



THE COST OF JUSTICE

WEIGHING THE COSTS OF FAIR & EFFECTIVE
RESOLUTION TO LEGAL PROBLEMS



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The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical. Unfortunately, many Canadian men and women find themselves unable, mainly for financial reasons, to access the Canadian justice system. Some of them decide to become their own lawyers. Our courtrooms today are filled with litigants who are not represented by counsel, trying to navigate the sometimes complex demands of law and procedure. Others simply give up.

- The Right Honourable Beverley McLachlin¹

¹ The Right Honourable Beverley McLachlin, PC, Chief Justice of Canada, 2007, Justice in our courts and the challenges we face (Address to the Empire Club of Canada).

INTRODUCTION

There is a growing belief that our civil and family justice system² is in crisis. Evidence is mounting that the public cannot afford to resolve their legal problems through the formal processes of our courts, and it is unclear whether they are accessing other civil justice system services to reach resolution or whether their legal problems remain unresolved. This is a vital concern not only for the individuals who are unable to pursue their claims, but also for the health, economic, and social well-being of all Canadians. There is increasing evidence that unresolved disputes have a significant negative impact on individuals, their families, businesses and society as a whole.

The civil justice system is a fundamental and far-reaching component of democratic societies, which touches the lives of Canadians every day. It impacts them through contracts and credit situations, family relationships and their breakdown, personal injury and various corporate arrangements. Although the civil justice system is a cornerstone of our democracy, there is a dearth of empirical research about this system in Canada & internationally. Surprisingly little is known about how well the civil justice system works: what it costs, who it serves, whether it is meeting the needs of users, or the price of failing to do so. The Cost of Justice project is designed to undertake ground breaking and innovative research which will provide the foundation of critical information needed for evidence-based decision-making about the civil justice systems in Canada and internationally. This evidence will fill an empirical gap that has persisted in spite of repeated calls for research.

The project will integrate teaching and research, incorporating ethical responsibilities and practical tools about providing access to affordable legal services into the teaching of professional responsibility. Social scientists will improve their understanding of the civil justice system as a foundation for our democratic system and of the need for empirical research in this field. New modes of service will be developed for the justice system and for the delivery of legal services. The evidence-base created through this research will increasingly become the foundation for decision-making in the justice community, informing and assisting government and other stakeholders to make sound decisions, set accurate priorities, and ensure a civil justice system that is effective and responsive to public needs.

The collaboration extends throughout the civil justice communities in Canada & internationally. Scholars from law and the social sciences will be engaged in developing innovative methodologies, much needed empirical evidence, new theory and evidence-based recommendations for change. This knowledge will be welcomed by key decision-makers in government, within the judiciary, in the courts, in the Bar and amongst the public users of our justice system. In this way, the knowledge gained will play a significant role in policy, reform and new understandings in our civil justice system.

² In this proposal we use the term “civil justice system” broadly to include all of the institutions and processes, judicial and extrajudicial, legal and extralegal which participate in the resolution of civil and family disputes.

THE SOCIAL IMPORTANCE OF ACCESS TO CIVIL JUSTICE

We know civil justice has a cost; more troubling, we know there is a cost to the lack of access to civil justice — but we do not know what these costs are. This project seeks to fill the current void of evidence-based information about the legal, economic, and social costs and benefits of pursuing, or not pursuing, justice through various dispute resolution pathways. The initiative has direct implications for access to justice policy and socio-legal scholarship throughout Canada and other peer jurisdictions.³

Equal access to a civil justice system⁴ that can uphold rights and fairly and effectively resolve disputes is a fundamental and far-reaching component of democratic societies (Farrow, 2006a, 2009, 2010a; Friedman, 2006; Marshall, 1950). It influences our lives every day via contracts and credit situations, the ownership and distribution of property, family relationships and their breakdown, personal injury, benefit entitlements, human rights, and various corporate arrangements. “At the most basic level, the civil justice system exists to provide people with access to knowledge about their rights, and if necessary to a means of enforcing them” (Civil Justice Advisory Group, 2005, p.20).

The system can then be said to have a two-fold purpose. The first plays a primary societal role as a source of information about the rights and responsibilities of individuals, businesses and government, including expectations of peaceful and fair resolution if conflict arises. This knowledge gives individuals the confidence to enter into personal and business relationships and provides a backdrop which empowers them to resolve disputes themselves. The second purpose, when necessary, is to perform a dispute resolution function, which has traditionally been available in the courts and increasingly includes additional court connected pathways to address and resolve legal problems (Farrow, 2009; McHale & Lowe, 2006).

In the last decade, a body of Canadian and international research has emerged demonstrating the high, everyday incidence of legal problems experienced among the general population (Coumarelos et al, 2006; Currie, 2006, 2007a, 2007b; Genn, 1999; Pleasence et al 2007, 2008a, 2008b).⁵

³“Access to justice” is a term used to describe many aspects of the growing concern about the ability of our justice system to serve the public. Our focus will be on the cost of justice, already identified as the key barrier to the civil justice system.

⁴We use the term “civil justice system” broadly to include all of the institutions and processes, judicial and extrajudicial, legal and extralegal which participate in the resolution of civil and family disputes. We include everyone who has a role in legal proceedings and resolving legal disputes via the courts, tribunals and alternative resolution options that deal with family law, child welfare, injuries from accidents, property disputes, wills and estates, administrative regulations, rights and entitlements and other non-criminal matters.

The Canadian research has found that between 45-48% of the population has a legal problem at any given time with just a small proportion of these addressed by the courts (commonly estimated at around 10%) or with formal legal representation. The degree to which problems are resolved by other means, or left unaddressed, remains unclear, although a significant amount of inaction is reported (Currie, 2007a; Pleasence, 2006). Proactive responses to legal problems are, however, rare in the civil justice system; instead, the tendency is for problems to escalate and become harder to resolve, most especially when family matters are involved (Jacobs & Jacobs, 2010; Semple, 2010; Stratton & Anderson, 2008). Canadian and UK findings also show a tendency for legal problems to cluster often leading to additional health, economic and social problems that have significant costs for individuals, their families, businesses, and society as a whole. This occurs for people who are seeking resolution through the courts as well as those who are not.

Early, accessible and effective resolution to legal problems is key to avoiding problems clustering and escalating, but not knowing where to seek help or feeling powerless to do so are significant reasons given for inaction. Furthermore, the experience of multiple problem clustering does not affect people uniformly across the population (Pleasence, 2006, p.72). People who are economically disadvantaged or vulnerable to social exclusion for other reasons such as disabilities, homelessness or ethnicity tend to have high rates of intersection with civil legal problems. Legal issues such as domestic violence, family/relationship breakdown, injury from accident, housing, employment, and discrimination, can also directly lead to or exacerbate social exclusion (Coumarelos et al, 2009; Currie, 2007a, 2007b; Forell et al, 2005; Grunseit et al, 2008; Karras et al, 2006; Pleasence, 2006; Pleasence et al, 2008a, 2009). This body of research argues for the recognition of everyday legal need. Responding with investments in affordable, community-based legal outreach involves acknowledging the very considerable social costs of non-resolution that are borne by social and health services, income supports, disability plans, employment insurance, and other services.

There is mounting evidence that the public cannot afford to resolve their legal problems through formal litigation processes because the cost of legal advice and representation required is beyond the means of low and middle-income Canadians (Access to Justice Study Committee, 2007; Cannon, 2002; Jackson, 2010; Knutsen, 2010; Lord Woolf, 1996; Systems of Civil Justice Task Force, 1996; Stratton & Anderson, 2008;).⁵ Some evidence that legal representation is too costly comes from the steady increase in the

⁵ Genn (1999, collaborator) considered the incidence of civil justice problems and how these problems are resolved. This study has been continued as a biannual English and Welsh Civil and Social Justice Survey and her colleagues, Pascoe Pleasence and Nigel Balmer (co-applicants) continue to investigate civil justice problems as interrelated aspects of broader social, economic and health problems. In Canada, Ab Currie (collaborator), Principal Researcher, Legal Aid and Access to Justice in the Federal Department of Justice, has conducted extensive parallel surveys. Currie (2007a) lists similar research in six countries. There are also numerous smaller studies concerned with the extent of unmet legal needs.

⁶ These are just a few of the possible references. Every province and territory in Canada has at least one report concerned with access to justice. Affordability is repeatedly identified as a barrier.

number of people appearing in court without legal counsel. In family matters, where objective representation is considered crucial, parties without counsel are reported to be as high as 50%.⁷ As well, in recent years considerable popular and legal media attention has focused on the lack of access to justice and the high cost of legal representation, often making connections to concerns about the adequacy of available legal aid (Crosariol, 2004; Diebel, 2007; Dodek, 2009; Pigg, 2009; Powell, 2007; Tyler, 2007a, 2007b are a few of 51 mass media and 34 legal media articles on file). Media coverage both reflects and fuels a growing belief that our civil and family justice system is in crisis that spans users, legal service providers and governmental policy-makers. In addition to individual disputes, scholars and policy analysts increasingly point to the importance of well-functioning legal systems to deal with the complexities of the globalized world (Farrow, 2006a; Friedman, 2006).

⁷ Although consistent statistics are still not collected, an increasing number of Canadian courts and the judiciary are counting the number of litigants appearing without counsel (often referred to as Unrepresented or Self-Represented Litigants (SRLs)). There is also substantial qualitative evidence from across Canada concerning SRLs. The reports of the Forum's previous CURA project, the Civil Justice System and the Public (<http://cfcj-fcjc.org/publications/cjsp-en.php>) have contributed to this knowledge, as has other province-based research such as Malcomson & Reid, 2004, 2006, Stratton, 2007, and the series of reports from the Alberta Legal Services Mapping Project (<http://cfcj-fcjc.org/publications/mapping-en.php#alsmp>). The Canadian Judicial Council undertook an extensive research project on SRLs from 2003-2006, resulting in a number of resources to assist the judiciary and the broader justice community to respond to the needs of SRLs (<http://cfcj-fcjc.org/research/srl-en.php>).

THE CURRENT STATE OF COST OF JUSTICE RESEARCH AND REFORM INITIATIVES

The concerns outlined above have spawned an array of reforms and new initiatives in recent years, spanning Rule changes, court processes, and legal service delivery.⁸ Some initiatives show promise, while others are acknowledged as falling short of reform goals. The lack of an evidence-base to properly inform design, delivery and evaluation of reforms and new initiatives is a priority concern of justice stakeholders.

There is a growing awareness of what policy analysts term ‘wicked problems’ — problems that are resistant to previous solutions and are characterized by critical information gaps about what actually helps and how best to direct appropriate resources (Bradford, 2003, p.6). The challenge of improving access to civil and family justice is a wicked problem. Despite recognition that the civil justice system is a cornerstone of our democracy, and the current widespread concern about the fairness and effectiveness of the system, there is a dearth of evidence-based research, or even basic statistical information, about this system in Canada and internationally.⁹ Scholars and policy makers have long recognized inevitable tensions surrounding the principles of equal access to justice and the public and private costs related to provision and use of legal processes and services (Posner, 1998; Farrow, 2006b; Hadfield, 2000). However, surprisingly little is known about how well the civil justice system works: what it costs, who bears those costs, who is well served by it, whether it is meeting the needs of users, or the price for failing to do so (Canadian Bar Association Task Force, 1996; Chappe, 2008; Civil Justice Advisory Group, 2005; Civil Justice Review Team, 1995; Hadfield, 2009; Jackson, 2009; Kakalik & Robyn, 1982). Deploring the lack of information on civil justice costs, the Ministry of the Attorney General of Ontario stated that:

On such an important issue, one would expect to find a wealth of research. Surprisingly, there is little analysis or hard data available. This is true not only for Ontario but for most jurisdictions around the world. (Civil Justice Review Team, 1995, p.3)

The need for strong integrated empirical data on civil justice costs is recognized as a priority by the Canadian and international justice communities (Canadian Forum on Civil Justice, 2007). There are, however, only limited statistics available to capture activities in our civil and family courts¹⁰ and even fewer regarding the broader system intended to serve the overall legal needs of the public.

⁸ The Inventory of Reforms is an online resource on reform initiatives in Canada: <http://cfcj-fcjc.org/inventory/about-en.php>

⁹ The lack of attention paid to the civil justice systems by social scientists has been the subject of international research (Genn, Partington & Wheeler, 2006) and theoretical-methodological critique (Friedman, 2006). The great risk in failing to appreciate the important role that the civil justice system plays in a democratic society is starkly apparent when that system is not functioning (Farrow, 2010a, 2006a, 2006b).

¹⁰ The Canadian Centre for Justice Statistics has begun to collect data as part of a Civil Court Survey (2007/08) reported in <http://www.statcan.gc.ca/daily-quotidien/090120/dq090120d-eng.htm> (accessed October 19, 2009).

An initial review of literature (Taylor & Svechnikova, 2009) indicates that existing large-scale empirical research on cost is decades old and almost all has occurred in countries other than Canada, most notably the Civil Litigation Research Project (CLRP) (Kritzer, 1984; Trubek et al, 1983; Worthington & Baker, 1993). The Cost of Justice Research Alliance intends to build on the foundation of these early studies and includes many of these internationally recognized scholars.¹¹ We have also identified more recent research concerned with justice costs. These small-scale studies, from academics and practitioner researchers, provide locally situated snapshots and often call for larger and ongoing research (Buck et al, 2009; Hadfield, 2009; Kritzer, 2009; Lee III & Willging, 2010; Ontario Civil Legal Needs Project, 2010;¹² Perryman Group, 2009; Semple, 2010; State Bar of Wisconsin, 2007). Examples and experiences from early and more recent research will inform the development of methodology for the Cost of Justice project. We also note that there are examples of measurement development from the social and health sector that we will draw on to inform this project (CCSD, 2000; Canadian Institute of Wellbeing, 2009).

The Cost of Justice Research Alliance is well aware that it will be extremely challenging to calculate the costs of justice. Previous research is beset with difficulties concerning definitions, scope, data access, and measurement validity. It is complex to determine what is to be defined as a cost and then derive a reliable method of measuring that cost. Furthermore, public financial investment in providing access to justice must be considered within the context of the social value of ensuring an effective accessible system. The research indicating the presence of broad everyday legal need suggests that the social costs attached to lack of access to legal resolutions is a vital concern not only for the individuals who are unable to pursue their claims, but for the health, economic and social well-being of all Canadians (Currie, 2006, 2007a, 2007b; Pleasence et al 2007, 2008a, 2008b; Stratton & Anderson, 2008). Empirical data about cost is essential to designing and implementing effective systemic change. Ways must be found to confront the research challenges and evolve new approaches to measurement and estimation that will begin to create baselines and models against which new reforms can be chosen and assessed.

¹¹ The “Civil Litigation Research Project” undertaken in the US in the early 1980s was leading edge research and the related work (Kritzer, 1982, 1983, 1984; Trubek et al 1983) is acknowledged as some of the best existing empirical research on civil justice costs. Kritzer, Bogart & Vidmar (1991) applied elements of the CLRP to examining injury compensation factors in the Ontario civil justice system and Bogart and Vidmar (1990) also conducted research in Ontario that looked at how people come to law. Kritzer and Vidmar are both members of the Cost of Justice Research Alliance.

¹² Co-Applicant Lorne Sossin was Principal Researcher for this project.

CONFRONTING THE COST OF JUSTICE CHALLENGE

The goal of the Cost of Justice Project is to gain an understanding of the cost of justice that can provide a foundation for policy, practice and program initiatives that improve access to needed legal services and resources.

The Research Alliance brings together a group of researchers and stakeholders that collectively have the expertise to solve the methodological problems posed in measuring civil justice costs and place Canada at the leading edge of socio-legal conceptualization and innovative research in this area.

RESEARCH ORIENTATION

The Canadian Forum on Civil Justice is dedicated to working with all stakeholders to facilitate needed reform to the civil justice system in its broadest sense. In Canada, this system is actually a complex set of systems made up of many separately and independently governed components. To accommodate this complexity and the diverse perspectives involved, we consider a collaborative approach to be essential. We assert that useful research and effective policy can only be achieved with strong stakeholder engagement. We are committed to interdisciplinary research with a robust action component throughout the project. We consider the rich combination of experience and expertise collectively held by the diverse participants in the civil justice system and related academic disciplines as the key to gaining knowledge that will advance theory, give rise to effective methodology, and be adopted in practice.

PROJECT OBJECTIVES AND OUTCOMES

The primary purpose of the Cost of Justice project is to facilitate & sustain a knowledge-sharing alliance that has the expertise to develop and pilot ground breaking research with the potential to fill the current empirical gap relating to cost-benefit analyses in the justice system. The scope and breadth of outcomes flowing from this work will be of high social, economic and intellectual significance and will indeed be transformational for the justice system. The research team nevertheless recognizes that the outcomes of this project will in many ways be the starting point for further applied research.

RESEARCH QUESTIONS

The research questions listed on the following page are designed to capture the breadth of issues in researching the cost of justice. Although this project cannot sufficiently or fully address these complex questions, we do expect outcomes of this project to contribute towards answers to each one, and we consider it important to maintain the overall context. Along with our central focus on pursuing this research, the larger goal is to encourage and leverage related work, which will add depth to the engagement of these questions.

RESEARCH STRATEGIES & METHODOLOGIES

Engaging with the challenges of developing viable methodology to advance research on costs of civil justice is the central purpose of the Cost of Justice project. Previous research on both civil and criminal justice costs has been beset by problems related to designing measures suitable to available — or creatable — data (Barendrecht et al; Cohen, 2000; Gramatikov, 2007; Kritzer, 1984; Swaray, et al, 2005; Taylor & Svechnikova, 2009). There is a lack of previous integrated scholarly work from which to build. Collaborative interdisciplinary and international knowledge-sharing and synthesis is therefore a necessary first step.

Members of the Cost of Justice Research Alliance have indicated willingness to open doors to accessing many data sources. Data about public costs of justice is quantified in budgets for courts, justice departments, the judiciary, legal aid programs and other publicly funded legal services. Private costs of justice exist as lawyers accounts, held in lawyers' confidential files, law society reviews of lawyers' accounts, court records, and from individual clients. Qualitative data may also be available or can be created to add depth of context and understanding. The need to solve the current methodological problems in costs of justice research is the core driver of this project. Collectively finding solutions and developing approaches to answer the research questions is of necessity the initial focus of the Cost of Justice Project.

what are the costs

of...

1 PURSUING THE RESOLUTION TO LEGAL PROBLEMS?

- i Where do costs accrue and who bears which costs (i.e., governments, courts, private lawyers, legal aid, individual litigants, corporations)?
- ii What are the costs of resolving disputes through the *traditional litigation* path?
- iii What are the costs of pursuing resolution of legal problems by *alternative* paths?

2 NOT ACHIEVING RESOLUTION?

- i Consider the tendency of unresolved legal problems to cluster.
- ii In addition to economic costs, consider personal health and social costs associated with unresolved disputes.
- iii In addition to economic costs, consider public health, economic and social costs associated with unresolved disputes.

I Is the cost of achieving resolution economically and socially warranted?

How can we better calculate, understand and balance the social value to democratic societies of ensuring an accessible, effective civil justice system against the financial costs of doing so, or the socio-economic costs of failing to provide access?

Are there methods that allow useful cost-benefit analysis?

II What can be done to effectively prevent disputes and at what costs and benefits?

What methods are there for limiting or eliminating the need for legal services, through consumer protection, licensing, standard-setting and pro-active regulation, or other innovations identified by the research?

What can be done to prevent recurring problems for low and middle income Canadians, most especially those who are the most vulnerable?

III What choices and changes are recommended based on the available evidence?

Reforms to the formal procedures in civil and family courts.

Reforms to the larger civil justice system, including frontline entry and information points for the public.

Changes to the investment in the civil justice system.

Changes in legal and judicial culture.

Involvement of the public and other key sectors including health care, the business community and social services.

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