation methodologies). To assist the discussion of justice system indicators, the Conference materials included

a discussion paper prepared by Dr. Elaine Todres for the Association of Canadian Court Administrators (ACCA), one of the Conference partners, on the "Development of Performance Standards in Civil Justice". See <http://cfcj-fcjc.org/docs/2006/acca-en.pdf>.

*The aim of an index is to provide a measure by which change can be made and evaluated in a particular form of institutional behaviour. Such change, in turn, affects the broader social environment and the lives of individuals.*

Jane Conly, "Creating a Composite Justice Index: Better Measures for Change" citing Karen Frecker, *Beyond GDP: Enabling Democracy with Better Measures of Social Well-Being* See <http://cfcj-fcjc.org/docs/2006/conly-en.pdf>

*When you're working with information, there's two steps. You have to amplify the information and you have to attenuate the information. You have to get the information. You have to amplify the quantitative knowledge so that when you attenuate the information down to an index or a set of three or four indicators, you know that you've got the right stuff and that what you're putting in is going to give a fair representation of the area ... One of our problems is we haven't amplified the information enough to know, when we're attenuating it, that we've got the key elements.*

Professor Carl Baar, citing Stafford Beer, Massey Lectures 1973

## Civil Justice Index Potential Benefits

A composite Civil Justice Index would serve as:

- a tool for knowledge exchange and communication
- a means of putting civil justice on the public wave length, attracting attention, sparking a dialogue and acting as a catalyst
- a vehicle for educating persons about the civil justice system
- a vehicle through which to report progress on the success of Canada's civil justice systems over time
- an easy way to summarize and synthesize information on complex issues and in turn, to support policy makers (eg, helping governments to make wise decisions about spending on justice)
- a starting point for future analysis, both in terms of providing a baseline from which to measure progress as the index is developed, and identifying new research that is needed
- a tool for understanding the civil justice system — what happens to cases between commencement and trial, whether we are in a crisis
- a way of developing accountability, separate from the traditional hierarchical methods
- an ability to compare data from different jurisdictions utilizing common language, common measures, common tools

## Civil Justice Index Potential Challenges

A number of caveats need to be expressed:

- a composite is not the only indicator that measures progress or performance — it ought to be used with other information
- an index could send misleading policy messages or oversimplify a complex issue — the Canadian Council on Learning has tried to avoid this trap by making all the information on all the underlying indicators behind the Index accessible on its website
- an index can be misused — the indicators and weights can be biased to carry a political agenda
- it could reduce interest, for example, if the measures of outcomes do not change much over the years — the Canadian Council on

Learning solution has been to present the information in a way that allows communities to learn from each other through the Index

- it could create apprehension among assessment-averse lawyers or judges
- much thinking and money would be required to build a Civil Justice Index and accumulate the data needed to apply the measures — as it is, the available data is seldom analyzed
- we have huge data problems — where possible we could draw on data from other indices such as the Canadian Council on Learning Index for justice and education or the Canadian Index of Well-Being.

### How can we move forward?

The Conference participants recognized a need for research on a national basis on the problems we have in common or where the research cannot be done by any jurisdiction on its own. It was apparent that building a composite index would help immensely with our understanding of the civil justice system and the state it is in, that we need to get facts and figures on what is going on and we need to gather the reasons for it.

Conference participants pondered how we could go about getting that data, those statistics. Who will do it? They saw a need for commitment to national co-operation and the forming of partnerships among organisations such as the Forum, the Canadian Bar Association; the Canadian Centre for Justice Statistics, the Provincial/Territorial Steering Committee on Justice Efficiencies and Access to the Justice System (which is looking at ways to ensure consistent measurement tools across Canada); the Canadian Judicial Council, the Association of Canadian Court Administrators, and Pro Bono Students Canada.

*...[t]here's talk about putting all the research together in one place, but it seems like the real answer is to put it into an index, through a joint committee, a multi-jurisdictional or national committee that would meet on a regular basis, collect data, decide what are the five or ten key indicators that we need to talk about when we're talking about the health of the civil justice system, indicators such as wait times, the number of Legal Aid lawyers doing certificate work, the number of clinics in the jurisdiction per population, whatever those ten factors are ... It seems that we want to have a national, multi-jurisdictional group committed to doing that research, meeting to publish it and rank each jurisdiction one against the other and then taking that index to government, taking that index to the press, publishing that index on a yearly basis, letting people who read the Globe and Mail or the Montreal Gazette open their paper and say, "Oh, our jurisdiction is behind. Let's push our government to bring us forward". And if we all think there's a crisis, either within our provinces or within this country, let's broaden that and compare Canada to Australia or the United States and let's use that index as a group, focus our efforts on joining that information together. Then we have our business case and if people want to respond to it, they can do it.*

Noah Aiken-Klar, Pro Bono Students Canada, summing up the key points in our discussion.

## Ensuring Leadership for a National Approach to Civil Justice in Canada

One of the six foundational parameters of the 1996 CBA Task

Force was the development of a national agenda that respects jurisdictional autonomy. A major goal of the *Into the Future* Conference was to again bring civil justice reform into focus as a national justice priority. In opening the Conference, Chief Justice McMurtry issued a clarion call to those present to take advantage of the breadth and depth of talent available, work together, and get the job done. What job? The job of ensuring that the civil justice system serves the public interest as best it can.

As the Conference wound to conclusion, a strong feeling existed that the persons in the room and the organizations they represent, should take responsibility for the ideas that were arising there. A number of those present expressed a willingness to commit to working collaboratively to make civil justice reform a national, coordinated priority. A national steering committee on justice reform might be convened to oversee developments, which should include progress with the construction of a Civil Justice Index. The Forum — an organization set up to serve as a catalyst for national civil justice reform — was seen as the logical organization to keep the ball rolling. The Forum undertook to facilitate the conversation going on among all of the players in the civil justice community including the public, to find effective ways to ensure that the public needs are identified and to define the civil justice system in a way that is acceptable to the players collectively.

### Words or phrases frequently heard during the *Into the Future* Conference

- “commitment” to a national approach to civil justice reform by government, the judiciary, the courts, court administrators and other knowledgeable players
- “public involvement” in civil justice reform
- “collaboration” in the reform process among all interested sectors
- “dearth of information and understanding” about the civil justice system and its operation
- “need for research” reaching outside the usual legal channels
- “multi-disciplinary” initiatives
- “leadership” by persons and organizations attending the Conference
- “facilitation by the Forum” of civil justice reform efforts

Diana Lowe, Executive Director, Canadian Forum on Civil Justice:

*The Forum has been suggested a number of times as the vehicle to move forward with this national approach to civil justice reform, and I'm delighted to hear that. The Forum is a catalyst for reform in the civil justice system and we're in existence to help facilitate the kind of change that's needed across the country ... that was, in large part, the reason that the Forum was created.*

*What I'm hearing is that you're telling the Forum that this is something that you're interested in and that there is energy in moving forward and in working together. And what the Forum can do for you is to facilitate that conversation going on amongst all of the players by bringing together, convening perhaps, a national working group that's made up of all of the players in our justice community, including the public.*





## ✓ Inventory of Reforms

In August 2007 the Forum launched an online Inventory of Reforms as a means of sharing knowledge about innovations in civil justice systems in Canada <http://cfcj-fcjc.org/inventory/> The Inventory contains descriptions of current practices and reform initiatives from across the country, each described according to a standard format that includes information on the purpose, development, implementation and evaluation of the practice. The Inventory currently captures practices in key areas relating to the cost of litigation: proportionality, experts, point-of-entry assistance, discovery and case-flow management. The Forum will continue to expand this resource.

## ✓ National Initiative on Access to Justice

The Right Honourable Chief Justice Beverley McLachlin has spoken publicly about access to justice on a number of occasions in the past year, including at the CBA Council Meeting on August 11<sup>th</sup>. In her remarks to Council she spoke of the need for the bench, the Bar and government to work together in order to achieve real and lasting improvements in access to justice. The Forum, the CBA and the Canadian Judicial Council are exploring the creation of a national initiative which will continue to promote dialogue among all of the key stakeholders on priority issues aimed at improving access to justice in civil and family matters.

## ✓ Research in Action project

The Forum has been working to develop awareness and capacity among social science and legal researchers, about the need for socio-legal research on the civil justice systems in Canada. Funding received from the Law Foundation of British Columbia enabled the Forum to host workshops in four centres in that province in August 2007. For a full description of this project see: <http://cfcj-fcjc.org/research/socio-en.php> The Forum has established an online database of researchers and a list of research priorities, and in the coming year will be seeking funding from SSHRC to develop a “research cluster” focussed on the civil justice systems in Canada.

## ✓ *Doing Justice: Dispute Resolution in the Courts and Beyond ( CIAJ )*

The 2007 CIAJ Annual Conference was about dispute resolution models ranging from the courts to mediation, arbitration and others and was designed to continue the discussions on dispute resolution models which began at Part I of the *Into the Future* Conference. Participants at the CIAJ October Conference looked at what makes a model effective, with the objective of matching the features of the models to various types of disputes and exploring the scope for adapting or reshaping models to suite the disputes they are called on to resolve. <http://www.ciaj-icaj.ca/english/calendar/BrochHalifax2007A%5B1%5D.pdf>

## ✓ Federation of Law Societies of Canada explore the role of Law Societies in ensuring access to legal services

The supply and demand for legal services was the focus of discussions during an afternoon of panel presentations at the November 2007 Annual Conference of the Federation of Law Societies. Consideration was given to the role that Law Societies can play in increasing access to justice through measures such as regulated and in-firm paralegals, and unbundled services.

## ✓ Law Related Education and Public Legal Education & Information

Participants confirmed the importance of public legal education and ensuring that the public understands what their rights and responsibilities are, in a civil society. We need to look beyond the justice system, at public legal education in our schools as well as programs for adults, and to find ways to encourage public legal literacy. The Public Legal Education Association of Canada (PLEAC) and its members are committed to providing legal education and information to Canadians.

## ✓ Cost of Litigation research

The Forum will be undertaking research on the cost of litigation. This will be a national, collaborative action research project which will be aimed at the primary concern in the civil justice system — cost. Funding will be sought to undertake a national project which will look at economic and social costs associated with our current system of civil justice.

# Carrying on the Dialogue

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## Future Report Cards

The Forum plans to continue to provide periodic updates or “report cards”, perhaps 6-12 months after this first report, to help maintain awareness about the civil justice reform initiatives that are taking place in Canada. In the interim, the Forum website and particularly the newspaper, is a good source of current information about events, new initiatives and research: <http://cfcj-fcjc.org/news/?cat=2> .

## Conference-Related Publications

All of the papers and speaking notes from Part I and II of the Conference are published online at: <http://cfcj-fcjc.org/publications/itf-en.php>.

The Forum is producing an edited DVD capturing the Self-Represented Litigant presentation from Part I of *Into the Future*, which will be available for education and training.

The Forum is also publishing a book with chapters by selected authors which will look at ideas for changes we need to make in order to move the agenda for reform forward.

## International Initiatives

The Forum hopes to develop an international conference with a group of partners from the UK, Australia and Europe, which will allow the sharing of information about issues and initiatives in civil justice reform from an international perspective. In the course of both this Conference and the research noted above, we will be identifying initiatives where measures are in place to help us identify approaches which have been successful in reducing costs, achieving proportionality, and of course improving access to justice.

# Into the Future ... and Beyond

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*Into the Future* was not a typical Conference. It was an important research initiative ... a dramatic storytelling ... a celebration of exciting initiatives ... an acknowledgment of lessons learned ... a challenge to all of us to continue our efforts ... and of course, a gathering for those interested in improving access to justice.

Conference organizers were delighted, first by the number of participants who registered for the Conference and the many roles that you all play in our justice system every day. We could not believe the enthusiasm and energy that you brought to every discussion. You challenged us and each other to do more to ensure that the public is at the centre of our justice systems and our efforts at reform.

Together, we confirmed a shared vision for a promising future in which real and measurable improvements in access to justice are possible. With this vision firmly in place and our commitment renewed, we have already begun the work that we agreed will help us to achieve this goal. We are gathering data, encouraging researchers to help us to better understand what works, creating vehicles for sharing our experiences, and moving forward with promising practices.

We are confident that you will be pleased to hear about the progress we've made, and with many exciting opportunities before us, are already looking forward to our next update! We are interested in hearing about your efforts as well. Do tell us about the work you are doing to improve access to justice, so that we can all benefit from your experiences.

*“Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it is the only thing that ever has”.*

Margaret Mead

Margaret Shone, QC contributed to a number of aspects of the Conference - from the research and writing of the *2006 & Beyond* report, to playing the role of a client in the SRL presentation at Part I, to participating in the opening panel at Part II. Most recently she has contributed significantly to the drafting of this Report, and we want to both acknowledge and thank Margaret for her assistance throughout.

## We want to hear from you

We want the content of *News & Views* to answer your questions, respond to your concerns or include your article or comments. Please write to us and contribute your ideas to future issues of *News & Views on Civil Justice Reform*: [cjforum@law.ualberta.ca](mailto:cjforum@law.ualberta.ca)