LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

**January 23, 2014**
**8:30 a.m.**

# CONVOCATION MATERIAL

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**CONVOCATION AGENDA**
**January 23, 2014**

***Convocation Room – 8:30 a.m.***

**Committee of the Whole** *(D. Wright/M. Sandler)*

**Treasurer's Remarks**

**Consent Agenda** - Motion [Tab 1]
- **Confirmation of Draft Minutes of Convocation** – November 21, 2013
- **Motion** – 2014 Annual General Meeting
- **Report of the Director of Professional Development and Competence** – Deemed Call Candidates
- **Audit and Finance Committee Report –** J. Shirley Denison Fund Application (in camera)

**Treasurer's Advisory Group on Access to Justice (TAG) Working Group Report** *(H. Goldblatt)* [Tab 2]

**Priority Planning Committee Report** *(C. Bredt)* [Tab 3]
- Revitalization and Enhancements to the Law Society's Annual General Meeting

**Audit and Finance Committee Report** *(C. Bredt, C. Hartman)* [Tab 4]
- Employee Business Conduct Policy
- Special Projects Fund Transfers

*For Information*
- LAWPRO Third Quarter Financial Statements for the Nine Months Ended September 30, 2013
- LibraryCo Inc. Third Quarter Financial Statements for the Nine Months Ended September 30, 2013
- Other Committee Work

**Professional Regulation Committee Report** *(M. Mercer)* [Tab 5]
- Amendments to the *Rules of Professional Conduct*
- Pre-Proceeding Consent Resolution Conference Pilot Project

**Paralegal Standing Committee Report** *(C. Corsetti)* [Tab 6]
- Amendments to Rule 2.03 of the *Paralegal Rules of Conduct*

*For Information*
- Pre-Proceeding Consent Resolution Conference Pilot Project
- Progress Report on Changes to the Licensing Process

**Tribunals Committee Report** *(R. Anand)* (in camera) [Tab 7]

Lunch – Benchers' Dining Room

**Tab 1**

# THE LAW SOCIETY OF UPPER CANADA

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 23, 2014

MOVED BY: Howard Goldblatt

SECONDED BY: Adriana Doyle

THAT Convocation approve the consent agenda set out at Tab 1 of the Convocation Materials.

**Tab 1.1**

D R A F T

MINUTES OF CONVOCATION

Thursday, 21st November, 2013
8:30 a.m.

PRESENT:

The Treasurer (Thomas G. Conway), Anand, Armstrong (by telephone), Backhouse (by telephone), Boyd, Bredt, Callaghan, Campion, Chilcott, Copeland, Dickson, Doyle, Dray, Earnshaw, Elliott, Epstein, Eustace, Evans, Falconer, Ferrier, Furlong (by telephone), Go, Goldblatt, Gottlieb, Haigh, Hare, Hartman, Horvat, Krishna, Leiper (by telephone), Lerner, MacLean, McDowell, McGrath, Mercer, Minor, Murchie, Murray, Pawlitza, Porter, Potter, Pustina, Richardson (by telephone), Richer, Ross, Rothstein, Ruby (by telephone), Sandler, Scarfone, Sikand, Silverstein (by telephone), C. Strosberg, H. Strosberg (by telephone), Sullivan, Swaye, Symes, Wadden, Wardlaw and Wright (by telephone).

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Secretary: James Varro

The Reporter was sworn.

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TREASURER'S REMARKS

The Treasurer welcomed Art Vertlieb, Q.C., the President of the Law Society of British Columbia to Convocation.

The Treasurer advised that Fred W. Headon, President of the Canadian Bar Association, will be joining Convocation later this morning.

The Treasurer expressed deepest condolences to the family of Madam Justice Joan Lax, former bencher, who passed away on November 4, 2013.

The Treasurer informed Convocation that nominations have opened for the Law Society Awards and encouraged benchers to mention the Awards in their outreach efforts.

The Treasurer congratulated bencher Janet Minor on receiving the Carol Creighton Award for Contribution to Public Law at the ALOC/ Government of Ontario Educational Conference on November 18, 2013.

The Treasurer updated Convocation on the Treasurer's Advisory Group on Access to Justice (TAG), including a successful symposium on October 29, 2013 and ongoing initiatives.

The Treasurer acknowledged the upcoming retirement of the Chief Justice of Ontario, The Honourable Warren K. Winkler, and applauded him for the great leadership he has shown in that role and for his contribution to the legal profession.

MOTION – CONSENT AGENDA

It was moved by Mr. Anand, seconded by Ms. MacLean, that Convocation approve the consent agenda set out under Tab 1 of the Convocation Materials.

Carried

DRAFT MINUTES OF CONVOCATION – Tab 1.1

The draft minutes of Convocation of October 24, 2013 were confirmed.

MOTION – APPOINTMENTS – Tab 1.2

THAT Alan Gold be reappointed to the Judicial Appointments Advisory Committee for a three year term commencing January 21, 2014.

THAT Constance Backhouse be reappointed to the Ontario Justice Education Network Board of Directors for a three year term commencing November 24, 2013.

THAT Ross Earnshaw, Jacqueline Horvat, James Scarfone and Alan Silverstein be reappointed to the LibraryCo. Inc. Board of Directors for a one year term commencing December 31, 2013.

Carried

REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE – Tab 1.3

THAT the Report of the Director of Professional Development and Competence listing the names of the call to the bar candidates be adopted.

Carried

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INTER-JURISDICTIONAL MOBILITY COMMITTEE REPORT – Tab 1.6

Re: Territorial Mobility Agreement 2013

THAT Convocation approve the Territorial Mobility Agreement, 2013 set out at Tab 1.6.1.2.

Carried

PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE REPORT

Ms. Minor presented the Report.

Pathways Report Implementation Announcement

Ms. Minor announced that Ryerson University will design and provide the Law Society's English language Law Practice Program, and that the University of Ottawa Faculty of Law will design and provide the Law Society's French language Law Practice Program.

Re: Proposal For Integrated Practice Curriculum at Lakehead University Faculty of Law

It was moved by Ms. Minor, seconded by Ms. Murchie, that Convocation approve Lakehead University Faculty of Law's integrated practice curriculum as satisfying the Law Society's experiential training requirement for lawyer licensing.

Carried Unanimously

Re: Pathways Report Implementation

It was moved by Ms. Minor, seconded by Mr. Sullivan, that Convocation approve a one million dollar lawyer licensee contribution to the 2014-2015 licensing process to defray the costs to licensing candidates.

Carried

Ms. Minor thanked the Committee and staff for their work on the Pathways initiative.

TREASURER'S REPORT

Mr. Goldblatt presented the Report.

Re: Mentoring and Advisory Services Proposal Task Force

It was moved by Mr. Anand, seconded by Mr. Mercer, that Convocation approve:

a. the creation of the Mentoring and Advisory Services Proposal Task Force;
b. the appointment of Janet Minor and Howard Goldblatt as Co-chairs and the members of the Task Force as set out in the Report, and
c. the Task Force's terms of reference as set out in the Report.

Carried

PROFESSIONAL REGULATION COMMITTEE REPORT

Mr. Mercer presented the Report.

Re: Federation of Law Societies of Canada: Consultation Report on Suitability to Practise Standard – Law Society Submission

It was moved by Mr. Mercer, seconded by Mr. Anand, that Convocation approve the Law Society Submission, responding to the Federation of Law Societies of Canada's Consultation Report on a Suitability to Practise National Standard, set out at Tab 4.1.1.

An amendment to the motion was accepted to add the words "and integrity" after the word "honesty" as one of the four behaviours identified in the Submission.

The motion as amended carried.

*For Information*

- Report on Judicial Complaints

ADDRESS BY THE PRESIDENT OF THE LAW SOCIETY OF BRITISH COLUMBIA

Art Vertlieb, Q.C., President of the Law Society of British Columbia, addressed Convocation.

ADDRESS BY THE PRESIDENT OF THE CANADIAN BAR ASSOCIATION

The Treasurer welcomed Fred W. Headon, President of the Canadian Bar Association, to Convocation.

Mr. Headon addressed Convocation.

FEDERATION OF LAW SOCIETIES OF CANADA PRESIDENT'S REPORT

Ms. Pawlitza presented the Report for information.

AUDIT & FINANCE COMMITTEE REPORT

Mr. Bredt presented the Report.

Re: 2014 LibraryCo. Inc. Budget

It was moved by Mr. Bredt, seconded by Mr. Silverstein, that Convocation approve LibraryCo. Inc.'s 2014 budget, incorporating Law Society funding of $7.5 million or $202 per lawyer.

Carried

Re: Law Society of Upper Canada Financial Statements for the Nine Months Ended September 30, 2013

Mr. Bredt presented the Statements for information.

*For Information*

- Law Society Financial Statements for the period ended September 30, 2013
- Investment Compliance Reporting for the period ended September 30, 2013
- Other Committee Work

EQUITY AND ABORIGINAL ISSUES COMMITTEE/COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES REPORT

Ms. Potter presented the Report.

Re: Human Rights Monitoring Group Request for Interventions

It was moved by Ms. Potter, seconded by Mr. Falconer, that Convocation approve the letters of intervention and public statements respecting:

a. Lawyer André Michel – Haiti – letters and public statement at Tab 7.1.1; and
b. Lawyer Adam Sharief – Sudan – letters and public statement at Tab 7.1.2.

Carried

*For Information*

- Guides to Advising Clients of their French Language Rights
- Law Society French Language Services
- Public Education Equality and Rule of Law Series Calendar 2013/2014

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CONVOCATION ROSE AT 12:31 P.M.

**Tab 1.2**

# THE LAW SOCIETY OF UPPER CANADA

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 23, 2014

THAT Convocation approve Wednesday May 7, 2014 at 5:15 p.m. at Osgoode Hall, 130 Queen Street West, Toronto as the time and place of the 2014 Annual General Meeting, in accordance with Section 5 of By-Law 2 [Corporate Provisions].

Explanatory Note:

Section 5 of By-Law 2 requires that Convocation determine the time and place of the Annual General Meeting each year:

**Meeting of members to be held annually**

5. A meeting of members shall be held annually at a time and place determined by Convocation.

**Tab 1.3**

To the Benchers of the Law Society of Upper Canada Assembled in Convocation

The Director of Professional Development and Competence reports as follows:

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CALL TO THE BAR AND CERTIFICATE OF FITNESS

Licensing Process and Transfer from another Province – By-Law 4

Attached is a list of candidates who have successfully completed the Licensing Process and have met the requirements in accordance with section 9.

All candidates now apply to be called to the bar and to be granted a Certificate of Fitness on Thursday, January 23rd, 2014

ALL OF WHICH is respectfully submitted

DATED this 23rd day of January, 2014

# CANDIDATES FOR CALL TO THE BAR

**January 23, 2014**

## Transfer from another province (Mobility)

Maria Cook
Kate Elizabeth Darling
Paramjit Singh Gill

## Transfer from another province (Quebec)

Man Yee Cindy Ho
Marcus Joseph Alain Léonard
Emma Leah Siemiatycki
Margaret Susan Mede

## Licensing Process

Sara Liu
Joel Henry Mixa
Lisa Marie Feltz
Shahram Larjani

## L3

Alice Raynard

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# Materials will be available

# prior to Convocation

# at TAB 9

The Law Society of Upper Canada | Barreau du Haut-Canada

**Tab 3**

# Report to Convocation
# January 23, 2014

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# Priority Planning Committee

**Committee Members:**
**Thomas Conway (Chair)**
**Raj Anand**
**Marion Boyd**
**Christopher Bredt**
**Cathy Corsetti**
**Howard Goldblatt**
**Michelle Haigh**
**Carol Hartman**
**William McDowell**
**Susan McGrath**
**Malcolm Mercer**
**Janet Minor**
**Julian Porter**

**Purpose of Report: Decision**

**Prepared by the Policy Secretariat**
**(Jim Varro - 416-947-3434)**

## COMMITTEE PROCESS

1. At the October 25, 2012 Convocation, the Treasurer announced the creation of a working group of the Priority Planning Committee ("the Committee") to address governance issues. Members of the Governance Issues Working Group are Raj Anand, Christopher Bredt, Howard Goldblatt, Michelle Haigh and Janet Minor.

2. A new issue referred to the Working Group by the Treasurer in May 2013 related to the need to explore enhancements to the Law Society's Annual General Meeting ("the AGM").

3. Based on the Working Group's review of a number of issues related to the AGM, it proposed a call for input from lawyers and paralegals on enhancements to the AGM. Convocation at its October 23, 2013 meeting approved the request of the Committee for the call for input.

4. At its January 8, 2014 meeting, the Committee reviewed the results of the call for input and has prepared this report respecting changes to the AGM for Convocation's consideration.

**FOR DECISION**

# REVITALIZATION OF AND ENHANCEMENTS TO THE LAW SOCIETY'S ANNUAL GENERAL MEETING

**Motion**

**5. That Convocation:**

**a. approve changes to the structure and format of the Law Society's Annual General Meeting for 2014 and following years as follows:**

**i. End motions at the Annual General Meeting;**

**ii. Dedicate a portion of the meeting to a forum for dialogue between the Law Society and its licensee members;**

**b. direct that the Law Society explore other enhancements to the Annual General Meeting as discussed in this report.**

**Introduction**

6. One of the responsibilities of the Priority Planning Committee ("the Committee") is to review the priorities established by Convocation and new policy issues that arise, and recommend to Convocation the priorities that should be considered and approved by Convocation going forward.

7. On April 26, 2012, Convocation approved the work plan proposed by the Committee for the priorities for the 2011-2015 bencher term, including Convocation governance effectiveness. Convocation agreed with the Committee's report that the Law Society's effectiveness as a regulator is directly linked to the efficacy of its governance processes and procedures. The work plan noted that "going forward, the Law Society will consider what will work to help to facilitate effective governance."

8. At the May 30, 2013 Convocation, the Treasurer announced that he was referring issues relating to the Annual General Meeting ("the AGM") to a working group of the Committee for review. He noted that prior to the May 2013 AGM, the Law Society received a number of communications from members asking about the ability to participate in the AGM

remotely and to vote by way of proxy voting. Neither electronic meetings nor proxy voting are part of the current procedures for the AGM. The suggestion was made, including from certain benchers, that the Law Society review these and related issues to determine what might be done to facilitate greater access to the AGM.

9. This report, arising from the work of the Committee's Governance Issues Working Group, proposes changes to the structure and format of the Law Society's Annual General Meeting (AGM) to revitalize it and enhance its effectiveness. The proposals for change are based on the Working Group's review, the results of the call for input on the issues and the Committee's review of the results of the call for input.

**Background**

The Purpose of the AGM and Developments in Law Society Outreach Initiatives

10. When the Law Society first held the AGM in 1969, the primary purposes of the AGM were to provide an opportunity to improve communications with members and to allow members to be heard on matters affecting the Law Society and the profession.

11. While the Law Society has attempted to use the AGM to engage with its members, the AGM appears to be an imperfect means of doing so. Within the past two decades, achieving attendance for a quorum of 50, for example, has been difficult. Motions at the AGM have historically been very infrequent. Convocation determined in 1969 that it would not be bound by motions that may pass at the AGM.

12. Some recent motions made and proposed to be moved at the AGM have required the Treasurer to devote significant time and effort to manage the issues they raised. This was especially so at the last AGM, as the subject matter tended to create divisions among licensees.

13. The Committee believes that the AGM must change to become a forum that more effectively serves a number of purposes: communications with member, dialogue with the professions regarding the business of the Law Society and education.

14. The Committee through its Working Group sought the views of lawyers and paralegals on this matter. The call for input issued by the Working Group, based on material prepared for the call[1], resulted in a very small number of submissions. Four individuals and four legal organizations offered views on the various proposals. The submissions are summarized at **Tab 3.1**[2].

15. Having considered this information, which generally supported changes to the AGM, the Committee recommends the following changes.

**Proposals**

End Motions at the AGM

16. In the late 1960s and early 1970s, the AGM was one of the very few outreach activities of the Law Society. Law Society consultation with its membership was infrequent. In theory, the AGM event and the use of motions provided a means of enhancing communications and Law Society transparency.

17. However, experience has shown that the process of bringing motions is a limited and somewhat ineffective way for the Law Society to engage with its members. Motions passed at an AGM must be considered by Convocation within six months of the AGM, but such motions are not binding on Convocation. The non-binding nature of a successful motion does not appear to be a well-known fact even among those who move a motion.

18. Much has changed since the first AGM. Technological innovations, enhanced communications, an evolution in the Law Society's external outreach activities and a culture of engagement at the Law Society have led to dedicated outreach initiatives through which the Law Society regularly communicates and consults with and seeks input from those it governs.[3]

[1] The call for input document can be found at http://www.lsuc.on.ca/AGM_Consultation/.

[2] Attribution is provided for the legal organizations only.

[3] The Law Society regularly engages in formal consultations to seek the input of members on Law Society matters. Recent consultations related to the work of the Articling Task Force, implementation of the Federation of Law

19. The enhancements to and increased frequency of these initiatives are part of a more consultative governance approach that the Law Society has effectively used to educate, inform and engage with members on important developments.

20. Bencher accountability has also increased. Public Convocation materials are available on the Law Society website. Convocation decisions are regularly reported by e-mail to all members. Bencher background information and the history of a bencher's voting record are publicly available. Through these and other similar means, the Law Society fulfills its duty to act in a timely, open and efficient manner.

21. Given these developments, the Committee has determined that the use of motions at the AGM is no longer necessary either as part of the Law Society's outreach efforts or as part of its accountability structure. The Committee recommends that motions as a part of the structure of the AGM be ended.

22. If approved, implementation of this recommendation would require amendments to By-Law 2 [Corporate Provisions][4] which would be presented at a future Convocation.

Dedicate Part of the AGM to a Forum for Dialogue

23. The Committee believes that ending motions at the AGM requires certain enhancements to the AGM, which would also serve to bring a new focus to the meeting as an annual outreach initiative. A revitalized AGM should educate and encourage dialogue between the Law Society and those it governs.

24. An important part of engagement with the membership is providing an opportunity for members to address their issues with the Law Society in an appropriate forum.

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Societies of Canada's Model Code of Professional Conduct, Law Society governance reforms and consideration of potential new business structures for the delivery of legal services. The Law Society's Equity Advisory Group, Aboriginal Working Group, Treasurer's Advisory Group on Access to Justice and Treasurer's Liaison Group meetings all enable the Law Society to hear from members of the profession and stakeholders in a timely manner on key policy initiatives. The Law Society regularly communicates with its members through direct e-mails, announcements in the *Ontario Reports*, and the Law Society Gazette.

[4] Relevant portions of By-Law 2 appear at **Tab 3.2.**

25. The Committee proposes that the AGM provide for such a forum as a dedicated part of the meeting. The forum would make the Treasurer or other Law Society leaders available to address questions or receive comments related to the work of the Law Society. The intent is to encourage those who wish to dialogue with the leadership of the regulator in a useful exchange that benefits both the members and Law Society.

26. Details on how the forum would be structured and particulars of that part of the AGM agenda may be left to the Treasurer and Secretary to determine.

27. The current agenda for the AGM set out in By-Law 2 contemplates a forum as described above,[5] and would not require amendment.

**Other Matters for Consideration to Encourage Engagement and Enhance Information Sharing**

28. The Committee proposes that Convocation direct the Law Society to explore other means to enhance the AGM for the purpose of encouraging the engagement of the professions and broader information-sharing. The following are some suggestions.

Webcasting the AGM and Remote Participation in the AGM by Electronic Means

29. The responses to the call for input favoured means by which a wider group of lawyers and paralegals could join the AGM. While the Committee is not proposing particular means to facilitate this, it recommends that the Law Society explore how this might be accomplished, mindful of human and financial resources.

30. The Committee understands that webcasting can be a relatively low cost means of permitting members to view the AGM. The event could also be recorded simultaneously

[5] By-Law 2:
**Agenda for meeting**
7. The annual general meeting shall consider the following matters:
1. Minutes of the previous annual general meeting.
2. Reports on the work of the Society and of the committees of Convocation.
3. Financial statements.
4. Matters of professional interest that are related to the work of the Society.

to preserve a record of the event. The simplest means of webcasting the AGM would be to hold the AGM at the Law Society's Lamont Learning Centre, which is equipped for webcasting.

31. Means could also be explored to have members participate in the AGM electronically. This could include participation by webcast or by telephone, and possibly enable interactive participation of members who join the AGM online, for example, to permit questions during the meeting. This could improve accessibility of those members outside Toronto.

32. Amendments to the AGM procedures would be required to permit electronic participation at the AGM. A process would also be required to ensure that those attending are members, including for the purposes of determining quorum. Online pre-registration is one method, which will also prompt development of the appropriate technological supports in advance of the meeting and verify that a member is authorized to participate.

Treasurer's Remarks on Key Law Society Initiatives/Reports

33. Currently, the AGM agenda includes:
    a. Minutes of the previous AGM;
    b. Reports of the work of the Society and of the committees of Convocation;
    c. Financial statements; and
    d. Matters of professional interest that are related to the work of the Society.

34. Within this framework, the Committee believes more could be done to highlight major Law Society achievements and developments within the professions. This might include a more expansive report from the Treasurer on key reports and initiatives, currently noted in the published Performance Highlights, the work being developed at the committee, working group or task force level (to the extent it can be shared) and important operational developments.

35. In addition, this enhanced method of reporting could focus in-depth on a particular new theme each year, be used to discuss developments related to particular priority issues or be used to promote upcoming Law Society events and consultations.

Inviting a Prominent Guest Speaker to Address the AGM

36. The Committee has considered how other law societies have structured their AGMs. For example, the Nova Scotia Barristers Society recently held an AGM with a guest speaker and CPD component.

37. The Committee believes that providing an opportunity for eminent speakers to address the AGM could enhance its profile among members and provide additional learning experiences. Speakers could include judges from the Supreme Court of Canada or Court of Appeal for Ontario, the Governor General or respected members of the profession. This could also be structured to provide an opportunity for dialogue on matters of professional interest related to the work of the Law Society.

**TAB 3.1**

# SUMMARY OF RESPONSES TO THE CALL FOR INPUT ON REVITALIZATING THE ANNUAL GENERAL MEETING

## Introduction

1. In October 2013, the Governance Issues Working Group of the Priority Planning Committee issued a call for input from lawyers and paralegals on some options under consideration for revitalizing the Law Society's Annual General Meeting. Submissions were due by December 16, 2013.

2. The Working Group received four submissions from legal organizations and four submissions from individuals. The following is a summary of the responses.[1]

## SUMMARY OF INPUT

### Proposal #1: Ending Motions at the AGM

3. Two organizations, the County and District Law Presidents Association (CDLPA) and the Peterborough Law Association, support ending motions at the AGM, as long as other mechanisms are introduced to facilitate dialogue with members.

4. Examples of these mechanisms include topical sessions in advance of the AGM or through increased direct communication with members by staff or benchers. It is essential that licensees are able to bring matters forward for Convocation's consideration. The suggestion is that enhancements to regional representation at Convocation would assist in meeting this objective.

5. The Ontario Bar Association noted that motions are at most one potential way to bring items of perceived importance to the attention of the Law Society. The essential elements for the AGM are providing opportunities to hear relevant information, raise issues of importance and provide input for the consideration of Convocation.

6. One individual supports maintaining motions at the AGM as a means for licensees to be involved in Law Society governance. There must be mechanisms in place to enable licensees to express concerns to Benchers, and to be able to question Law Society functions. Motions or some other mechanism must be maintained to enable licensees to

[1] Attribution is shown for the legal organizations only.

express these concerns, as electing benchers every four years is an inadequate and unacceptable licensee participation mechanism without more.

**Proposal #2: Creating a Forum for Dialogue**

7. Most submissions note the need to transform the AGM to provide greater opportunity for dialogue.

8. CDLPA supports this proposal, especially if combined with other proposed reforms to the AGM process. It notes, however, that processes would need to be developed to manage how questions may be raised by licensees during the AGM. It also recommends affording those unable to attend the AGM the opportunity to ask questions at a later date.

9. The Ontario Bar Association says a forum as described may assist in allowing members to constructively raise issues of importance to the Law Society.

10. One individual suggests that the AGM could be used, in full or in part, as an opportunity for discussion and debate on Law Society matters. The Law Society could canvass in advance with licensees as to two to three potential discussion topics to be addressed at the AGM. AGM participants could then be provided an opportunity to provide their feedback at this time. This would provide an opportunity for members to be heard.

**Proposal #3: Webcasting the AGM**

11. Three organizations - CDLPA, and the Peterborough and Renfrew County Law Associations - and one individual support webcasting the AGM.

12. The Ontario Bar Association generally suggests that technological advances, such as webcasting and facilitating remote (electronic) participation, discussed below, are likely to help enhance participation at the AGM.

13. Submissions noted that webcasting the AGM could presumably be accomplished with relative ease using existing technologies, and that it would make it easier for licensees to learn about Law Society initiatives.

**Proposal #4: Remote Participation in the AGM by Electronic Means**

14. Three organizations – CDLPA and the Renfrew County and Peterborough Law Associations - support this proposal. Respondents noted that this option removes geographic and related time and cost barriers for licensees to participate in the AGM,

which would enhance participation and dialogue at the AGM.

15. The Renfrew County Law Association organization would expand this option to include remote participation in both debate and voting at the AGM, subject to verifying the licensees' standing, as contemplated by this proposal. It notes that the technology to enable both debate and voting at the AGM is already available.

**Proposal #5: Treasurer's Remarks on Key Law Society Initiatives / Reports**

16. Generally, CDLPA and the Peterborough Law Association supported this initiative, so long as it is not used to reduce current outreach initiatives and the remarks are "concise but informative".

17. The Ontario Bar Association sees this development as providing an increased opportunity for members to consider and contribute to policy development and post-implementation assessment.

18. One individual suggests that there is little value to having the Treasurer or others report on successes which can be learned about through written reports. The individual endorses a shift to a more thematically based discussion at the AGM, which would offer the Treasurer and others the opportunity to hear directly from licensees.

**Proposal #6: Inviting a Prominent Guest Speaker to Address the AGM**

19. Views on this proposal were mixed. CDLPA sees no value in this proposal, and submits that the focus of the AGM should continue to be to hear directly from the Treasurer and from the Law Society regarding Law Society matters.

20. The Peterborough Law Association supports this idea, including a CPD component.

21. The Ontario Bar Association agrees that this feature of an AGM could provide an additional opportunity to speak to issues and perspectives of importance to the profession and may help improve participation.

22. One individual suggests scheduling the AGM in tandem with other events such as CPD, which might give out of town licensees an incentive to travel to Toronto.

**Proposal #7: Rotating the Place of the AGM**

23. CDLPA endorses this option, as it would provide enhanced opportunities for licensees based outside of Toronto to attend the AGM in person. It also recognizes the symbolic

value of rotating the AGM as demonstrative of the Law Society's commitment to regulating provincially, and encourages the Law Society to consider this option in tandem with webcasting the AGM and permitting remote participation to enhance participation.

24. The Ontario Bar Association says it is not clear from the proposal that rotating the place of the AGM would alleviate the challenge of members living outside of the GTA participating in person, except for those living in close proximity to the particular location chosen in a given year.

**Other Comments**

25. More information should be distributed in advance of the AGM to enhance the level of dialogue at the AGM. Better information regarding the AGM processes could also enhance the meeting. The membership should be informed that, rather than voting on reports or on the budget, the AGM offers an opportunity for debate and discussion.

26. Consideration should be given to holding a pre-budget meeting where licensees may review budget details and ask questions about them. If such a meeting were held, then the Law Society could decide that individual items related to the budget will not be discussed at the AGM.

27. Benchers should be more available at the event following the AGM to engage with licensees.

28. Members should be permitted to vote by proxy. The number of controversial motions to be considered at an AGM should be limited to three.

## BY-LAW 2

Made: May 1, 2007
Amended: June 28, 2007
September 20, 2007
September 27, 2012

## CORPORATE PROVISIONS

**...**

## PART II

## MEMBERS

**...**

MEETINGS OF MEMBERS
ANNUAL GENERAL MEETING

**Meeting of members to be held annually**
5. A meeting of members shall be held annually at a time and place determined by Convocation.

**Notice of meeting**
6. Notice of the annual general meeting, stating the date, time and place of the meeting, shall be given by publication in an issue of the Ontario Reports dated at least sixty days before the day fixed for the meeting.

**Agenda for meeting**
7. The annual general meeting shall consider the following matters:

1. Minutes of the previous annual general meeting.
2. Reports on the work of the Society and of the committees of Convocation.
3. Financial statements.
4. Matters of professional interest that are related to the work of the Society.

RULES OF PROCEDURE
GENERAL

**Interpretation: "meeting"**
8. (1) In this section and in sections 9 to 41, "meeting" means any meeting of members.

**Same: "Treasurer"**

(2) In this Part, except in section 10, "Treasurer" includes a bencher who presides at a meeting in accordance with section 6.

**Reference text**

9. Where a matter of order or procedure is not settled by this Part, it shall be settled in accordance with the rules of order set out in the most recent edition of *Bourinot's Rules of Order*.

**Presiding bencher**

10. The Treasurer shall preside at each meeting, but if the Treasurer for any reason is unable to preside at a meeting, one of the following benchers shall preside, in the following order of precedence:

1. The chair of the Audit and Finance Committee.
2. The chair of the Professional Development and Competence Committee.
3. A bencher selected from among and by the benchers present at the meeting.

**Secretary to prepare agenda for meeting**

11. For each meeting, the secretary shall prepare an agenda showing the order of business.

QUORUM

**Quorum at a meeting**

12. Fifty members, none of whose licence is suspended, constitute a quorum at a meeting.

**Quorum not present**

13. If within one hour after the time appointed for a meeting a quorum is not present, the Treasurer shall adjourn the meeting.

**Quorum lost during meeting**

14. (1) If a quorum is lost during a meeting, the Treasurer shall, subject to subsection (2), adjourn the meeting.

**Same**

(2) If a quorum is lost during a meeting, the Treasurer may permit the members remaining to continue to debate a motion, an amendment to a motion or an appeal of a ruling already put to the meeting but not yet disposed of if no member remaining objects.

**No voting when quorum not present**

(3) Even though debate on a motion, an amendment or an appeal may continue if a quorum is lost during a meeting, no motion, amendment or appeal shall be voted on when a quorum is not present.

**Quorum regained**

(4) If a quorum, having been lost during a meeting, is regained before the meeting is adjourned, the meeting shall continue as if the quorum had not been lost.

MOTIONS

**Subject matter**

15. All motions made at a meeting shall relate to the work of the Society.

**Procedure for making motions**

16. (1) Subject to subsection (2), a motion to be made at a meeting shall be,

(a) in writing and signed by at least ten members, none of whose licence is suspended at the time of signature; and

(b) delivered to the secretary at least forty days prior to the day fixed for the meeting.

**Same**

(2) A motion may be made at any time during a meeting, even though the requirements set out in subsection (1) have not been complied with, if the motion relates to a matter then being debated.

**Publication of motions**

17. The secretary shall arrange for publication of the text of all motions delivered to him or her under section 16.

**Introduction at meeting**

18. (1) At a meeting, a motion described in subsection 16 (1) may be made by it being,

(a) proposed by one of the ten members who signed the motion; and

(b) seconded by any other member whose licence is not suspended.

**Same**

(2) At a meeting, a motion described in subsection 16 (2) may be made by it being,

(a) proposed by one member whose licence is not suspended; and

(b) seconded by another member whose licence is not suspended.

**Permitted amendments**

19. (1) A motion made at a meeting may be amended by,

(a) adding or deleting words;

(b) varying minor details; or

(c) rephrasing sentences.

**Amendment not to alter substance of motion**

(2) An amendment to a motion shall not alter the substance of the motion.

**Introduction of amendments**

20. An amendment to a motion shall be,

(a) proposed by one member whose licence is not suspended; and
(b) seconded by another member whose licence is not suspended.

**Limit on number of amendments**
21. No more than two amendments to a motion shall be before the meeting for debate at the same time.

**Withdrawal**
22. A motion or an amendment to a motion made at a meeting may be withdrawn if,
(a) the member who proposed the motion or amendment consents to the withdrawal;
(b) the member who seconded the motion or amendment consents to the withdrawal; and
(c) no member present at the meeting objects to the withdrawal.

DEBATE

**Debate on motions and amendments**
23. (1) Subject to subsection (2), a motion and an amendment to a motion may be debated by the members present at the meeting.

**Debate prohibited**
(2) The following motions shall not be debated:
1. A motion to adjourn a debate.
2. A motion to proceed to the next business.
3. A motion to table.

**Order of speaking**
24. (1) In a debate, members are entitled to speak to a motion or an amendment to a motion in the following order:
1. The member who proposed the motion or amendment.
2. The member who seconded the motion or amendment.
3. Any other member present at the meeting when recognized by the Treasurer.

**Reserving right to speak**
(2) The member who seconds a motion or an amendment to a motion may reserve the right to speak until a later time in the debate.

**Limits on speaking**
25. (1) Subject to subsection (2), a member is entitled to speak to a motion or an amendment to a motion only once.

**Exception**
(2) A member may speak to a motion or an amendment a second time if,
(a) all members present at the meeting have exercised, or declined to exercise, their right to speak to the motion or amendment; and

(b) the member does not repeat anything already said by any other member.

RULING OF TREASURER

**Treasurer may make rulings**
26. The Treasurer may make rulings as to the conduct of the meeting and, without limiting the generality of the foregoing, the Treasurer may rule upon the propriety, acceptability, form and substance of any motion or amendment to a motion proposed at a meeting.

**Appeal of ruling of Treasurer**
27. (1) Subject to subsection (2), a ruling of the Treasurer may be appealed by any member present at the meeting.

**Appeal prohibited**
(2) No member is entitled to appeal a ruling of the Treasurer that a matter may not be made the subject of debate or motion by the meeting because,

(a) it is a matter in respect of which a hearing may be conducted under the Act, regulations, by-laws or rules of practice and procedure; or

(b) it is a matter that is pending before an adjudicative body for determination.

**Time for making appeal**
28. Where a member wishes to appeal a ruling of the Treasurer, the appeal shall be made immediately after the ruling.

**Debate permitted**
29. (1) Subject to subsection (2), an appeal of a ruling of the Treasurer may be debated by the members present at the meeting.

**Debate prohibited**
(2) An appeal of a ruling of the Treasurer relating to inappropriate language or behaviour shall not be debated.

**Application of ss. 24 and 25**
30. Sections 24 and 25 apply, with necessary modifications, to a debate of an appeal of a ruling of the Treasurer.

**Treasurer's reasons for ruling**
31. (1) After an appeal of a ruling of the Treasurer has been made, and before commencement of debate of the appeal, if permitted, the Treasurer is entitled to give the reasons, including any authority, for the ruling.

**Same**
(2) After debate of an appeal of a ruling of the Treasurer concludes, the Treasurer is entitled,

(a) to answer any points raised during the debate; and

(b) to give, or to repeat, the reasons, including any authority, for the ruling.

**Disposition by vote**
32. (1) An appeal of a ruling of the Treasurer shall be disposed of by a vote on the question: "Should the ruling of the Treasurer be upheld? "

**Call for vote on appeal where debate on appeal prohibited**
(2) Where debate on an appeal of a ruling of the Treasurer is prohibited, the Treasurer shall call for a vote on the appeal after exercising, or declining to exercise, the rights given to the Treasurer in subsection 31 (1).

**Call for vote on appeal where debate on appeal permitted**
(3) Where debate on an appeal of a ruling of the Treasurer is permitted, the Treasurer shall call for a vote on the appeal after debate has concluded and the Treasurer has exercised, or declined to exercise, the rights given to the Treasurer in subsection 31 (2).

VOTING

**No appeal from call for vote**
33. No member is entitled to appeal a call by the Treasurer for a vote on a motion, an amendment to a motion or an appeal of a ruling.

**Order of voting on motions and amendments to motions**
34. (1) All amendments to a motion shall be put to a vote before the motion is put to a vote.
**Order of voting on amendments to motions**
(2) Amendments to a motion shall be put to a vote in the following order:
1. The second amendment proposed.
2. The first amendment proposed.

**Entitlement to vote**
35. Every member present at a meeting, whose licence is not suspended, is entitled to one vote on each question put to the meeting.

**Treasurer may not vote**
36. Subject to section 40, the Treasurer shall not vote on any motion, amendment to a motion or appeal of a ruling.

**Proxy voting prohibited**
37. Votes may not be cast by proxy.

**Manner of voting**
38. Voting shall be by a show of hands unless a poll is required by the Treasurer or called for by a member.

**Poll**

39. (1) A poll may be required by the Treasurer or called for by a member either before a question is put to a vote or immediately after the question has been voted on by a show of hands.

**Manner of conducting poll**

(2) A poll shall be conducted either by ballot or by division, as determined by the Treasurer.

**No appeal**

(3) No member is entitled to appeal a determination by the Treasurer as to the manner of conducting a poll.

**Resolution of question**

40. (1) Subject to subsection (3), each question put to the meeting shall be determined by the majority of the votes cast.

**Treasurer may exercise casting vote**

(2) In the case of a tied vote, except on a vote of an appeal of a ruling of the Treasurer, the Treasurer shall have a casting vote.

**Resolution of question: appeal of ruling of Treasurer**

(3) A ruling of the Treasurer shall be upheld on appeal when,

(a) the majority of votes cast are in favour of upholding the ruling of the Treasurer; or

(b) the vote on the appeal results in a tie.

**Entry in minutes**

41. Whenever voting has been by a show of hands, unless immediately following the vote a poll on the same question is required by the Treasurer or called for by a member, an entry in the minutes of the meeting to the effect that the Treasurer declared a motion carried, an amendment to a motion approved or a ruling upheld is conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the motion, amendment or ruling.

**Communication of resolutions to Convocation**

42. (1) All motions carried at a meeting of members shall be,

(a) communicated to Convocation at its first regular meeting after the meeting of members; and

(b) considered by Convocation within six months of the meeting of members.

**Convocation not bound by resolutions of meeting**

(2) A motion carried at a meeting of members is not binding on Convocation.

The Law Society of Upper Canada | Barreau du Haut-Canada

**TAB 4**

**Report to Convocation**
**January 23, 2014**

# Audit & Finance Committee

**Committee Members**
**Christopher Bredt (Co-Chair)**
**Carol Hartman (Co-Chair)**
**John Callaghan (Vice-Chair)**
Adriana Doyle
Paul Dray
Susan Elliott
Seymour Epstein
Janet Leiper
James Scarfone
Alan Silverstein
Catherine Strosberg
Robert Wadden
Peter Wardle

**Purpose of Report: Decision and Information**

**Prepared by the Finance Department**
**Wendy Tysall, Chief Financial Officer, 416-947-3322 or wtysall@lsuc.on.ca**

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# COMMITTEE PROCESS

1. The Audit & Finance Committee ("the Committee") met on January 8, 2014. Committee members in attendance were Chris Bredt (co-chair), John Callaghan (vice chair), Adriana Doyle (phone), Susan Elliott (phone), Janet Leiper, Jim Scarfone (phone), Alan Silverstein, Catherine Strosberg (phone), Robert Wadden (phone) and Peter Wardle.

2. Law Society staff in attendance: Robert Lapper, Wendy Tysall, Terry Knott, Elliot Spears, Fred Grady, Felicia North and Andrew Cawse.

3. Also in attendance: Robert Evans, Kathleen Waters (LAWPRO), Steve Jorgensen (LAWPRO), Barbara Lomnicki (Aon Hewitt) and Stephanie Kalinowski (Hicks Morley).

**TAB 4.1**

**FOR DECISION**

# BUSINESS CONDUCT POLICY

**Motion:**

4. **That Convocation approve the revised Business Conduct Policy for employees of the Law Society.**

5. The Business Conduct Policy is an important tool within the Law Society's internal control environment. The Policy is intended to ensure consistently ethical and honest business conduct and is regularly updated to ensure relevance.

6. Requested amendments to Section 6 (Other Employment) are attached. The provision prohibits employees from engaging in other employment, business activity or other undertakings that may interfere with their duties and responsibilities as employees of the Law Society. Under section 6, the CEO may grant an exemption from the prohibition on other employment where there is no conflict of interest.

7. As currently drafted, section 6 appears to require employees to seek the approval of the CEO whenever they wish to engage in outside employment, even in circumstances where it is clear that no conflict of interest exists (e.g. our restaurant employees seeking employment during the summer season when the Convocation Hall restaurant is closed). This has created a heavy administrative burden on the Human Resources and Legal Affairs departments which are charged with processing "Other Employment" approval requests from employees.

8. The new Section 6 of the Business Conduct Policy seeks to streamline the process for "Other Employment" requests by removing the specific reference to the CEO granting permission for an exemption from application of the rule and instead creating a positive obligation on employees to advise their managers of outside employment only in certain circumstances.

9. Section 5 (Conflicts of Interest and Duties) has also been amended. As currently drafted, section 5 does not contain a specific obligation on employees to disclose a conflict of interest to his or her manager but rather only indirectly references disclosure with the statement “Law Society employees shall not be in a position of having any undisclosed or avoidable real, perceived or potential conflict between their duties and responsibilities as employees of the Law Society and their personal interests.”

10. A draft of the revised policy and a comparison to the previous policy (changes tracked) is attached.

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|---|---|
| **Section:** General Policy Statement | **Code Number** 2.01 |
| **Subject:** Business Conduct Policy | |
| **Effective Date:** February 1, 2014 | **Pages:** 1 of 7 |
| **Policy Issue Date:** February 3, 2014 | **Supersedes:** October 4, 2012 |

## 1. ORGANIZATIONAL AND EMPLOYEE INTEGRITY

The Law Society's employees interact, on a daily basis, with licensees, with members of the public, with a wide variety of other stakeholders and with many other persons. It is through the professionalism, civility and courtesy demonstrated in these interactions that respect for each other can be achieved. The Law Society's employees are ambassadors of the Law Society and are expected to reflect a professional image at all times, whether at or away from work. Employees should be conscious of the Law Society's function and duties and should conduct themselves with the highest degree of moral and ethical behaviour and integrity.

Improper behaviour in the workplace has a negative effect on all employees and on the Law Society's many stakeholders (including licensees and the public). Employees should therefore be professional, civil and courteous with one another and all those with whom they deal.

Above all, the behaviour of the Law Society's employees should be reflective of the Law Society's reputation for integrity.

## 2. COMPLIANCE WITH LAWS AND POLICIES

The Law Society's reputation for integrity is one of its most valued assets and essential to the fulfillment of its mission of governing the profession and protecting the public interest. It is imperative that honesty and fair dealing characterize all of the Law Society's activities both with the public and the profession. Personal integrity demonstrates soundness of moral principle and good character especially in relationship to truth and fair dealing, uprightness, honesty and sincerity. To ensure that this basic policy is followed fully, the Law Society strives at all times to be in compliance with all applicable laws and regulations and formal internal policies.

If any Law Society employee should have reason to be concerned at any time that the Law Society is not operating in compliance with applicable laws and regulations or formal internal policies, or if any Law Society employee has knowledge of any matter which might affect adversely the Law Society's reputation or operations, the employee should immediately report the concern or matter to a manager, or if preferred to any of the following: a senior manager, the Chief Executive Officer, the Treasurer, the Chair and Vice Chair of the Audit & Finance Committee.

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A manager to whom a report has been made, and who has reason to be concerned that the Law Society is not operating in compliance with applicable laws and regulations or formal internal policies or believes the Law Society's reputation or operations might be adversely affected, shall bring it promptly to the attention of his or her senior manager, or if preferred to any of the following: the Chief Executive Officer, the Treasurer, the Chair and Vice Chair of the Audit & Finance Committee. A senior manager to whom a report has been made, and who has reason to be concerned that the Law Society is not operating in compliance with applicable laws and regulations or formal internal policies or believes the Law Society's reputation or operations might be adversely affected, shall bring it promptly to the attention of the Chief Executive Officer, or if preferred to any of the following: the Treasurer, the Chair and Vice Chair of the Audit & Finance Committee. The Chief Executive Officer is responsible for bringing to the attention of the Audit & Finance Committee reports of non-compliance with applicable laws and regulations or formal internal policies and reports of matters that might affect adversely the Law Society's reputation or operations.

Any employee who makes a report under this section shall be fully protected against recrimination.

## 3. PAYMENTS OF LAW SOCIETY FUNDS

All payments for goods and services and all compensation payments shall be made only after being properly authorized in accordance with formal policies and procedures. A request for authorization to make any payment that is not covered by a formal policy or procedure must be specifically approved by the Chief Executive Officer.

## 4. GIFTS AND HOSPITALITY

Law Society employees shall not give gifts to persons who use the services of the Law Society, clients, patrons or suppliers, other than items of nominal value, or provide them with hospitality other than such hospitality as is appropriate in a normal business relationship.

No Law Society employee shall give any service or thing of value to any public official, nor to any employee or representative of any entity, for any reason related to the Law Society's business or with the intent to influence that person's official acts.

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No Law Society employee shall accept any benefit from, or have any association, agreement or understanding with, persons who use the services of the Law Society, clients, patrons or suppliers, that would result in, or give the appearance of the persons, clients, patrons or suppliers being favoured or given preference over others.

Law Society staff and any of their family members shall not accept from a supplier any gift, other than items of nominal value, or any hospitality, which is not appropriate to the business relationship. In no circumstances is a payment of money to be accepted.

## 5. CONFLICTS OF INTEREST AND DUTIES

Law Society employees shall not be in a position of having any undisclosed or avoidable real, perceived or potential conflict between their duties and responsibilities as employees of the Law Society and their personal interests.

A conflict of interest may exist where the employee or his or her family member has a pecuniary interest or non-pecuniary interest in a contract or proposed contract with the Law Society or where the employee may or may be seen to influence the decision made by the Law Society with respect to the contract.

The employee shall have no real, perceived or potential conflicts of interest between the duty to act in the best interest of the Law Society and duties owed to any other activity or organization with which the employee is involved.

If, for example, a Law Society employee serves on the board of directors of a charitable organization, the employee must withdraw from any meeting or other situation in which a specific transaction between the Law Society and charitable organization is or might be involved.

No Law Society employee shall undertake on behalf of the Law Society any business relationship with another entity, that is related in any way to the employee, on terms less favourable to the Law Society than are available from a similar business relationship with an unrelated third party.

It is the responsibility of the employee to advise his or her manager of any pecuniary or non-pecuniary interest so that it can be determined whether that interest that might present a real, perceived or potential conflict of interest in connection with ~~his or her~~the employee's duties and responsibilities as an employee of the Law Society.

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## 6. OTHER EMPLOYMENT

The Law Society's high standards of performance are attributable to its employees. To ensure that the Law Society continues to meet the standards of performance it has established for itself, Law Society employees are expected to avoid other employment, business activity or other undertakings that may interfere with their duties and responsibilities as employees of the Law Society. Other employment means working for another employer, being self-employed or working for a charitable or volunteer organization which results in receiving or being eligible to receive profit, payment of compensation or other benefit. ~~In appropriate circumstances, where there is no conflict of interest, the CEO may grant permission for an employee being exempted from the application of this rule, such permission to be in writing.~~ Law Society employees must advise their managers of involvement in any other employment, business activity or other undertakings so that it can be determined whether the employment, activity or undertaking may subject employees to demands which are inconsistent with their official duties and responsibilities or which call into question their ability to perform their official duties and responsibilities in an objective manner. ~~which may subject them to demands which are inconsistent with their official duties and responsibilities or which call into question their ability to perform their official duties and responsibilities in an objective manner.~~

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## 7. CONFIDENTIAL INFORMATION

"Confidential Information" is any information concerning the Law Society that a person obtains during the course of employment with the Law Society. Examples include information about specific complaints or discipline charges against a licensee; details of the licensee's Errors and Omissions record and information relating to the financial affairs or condition of the Law Society that has not been made available generally to the public.

No Law Society employee shall use or disclose Confidential Information except in the performance of the duties and responsibilities associated with his or her position and, in the case of the disclosure of Confidential Information, where disclosure is necessary and proper in the discharge of the Law Society's functions or for a specific business purpose of the Law Society or where disclosure is required by law.

Because of the nature of the Law Society's role, employees should be especially sensitive to the need for this rule. It would be unethical and in some instances illegal to

use Confidential Information for any purpose whatsoever, other than the purpose for which it was made available to the Law Society.

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## 8. USE OF LAW SOCIETY PROPERTY

"Law Society Property" includes all property of the Law Society, including equipment, financial assets, land, material, documents (whether in hard or digital/electronic form), inventories, tools, electronic equipment, computers, electronic mail, internet services, Confidential Information and work time.

Law Society Property should only be used by an employee to perform the duties and responsibilities of his or her position or for activities that are supported by the Law Society (e.g., organizing Law Society sponsored social events for employees).

Law Society Property is to remain on Law Society property at all times unless it is necessary to take items off site to perform the duties and responsibilities of an employee's position. Where Law Society Property is in the care of an employee, it must be protected and kept secure at all times.

A Law Society employee must not under any circumstances misuse Law Society Property or knowingly assist another person to do so.

The intellectual property rights in any work produced by an employee in the course of his/her employment with the Law Society are the exclusive property of the Law Society.

## 9. REPORTING TO AUDITORS

There shall be no concealment of information from any auditors of the Law Society.

## 10. PROPER ACCOUNTING

In all accounting and related records, the financial position of each operating entity within the Law Society and the results of its operations shall be accurately recorded and fairly presented, all in accordance with generally accepted accounting principles.

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## 11. DEALING WITH SUPPLIERS

The Law Society shall at all times deal fairly, ethically and in good faith with all suppliers. Every supplier representative shall be given a prompt and courteous hearing and a fair and equal opportunity to seek Law Society business. All major purchases of goods and services shall be made on the basis of competitive quotations, giving due consideration to all relevant factors including service, quality and delivery. A minor purchase may be approved without seeking competitive quotations if there is sufficient purchasing experience and pricing information available to satisfy senior management that the purchase is being made competitively.

With regard to companies and individuals that supply goods or services to the Law Society, employees of the Society:

(1) shall not serve the supplier in any way;
(2) shall not have a financial interest in the supplier that could weaken the employee's loyalty to the Law Society;
(3) shall not ask for special treatment when purchasing goods or services for personal use.

In all dealings with suppliers, employees shall avoid any activity or interest that could in any way impair the integrity of the Law Society.

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## CONCLUSION

In conclusion, the Business Conduct Policy Statement is intended to serve only as a general guide toward compliance with the Law Society's standards of business conduct.

In any case where an employee requires more specific guidance the employee should ask his or her manager for clarification and direction.

It shall be the responsibility of all managers to ensure compliance with the standards of conduct set out in this Business Conduct Policy Statement. Managers should reinforce the Business Conduct Policy Statement by demonstrating by example the standards of conduct set out therein. Each manager shall be responsible for the appropriate distribution of the Business Conduct Policy Statement, for dissemination of the guidelines and for ensuring that they are fully understood and followed. It is the duty of management to investigate suspected violations of the Business Conduct Policy Statement and to respond appropriately. Management must treat employees in a fair and equitable manner.

## Employee Declaration

I have read this Business Conduct Policy Statement and confirm that I will comply with its requirements.

_____
Employee Name (printed)

_____ _____
Employee Signature Date

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## 1. ORGANIZATIONAL AND EMPLOYEE INTEGRITY

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Improper behaviour in the workplace has a negative effect on all employees and on the Law Society's many stakeholders (including licensees and the public). Employees should therefore be professional, civil and courteous with one another and all those with whom they deal.

Above all, the behaviour of the Law Society's employees should be reflective of the Law Society's reputation for integrity.

## 2. COMPLIANCE WITH LAWS AND POLICIES

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If any Law Society employee should have reason to be concerned at any time that the Law Society is not operating in compliance with applicable laws and regulations or formal internal policies, or if any Law Society employee has knowledge of any matter which might affect adversely the Law Society's reputation or operations, the employee should immediately report the concern or matter to a manager, or if preferred to any of the following: a senior manager, the Chief Executive Officer, the Treasurer, the Chair and Vice Chair of the Audit & Finance Committee.

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A manager to whom a report has been made, and who has reason to be concerned that the Law Society is not operating in compliance with applicable laws and regulations or formal internal policies or believes the Law Society's reputation or operations might be adversely affected, shall bring it promptly to the attention of his or her senior manager, or if preferred to any of the following: the Chief Executive Officer, the Treasurer, the Chair and Vice Chair of the Audit & Finance Committee. A senior manager to whom a report has been made, and who has reason to be concerned that the Law Society is not operating in compliance with applicable laws and regulations or formal internal policies or believes the Law Society's reputation or operations might be adversely affected, shall bring it promptly to the attention of the Chief Executive Officer, or if preferred to any of the following: the Treasurer, the Chair and Vice Chair of the Audit & Finance Committee. The Chief Executive Officer is responsible for bringing to the attention of the Audit & Finance Committee reports of non-compliance with applicable laws and regulations or formal internal policies and reports of matters that might affect adversely the Law Society's reputation or operations.

Any employee who makes a report under this section shall be fully protected against recrimination.

## 3. PAYMENTS OF LAW SOCIETY FUNDS

All payments for goods and services and all compensation payments shall be made only after being properly authorized in accordance with formal policies and procedures. A request for authorization to make any payment that is not covered by a formal policy or procedure must be specifically approved by the Chief Executive Officer.

## 4. GIFTS AND HOSPITALITY

Law Society employees shall not give gifts to persons who use the services of the Law Society, clients, patrons or suppliers, other than items of nominal value, or provide them with hospitality other than such hospitality as is appropriate in a normal business relationship.

No Law Society employee shall give any service or thing of value to any public official, nor to any employee or representative of any entity, for any reason related to the Law Society's business or with the intent to influence that person's official acts.

| HUMAN RESOURCES POLICIES & PROCEDURES | |
|---|---|
| **Section:** General Policy Statement | **Code Number** 2.01 |
| **Subject:** Business Conduct Policy | |
| **Effective Date:** September 27, 2012 | **Pages:** 3 of 7 |
| **Policy Issue Date:** October 4, 2012 | **Supersedes:** May 2011 |

No Law Society employee shall accept any benefit from, or have any association, agreement or understanding with, persons who use the services of the Law Society, clients, patrons or suppliers, that would result in, or give the appearance of the persons, clients, patrons or suppliers being favoured or given preference over others.

Law Society staff and any of their family members shall not accept from a supplier any gift, other than items of nominal value, or any hospitality, which is not appropriate to the business relationship. In no circumstances is a payment of money to be accepted.

## 5. CONFLICTS OF INTEREST AND DUTIES

Law Society employees shall not be in a position of having any undisclosed or avoidable real, perceived or potential conflict between their duties and responsibilities as employees of the Law Society and their personal interests.

A conflict of interest may exist where the employee or his or her family member has a pecuniary interest or non-pecuniary interest in a contract or proposed contract with the Law Society or where the employee may or may be seen to influence the decision made by the Law Society with respect to the contract.

The employee shall have no real, perceived or potential conflicts of interest between the duty to act in the best interest of the Law Society and duties owed to any other activity or organization with which the employee is involved.

If, for example, a Law Society employee serves on the board of directors of a charitable organization, the employee must withdraw from any meeting or other situation in which a specific transaction between the Law Society and charitable organization is or might be involved.

No Law Society employee shall undertake on behalf of the Law Society any business relationship with another entity, that is related in any way to the employee, on terms less favourable to the Law Society than are available from a similar business relationship with an unrelated third party.

It is the responsibility of the employee to advise his or her manager of any pecuniary or non-pecuniary interest so that it can be determined whether that interest that might present a real, perceived or potential conflict of interest in connection with the employee's duties and responsibilities as an employee of the Law Society.

| HUMAN RESOURCES POLICIES & PROCEDURES | |
|---|---|
| **Section:** General Policy Statement | **Code Number** 2.01 |
| **Subject:** Business Conduct Policy | |
| **Effective Date:** September 27, 2012 | **Pages:** 4 of 7 |
| **Policy Issue Date:** October 4, 2012 | **Supersedes:** May 2011 |

## 6. OTHER EMPLOYMENT

The Law Society's high standards of performance are attributable to its employees. To ensure that the Law Society continues to meet the standards of performance it has established for itself, Law Society employees are expected to avoid other employment, business activity or other undertakings that may interfere with their duties and responsibilities as employees of the Law Society. Other employment means working for another employer, being self-employed or working for a charitable or volunteer organization which results in receiving or being eligible to receive profit, payment of compensation or other benefit. Law Society employees must advise their managers of involvement in any other employment, business activity or other undertakings so that it can be determined whether the employment, activity or undertaking may subject employees to demands which are inconsistent with their official duties and responsibilities or which call into question their ability to perform their official duties and responsibilities in an objective manner.

## 7. CONFIDENTIAL INFORMATION

"Confidential Information" is any information concerning the Law Society that a person obtains during the course of employment with the Law Society. Examples include information about specific complaints or discipline charges against a licensee; details of the licensee's Errors and Omissions record and information relating to the financial affairs or condition of the Law Society that has not been made available generally to the public.

No Law Society employee shall use or disclose Confidential Information except in the performance of the duties and responsibilities associated with his or her position and, in the case of the disclosure of Confidential Information, where disclosure is necessary and proper in the discharge of the Law Society's functions or for a specific business purpose of the Law Society or where disclosure is required by law.

Because of the nature of the Law Society's role, employees should be especially sensitive to the need for this rule. It would be unethical and in some instances illegal to use Confidential Information for any purpose whatsoever, other than the purpose for which it was made available to the Law Society.

| HUMAN RESOURCES POLICIES & PROCEDURES | |
|---|---|
| **Section:** General Policy Statement | **Code Number** 2.01 |
| **Subject:** Business Conduct Policy | |
| **Effective Date:** September 27, 2012 | **Pages:** 5 of 7 |
| **Policy Issue Date:** October 4, 2012 | **Supersedes:** May 2011 |

## 8. USE OF LAW SOCIETY PROPERTY

"Law Society Property" includes all property of the Law Society, including equipment, financial assets, land, material, documents (whether in hard or digital/electronic form), inventories, tools, electronic equipment, computers, electronic mail, internet services, Confidential Information and work time.

Law Society Property should only be used by an employee to perform the duties and responsibilities of his or her position or for activities that are supported by the Law Society (e.g., organizing Law Society sponsored social events for employees).

Law Society Property is to remain on Law Society property at all times unless it is necessary to take items off site to perform the duties and responsibilities of an employee's position. Where Law Society Property is in the care of an employee, it must be protected and kept secure at all times.

A Law Society employee must not under any circumstances misuse Law Society Property or knowingly assist another person to do so.

The intellectual property rights in any work produced by an employee in the course of his/her employment with the Law Society are the exclusive property of the Law Society.

## 9. REPORTING TO AUDITORS

There shall be no concealment of information from any auditors of the Law Society.

## 10. PROPER ACCOUNTING

In all accounting and related records, the financial position of each operating entity within the Law Society and the results of its operations shall be accurately recorded and fairly presented, all in accordance with generally accepted accounting principles.

| HUMAN RESOURCES POLICIES & PROCEDURES | |
|---|---|
| **Section:** General Policy Statement | **Code Number** 2.01 |
| **Subject:** Business Conduct Policy | |
| **Effective Date:** September 27, 2012 | **Pages:** 6 of 7 |
| **Policy Issue Date:** October 4, 2012 | **Supersedes:** May 2011 |

## 11. DEALING WITH SUPPLIERS

The Law Society shall at all times deal fairly, ethically and in good faith with all suppliers. Every supplier representative shall be given a prompt and courteous hearing and a fair and equal opportunity to seek Law Society business. All major purchases of goods and services shall be made on the basis of competitive quotations, giving due consideration to all relevant factors including service, quality and delivery. A minor purchase may be approved without seeking competitive quotations if there is sufficient purchasing experience and pricing information available to satisfy senior management that the purchase is being made competitively.

With regard to companies and individuals that supply goods or services to the Law Society, employees of the Society:

(1) shall not serve the supplier in any way;
(2) shall not have a financial interest in the supplier that could weaken the employee's loyalty to the Law Society;
(3) shall not ask for special treatment when purchasing goods or services for personal use.

In all dealings with suppliers, employees shall avoid any activity or interest that could in any way impair the integrity of the Law Society.

| HUMAN RESOURCES POLICIES & PROCEDURES | |
|---|---|
| **Section:** General Policy Statement | **Code Number** 2.01 |
| **Subject:** Business Conduct Policy | |
| **Effective Date:** September 27, 2012 | **Pages:** 7 of 7 |
| **Policy Issue Date:** October 4, 2012 | **Supersedes:** May 2011 |

## CONCLUSION

In conclusion, the Business Conduct Policy Statement is intended to serve only as a general guide toward compliance with the Law Society's standards of business conduct.

In any case where an employee requires more specific guidance the employee should ask his or her manager for clarification and direction.

It shall be the responsibility of all managers to ensure compliance with the standards of conduct set out in this Business Conduct Policy Statement. Managers should reinforce the Business Conduct Policy Statement by demonstrating by example the standards of conduct set out therein. Each manager shall be responsible for the appropriate distribution of the Business Conduct Policy Statement, for dissemination of the guidelines and for ensuring that they are fully understood and followed. It is the duty of management to investigate suspected violations of the Business Conduct Policy Statement and to respond appropriately. Management must treat employees in a fair and equitable manner.

## Employee Declaration

I have read this Business Conduct Policy Statement and confirm that I will comply with its requirements.

_____
Employee Name (printed)

_____ _____
Employee Signature Date

**TAB 4.2**

**FOR DECISION**

# SPECIAL PROJECTS FUND TRANSFER

**Motion:**

11. **That Convocation approve the transfer of $262,165 from the 2013 operating budget to the Special Projects Fund.**

12. The Special Projects Fund is maintained to ensure that financing is available for ongoing special projects approved by Convocation in order to complete projects that were budgeted, commenced but not completed, in one fiscal period. The balance at September 31, 2013 was $524,000, primarily allocated for bencher elections and access to justice initiatives.

13. The 2013 budget approved by Convocation included funding for the following projects which have not been completed by year end.

| | | |
|---|---|---|
| Equity | | |
| | Legal Information for Everyone | $7,325 |
| | Access to Justice Public Guide | $40,000 |
| | Challenges Faced by Racialized Licensees | $19,000 |
| Human Resources | | |
| | Development of Current Job Evaluation System | $62,400 |
| | Time and Attendance Software | $50,000 |
| Finance | | |
| | Time and Attendance Software | $50,000 |
| Other | | |
| | Lawyer and Paralegal Bencher Elections (to be held in 2015 and 2014 respectively) | $33,440 |
| **TOTAL** | | **$262,165** |

14. Work on most of these activities commenced in 2013 but was not completed by December 31, 2013. No funding for these projects was included in the 2014 Budget as their completion prior to year end had been anticipated.

15. To provide funding in 2014 for the completion of these undertakings, the requested transfers from the 2013 budget to the Special Projects fund is necessary.

**TAB 4.3**

**FOR INFORMATION**

**TAB 4.3.1**

**FOR INFORMATION**

# LAWYERS PROFESSIONAL INDEMNITY COMPANY FINANCIAL STATEMENTS FOR THE NINE MONTHS ENDED SEPTEMBER 30, 2013

16. **The Audit & Finance Committee recommends that the 2013 third quarter financial statements for LAWPRO be received by Convocation for information.**

17. The statements as approved by the LAWPRO board follow on the next page.

# *Report to the Audit and Finance Committee of The Law Society of Upper Canada*

## *January 08, 2014*

LawPRO®
Lawyers' Professional Indemnity Company
Assurance LawPRO™

# *Report to the Audit and Finance Committee – Law Society January 08, 2014*

## INDEX


- ***Key Point Summary*** ..... **2**

***LAWPRO***

- ***Financial Statements, as at September 30, 2013*** ..... **3**
- ***Premiums*** ..... **7**
- ***Claims & Adjustment Expenses*** ..... **7**
- ***Claims Trends*** ..... **8**
- ***Review of Insurance Ratios*** ..... **10**
- ***Compliance with Investment Guidelines:***
  - ***CIBC Global Asset Management Inc*** ..... **11**
  - ***Letko Brosseau & Associates Inc*** ..... **12**

# *KEY POINT SUMMARY*

- ***LAWPRO has sufficient assets to discharge its claims and other liabilities.***

- ***At September 30, 2013, LAWPRO held investment assets totaling $582.4 million, inclusive of cash and cash equivalents and investment income due and accrued. These funds have been invested in accordance with the Company's investment policy. LAWPRO was in compliance with its policy during the nine months ended September 30, 2013 (see pages 11 and 12).***

- ***LAWPRO'S net loss for the nine months ended September 30, 2013 was $9.7 million compared to a budgeted income of $2.1 million and a net loss of $5.6 million for the same period in 2012. During the nine months ended September 30, 2013 LAWPRO experienced a total comprehensive loss of $3.5 million, which reflects an increase in unrealized gains of $6.2 million on its surplus investments, compared to a budgeted income of $3.1 million and a loss of $1.6 million for the same period in 2012.***

- ***Overall, earned premiums on the mandatory program were substantially at expected levels. Investment income of $10.7 million for the nine months of 2013 was lower than budgeted levels by $3.1 million and the results for the same period in 2012 by $1.1 million, the key difference being $5.5 million of unrealized losses for the matched portfolio in the current year due to a rise in market yields on fixed income securities, which was partially offset by $3.9 million of realized gains.***

- ***Claims and adjustment expenses for the nine months ended September 30, 2013 were $13.4 million higher than budget due to an increase in expected claims counts in the E&O program. Current policy year claims expense was $8.0 million higher than the 2012 policy at the same point in time last year, primarily due to higher expected claims counts in the E&O program during the 2013 fiscal period and to a lesser extent due to increases in expected claims severity. General expenses for the nine months ended September 30, 2013 were $1.5 million lower than budget and $0.9 million lower than the same period in 2012.***

- ***LAWPRO is in compliance with all regulatory requirements regarding solvency and filing of financial information. A summary of LAWPRO'S position with respect to standard insurance ratios as at September 30 is included on page 10.***

## Lawyers' Professional Indemnity Company
## STATEMENTS OF FINANCIAL POSITION
Stated in thousands of Canadian dollars
**UNAUDITED**

| | As at September 30 2013 | As at December 31 2012 | As at January 1 2012 |
|---|---|---|---|
| **Assets** | | | |
| Cash and cash equivalents | 11,248 | 18,377 | 16,936 |
| Investments | 567,638 | 533,175 | 500,674 |
| Investment income due and accrued | 3,548 | 1,902 | 3,159 |
| Due from reinsurers | 1,363 | 2,883 | 2,179 |
| Due from insureds | 2,385 | 1,739 | 1,570 |
| Due from the Law Society of Upper Canada | 19,457 | - | 1,118 |
| Reinsurers' share of provisions for: | | | |
| Unpaid claims and adjustment expenses | 41,000 | 39,936 | 43,089 |
| Unearned premiums | 1,776 | - | - |
| Deferred policy aquisition expenses | 826 | - | - |
| Other receivables | 5,754 | 1,045 | 864 |
| Other assets | 1,895 | 1,707 | 1,115 |
| Property and equipment | 2,364 | 2,835 | 2,716 |
| Income taxes recoverable | 3,243 | 2,671 | 2,528 |
| Deferred income tax asset | 4,846 | 4,489 | 4,009 |
| **Total assets** | **667,343** | **610,759** | **579,957** |
| **Liabilities** | | | |
| Provision for unpaid claims and adjustment expenses | 462,551 | 433,329 | 408,666 |
| Unearned premiums | 28,311 | 723 | 663 |
| Unearned reinsurance commissions | 372 | - | - |
| Due to reinsurers | 1,608 | 601 | 690 |
| Due to insureds | 282 | 206 | 263 |
| Due to the Law Society of Upper Canada | - | 2,565 | - |
| Expenses due and accrued | 6,082 | 1,634 | 1,968 |
| Other taxes due and accrued | 333 | 412 | 432 |
| | 499,539 | 439,470 | 412,682 |
| **Equity** | | | |
| Capital stock | 5,000 | 5,000 | 5,000 |
| Contributed surplus | 30,645 | 30,645 | 30,645 |
| Retained earnings | 113,938 | 123,627 | 125,859 |
| Accumulated other comprehensive income | 18,221 | 12,017 | 5,771 |
| | 167,804 | 171,289 | 167,275 |
| **Total liabilities and equity** | **667,343** | **610,759** | **579,957** |

## Lawyers' Professional Indemnity Company
## STATEMENTS OF INCOME
Stated in thousands of Canadian dollars
**UNAUDITED**

| **For nine months ended September 30** | | **2013** | **2012** |
|---|---|---|---|
| **Revenue** | | | |
| Gross written premiums | | 111,885 | 109,186 |
| Premiums ceded to reinsurers | | (7,044) | (5,897) |
| Net written premiums | | 104,841 | 103,289 |
| (Increase) decrease in unearned premiums | | (25,812) | (25,372) |
| Net premiums earned | | 79,029 | 77,917 |
| Net investment income | | 10,712 | 11,783 |
| Ceded commissions | | 1,187 | 1,894 |
| | | **90,928** | **91,594** |
| **Expenses** | | | |
| Gross claims and adjustment expenses | | 92,975 | 85,948 |
| Reinsurers' share of claims and adjustment expenses | | (3,115) | (1,691) |
| Net claims and adjustment expenses | | 89,860 | 84,257 |
| Operating expenses | | 11,898 | 12,811 |
| Premium taxes | | 2,532 | 2,473 |
| | | **104,290** | **99,541** |
| **Income before income taxes** | | **(13,362)** | **(7,947)** |
| Income tax expense (recovery) | - current | (3,316) | (2,079) |
| | - deferred | (357) | (286) |
| | | (3,673) | (2,365) |
| **Net income / (loss)** | | **(9,689)** | **(5,582)** |
| Unrealized gains / (losses) | - bonds | (1,549) | (429) |
| | - equities | 7,753 | 4,424 |
| **Other comprehensive income / (loss)** | | **6,204** | **3,995** |
| **Total comprehensive income / (loss)** | | **(3,485)** | **(1,587)** |

## Lawyers' Professional Indemnity Company
**STATEMENTS OF COMPREHENSIVE INCOME**
Stated in thousands of Canadian dollars
**UNAUDITED**

| **For nine months ended September 30** | **2013** | **2012** |
|---|---|---|
| **Net income** | **(9,689)** | **(5,582)** |
| Other comprehensive income, net of income tax: | | |
| Net changes unrealized gains (losses) on available-for-sale financial assets, net of income tax expense (recovery) of $3,216 (2012: $1,065) | 8,926 | 2,955 |
| Reclassification adjustment for (gains) losses included in net income, net of income tax (expense) recovery of ($1,203) [2012: ($224) ] | (3,336) | (622) |
| Reclassification adjustment for impairments on available-for-sale assets, included in net income, net of income tax expense of $222 (2012: $599) | 614 | 1,662 |
| **Other comprehensive income** | **6,204** | **3,995** |
| **Comprehensive income** | **(3,485)** | **(1,587)** |

## Lawyers' Professional Indemnity Company

**STATEMENTS OF CHANGES IN EQUITY**

Stated in thousands of Canadian dollars

**UNAUDITED**

| | Capital stock | Contributed surplus | Retained earnings | Accumulated other comprehensive income | Equity |
|---|---|---|---|---|---|
| **Balance at December 31, 2011** | **5,000** | **30,645** | **125,859** | **6,372** | **167,876** |
| IAS 19 adjustment for defined benefit remeasurement | - | - | - | (601) | (601) |
| **Balance at January 1, 2012** | **5,000** | **30,645** | **125,859** | **5,771** | **167,275** |
| Total comprehensive income for the year | - | - | (2,232) | 6,246 | 4,014 |
| **Balance at December 31, 2012** | **5,000** | **30,645** | **123,627** | **12,017** | **171,289** |
| Total comprehensive income for the year | - | - | (9,689) | 6,204 | (3,485) |
| **Balance at September 30, 2013** | **5,000** | **30,645** | **113,938** | **18,221** | **167,804** |

**LAWYERS' PROFESSIONAL INDEMNITY COMPANY**
**REPORT TO AUDIT AND FINANCE COMMITTEE - LAW SOCIETY OF UPPER CANADA**
**MANDATORY E&O INSURANCE PROGRAM**
**NINE MONTHS ENDED SEPTEMBER 30, 2013**

## PREMIUMS

- The 2013 Ontario mandatory professional liability program performed substantially as expected. Overall, written premiums were at expected levels. At September 30, 2013, there were 24,224 full-time equivalent practitioners, a level which has already surpassed the budgeted amount of 24,112.

- For the first nine months of 2013, transaction levies were $0.8 million below budget, compared to $1.1 million above budget in 2012 comparative period.

- The retrospective rating arrangement in its insurance contract with the Law Society, which was significantly restructured commencing in 2010, resulted in no additional premium recorded in 2013**.**

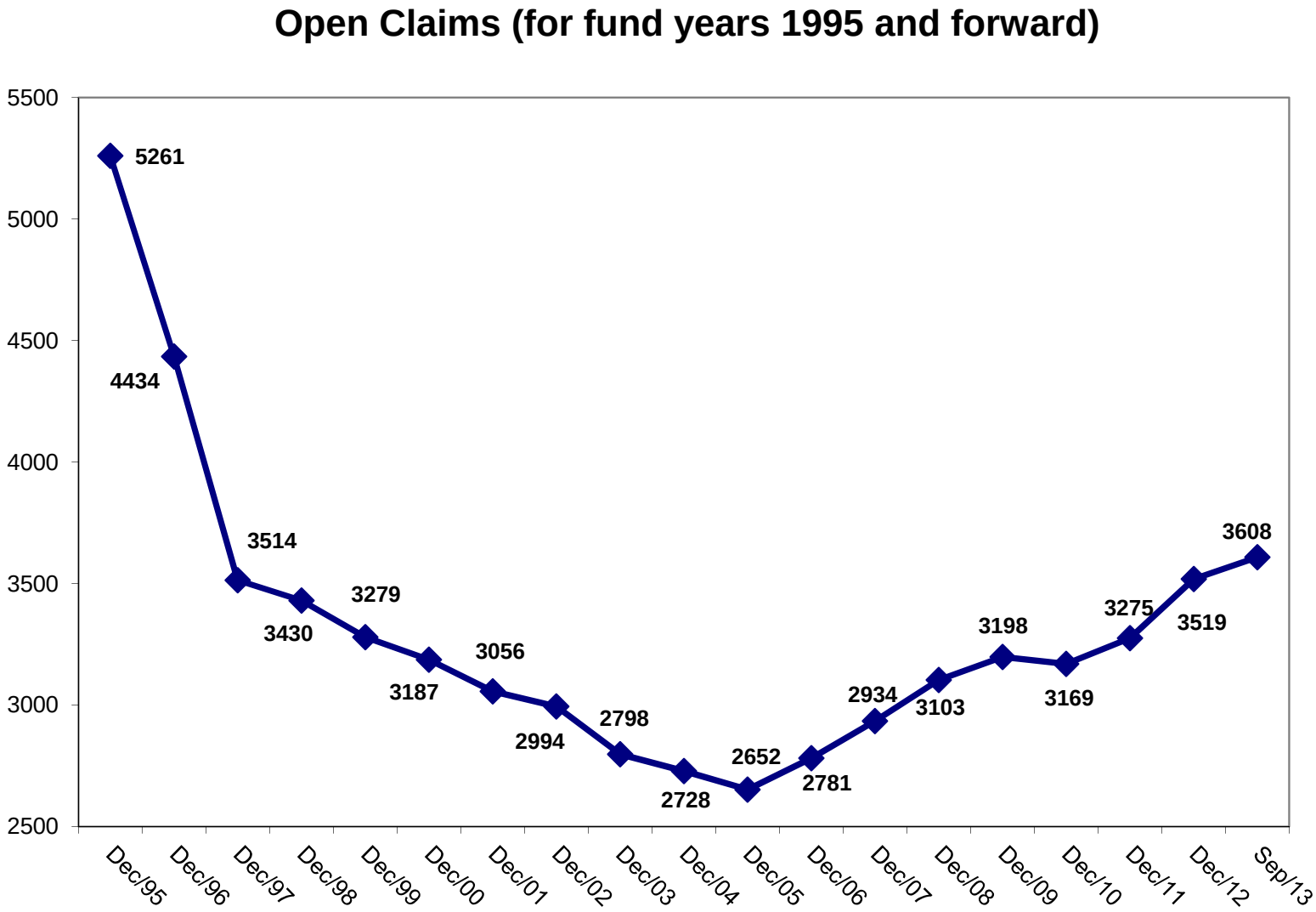
## CLAIMS & ADJUSTMENT EXPENSES

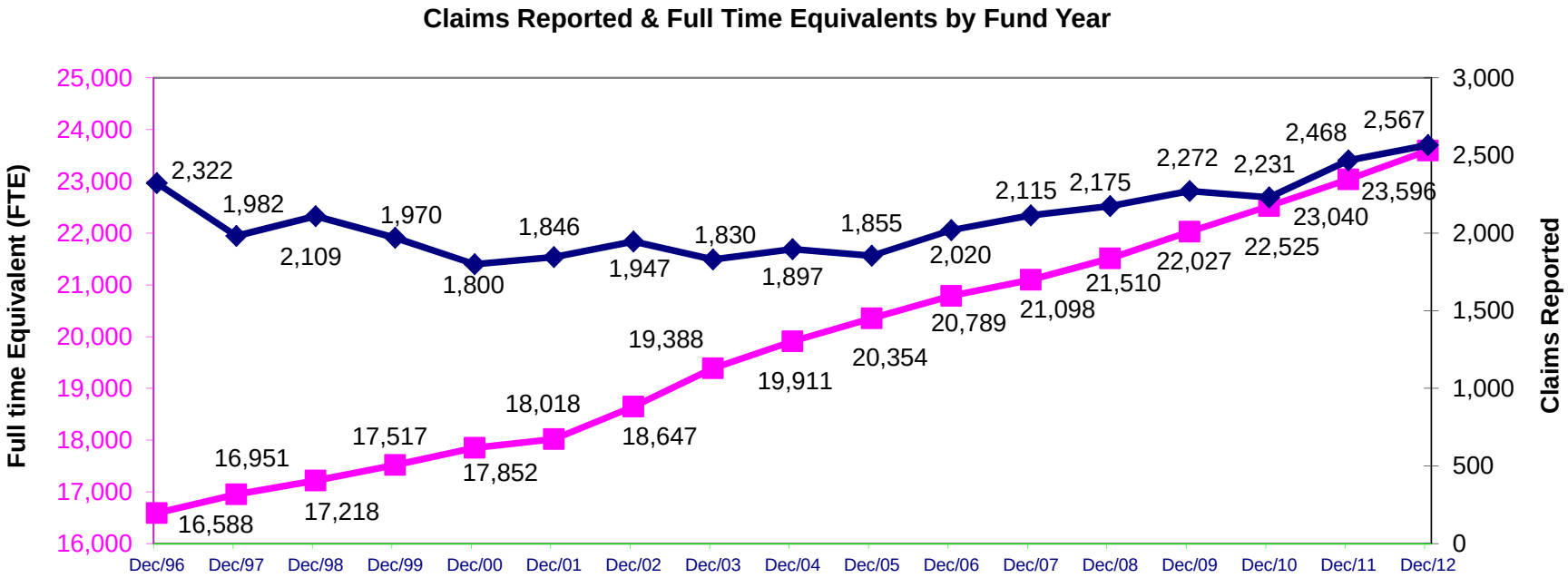
- In the first nine months of 2013, there were 1,496 new 2013 fund year claim files reported compared with 1,460 new 2012 fund year claim files reported in 2012.

- The number of files remaining open at September 30, 2013 was 3,608, higher than the 3,420 files remaining open at September 30, 2012.

- For all fund years, 1,799 new files were opened through September 30, 2013 and 1,710 closed. The comparable figures for the nine months ended September 30, 2012 were 1,796 claims opened and 1,651 closed.

- On an aggregate basis, in the first nine months of 2013 there has been net unfavorable development on claims of prior years (in particular fund years 2007, and 2009 through 2012, offset somewhat by a large favorable development for fund year 2008). In comparison during the same period in 2012, there was a slight net favourable development on claims of prior years (in particular fund years 2005, 2007, and 2010, offset somewhat by large unfavourable developments for fund years 2006 and 2011).


Open Claims (for fund years 1995 and forward)
5500
5000
4500
4000
3500
3000
2500
5261
4434
3514
3430
3279
3187
3056
2994
2798
2728
2652
2781
2934
3103
3198
3169
3275
3519
3608
Dec/95
Dec/96
Dec/97
Dec/98
Dec/99
Dec/00
Dec/01
Dec/02
Dec/03
Dec/04
Dec/05
Dec/06
Dec/07
Dec/08
Dec/09
Dec/10
Dec/11
Dec/12
Sep/13


Claims Reported & Full Time Equivalents by Fund Year
Full time Equivalent (FTE)
Claims Reported
25,000
24,000
23,000
22,000
21,000
20,000
19,000
18,000
17,000
16,000
3,000
2,500
2,000
1,500
1,000
500
0
2,322
1,982
2,109
1,970
1,800
1,846
1,947
1,830
1,897
1,855
2,020
2,115
2,175
2,272
2,231
2,468
2,567
23,596
23,040
22,525
22,027
21,510
21,098
20,789
20,354
19,911
19,388
18,647
18,018
17,852
17,517
17,218
16,951
16,588
Dec/96
Dec/97
Dec/98
Dec/99
Dec/00
Dec/01
Dec/02
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Dec/04
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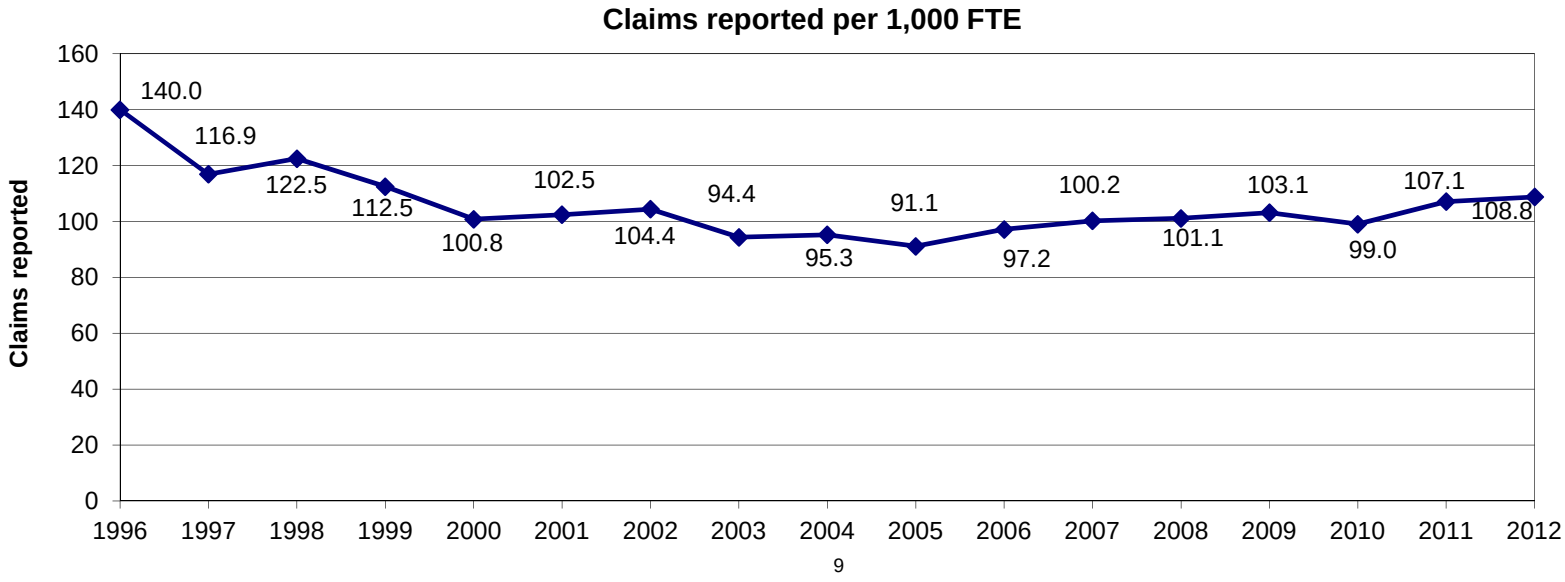
Dec/06
Dec/07
Dec/08
Dec/09
Dec/10
Dec/11
Dec/12


Claims reported per 1,000 FTE
Claims reported
160
140
120
100
80
60
40
20
0
140.0
116.9
122.5
112.5
100.8
102.5
104.4
94.4
95.3
91.1
97.2
100.2
101.1
103.1
99.0
107.1
108.8
1996
1997
1998
1999
2000
2001
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012

## INSURANCE RATIOS[1]

| TEST | RECOMMENDED RANGE | SEP 2013 | DEC 2012 | SEP 2012 | DEC 2011 |
|---|---|---|---|---|---|
| **I. Solvency Ratios** | | | | | |
| ***1. Minimum Capital Test*** | | | | | |
| *(Measures the excess of capital available to capital required based on a risk-based capital adequacy framework and is used to determine capital adequacy of a company.)* | Preferred: 220-230%<br>Minimum: 180% | 202% | 223% | 219% | 220% |
| ***2. Loss reserves to equity*** | | | | | |
| *(Measures unpaid claim and adjustment reserves as a percentage of surplus and provides a simple test of the leveraged position of the company.)* | Preferred: < 225%<br>Maximum: 250% | 251% | 230% | 237% | 218% |
| **II. Other Select Ratios** | | | | | |
| ***1. Liabilities as a % of liquid assets*** | | | | | |
| *(Liabilities as a percentage of Cash and other liquid assets-measures company's ability to meet its financial demands.)* | Preferred: < 80%<br>Maximum: 105% | 79% | 72% | 77% | 71% |
| ***2. Net premiums written as a % of surplus*** | | | | | |
| *(Net risk ratio measures the company's ability to absorb financial shocks. The higher the ratio of premiums to surplus, the greater is the potential risk borne by the company in relation to the surplus available to absorb loss variations.)* | Preferred: < 80%<br>Maximum: 100% | 62% | 61% | 62% | 65% |
| ***3. Return on equity*** | | | | | |
| *(Measures an insurer's net income as a percentage of equity. The higher the ratio, the greater the return to shareholders per unit of invested capital. Sustainability of earnings is more important than periods of high returns followed by periods of low returns or losses.)* | Greater than 0%[2],<br>Net income | (8%) | (1%) | (4%) | 5% |
| | Comprehensive Income | (3%) | 2% | (1%) | 5% |
| ***4. General expense ratio*** | | | | | |
| *(Measures an insurer's general expenses, excluding commissions, as a percentage of net earned premiums.). This ratio should be maintained at lower than or equal to comparable small insurance companies.* | Up to small insurance company benchmark (25% as at Dec 2012) | 18% | 20% | 20% | 19% |
| ***5. Optional business segment*** | | | | | |
| *(Excess program and TitlePLUS title insurance) is planned to operate on a break-even or better basis.* | Greater than $0 (stated in $'000s) | 2,292 | (753) | (852) | 1,160 |

**Note:**

1. The above metrics reflect the Risk Appetite Statement approved by the Board of Directors on February 26, 2013.
2. Sufficient to maintain/grow MCT.

| |
|---|
| Better Than Range |
| Within Range |
| Outside of Range |

LAWPRO & LAWPRO POST 2007

## COMPLIANCE

As of and for the quarter ending September 30, 2013, we hereby certify that to the best of our knowledge the investments in the Lawyers' Professional Indemnity Company portfolio were in compliance, based on our records which are issued on a trade date basis, in accordance with the Investment Policy Statement dated January 1, 2013.

Deborah Lewis, CFA
First Vice President

Oct 24/13
Date:

CIBC

– Confidential –

LETKO BROSSEAU

GESTION DE PLACEMENTS GLOBALE
GLOBAL INVESTMENT MANAGEMENT
www.letkobrosseau.ca

1800 McGill College
Suite 2510
Montréal, QC H3A 3J6
Canada
☎ (514) 499-1200
(800) 307-8557
🖷 (514) 499-0361

130 Adelaide Street West
Suite 3200
Toronto, ON M5H 3P5
Canada
☎ (647) 426-1987
(800) 307-8557
🖷 (647) 426-1587

October 21st, 2013

Lawyer's Professional Indemnity Company
C/O Ms Kathleen A. Waters, President & CEO
250 Yonge Street, Suite 3101
P.O. Box 3
Toronto, Ontario
M5B 2L7

**SUBJECT: COMPLIANCE CERTIFICATE**

Dear Ms. Waters,

This is to confirm that, at the end of each month of the quarter ending September 30th, 2013, Letko Brosseau was in compliance with the requirements of the Statement of Investment Policies and Procedures, effective January 1st, 2013. To the best of our knowledge, we have no reason to believe that we were not in compliance with all such requirements at any other time during such period.

Should you require additional information, please do not hesitate to contact us at your convenience.

Regards,

P Letko

Peter Letko
Letko Brosseau & Associates Inc.
PL/mn

**TAB 4.3.2**

**FOR INFORMATION**

# LIBRARYCO INC.
# FINANCIAL STATEMENTS FOR THE NINE MONTHS ENDED SEPTEMBER 30, 2013

18. **The Audit & Finance Committee recommends that the 2013 third quarter financial statements for LibraryCo be received by Convocation for information.**

19. The statements as approved by the LibraryCo board follow on the next page.

**LIBRARYCO INC. FINANCIAL REPORT**
For the nine months ended September 30, 2013

## KEY POINT SUMMARY

### Overall Results

1. Results for the third quarter identify a deficit of $125,000 compared to a budgeted deficit of $197,000. The positive variance from budget of $72,000 is spread across most expense categories.

### Revenues

2. The Law Society grant (line 1) is the lawyer-based fee that is transferred to Library Co. This transfer includes amounts for central administration and quarterly transfers to 47 libraries. The actual grant from the Law Society was $5,624,000 and matched budgeted amounts for the period.

3. The Law Foundation of Ontario grant (line 2) of $722,500 was provided to LibraryCo to subsidize the purchase of electronic resources and the amount received equalled the amount budgeted.

### Expenses

4. Other expenses - head office (line 7) are lower than budget for the period by $10,000 primarily because of professional development, publications, and web initiatives.

5. The electronic products and services purchases of $893,000 equalled the amount budgeted.

6. Group benefits and insurance are $13,000 lower than budgeted due to lower than expected premium increases.

7. Other expenses – law libraries (line 10) are lower than budget for the period by $14,000 primarily because of continuing education, staff and travel, and COLAL meeting expenses

8. Capital and special needs grants are lower than budgeted by $18,000 as there have been only 2 discretionary grants given for the year-to-date. The Waterloo moving expenses grant was paid and the computer refresh program is ongoing.

## Balance Sheet

9. Cash and short-term investments of $847,000 have decreased by $111,000 from the same time last year due to the budgeted operating deficits in recent periods.

10. Prepaid expenses increased by $16,000 as the new Directors and Officers Insurance Policy for the Associations was paid in full in March.

11. The General Fund has decreased by $91,000 due to the budgeted operating deficits.

**LIBRARYCO INC. FINANCIAL REPORT**
For the nine months ended September 30, 2013

**LIBRARYCO INC.**
**Schedule of Actual and Budgeted Revenues and Expenses**
**Stated in Dollars**
***For the nine months ended September 30***
**Unaudited**

| | | 2013 Actual | YTD Budget | Variance | Annual Budget |
|---|---|---|---|---|---|
| | **REVENUES** | | | | |
| 1 | Law Society of Upper Canada grant | 5,623,893 | 5,623,893 | - | 7,498,524 |
| 2 | Law Foundation of Ontario grant | 722,500 | 722,500 | - | 722,500 |
| 3 | Other Income | 6,064 | - | 6,064 | - |
| 4 | **Total revenues** | **6,352,457** | **6,346,393** | **6,064** | **8,221,024** |
| | **EXPENSES** | | | | |
| | **Head office / administration** | | | | |
| 5 | Salaries and administration | 488,760 | 494,071 | 5,311 | 665,500 |
| 6 | Professional fees | 10,954 | 17,280 | 6,326 | 23,000 |
| 7 | Other | 43,917 | 54,025 | 10,108 | 65,705 |
| 8 | **Total Head office / administration expenses** | **543,631** | **565,376** | **21,745** | **754,205** |
| | **Law Libraries - centralized purchases** | | | | |
| 9 | Electronic products and services | 892,519 | 892,519 | - | 892,519 |
| 10 | Group benefits and insurance | 240,427 | 253,250 | 12,823 | 338,000 |
| 11 | Other | 93,014 | 107,000 | 13,986 | 166,800 |
| 12 | **Total Law Libraries - centralized purchases** | **1,225,960** | **1,252,769** | **26,809** | **1,397,319** |
| 13 | County and District law libraries - grants | 4,640,625 | 4,640,625 | - | 6,187,500 |
| 14 | Capital and special needs grants | 67,334 | 85,000 | 17,666 | 100,000 |
| 15 | **Total County and District Law Libraries Expenses** | **4,707,959** | **4,725,625** | **17,666** | **6,287,500** |
| 16 | **Total expenses** | **6,477,550** | **6,543,770** | **66,220** | **8,439,024** |
| 17 | **Excess of expenses over revenues** | **(125,093)** | **(197,377)** | **72,284** | **(218,000)** |

**LIBRARYCO INC.**
**Balance Sheet**
**Stated in Dollars**
***As at September 30***
**Unaudited**

| | | 2013 | 2012 |
|---|---|---|---|
| | **Assets** | | |
| | **Current Assets** | | |
| 1 | Cash and short-term investments | 847,008 | 958,131 |
| 2 | Accounts receivable | 19,220 | 18,443 |
| 3 | Prepaid Expenses | 46,897 | 31,185 |
| 4 | **Total Assets** | **913,125** | **1,007,759** |
| | | | |
| | **Liabilities, Share Capital and Fund Balances** | | |
| | **Liabilities** | | |
| 5 | Accounts payable and accrued liabilities | 66,830 | 70,243 |
| 6 | **Total Liabilities** | **66,830** | **70,243** |
| | | | |
| | **Share Capital and Fund Balances** | | |
| 7 | Share capital | 200 | 200 |
| 8 | General fund | 346,095 | 437,316 |
| 9 | Reserve fund | 500,000 | 500,000 |
| 10 | **Total Share Capital and Fund Balances** | **846,295** | **937,516** |
| | | | |
| 11 | **Total Liabilities, Share Capital and Fund Balances** | **913,125** | **1,007,759** |

**LIBRARYCO INC.**
**Statement of Changes in Fund Balances**
**Stated in Dollars**
***For the nine months ended September 30***

| | | 2013 | | | 2012 |
|---|---|---|---|---|---|
| | | General Fund | Reserve Fund | **Total** | **Total** |
| 1 | Balance, beginning of year | 471,188 | 500,000 | **971,188** | **1,034,060** |
| | | | | - | - |
| 2 | Excess of expenses over revenues | (125,093) | - | **(125,093)** | **(96,744)** |
| 3 | **Balance, end of period** | **346,095** | **500,000** | **846,095** | **937,316** |

**LIBRARYCO INC.**
**Schedule of Revenues and Expenses**
**Stated in Dollars**
***For the nine months ended September 30***
**Unaudited**

| | | 2013 | | | 2012 | | |
|---|---|---|---|---|---|---|---|
| | | LibraryCo | Law Libraries | Total | LibraryCo | Law Libraries | Total |
| | **Revenues** | | | | | | |
| 1 | Law Society of Upper Canada grant | 5,623,893 | - | 5,623,893 | 5,469,447 | - | 5,469,447 |
| 2 | Law Foundation of Ontario grant - Electronic Resources | 722,500 | | 722,500 | 722,500 | - | 722,500 |
| 3 | Other income | 6,064 | 262,099 | 268,163 | 6,676 | 276,256 | 282,932 |
| 4 | **Total revenues** | **6,352,457** | **262,099** | **6,614,556** | **6,198,623** | **276,256** | **6,474,879** |
| | **Expenses** | | | | | | |
| 5 | Salaries and administration | 488,760 | 2,772,443 | 3,261,203 | 485,178 | 2,702,112 | 3,187,290 |
| 6 | Professional fees | 10,954 | 44,235 | 55,189 | 12,461 | 49,310 | 61,771 |
| 8 | Other (Head office) | 43,917 | - | 43,917 | 42,104 | - | 42,104 |
| 9 | Electronic products and services | 892,519 | - | 892,519 | 868,432 | - | 868,432 |
| 10 | Collections | - | 1,759,860 | 1,759,860 | - | 1,701,612 | 1,701,612 |
| 11 | Group benefits and insurance | 240,427 | - | 240,427 | 223,411 | - | 223,411 |
| 13 | Other (Law Libraries) | 93,014 | - | 93,014 | 90,477 | | 90,477 |
| 14 | **Total Expenses before grants** | **1,769,591** | **4,576,538** | **6,346,129** | **1,722,063** | **4,453,034** | **6,175,097** |
| 15 | Law Libraries - grants | 4,640,625 | (4,640,625) | - | 4,545,977 | (4,545,977) | - |
| 16 | Law Libraries - Capital and special needs grants | 67,334 | (67,334) | - | 27,327 | (27,327) | - |
| 17 | **Total grants** | **4,707,959** | **(4,707,959)** | **-** | **4,573,304** | **(4,573,304)** | **-** |
| 18 | **Total expenses and grants** | **6,477,550** | **(131,421)** | **6,346,129** | **6,295,367** | **(120,270)** | **6,175,097** |
| 19 | **Excess of (expenses over revenues) revenues over expenses** | **(125,093)** | **393,521** | **268,427** | **(96,744)** | **396,526** | **299,782** |

*This schedule includes revenues and expenses at the LibraryCo and Law Library level.*

**TAB 4.3.3**

**FOR INFORMATION**

## OTHER COMMITTEE WORK

20. Under Bylaw 3, the Audit and Finance Committee shall be the administrator of and shall administer the registered pension plan for the employees of the Society. The performance of any duty, or the exercise of any power, by the Audit and Finance Committee as administrator of the pension plan is not subject to the approval of Convocation. The Committee:

a) reviewed the report on Pension Plan activities from the Law Society's Pension Committee.

b) adopted, as recommended by the Pension Committee, the Pension Plan Governance Structure and Guidelines, revised effective May 8, 2013, reflecting the following changes:

i. the addition of the Director, Corporate Services to, and the removal of the Director of Human Resources from, the membership of the Pension Committee;

ii. the assumption by the Director, Corporate Services of the role and responsibilities of the Director of Human Resources set out under the previously approved version of Governance Structure and Guidelines as at June 28, 2012; and

iii. revisions to Appendix F "Roles and Responsibilities Table" to reflect the change in Pension Committee membership and the reallocation to the Director, Corporate Services of the role and responsibilities previously allocated to the Director of Human Resources.

c) adopted the Statement of Investment Policies and Procedures (SIP&P) for the Plan, as revised April 29, 2013 and July 3, 2013 reflecting the changes recommended by the Pension Committee on the advice of the Plan's investment advisors, Aon Hewitt. The SIP&P has been amended to reflect Aon Hewitt's recommendations to:

- adjust the performance objectives of the actively managed investment fund options and to add the Aberdeen Global Equity fund to the platform of investment options platform, both effective April 29, 2013; and
- remove the MFS McLean Budden Global Equity fund from the current platform effective July 3, 2013.

d) adopted the amended and restated Plan text effective July 1, 2012, which contains the following amendment:

- effective July 1, 2012, clarification in Section 4.05 that catch-up contributions are subject to Canada Revenue Agency approval only where such approval is required.

e) received the Legal Advisor's Report for the period May 22, 2012 to May 22, 2013.

21. The Committee assessed a possible increase to the bencher remuneration rate. There was consensus that it was not an appropriate time to increase the remuneration rate and that the Bencher Remuneration Working Group should examine the process as to how changes to the rate would be implemented in the future.

22. The Committee reviewed an allocation of $450,000 from the contingency to fund the new office of Executive Director, Strategic Policy, Communications and Corporate Relations and the elevation of the Senior Counsel to General Counsel and to the Senior Management team.

23. The Committee received a copy of the latest Litigation List.

24. The Committee reviewed the control environment at the Law Society, the risk of fraud at the Law Society and the Committee's response to the auditors regarding:

i. The Committee's views about the risk of fraud
ii. The Committee's knowledge of any actual, suspected or alleged fraud and
iii. The role the Committee exercises in the oversight of management's anti-fraud programs

The Law Society of Upper Canada | Barreau du Haut-Canada

**TAB 5**

**Report to Convocation**
**January 23, 2014**

# Professional Regulation Committee

**Committee Members**
Malcolm Mercer (Chair)
Paul Schabas (Vice-Chair)
John Callaghan
Robert Evans
Julian Falconer
Janet Leiper
William C. McDowell
Kenneth Mitchell
Ross Murray
Jan Richardson
Susan Richer
Peter Wardle

**Purpose of Report: Decision**

**Prepared by the Policy Secretariat**
**(Margaret Drent (416-947-7613)**

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**For Decision**

Amendment to Rule 5.04 of the *Rules of Professional Conduct*……..…**TAB 5.1**

Continuation of the Pre-Proceeding Consent Resolution Conference……..**TAB 5.2**

## COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on January 9, 2014. In attendance were Malcolm Mercer (Chair), John Callaghan, Robert Evans, Janet Leiper (by telephone), Ross Murray, Jan Richardson (by telephone), Susan Richer, and Peter Wardle. Staff members attending were Zeynep Onen, Naomi Bussin, Josée Bouchard, Lesley Cameron, Jim Varro and Margaret Drent.

**Tab 5.1**

# AMENDMENTS TO THE *RULES OF PROFESSIONAL CONDUCT*

## MOTION

**2. That Convocation amend Rule 5.04 of the current *Rules of Professional Conduct* and Rule 6.3.1-1 of the *Rules of Professional Conduct* coming into force on October 1, 2014 as set out in this report.**

## BACKGROUND

3. In 2012, the *Human Rights Code* was amended to specify that every person has a right to equal treatment without discrimination because of gender identity or gender expression. The *Code* was also amended to specify that every person has a right to be free from harassment because of sexual orientation, gender identity or gender expression.[1]

4. Convocation is asked to approve the amendment of the current *Rules of Professional Conduct*, which are in force until September 30, 2014, to reflect these changes. Convocation is also asked to approve the amendment of the Rules amended on October 24, 2013 which will come into force on October 1, 2014, to reflect the Model Code of Professional Conduct of the Federation of Law Societies of Canada.

5. Blackline versions of the current Rules and amended Rules, which take effect October 1, 2014, appear as **Tab 5.1.1** and **Tab 5.1.2**, respectively.

[1] Bill 33, which amended the *Human Rights Code* in 2012, is *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression), 2012*, and may be viewed online at http://www.ontla.on.ca/bills/bills-files/40_Parliament/Session1/b033ra.pdf.

## 5.04 DISCRIMINATION

### Special Responsibility

5.04 (1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

*[Amended – June 2007, January 2014]*

Commentary

The Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

Rule 5.04 will be interpreted according to the provisions of the Ontario Human Rights Code and related case law.

The Ontario Human Rights Code defines a number of grounds of discrimination listed in rule 5.04. For example,

Age is defined as an age that is eighteen years or more.

*[Amended - January 2009]*

Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

*[Amended - January 2009]*

Family status is defined as the status of being in a parent-and-child relationship.

Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage.

*[Amended - January 2009]*

Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the Criminal Records Act (Canada) and not revoked) or provincial offences.

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

(a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

*[Amended - January 2009]*

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 5.04, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

*[Amended - January 2009]*

Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario Human Rights Code requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Code.

In addition to prohibiting discrimination, rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

*[Amended - January 2009, January 2014]*

Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 5.04. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

**Services**

(2) A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

**Employment Practices**

(3) A lawyer shall ensure that his or her employment practices do not offend this rule.

Commentary

Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario Human Rights Code, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

*[Amended - January 2009]*

An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 5.04 unless changing or eliminating the rule would cause undue hardship.

If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario Human Rights Code, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 5.04.

The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 5.04, the following obligations arise:

The rule, requirement or expectation must be examined to determine whether it is "reasonable and *bona fide*." If the rule, requirement, or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business.

If the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

## SECTION 6.3.1 DISCRIMINATION

### Special Responsibility

**6.3.1-1** A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario *Human Rights Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

*[Amended – June 2007, October 2014]*

**Commentary**

**[1]** The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

**[2]** This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

**[3]** Rule 6.3.1 will be interpreted according to the provisions of the Ontario *Human Rights Code* and related case law.

**[4]** The Ontario *Human Rights Code* defines a number of grounds of discrimination listed in rule 6.3.1. For example,

**[5]** Age is defined as an age that is eighteen years or more.

*[Amended - January 2009]*

**[6]** Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

*[Amended - January 2009]*

**[7]** Family status is defined as the status of being in a parent-and-child relationship.

**[8]** Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage.

*[Amended - January 2009]*

**[9]** Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the *Criminal Records Act* (Canada) and not revoked) or provincial offences.

**[10]** The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

**[11]** There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

(a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

*[Amended - January 2009]*

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 6.3.1, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

*[Amended - January 2009]*

**[12]** Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario *Human Rights Code* requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

**[13]** A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

**[14]** Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the *Code*.

**[15]** In addition to prohibiting discrimination, rule 6.3.1 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

*[Amended – January 2009, October 2014]*

**[16]** Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 6.3.1. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

**Services**

**6.3.1-2** A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

**Employment Practices**

**6.3.1-3** A lawyer shall ensure that their employment practices do not offend rule 6.3.1-1 and 6.3.1-2.

**Commentary**

**[1]** Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario *Human Rights Code* and related equity legislation.

**[2]** In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario *Human Rights Code*, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

*[Amended - January 2009]*

**[3]** An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 6.3.1 unless changing or eliminating the rule would cause undue hardship.

**[4]** If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario *Human Rights Code*, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

**[5]** The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 6.3.1.

**[6]** The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

**[7]** If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 6.3.1, the rule, requirement or expectation must be examined to determine whether it is "reasonable and *bona fide*". The following must be taken into account:

(a) if the rule, requirement or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business; and

(b) ~~i~~if the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, then the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

**[8]** The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

*[Amended – October 2014]*

**Tab 5.2**

# CONTINUATION OF THE PRE-PROCEEDING CONSENT RESOLUTION PROCESS

## MOTION

**6. That Convocation approve the Pre-Proceeding Consent Resolution Process for an additional two years, and that a report will be provided prior to the end of the two year period containing recommendations regarding the continuation of the conference on a permanent basis.**

## Overview

7. The Pre-Proceeding Consent Resolution Conference (the "Consent Process") is an alternative to the regular investigations and hearings stream. The Consent Process was approved by Convocation on January 28, 2010 as pilot project. Changes to the *Rules of Practice and Procedure* required to support the Consent Process were approved by Convocation on January 27, 2011. The 2010 and 2011 Convocation Reports may be found at **Tab 5.2.1** and **Tab 5.2.2**, respectively.

8. Reporting on the pilot project was awaiting completion of two cases in the process. In summary, based on the report from the Professional Regulation Division, the Committee has concluded that the Consent Process to be a helpful tool and it is likely to be used with greater frequency in the future.

9. No changes are recommended by the Committee to the portion of the Consent Process that occurs prior to authorization by the Proceedings Authorization Committee.

10. The Committee believes there may be ways to streamline some aspects of the post-authorization Consent Process. For this reason it is recommended that the procedures set

out in Rule 29 of the *Rules of Practice and Procedure* be reviewed. Rule 29 may be found at **Tab 5.2.3**.

11. The Committee recommends that the consent resolution process be continued for a further two years. The continuation of the two-year pilot will permit additional study of the post-authorization Consent Process. During that time, a report will be prepared containing recommendations regarding whether the Consent Process should be continued on a permanent basis.

**Background – Purpose of the Consent Process**

12. The Consent Process begins during the investigation stage and concludes with a Hearing Panel Order. Through the Consent Resolution Process, a licensee may admit to conduct allegations and consent to a joint penalty to be submitted to a Hearing Panel for an Order.

13. The goals of the Consent Process were to:

    a. be flexible by providing for negotiations at an early stage for licensees who are interested in making early admissions in aid of a fast outcome that is more certain;

    b. reduce the time and resources required for full investigation and prosecution of some cases;

    c. save significant costs for the licensee; and

    d. continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

**Overview of the Consent Process**

14. The policy which includes a description of the process is set out in the 2010 Report at **Tab 5.2.1** and has also been codified in part in Rule 29 of the *Rules of Practice and Procedure*. A brief overview is set out below.

*Description*

15. The Consent Process may be initiated by the Law Society or the licensee during the investigation stage. Cases are approved for the Consent Process by the Director,

Professional Regulation. Once presented to the licensee, he or she has 30 days to accept or reject the agreement, or negotiate changes with the Law Society. The Law Society and the licensee negotiate a tentative agreement on admissions and penalty, and conduct a fast-track investigation before finalizing the agreement.

16. The Director will only approve a case where in her opinion, diversion would fulfill the Law Society's duty to act in a timely, open and efficient manner and its duty to protect the public interest. Additional criteria have been identified in the 2010 Report at **Tab 5.2.1**, page 8 (paragraph 18) including:

    a. that the licensee is prepared to admit to the allegations;

    b. there is sufficient jurisprudence on the issue;

    c. discipline proceedings have not yet been authorized;

    d. the licensee is cooperating with the Law Society;

    e. the Law Society has no concerns about the licensee's capacity to engage in the process; and

    f. the licensee has legal representation or has been advised to obtain independent legal advice.

17. Once the Director is satisfied with the agreement, a Consent Proposal is referred to the Proceedings Authorization Committee (PAC) for authorization.

18. After authorization by PAC, a Consent Resolution Conference is held (Rule 29.02). This meeting is not public (Rule 29.05(3)). The Consent Resolution Conference may accept or reject the Consent Proposal but should accept it unless the Panel concludes that the joint submission on penalty is outside of the reasonable range.

19. Until the Consent Resolution Conference accepts the Consent Proposal, either party may withdraw (Rule 29.06). If the parties withdraw or the Consent Proposal is rejected by them or the Consent Resolution Conference, the Law Society completes its investigation. The documents created for the Consent Resolution Conference and any statements made

at the Consent Resolution Conference are not admissible for the purpose of any subsequent investigation and prosecution of the same allegations (Rule 29.08).

20. Lastly, a Notice of Application is issued and the matter proceeds to a hearing in public before the same members of the Conference panel, composed as a Hearing Panel. The Consent Proposal becomes part of the public record and the Hearing Panel issues an Order in the normal course.

**Experience with the Consent Process**

21. Two cases have been completed through the Consent Process to date.

22. In the first case, the licensee was granted permission to surrender his licence. No costs were ordered. The misconduct that was the basis for the admissions and the finding was multiple failures to respond to and cooperate with the Law Society, and failure to provide the Law Society with information with respect to the disposition of the licensee's practice.

23. In the second case, the licensee was suspended for one month, was required to continue weekly telephone meetings with a sponsor for a period of two years and was required to pay costs in the amount of $2000. The misconduct that was the subject of the licensee's admissions, and the basis for the finding, was that the licensee had contravened Rule 6.01 of the *Rules of Professional Conduct* by acting without integrity when the licensee received trust funds totaling $5,800 from various clients and withheld them from the licensee's employer, appropriating them for personal use.

*Benefits*

24. Based on information from the Director of Professional Regulation, the Committee has identified benefits from the above two cases. Early agreement increased the level of certainty in the process for both parties. Discipline Counsel was able to consider the strengths and weaknesses of the Law Society's case and to negotiate a fair outcome based on an agreed set of facts at an early stage in the process. Disclosure was not required, thereby saving time in the investigation and discipline process.

25. The two cases were different substantively, suggesting that the Consent Process may be appropriate in different types of cases.

*Challenges*

26. The Committee noted that identifying appropriate cases and moving them forward at an early stage in the investigation is a key challenge. The Committee understands that steps are being taken to assist in identifying more cases in future, at an earlier stage in the process.

27. In addition, despite the goal of expediting the investigations/hearing process, the Consent Process is somewhat cumbersome. This is largely because of the two-step process, as the Consent Resolution Conference is scheduled first, followed by the hearing. The requirement to schedule a Conference panel and a subsequent hearing take time, particularly since it is necessary to schedule the same three-member panel. It would be appropriate to explore ways to address this issue in future. For example, it may be possible to include in the Consent Proposal the parties' consent to a single member Hearing Panel.

**Recommendations and Next Steps**

28. The Committee believes that the goal of providing an alternative to the regular investigations/discipline process is still relevant. In the Committee's view, there have not been enough cases through the Consent Process to fully assess its efficacy. The Committee recommends that Convocation approve the continuation of the Consent Process for an additional two years.

29. The Committee's review of the consent resolution process has occurred in the context of its consideration of one of Convocation's current priorities, which is enhancements to Tribunals procedures and processes, including file and case management, to improve effectiveness and efficiency. Relevant priorities related to Professional Regulation are

enhanced case management, discipline diversion and avoidance, expanding matters for which a single adjudicator hearing can be utilized, and exploring written hearings.

30. The Committee continues to study these matters and there may be other ways to achieve the goals of the Consent Process that are equally effective.

31. Accordingly, it is recommends that:

    a. Convocation approve the continuation of the Consent Process as set out in this report, and

    b. The processes set out in Rule 29 of the *Rules of Practice and Procedure* (the Consent Resolution Conference and subsequent Hearing) be considered along with the other discipline/tribunals enhancements currently being studied.

The Law Society of Upper Canada | Barreau du Haut-Canada

**Report to Convocation**
**January 28, 2010***

# Professional Regulation Committee

**Committee Members**
Linda Rothstein (Chair)
Julian Porter (Vice-Chair)
Bonnie Tough (Vice-Chair)
Christopher Bredt
John Campion
Carl Fleck
Patrick Furlong
Gary Lloyd Gottlieb
Glenn Hainey
Brian Lawrie
Ross Murray
Sydney Robins
Baljit Sikand
Roger Yachetti

**Purpose of Report: Decision**

**Prepared by the Policy Secretariat**
**(Jim Varro – 416-947-3434)**

*Items deferred from December 4, 2009 Convocation

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## COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on January 14, 2010. In attendance were Linda Rothstein (Chair), Julian Porter (Vice-Chair), Christopher Bredt, Patrick Furlong, Glenn Hainey, Brian Lawrie and Ross Murray. Staff attending were Nicole Anthony, Julia Bass, Cathy Braid, Lesley Cameron, Grace Knakowski, Terry Knott, Lisa Mallia, Zeynep Onen, Sophia Sperdakos, Arwen Tillman and Jim Varro.

# PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE (JOINT REPORT WITH THE PARALEGAL STANDING COMMITTEE AND THE TRIBUNALS COMMITTEE)

**Motion**

**2. That Convocation approve the policy for the Pre-Proceeding Consent Resolution Conference for a two-year pilot project.**

**Introduction and Background**

3. In April 2009, the Committee began consideration of a proposal for an expedited investigations and hearing process for lawyers and paralegals who admit to conduct allegations against them and agree to a joint penalty to be submitted to a Hearing Panel to obtain an Order. The proposal necessitated discussions with the Tribunals Committee and the Paralegal Standing Committee, and culminated in a joint meeting of the Committees in November 2009.

4. This report includes the Committees' joint proposal for the new process, which is titled the Pre-Proceeding Consent Resolution Conference ("the Conference"), for Convocation's consideration.

5. If approved, amendments to the *Rules of Practice and Procedure* to implement the proposal will be required. These amendments will be presented at a future Convocation.

**Why the Conference is Being Proposed**

6. The Conference is intended to provide lawyers and paralegals with an alternative process to the regular investigations and hearing stream. Through this process, they may admit to conduct allegations and consent to a joint penalty to be submitted to a Hearing Panel for an Order.

7. The proposed process:

a. is flexible in that it provides for negotiations at an early stage for lawyers and paralegals who are interested in making early admissions in aid of a fast outcome that is more certain;

b. has the potential to reduce the time and resources required for full investigation and prosecution of some cases in an environment where caseloads that require a discipline response are increasing[1];

c. will save significant costs for the licensee[2]; and

d. with increased efficiencies, will continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

**Cases Suitable for the Process**

8. The Conference would be suitable for cases that meet the criteria discussed below, regardless of the nature of the conduct.[3]

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[1] In 2008, the Professional Regulation Division received 15% more cases than in the previous year, including an approximately 7% increase in conduct allegations. In 2009, this number has increased a further 3% and is expected to rise before the end of the year. The increasing number of lawyers and paralegals licensed in Ontario each year makes it unlikely that there will be an overall decrease in the number of complaints.

As the caseload increases, inevitably there is a related increase in cases that will require a formal response up to and including prosecution. An extensive investment of resources is required for any case that is taken to the Proceedings Authorization Committee (PAC) for either resolution or authorization for prosecution. Cases that are prosecuted require even more extensive investigatory and discipline resources. For example, in a mortgage fraud case, Discipline Counsel typically spend 200 to 400 hours working on each case. In more complex cases, Counsel spend in excess of 400 hours.

[2] Under the current process, where the evidence suggests that an investigation is likely to require authorization for a conduct application, the full investigation and discipline process must be deployed. This is the case even where the lawyer or paralegal who is the subject of the investigation admits to the wrongdoing and is seeking an early conclusion with sanction. There is no alternative fast track process. Although many hearings are streamlined at the hearing stage through Agreed Statements of Fact (ASF), this occurs after the completion of the full investigation (Investigation Report, Authorization Memorandum, witness statements, disclosure completed). In the absence of an ASF, Discipline Counsel must prepare for a fully contested hearing. Moreover, the experience of staff with lawyer complaints is that in cases where a lawyer considers admitting to wrongdoing to complete the matter quickly at the investigation stage, the lawyer's willingness to cooperate is significantly diminished by the time the lawyer reaches discipline. By that point, the lawyer has invested time and resources in the process and is often inclined to resist full engagement in the process.

[3] To elaborate:
Mortgage fraud. The evidence used in a mortgage fraud case is largely documentary. In this type of case, the Society can often be certain that the lawyer's admissions are supported by the evidence, and can assess the appropriate penalty to be proposed to the lawyer and his or her counsel. Given the size of mortgage fraud investigation files, the time saved by not having to prepare the file for disclosure and for hearing, not having to prepare witnesses and forgoing the hearing, are significant.

9. Since the public interest is paramount in the Law Society's regulatory processes, cases of a serious nature and that present a novel issue that should be fully tried at a hearing will not be appropriate for the process. Further, a case will not be appropriate for the process if there is a concern that sufficient facts cannot be included in the record of the hearing resulting from the Conference to satisfy the Law Society's obligation to have a transparent and fair process.

10. There will also be other cases where the public interest requires that there be a full hearing on the merits. The Proceedings Authorization Committee (PAC), which will be involved in approving a case for the process, as described below, will have the opportunity to apply these criteria when reviewing cases that may be suitable for a Conference.

**Overview of the Process**

11. Lawyers and paralegals would be notified of the availability of the Conference at the start of an investigation. A decision to move a matter to a Conference would be made only after an investigation sufficient to ensure that the regulatory issues are known and complete. The process would be available only where no disciplinary proceedings have been authorized in the case.

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Financial transactions. The evidence used in cases of financial misconduct is often supported by documents. Where documentary evidence is lacking, for example, where a lawyer or paralegal's books and records are not up to date, the lawyer's or paralegal's admissions would assist the Society in completing its investigation and would save the time and resources required for a contested hearing.

Fail to serve. Where a lawyer or paralegal fails to serve his or her clients, evidence is obtained from the client file, court documents and from the lawyer or paralegal and clients. Where the lawyer or paralegal does not admit to the allegations, they can take a significant amount of time to prove. If a lawyer or paralegal is willing to admit to a failure to serve his or her clients, consideration should be given to the appropriateness of the consent process.

Professionalism. Where allegations of incivility or misleading the court arise out of proceedings, the factual issue of what the lawyer or paralegal said or did may not be in dispute and is often supported by transcripts or documents. However, the lawyer or paralegal often raises a defence justifying his or her conduct, for example, on the basis of the actions of the opposing party or the adjudicator. Investigating and prosecuting these cases is very time-consuming. If a lawyer or paralegal is willing to agree to a discipline outcome and penalty, consideration should be given to the appropriateness of the consent process and the fact that it will result in a public order and record of this conduct.

12. Cases dealt with through the Conference process would result in a Hearing Panel Order or would be returned to the Society for further investigation.

13. If the parties agree on the facts and penalty, after authorization by the PAC, the agreement would be considered at the Conference (a meeting of a three-person panel similar to a pre-hearing conference). If the agreement is approved, the Notice of Application in the matter would be issued and served. The Conference panel would then convene as the Hearing Panel and order the agreed-upon result. Some matters may be heard by a single member of the Hearing Panel, selected from the three panel members who convened for the Conference.

14. If the Conference panel rejects the agreement, the Law Society would resume its investigation.

**Pilot Project**

15. As this is a new process, the Committees are proposing a pilot project. The pilot project would provide for a two year review on the anniversary of the approval of the policy by Convocation, at which time it could be continued, amended or ended.

**Details of the Conference Process**

16. The following is a narrative description of the steps in the proposed Conference. A diagram following paragraph 36 illustrates the process.

Step 1 - Initiating the Conference

17. Either the lawyer/paralegal or the Law Society may initiate discussion about the Conference. The Director, Professional Regulation must approve a case in order for it to be diverted to this process. The Director will only approve a case where, in the Director's opinion, diversion would fulfill the Law Society's duty to act in a timely, open and efficient manner and its duty to protect the public interest.

18. In addition to the general test set out in paragraph 17 above, before approving a case, the Director must ensure that the following criteria are met:

a. The public interest can be addressed through a consent order. Cases will not be included in the process if they present novel issues, or issues which, for reasons of regulatory effectiveness or transparency, require a full hearing.
b. There is sufficient Law Society jurisprudence on the issue of conduct and penalty for the Society to be able to agree to the process (the jurisprudence forms the basis for the Society's agreement to a penalty or range of penalties on the basis of the applicable law and facts);
c. Discipline proceedings have not yet been authorized in the matter;
d. The lawyer or paralegal is prepared to admit to the allegations made by the Society;
e. There is no issue of failure to cooperate with the Law Society; for example, the lawyer or paralegal is responding promptly to the Law Society;
f. The lawyer or paralegal agrees to abide by the timeline of 30 days to arrive at an agreement;
g. The Law Society has no concerns about the lawyer's or paralegal's capacity to engage in negotiations;
h. The lawyer or paralegal understands that the result of the Conference will be a public hearing, although it will be abbreviated, and a public Order;
i. The lawyer or paralegal has legal representation, failing which the lawyer or paralegal affirms that he or she has been advised to obtain independent legal advice about his or her rights in the Conference process.

19. The Law Society has the right to decide that a case is not suitable for the Conference where any of the factors listed in paragraphs 17 and 18 above would make it unsuitable or where the Law Society is not satisfied that there has been sufficient investigation to make a determination on the suitability of the process.

20. Other matters may affect the Law Society decision to continue with the process. For example, if new evidence relevant to the subject of the Conference comes to the Law Society's attention, or if allegations of misconduct about the lawyer or paralegal arise after the process has begun, it may not be appropriate for the Law Society to continue

with the resolution of the original matter pending the assessment of the evidence or the outcome of the new investigation.

Step 2 - Diversion into the Conference Process

21. The Law Society and the lawyer or paralegal would negotiate a tentative agreement on admissions and penalty. The Law Society would conduct a fast-track investigation before finalizing the agreement. The Law Society would obtain the lawyer's or paralegal's admissions and such evidence as necessary to satisfy the Law Society that the admissions are accurate and would support a finding of professional misconduct or conduct unbecoming.

22. The consent proposal would be prepared by the Law Society and presented to the lawyer or paralegal. The lawyer or paralegal would have 30 days to accept or reject the agreement, or to negotiate changes with the Law Society. The consent proposal would be based on a standard template that includes the lawyer's or paralegal's admissions and the joint penalty proposal, including an explanation of the basis for the penalty recommendation. The template will include the lawyer's or paralegal's declaration that the information provided is complete and accurate.

23. Where there is no agreement on penalty, the parties may still use the process if there is agreement on a finding of professional misconduct and agreement on the range of an appropriate penalty. In that case, the parties would provide their position on the range of penalty and this will be included in the documentation filed for the Conference.

24. With agreement as described above, the case will proceed to hearing based on the penalty or the range of penalty submitted.

25. If one of the parties is unable to agree to the outcome, the consent process would terminate and the matter would be returned to the Investigation department. The documents prepared in support of the Conference would be excluded from any further proceedings.

Step 3 - Submission of the Consent Proposal to the PAC

26. Upon approval of the agreement by the Director, Professional Regulation, the consent proposal would be presented to the PAC for authorization of a conduct proceeding and authorization to proceed with the Conference.

27. As with all conduct proceedings, pursuant to By-Law 11[4], section 51(2)), the PAC must be satisfied that there are reasonable grounds for believing that the lawyer or paralegal has contravened section 33 of the *Law Society Act*.

28. If the PAC approves the agreement, the matter would be submitted to a three-person Conference panel for consideration. The Notice of Application would not be issued at this stage.

29. If the PAC is not satisfied to the requisite standard that discipline proceedings are warranted, the consent agreement would fail and the matter would be returned to the Investigation department to proceed in the normal course.

Step 4 - Presentation to a Conference Panel

30. The proposal would be presented at the Conference for approval. The submission would include a draft Notice of Application, a draft Order and the consents from the lawyer or paralegal and the Law Society that if the individuals who convene as the Conference panel accept the proposal, they may subsequently convene as the Hearing Panel to determine the matter. The Hearing Panel would not meet until after the Notice of Application is issued and served.

31. Consistent with the current Convocation policy on joint submissions (attached as **Appendix 1**), the members of the Conference panel should accept the consent proposal unless the panel concludes that the joint submission on penalty is outside the reasonable range, in the circumstances.

[4] Regulation of Conduct, Capacity and Professional Competence.

32. Where the Conference panel does not accept the joint submission, the panel may reject the consent proposal, or may give its views to the parties about the case, including penalty. The parties may agree to adopt the Conference panel's views about the case and the penalty the panel proposes. The decision resulting from the Conference is by consent only. If the panel or either party disagrees, the proposal would fail. No costs are to be awarded to either party in a subsequent proceeding for failure to accept an alternate proposal by the Conference panel.

33. If the Conference panel does not approve the proposal, the Law Society would complete its investigation and proceed through the process in the normal manner. The draft agreement and Order are not admissible for the purpose of any subsequent investigation and prosecution of the same allegations.

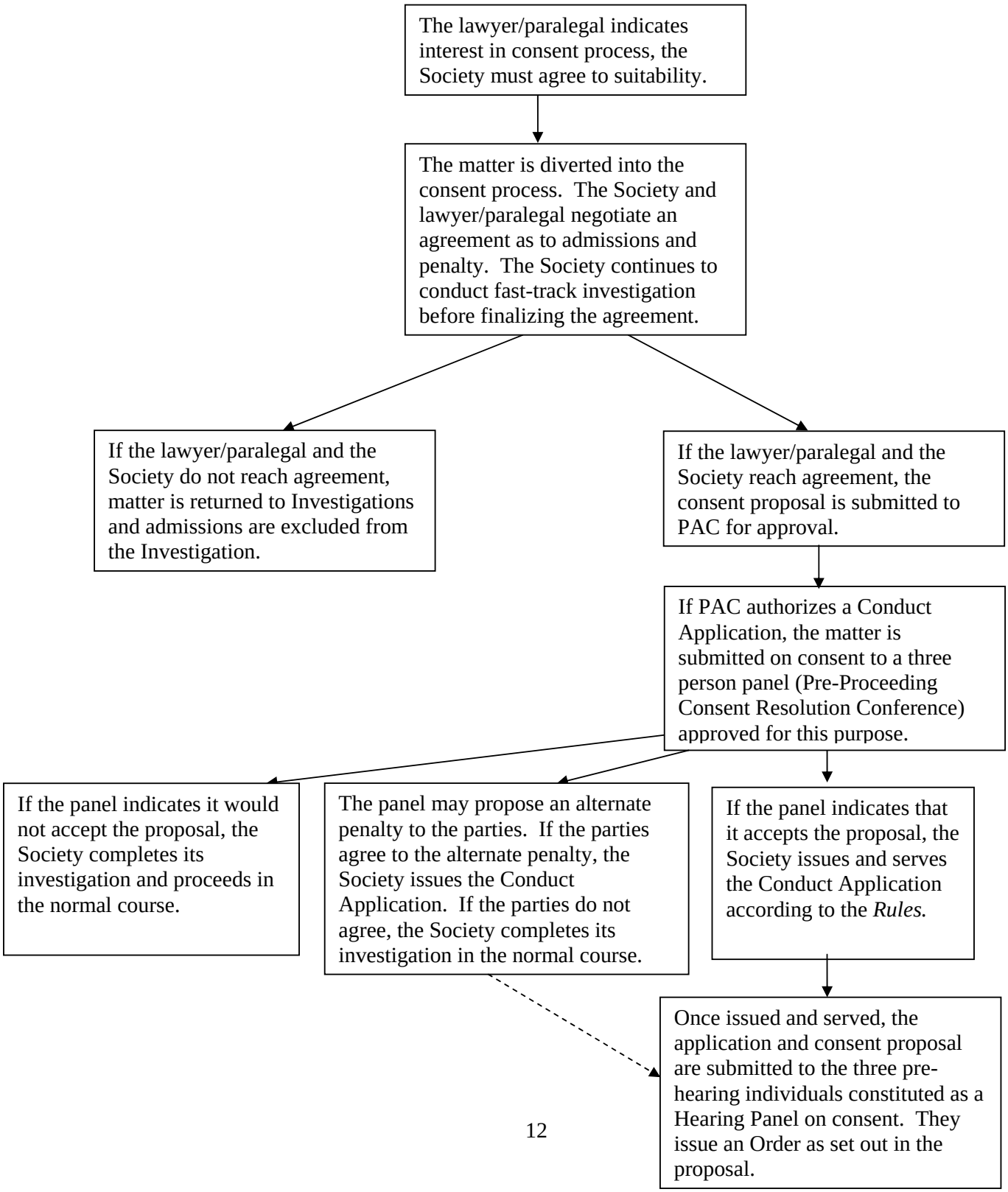
Step 5 – The Hearing

34. If the Conference panel approves the proposal, the Law Society would then issue the Notice of Application. Once issued, the Notice would be served according to the *Rules of Practice and Procedure* and would become a public document.

35. A hearing would be held before the individuals who convened as the Conference panel and who now sit as the Hearing Panel for the purpose of making a determination on the consent proposal. Some matters may be heard by a single member of the Hearing Panel, who would be selected from the three persons who convened for the Conference.

36. The proposal, which includes the lawyer's or paralegal's admissions, would be filed as an exhibit at the hearing to become part of the public record. The Hearing Panel would issue an Order in the normal course. Reasons for the Order are an important component of the public nature of this process.

## PROPOSED CONSENT PROCESS



**Key Elements of the Process**

37. The following highlights some key elements of this consent process.

Transparency

38. If the proposed agreement is approved by the PAC and at the Conference, it will result in public notice, a public hearing and a public Order. From a public perspective, there is no significant difference between the current process in which matters are resolved through an Agreed Statement of Fact (ASF), and the Conference process. The following chart illustrates the similarities and differences between the two processes.

| Current Process | Conference Process |
|---|---|
| Non-public investigation | Non-public investigation |
| Non-public, off-the-record settlement discussions | Non-public, off-the-record consent resolution discussions |
| | Non-public drafting of consent agreement |
| | Non-public agreement on disposition |
| Non-public consideration by PAC | Non-public consideration by PAC |
| **Public** Notice of Application | Non-public settlement conf. |
| Non-public Pre-Hearing Conf. | **Public** Notice of Application |
| Non-public drafting of ASF | |
| Non-public agreement on disposition | |
| **Public** hearing; revelation of ASF and joint submission on disposition | **Public** hearing; revelation of consent agreement and joint submission on disposition |

39. As illustrated above, the Notice of Application is issued and served following the approval at the Conference, and this is necessary for the following reason. If the Conference panel were to reject an agreement, the proposal would fail, and the Society would complete its investigation. If the Notice was public at that time and the Conference panel rejected the proposal, it would be unfair to the licensee and difficult for the Society to complete its confidential investigation.

40. Once the Notice of Application is issued and served, it becomes public. As with all investigations, new complaints are sometimes received as a result of this public notice. If a new complaint was received after the issuance of the Notice of Application that results from the Conference, that complaint would be investigated separately from the complaint that is the subject of the consent proposal, as is done in the regular discipline stream.

Penalties and Mitigation

41. The agreed penalty in the consent proposal must be proportionate. It should reflect penalties imposed in cases with comparable findings, taking into account the costs saved by making the early admission. All penalties would be available in this process, including revocation.

42. There may be a range of possible penalties. A number of factors informing penalty are described in *Law Society of Upper Canada v. Ricardo Max Aguirre*, 2007 ONLSHP 0046 and these are all relevant to the consent process as well. The following factors inform the appropriate penalty to be proposed, with those most relevant to the consent process emphasized:

*a.* The existence or absence of a prior disciplinary record;

*b.* *The existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others;*

c. Whether the member has since complied with his or her obligations by responding to or otherwise co-operating with the Society;

d. The extent and duration of the misconduct;

e. The potential impact of the member's misconduct upon others;

*f.* *Whether the member has admitted misconduct, and obviated the necessity of its proof;*

g. Whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct);

h. Whether the misconduct is out-of-character, or, conversely, likely to recur.

Three-Member Conference Panel and Hearing Panel

43. The proposed process provides that the same individuals would convene for the Conference and the Hearing Panel, by consent of the parties.

44. This feature of the proposed process resembles the process that may be followed when agreement is reached on facts and issues at a pre-hearing conference before a single panelist and, with the consent of the parties, the single panelist presides at the hearing on the merits. Rule 22.10 (2) of the *Rules of Practice and Procedure* provides that a single panel member may hear a case, on consent of the parties. This is an alternative dispute resolution process which, with adequate protections, is useful for the parties and the tribunal. In the proposed Conference process, rather than a single individual convening for the pre-proceeding Conference, three individuals would convene as the Conference panel.

45. There are two reasons for having a three-person panel at the Conference. First, the agreement of a three-person panel on the outcome between the Society and a lawyer or paralegal would have greater weight. Secondly, if only one member of a three-person panel were to preside at the Conference, the Hearing Panel might reject the agreement that the Conference panel had accepted.

46. At the hearing stage that follows the Conference, in some cases, it may be appropriate for a single member of the Hearing Panel to preside at the hearing. This person would be selected from the three persons who convened as the Conference panel, as he or she would be familiar with the facts and the issues that led to the consent agreement. Similar to the process described in paragraph 44, this person would sit as a single member with the consent of the parties.[5]

[5] Ontario Regulation 167/07 (Hearings Before the Hearing and Appeal Panels) provides as follows:

**Proceedings to be heard by one member**

2. (1) Subject to subsection (2), the chair or, in the absence of the chair, the vice-chair, shall assign either one member or three members of the Hearing Panel to a hearing to determine the merits of any of the following applications:

…

Legal Representation

47. The process is predicated on the lawyer or paralegal having legal representation. The lawyer's or paralegal's admissions and agreement to the proposal are essential to the success of the consent process. While legal representation is not a prerequisite to participating in the Conference, it would be strongly encouraged by the Society. Lawyers and paralegals who participate in the process would be advised by the Law Society to obtain legal advice.

Timelines

48. Since the Conference is a diversionary, "without prejudice" process, it is not in the public interest to stall the investigation during protracted negotiations and delay. The Committees propose that the timeline for arriving at an agreement be 30 days from the time that the agreement is presented to the lawyer or paralegal by the Law Society. If agreement is not reached in 30 days, the Law Society would resume its investigation.

Documents and the Record

49. The documents filed before the Hearing Panel should be public in the normal course, with the notation that it is the result of a consent proposal that would also be public as part of the Tribunal record.

**Tribunals Office's Administration of the Process**

50. Attached at **Appendix 2** is a proposed template prepared by the Tribunals Office for the administration of the process, with particular emphasis on ensuring the process is open and transparent and in keeping with general Tribunals administration.

**Amendments to the *Rules of Practice and Procedure***

51. To implement the Conference process, amendments to the *Rules of Practice and Procedure* would be required. They would refer to the process as a "pre-proceeding

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2. An application under subsection 34 (1) of the Act, if the parties to the application consent, in accordance with the rules of practice and procedure, to the application being heard by one member of the Hearing Panel.

consent resolution conference", and codify the procedural elements of the process described in this report. Consequential amendments to certain Rules may also be required.

52. Amendments to the Rules will be provided at a future Convocation should Convocation agree to the proposal for the Conference.

**APPENDIX 1**

## CONVOCATION POLICY ON JOINT SUBMISSIONS
## (Discipline Policy Committee Report to Convocation)

B.l. Joint Submissions of Counsel

B.1.1. The Committee was asked to consider the manner in which the joint submissions of counsel are currently treated by Discipline Panels, in light of the principles adopted by Convocation on March 27, 1992 in respect of joint submissions.

B.1.2. On March 27, 1992, Convocation adopted the recommendations of this Committee which provided, inter alia,

"5(a) Convocation encourages benchers sitting on discipline committees to accept a joint submission except where the committee concludes that the joint submission is outside a range of penalties that is reasonable in the circumstances.

"5(b) If the Committee, after hearing and considering submissions of counsel, does not accept the joint submission as to a particular penalty or as to the shared submission as to a range of penalties, the Committee will be at liberty to impose the penalty that it deems proper and should give reasons for not accepting the joint submission."

B.l.3. Some members of the Committee expressed concern that these principles are not being followed at the Committee level or at Convocation and that a lack of certainty in the process might discourage counsel from entering into Agreed Statements. The Committee noted that where, following negotiations of an Agreed Statement of Facts on the basis of a joint submission as to penalty, the proposed penalty is rejected, it might be appropriate to provide the Solicitor the option of commencing the hearing anew before another Committee.

B.l.4. Your Committee established a Sub-Committee, chaired by Robert J. Carter, Q.C., to consider the present practice regarding joint submissions at both the Committee level and at Convocation, to consider the consequences of the practice and to report to the Committee with recommendations.

…

ALL OF WHICH is respectfully submitted
DATED this 24th day of February, l995
D. Scott, Chair

THE REPORT WAS ADOPTED

**APPENDIX 2**

## Tribunals Offices' Administration of the Proposed Consent Process

1. Discipline Counsel will request in writing a date from the Hearings Coordinator, Tribunals Office for the Pre-Proceeding Consent Resolution Conference ("the Conference"), and provide a time estimate.

2. The Hearings Coordinator will schedule the Conference date and secure a three person panel as assigned by the Chair of the Hearing Panel.

3. The composition of the Conference panel will mirror the requirements of *Ontario Regulation 167/07* to allow this panel to convert to a Hearing Panel should the parties' proposal to the Conference panel be accepted.

4. The Hearings Coordinator will advise Discipline Counsel and the lawyer or paralegal of the assigned Conference date and panel. The parties will immediately advise the Hearings Coordinator of any conflicts with the date or panel.

5. If the parties' proposal is accepted by the Conference panel, the Hearings Coordinator will attend in person at the Conference to facilitate scheduling a hearing date for the Hearing Panel and parties to convene at a future date.

6. If the matter is to be heard by a single member of the Hearing Panel, the members of the Conference panel shall elect one member to preside on the hearing date as a Hearing Panel and will so notify the Hearings Coordinator.

7. The matter will now follow the same protocol applied by the Tribunals Office as in other hearings.

8. In accordance with Rule 9 of the *Rules of Practice and Procedure*, Discipline Counsel will request the Tribunals Office to issue and file the notice of application and will serve it.

9. Once filed, the notice of application will be publicly available.

10. The notice of application will refer to the hearing date scheduled in paragraph 5 above. The matter will by-pass the Proceedings Management Conference (PMC) and go straight to a hearing date.

11. To satisfy transparency requirements, two to four weeks prior to the hearing date, the Tribunals Office will prepare a summary of the notice of application for publication on the Law Society's "Current Hearings" website.

12. During the hearing, the accepted proposal referred to in paragraph 5 above will be marked as an exhibit and thereby form part of the public record. The Hearing Panel will endorse the notice of application to reflect its Decision and Order as set out in the accepted proposal.

13. After the hearing, the Office will
    - prepare any required formal orders from the Hearing Panel's endorsement;
    - deliver the Decision and Order and reasons of the Hearing Panel, if any, to the parties;
    - publish an order summary on the Law Society's "Tribunal Orders and Dispositions" website and in the *Ontario Reports*; and
    - publish the Hearing Panel's reasons, if any on the Canadian Legal Information Institute (CanLII) and Quicklaw databases.

14. The matter will then be closed, catalogued and archived off site.

15. After the matter is closed and on request, it would be made available to the public for viewing or copies of content, unless the Hearing Panel had ordered otherwise in the course of the hearing.

# CONFLICTS OF INTEREST STANDARD FOR COUNSEL IN PRO BONO LAW ONTARIO'S "BRIEF SERVICES" PROGRAMS

**Motion**

**53. That Convocation approve**

**(a) the policy for a new rule in the *Rules of Professional Conduct* that modifies the standard for conflicts of interest for lawyers participating in Pro Bono Law Ontario's court-based brief services programs by permitting a lawyer to provide brief services to a person within such programs unless the lawyer knows of a conflict of interest that would prevent him or her from acting, and**

**(b) the draft of the new rule for review by the Law Society's Rules drafter.**

**Introduction**

54. Pro Bono Law Ontario (PBLO) has been discussing with the Law Society the challenges PBLO faces in providing brief services to clients through its court-based programs. Many of the lawyers who volunteer for this work are younger lawyers from large law firms that represent large institutional and corporate clients.

55. A major issue affecting the ability of these lawyers to provide the services is the current conflicts of interest regime and the requirements in the *Rules of Professional Conduct.* The Rules require that a lawyer not act where there is or likely to be a conflict of interest. This means that a lawyer cannot represent a plaintiff or defendant where the lawyer's firm acts for or represents the other party in other matters, as this would breach the lawyer's duty of loyalty to that client.

56. To determine if a conflict exists, the lawyers assisting PBLO must have their firms do extensive conflicts searches before agreeing to provide the brief services. This can be very time-consuming, to the point where clients are being denied services because the conflicts checks are pending. PBLO has advised that this affects its ability to provide

access to justice to those for those who access PBLO's programs, and can defeat the purpose of the programs for those most in need.

57. PBLO has requested that the Law Society consider a modification of the conflicts standard for lawyers engaged in these brief services. Two other Canadian law societies have recently adopted rules to this effect.

58. The Committee considered the matter and is proposing that Convocation agree that lawyers performing brief services through PBLO programs may act for a client unless they *know* a conflict exists that would prevent them from acting.

59. If Convocation approves the proposal, the Committee will prepare a draft rule, with the assistance of the Law Society's Rules drafter, Don Revell, to provide the necessary guidance.

**Background on PBLO's Law Help Ontario Programs**

60. PBLO operates programs under the banner of Law Help Ontario that assist those who cannot afford to pay for legal services (see **Appendix 3**, which also includes information on other PBLO initiatives).

61. The **Small Claims Duty Counsel Project,** launched in June 2006, provides brief services including legal merit assessments, form-completion assistance and duty counsel to low-income unrepresented litigants appearing before Small Claims Court in Toronto.

62. In late 2007, the **Law Help Centre at the Superior Court of Ontario,** a self-help centre in Toronto, was opened as a two-year pilot project, developed in partnership with the Ministry of the Attorney General and The Advocates' Society. Low-income unrepresented litigants with civil matters for which a legal aid certificate is not available can access basic procedural information, form completion assistance, summary advice and duty counsel services.[6]

[6] Information from PBLO in 2007 was that there were more than 15,000 cases brought before the Court in 2006, many of which were brought by a growing number of unrepresented litigants.

63. Individuals must meet financial eligibility requirements to qualify for assistance, and corporations and businesses do not qualify. The Centre does not assist with family law matters, criminal cases, human rights, or other similar cases.

64. The application form to be completed by those seeking these services, attached at **Appendix 4,** offers information on the program, including the following:

a. the volunteer lawyers will not become their lawyer; the scope of legal services provided is limited to brief services, and any services with respect to potential representation at a motion, trial or appeal are at the sole discretion of the volunteer lawyer; and

b. the matter must clear a conflicts check, and that if a conflict arises, this means that a lawyer (or law firm) cannot represent the person if the opposing parties are the firm's client.[7]

65. Lawyers who volunteer for these programs must submit an application form to PBLO that requests a variety of information about their qualifications, practice and interests. They must also adhere to the Volunteer Guidelines.[8]

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[7] Information on PBLO's website about conflicts for Small Claims Court assistance is as follows:

> In the legal profession, a lawyer (or law firm) cannot represent you if the opposing parties are also their client. This is commonly referred to as a "conflict of interest." When you apply for assistance, we will confirm that the opposing parties are not being represented by the volunteer lawyer or their law firm. If a conflict of interest exists, regrettably, we will not be able to represent you in court nor offer summary legal advice.

[8] *Volunteer Guidelines*
Pro Bono Law Ontario greatly appreciates the participation of pro bono volunteers. As a volunteer, you agree to adhere to the following guidelines:

1. Abide by the *Rules of Professional Conduct*.

2. Treat pro bono clients with the same level of professionalism as paying clients.

3. Stay in touch with the pro bono project coordinator who referred the case to you. The project coordinator will contact you periodically to see how the matter is progressing and to see if you require any additional support such as training and mentoring, access to resources, or will provide a referral list of social service agencies that can assist your client.

4. If you find that you are unable to devote sufficient attention to the pro bono matter assigned to you, contact the project coordinator immediately.

66. These PBLO projects are established pursuant to PBLO's Best Practices Manual for Pro Bono Programs. The Manual includes a number of requisites for the programs covering such things as communication to volunteers about their professional and ethical duties, policies and procedures to identify and address conflicts of interest (it is the *pro bono* lawyer's responsibility to ensure that conflicts of interest do not exist or arise when the lawyer decides to take on a case) and appropriate intake and co-ordination systems.

67. Law Help Ontario has developed its own guidance to lawyers within the current regulatory framework. The following excerpt from the Law Help's 2008 pilot project report, discussed later in this report, explains:

> **Scope of Service: Providing Limited Scope Assistance**
>
> Law Help has been developing procedures and best practices regarding the provision of limited scope assistance. An advice module for volunteer lawyers has been developed to address best practices regarding a lawyer's ethical and professional obligations in a court based context where providing limited services, such as appearing on a motion. This advice module (and others) will be posted on the Law Help website as an on-line resource for its volunteers.
>
> Limited retainer forms are in use that recognize the various types of limited scope assistance that may be offered, including single day assistance, multiple day assistance (both under the auspices of Law Help) and a private limited scope retainer between the firm and litigant.
>
> Law Help encourages volunteer lawyers to use these written retainers in circumstances where they are providing services to litigants beyond the standard 30 minutes information and advice session. For example, where they may be drafting (or "ghostwriting") documents or appearing before Superior Court on a motion. In addition, a form is in use that the volunteer

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5. Keep track of the amount of time you work on the matter and, when the matter is completed, please let us know what your total commitment was.

6. Inform the project coordinator when the matter is complete.

7. Complete and return surveys or evaluation forms (usually just a few quick questions) to the project coordinator. Your feedback is an important means of improving the quality of our pro bono projects, and can even help PBLO tell the story of the good work being done by lawyers in Ontario.

8. If any problems or questions arise in the course of representing your client, contact the project coordinator immediately.

lawyer may provide to opposing counsel, court staff, and the presiding justice to notify them of the limited role of the Law Help duty counsel service.

**The Manner in Which the Conflicts Issues Arise and PBLO's Efforts to Address the Issue**

68. As noted earlier, PBLO has advised that the current regulatory framework with respect to conflicts of interest has created "barriers" to lawyers' participation in these brief services projects. PBLO explained that these barriers place significant administrative burdens on PBLO's operation of these projects. The concern is that this will threaten their sustainability when serving a high volume of clients, especially in Superior Court.

The Rules in Question

69. The regulatory framework in question includes the *Rules of Professional Conduct* on conflicts of interest:

> 2.04 (1) In this rule,
>
> a "conflict of interest" or a "conflicting interest" means an interest
>
> (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
>
> (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.
>
> **Avoidance of Conflicts of Interest**
>
> 2.04 (2) A lawyer shall not advise or represent more than one side of a dispute.
>
> 2.04 (3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

70. The Committee learned that approximately 30% of Law Society complaints concern an issue that touches on conflict. The Rules do not specify the types of conflicts checks required or how extensive they need to be to find a conflict. But in response to a complaint, the Law Society would be looking for evidence that the lawyer had an appropriate process in place, and made reasonable efforts in the circumstances to

determine if a conflict exists. Further, the Society would be concerned that once a conflict is identified, the lawyer responded appropriately.

71. From the Law Society's viewpoint, any amendment to the *Rules of Professional Conduct* would have to be consistent with the common law, including recently decided cases concerning loyalty and confidentiality of client information.

How PBLO Has Defined the Issue

72. David Scott, Chair of PBLO, wrote to Treasurer Gavin MacKenzie in 2007, just prior to the launch of the Superior Court Law Help Centre, and explained the issue respecting conflicts in PBLO's court-based programs as follows:

> One of the Rules of particular interest in a context such as the Law Help Centre is conflicts of interest. PBLO has learned from its other duty counsel projects (for example, the Small Claims Duty Counsel Project) that doing full conflicts screening where pro bono advice is being offered can be extremely challenging given the time-lines, volume and logistics of these settings.
>
> On the one hand, our law firm partners have indicated that the volume of conflict searching required in these settings is administratively burdensome. It should be noted that to date these firms have been large firms with sufficient administrative resources to undertake the additional conflict searches. Mid-size and smaller firms participating in the Law Help Centre will find these requirements even more challenging.
>
> On the other hand, walk-in applicants for our services have had to wait up to three hours to find out whether they can speak with a volunteer lawyer or not, many of them running out of time to obtain services. In fact, PBLO found in the course of administering its Small Claims Duty Counsel Project that 80% of all applicants who were refused services, were denied for conflict of interest reasons.
>
> In other words, the conflict of interest regime, as the firms understand the existing LSUC requirements, has created a real barrier to pro bono participation and has diminished PBLO's ability to improve access to justice for unrepresented litigants and improve the administration of justice for judges, court staff and the legal profession.

73. In 2007, PBLO's proposal was to have the Law Help Centre adopt the following policy:

> A lawyer who, under the auspices of PBLO's Law Help Centre, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided is subject to the conflict of interest provisions within Rule 2 of the Rules of Professional Conduct only where the lawyer knows that the representation of the client involves a conflict of interest within the meaning of Rule 2.

74. In March 2008, the Law Society received information about the experience of the Law Help Centre with conflicts of interest. The information was that pro bono counsel were turning away a considerable number of clients on the basis of conflicts of interest.

75. More recent information was received from PBLO this fall, at the request of the Law Society. PBLO confirmed the information disclosed in Mr. Scott's letter:

a. The amount of time it takes to clear conflicts creates long delays for litigants trying to access legal assistance. Depending on the law firm and conflict checking process, litigants can expect to wait anywhere from 20 minutes to three hours before they can speak with a pro bono lawyer. This issue is compounded by the number of litigants who try to use the centre. Between January and September 30, 2009, the Law Help Centre had over 5800 visitors, nearly all of whom had to wait for a conflicts check to clear before they could receive assistance. The delays multiply and force the centre to turn people away. No available lawyers and running out of time in a day remain the main reasons that people are denied service at Law Help Ontario.

b. Conflict checking impedes law firm participation, especially now that the demand from the public is so high. In the past three months, the PBLO has been informed on at least three separate occasions that law firms were cancelling their pro bono appearances because their conflicts departments were being overwhelmed by the volume of names they had to run.[9]

[9] In November, 2009, the Law Society received information from PBLO that a lawyer at one firm was unable to continue with duty counsel sessions. The lawyer explained that the conflicts check system at the firm did not allow for quick checks, which caused substantial delays and hindered the volunteer process at the lawyer's last session.

76. Law Help Ontario's one year report (2008) includes a discussion of how PBLO has attempted to manage the conflicts issue to date:

> Conflicts of interest continue to present a problem for servicing litigants. However, important strides in identifying the scope of the challenge and developing important institutional support to rectify the issues have occurred. The main problem is that litigants are turned away when a conflict exists or must wait--sometimes up to 3 hours--for conflicts to clear. In addition, some law firms are also reluctant to assist clients if they think the matter may pose a future business conflict. A common problem occurs where large companies or institutions (banks, financial companies, insurance companies, the city, police, etc.) are involved. Most of the larger law firms--the source of the majority of PBLO's volunteers--are conflicted when the lawyer checks with their firm. At least one firm has reported that approximately 80% of such conflicts are affiliated with financial institutions.
>
> The conflicts issue is compounded as the popularity of the projects grows. Law Help now attracts litigants from communities outside of the Toronto area. It is frustrating for litigants who have traveled great distances if they have to wait for half a day, or if they can't be served at all. Where a conflict of interest exists, Law Help staff often give out the Law Help phone number to the litigant so they can call ahead to have conflict checks cleared if they choose to return on another day. This is helpful to the litigant; however, it interrupts front line staff providing direct assistance. It can also be frustrating when the litigant has a question that is procedural (such as a question regarding service of documents), because they still have to clear conflict checks in order to speak to a lawyer.
>
> Law Help tracked the actual number of conflicts for a four month period from March 1 to June 30, 2008. There were 184 conflicts of interest where litigants could not be seen and either had to return, or were not serviced at all. This averages out to 2.3 conflicts per day or 25% of all applicants for assistance during this period.
>
> Recent developments have helped increase access to some extent. In order to decrease the wait time for clients, many participating firms have developed an expedited search process for Law Help. If the name matches a name in their database, the firm deems it to be a conflict. They eliminate the much lengthier checking process.[10]

[10] One volunteer lawyer advised the Managing Lawyer at Law Help that their standard firm conflict check could, in some cases, take a couple of days to obtain a result.

> Moreover, there is growing institutional concern about the fact that the current commercial, professional and ethical obligations around conflicts have created a barrier to justice for the neediest litigants. PBLO has struck a working group to determine whether a more satisfactory conflicts process can be identified for the provision of brief, pro bono legal services in court-based context. This has resulted in a major bank (RBC) advising its clients that lawyers from law firms that have represented RBC in the past or at present may participate in Pro Bono Law Ontario's court-based pro bono projects--notwithstanding this potential conflict--where a lawyer provides short term, limited legal services to a client in circumstances where neither the lawyer nor the client expects that the lawyer will provide continuing representation in the matter.

77. Lynn Burns, PBLO's executive director, confirmed that a very high percentage of the conflicts arose with large institutional clients, primarily financial institutions, and that not all conflicts are actual conflicts. Many law firms will not assist litigants if there is a business conflict. PBLO has tried to address this by working with some of the major financial institutions to consent to conflicts in the context of court-based pro bono services.

78. In late 2008, Ms. Burns confirmed that the correspondence from RBC was sent to at least 12 law firms advising that it was prepared to waive conflicts on the limited basis described above. She advised that this is the start of what she hopes will be a common decision among all of the major financial institutions.

**Other Legal Regulators**

79. PBLO provided information to the Law Society about developments in the United States and Canada.

80. In the United States, a number of the courts and state bar associations have adopted rules to enhance access to justice for the unrepresented and to facilitate pro bono participation in brief services projects, especially those run through an organized assistance program. The common elements of these initiatives are:

    a. developing comprehensive plans to address the needs of unrepresented litigants, including revising judicial ethics and court procedures;

b. informed consent on the client's part regarding the use of limited representation
c. use of retainers to limit representation up front;
d. adoption of special conflict-of-interest rules in high-volume, public service programs that adhere to best practices.

81. One example is the rules adopted by the Washington State Bar Association (and by the Court, in accordance with the usual practice in many states for lawyer regulation) applicable to this type of representation, which state that a lawyer who is aware of a conflict may not act in providing brief services to a person.

82. Two law societies in Canada have recently amended their rules of conduct to provide a more relaxed standard for conflicts within the narrow scope of brief services retainers. Some of the elements of the Washington rules appear in these new rules.

83. The Law Society of British Columbia adopted a report on the unbundling of legal services[11], which included Recommendation 15 dealing with pro bono services through court-annexed and non-profit legal clinics or programs (see **Appendix 5** for the text of the Recommendation and discussion). This led to the adoption of the following conflict rules (in Chapter 6) in January 2009:

> **Limited representation**
>
> **7.01** In Rules 7.01 to 7.04, **"limited legal services"** means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a not-for-profit organization with the expectation by the

[11] Report of the Unbundling of Legal Services Task Force – Limited Retainers: Professionalism and Practice, April 4, 2008, Law Society of British Columbia. This report was provided to the Committee for information in October 2008, with the following note:

> The issue identified in paragraph 9d. above has been the subject of discussion between Law Society staff (through the CEO's office) and Pro Bono Law Ontario (PBLO), primarily from the perspective of conflicts of interest and the services that pro bono counsel in large firms provide through PBLO's programs (this issue is addressed in Recommendation 15 of the BC report). These discussions are ongoing and may result in consideration by the Committee at a future date of changes or enhancements to the *Rules of Professional Conduct*.

lawyer and the client that the lawyer will not provide continuing representation in the matter.

[added 01/09]

**7.02** A lawyer must not provide limited legal services if the lawyer is aware of a conflict of interest and must cease providing limited legal services if at any time the lawyer becomes aware of a conflict of interest.

[added 01/09]

**7.03** A lawyer may provide limited legal services notwithstanding that another lawyer has provided limited legal services under the auspices of the same not-for-profit organization to a client adverse in interest to the lawyer's client, provided no confidential information about a client is available to another client from the not-for-profit organization.

[added 01/09]

**7.04** If a lawyer keeps information obtained as a result of providing limited legal services confidential from the lawyer's partners and associates, the information is not imputed to the partners or associates, and a partner or associate of the lawyer may

(a) continue to act for another client adverse in interest to the client who is obtaining or has obtained limited legal services, and

(b) act in future for another client adverse in interest to the client who is obtaining or has obtained limited legal services.

[added 01/09]

84. In June 2009, the Law Society of Alberta amended its conflicts rules (in Chapter 6) to add the following on the provision of short-term legal services provided by non-profit legal service providers:

> 5.1. (a) A lawyer engaged in the provision of short-term legal services through a non-profit legal services provider, without any expectation that the lawyer will provide continuing representation in the matter:
>
> (i) May provide legal services, unless the lawyer is aware that the clients' interests are directly adverse to the immediate interests of another current client of the individual lawyer, the lawyer's firm or the non-profit legal services provider; and

(ii) May provide legal services, unless the lawyer is aware that the lawyer or the lawyer's firm may be disqualified from acting due to the possession of confidential information which could be used to the disadvantage of a current or former client of the lawyer, the lawyer's firm, or the non-profit legal services provider.

(b) In the event a lawyer provides short-term legal services through a non-profit legal services provider, other lawyers within the lawyer's firm or providing services through the non-profit legal services provider may undertake or continue the representation of other clients with interests adverse to the client being represented for a short-term or limited purpose, provided that adequate screening measures are taken to prevent disclosure or involvement by the lawyer providing short-term legal services.

*Jun2009*

*Commentary*

C.5.1 As noted in Commentary G.1, "firm" and "firm member" are defined broadly for the purposes of this Code and, in particular, this chapter (see *Interpretation*).

For the purposes of this Rule, the term "non-profit legal services provider" means volunteer pro bono and non-profit legal services organizations, including Legal Aid Alberta. These non-profit legal services providers have established programs through which lawyers provide short-term legal services. "Short-term legal services" means advice or representation of a summary nature provided by a lawyer to a client under the auspices of a non-profit organization with the expectation by the lawyer and the client that the lawyer will not provide continuing representation in the matter. It is in the interests of the public, the legal profession and the judicial system that lawyers are available to individuals through these organizations. While a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs or services are normally offered in circumstances which make it difficult to systematically screen for conflicts of interest, despite the best efforts and existing practices of non-profit legal services organizations. Further, the limited nature of the legal services being provided significantly reduces the risk of conflicts of interest with other matters being handled by the consulting lawyer's firm. Accordingly, Rule #5.1 requires compliance with the usual rules which govern conflicts of interest only if the consulting lawyer has actual knowledge that he or she is disqualified as the result of a relationship between an existing or former client and the consulting lawyer, the lawyer's firm or the non-profit legal services provider. In most cases, it is expected that the existence of a potential conflict will be identified through the conflict screening processes employed by non-profit legal services organizations or by the individual lawyer who may identify a

conflict before or at the time of meeting with the client receiving the short-term legal services.

The personal disqualification of a lawyer providing legal services through a non-profit legal services provider will not be imputed to other participating lawyers. If, however, the lawyer intends to represent the client on an ongoing basis after commencing the short-term limited retainer, the other Rules in this Chapter will apply.

The confidentiality of information obtained by a lawyer providing short-term legal services pursuant to this Rule must be maintained. If not, a lawyer's partners and associates in his or her firm, or other lawyers providing services under the auspices of the non-profit legal services provider, will not be able to act for other clients where there is a conflict with the client who has obtained, or is obtaining, short-term legal services. Without restricting the scope of screening measures which may appropriately be undertaken in a particular set of circumstances, the following are some examples of proper measures which may be taken to ensure confidentiality. The lawyer who provided the short-term legal services shall have no involvement in the representation of another client whose interests conflict with those of the client who received short-term legal services from the lawyer, and shall not have any discussions with the lawyers representing the other client. Discussions involving the relevant matter should take place only with the limited group of firm members working on the other client's matter. The relevant files may be specifically identified and physically segregated and access to them limited only to those working on the file or who require access for specifically identified or approved reasons. It would also be advisable to issue a written policy to all lawyers and support staff, explaining the screening measures which have been undertaken.

No consent is required from either the client who received short-term legal services, or the client whose interests may conflict with the client receiving short-term legal services, to allow a lawyer, the lawyer's firm or a non-profit legal services provider to act for any client whose interests conflict with those of the client who has received short-term legal services, provided there has been compliance with Chapter 6, Rule 5.1(b). Rule 5.1(a) does not contemplate that a conflict, of which a lawyer is or becomes aware when engaged in the provision of short-term legal services through a non-profit legal services provider, may be waived by consent.

When offering short-term limited legal services, lawyers should also assess whether the client may require additional legal services, beyond a limited consultation. In the event that such additional services are required or advisable, the lawyer should explain the limited nature of the consultation and encourage the client to seek further legal assistance.

*Jun2009*

**The Committee's Assessment and Proposal**

85. PBLO's view is that in order to make limited representation projects successful in Ontario, a comprehensive plan to support unrepresented litigants and make sure that the regulatory and ethical framework of the legal profession supports this plan should be developed.

86. In considering the merits of PBLO's request, the Committee believes that an appropriate balance must be struck between the public interest in helping to facilitate representation for litigants and the risks occasioned by a modified standard on for conflicts of interest. The risks include the risk to the volunteer firm's client and the risk that the pro bono client may lose his or her lawyer in the middle of a matter, something that should be fully explained to the clients in the context of such limited retainers.

87. The issue is whether it would be appropriate to change the conflicts standard for lawyers in this setting, narrowly construed to apply to brief services for PBLO's court-based programs. As noted above, two law societies have changed their rules in this way. The Committee also noted that from the perspective of clients of the large law firms, whose counsel provide pro bono services, one large institutional client has confirmed that, notwithstanding a potential conflict, lawyers in the firms that act for the client may participate in PBLO's court-based pro-bono programs.

88. The Committee believes that while the ethical rules should not impede the provision of services, the reduced due diligence standard must be justifiable. In that respect, where mechanisms are in place to ensure a high quality of legal services are provided and the legal services provided are of limited scope and brief duration, a different conflicts screening standard - where lawyers and firms would not need to screen for conflicts before participating in the limited legal services provided by the Law Help Centre – would be acceptable.

89. The Committee agreed that the Law Society should take an approach similar to that taken by the Law Society of Alberta and the Law Society of British Columbia. The committee proposes that Convocation adopt a conflict of interest standard applicable to PBLO brief

services that would permit a lawyer to act in such cases unless the lawyer *knows* of a conflict of interest that would prevent him or her from acting.

Information from LawPRO

90. The views of LawPRO were sought on the Committee's proposal from the risk management perspective.

91. LAWPRO advised that generally it sees two basic types of conflicts claims: conflicts that occur between multiple current or past clients represented by the same lawyer or firm, and conflicts that arise when a lawyer has a personal interest in the matter.[12] Lawyers practicing real estate and corporate commercial law regularly act for multiple clients and/or entities and experience more conflicts claims than lawyers practicing in other areas of law. Litigators have a lower rate of conflicts claims. From a risk management point of view, LAWPRO encourages firms to have a procedure and system in place for checking conflicts at the earliest possible time.[13]

92. In LAWPRO's view, the proposed rule change will not appreciably increase the risk of conflicts claims arising for lawyers participating in Pro Bono Law Ontario's Law Help Ontario program, provided that the rule change narrowly restricts the ability to forego a conflicts check to lawyers providing brief services or advice to clients under this program, and that lawyers not act if there is a known actual or potential conflict. LawPRO noted that the Law Help Ontario program does not provide assistance on family law matters, criminal cases, human rights or other similar cases, all areas where there is a higher risk of claims in a short-term limited legal services setting.

93. From a broader risk management and claims prevention perspective, LAWPRO notes that it is important that any lawyers providing services through Law Help Ontario or similar

[12] Over the last ten years, conflicts of interest claims ranked fifth by count (1,288 claims) and cost ($5.9 million) or 6.2% of claims and 9.5% of costs, respectively. Conflicts claims are proportionally more costly to defend and indemnify as they tend to be complex and involve multiple parties.

[13] Ideally, the system should be electronic and include more than just client names. A system that includes individuals and entities related to the client, including corporations and affiliates, officers and directors, partners, trade names, etc. will flag more real and potential conflicts.

programs be competent and have current knowledge of the law for any matters on which they are providing short-term limited legal services.

Amendments to the *Rules of Professional Conduct*

94. If Convocation agrees with the Committee's proposal, amendments to the Law Society's *Rules of Professional Conduct* would be required.

95. The Committee has prepared a draft of a new rule, the text of which appears on the following pages. This proposed rule would be added to the rule on conflicts of interest (rule 2.04). The proposed rule includes:

a. A definition of the type of legal services to which the modified conflict standard applies;
b. A knowledge standard for conflicts of interest;
c. A requirement to protect confidential information, and establish required screens within a law office;
d. Client management requirements; and
e. Commentary that explains the need for the rule and that elaborates on some of the requirements.

96. The Committee requests that Convocation approve the proposed rule, with any changes it considers appropriate. This draft will then be referred to Don Revell, the Law Society's Rules drafted, for preparation of a final draft of the rule for adoption by Convocation.

## PROPOSED DRAFT SUBRULE AND COMMENTARY ON CONFLICTS OF INTEREST FOR LAWYERS PROVIDING SHORT TERM LIMITED LEGAL SERVICES THROUGH PBLO

2.04 (X1) In this subrule, "short-term limited legal services" means *pro bono* summary legal services provided by a lawyer to a client through [OR "under the auspices of"] Pro Bono Law Ontario's Law Help Ontario program for matters in the Superior Court of Ontario and Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

(X2) A lawyer shall not act for a client in providing short-term limited legal services if the lawyer:

(a) knows or becomes aware of a conflict of interest between the lawyer's client and another client of the lawyer, the lawyer's firm or Pro Bono Law Ontario; or

(b) has or obtains confidential information relevant to a matter involving a current or former client whose interests are adverse to those of the client of the lawyer, the lawyer's firm or Pro Bono Law Ontario.

(X3) A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a client may act for other clients of the law firm whose interests are adverse to the client receiving short-term limited legal services, provided that adequate and timely measures are in place to ensure that no disclosure of the client's confidential information is made to the lawyer acting for the other clients.

(X4) Where a lawyer knows or becomes aware of a conflict pursuant to this sub-rule, the lawyer shall not seek the client's waiver of the conflict.

(X5) In providing short-term limited legal services to a client, the lawyer shall:

(a) prior to providing the legal services, ensure that the appropriate disclosure of the nature of the legal services has been made to the client;

(b) determine whether the client may require additional legal services beyond the short-term limited legal services; and

(c) in the event that such additional services are required or advisable, encourage the client to seek further legal assistance.

**Commentary**

Short-term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best

efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in the subrule are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

This subrule applies in circumstances in which the limited nature of the legal services being provided significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for the client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.

The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

Confidential information obtained by the lawyer representing the client who is receiving short-term limited legal services will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term limited legal services.

Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Subrule (X3) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include:

- having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the client who is receiving or has received short-term limited legal services;
- identifying relevant files, if any, of the client who is receiving or has received short-term limited legal services and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and
- ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

**APPENDIX 3**

## INFORMATION ON PBLO ADVOCACY PROGRAMS

Law Help Ontario - Superior Court

Law Help Ontario is a court-based, self-help centre for low-income, unrepresented litigants. It operates the Superior Court walk-in centre at 393 University Avenue. The Superior Court program was launched in November 2007 and joined the existing Small Claims Court program, described later in this report, as the two court-based programs.

Law Help Ontario provides a range of services, including general information on rules and procedures of Superior Court, help in filling out court forms, legal advice (30-minute sessions), legal representation at a trial or motion and referral services.

The public is advised that the volunteer lawyers will not become their lawyer. The scope of legal services provided is limited to brief services, and any services with respect to potential representation at a motion, trial or appeal are at the sole discretion of the volunteer lawyer.

Individuals must meet financial eligibility requirements to qualify for assistance, and corporations and businesses do not qualify. The Centre does not assist with family law matters, criminal cases, human rights, or other similar cases.

Individuals are also advised that the matter must clear a conflicts check.

Law Help Ontario - Small Claims Court

This service is similar to that described above and operates from 47 Sheppard Avenue East. Law Help provides Duty Counsel who offer limited services to the public on a first come, first served basis.

Duty Counsel Lawyers assist self represented litigants by attending at the trial or motion, helping individuals to identify legal issues relating to their case, providing general information on the rules and procedures of Small Claims Court, and answering general legal questions. If a person only needs legal advice, the meeting with a lawyer will be limited to 30 minutes.

As at Superior Court, the public is advised that the lawyers who volunteer will not become their lawyer. The scope of legal services provided at Law Help Ontario is limited to brief services and any services with respect to potential representation at a motion, trial or appeal are at the sole discretion of the volunteer lawyer.

Conflicts are also explained to the effect that a lawyer (or law firm) cannot represent the individual if the opposing parties are also their client, and that after a conflicts check, if a conflict of interest exists, PBLO will not be able to represent the individual in court nor offer summary legal advice.

Appeals Assistance Project (The Advocates' Society)

Free legal services are available to eligible unrepresented litigants before the Ontario Court of Appeal (civil and some limited family law matters), the Divisional Court (civil and some limited family law matters) and the Federal Court of Appeal (no criminal appeals).

This project provides pro bono legal advice and representation to qualified unrepresented litigants. The Project will also help those who may choose to represent themselves but may wish to obtain legal advice on whether they have valid grounds on which to proceed.

In order to qualify for the program, the individual must have been refused legal aid, meet financial eligibility guidelines, and have a case that has some reasonable prospect of success.

The Project relies on a roster of qualified volunteer lawyers prepared by The Advocates' Society who represent litigants at the Ontario Court of Appeal, Divisional Court, and the Federal Court of Appeal. These lawyers will represent the individual pro bono but the individual is responsible for any disbursements, such as court fees or photocopying expenses.

When the case has been perfected, the individual must contact the Projects' co-ordinator will conduct a detailed intake to determine eligibility for pro bono representation. If the person qualifies, the coordinator will try to match him or her with a pro bono lawyer. The individual is responsible for contacting that pro bono lawyer chosen to arrange an initial consultation meeting.

The goal of this meeting is to determine if the lawyer will be able to represent the individual and ensure he or she is comfortable with the lawyer. A retainer agreement is signed that outlines the kind of work the lawyer has agreed to do, that the lawyer has waived their hourly billing rate, and that the client will be responsible for disbursements.

The Lawyers on the pro bono roster participate on a voluntary basis and have a right of refusal if they have a conflict of interest, do not have the resources to carry the file, do not believe there is sufficient merit to the appeal, or do not accept the case for any other reason. PBLO does not guarantee pro bono representation or assistance for any applicant. PBLO advises that it may take up to three weeks before notice is received that a lawyer has accepted the case.

Child Advocacy Project (The Advocates' Society)

The Child Advocacy Project is dedicated to enhancing access to justice for children by providing free legal services to eligible families who cannot afford a lawyer. Volunteer lawyers, who are members of The Advocates' Society provide assistance on legal issues that impact upon the health and well-being of children and youth. Some programs are set up as partnerships between lawyers and community groups that serve children and youth.

The programs include the Education Law Program and the Family Legal Help Program

The Education Law Program is a free legal service available to low and moderate-income families whose children face challenges to their rights at school. Lawyers help students and their parents understand their legal rights and negotiate solutions when they feel unable to resolve conflicts with school administrators and officials. The volunteer lawyer will provide students and families with advice on their legal rights, intervene on behalf of students with school administrators (by letter, phone or in person) and will represent students at tribunals or hearings.

Each family is assessed on a case-by-case basis, and the case must have legal merit. In many cases, advice on the legal aspects of the problem at hand is all that is needed, and only a few cases go on to full legal representation.

The Family Legal Health Program is a partnership that links health care and legal care to help young children and their families. The first of its kind in Canada, the partnership includes The Hospital for Sick Children (SickKids), PBLO, law firms McMillan and Torkin Manes Cohen Arbus, and Legal Aid Ontario. The model uses legal remedies when appropriate to address issues that adversely impact child health within low-income families. The program aims to improve the health outcomes of low-income paediatric patients and, at the same time, enhance the capacity of health care professionals such as social workers, physicians, nurses and dieticians by incorporating legal advocacy and legal services into clinical practice.

The program recognizes that lawyers are beneficial interdisciplinary partners for health care practitioners treating low-income patients/families whose health may be impacted by complex, socio-economic issues. Through this program, nurses, social workers, and doctors at SickKids have access to legal resources to redress detrimental social conditions and resolve persistent issues that prevent low-income families from focusing their full attention on a sick child. As a result, clinical interventions are more effective and sustainable.

The program has three main areas of activity: advocacy and legal issue training for clinical staff, direct legal assistance to low-income patients/families and systemic advocacy.

Direct legal assistance is provided through access to an on-site Triage Lawyer, who manages an intake process and coordinates cases which are placed with appropriate lawyers from the program's legal network. Services provided are both pro bono and Legal Aid. Pressing legal issues get the attention they require so families can focus their attention on their child's health. Systemic advocacy is tool to effect change on systemic issues that impact the health and wellbeing of present and future patient populations. This can involve policy work and test cases as two effective ways that lawyers can help paediatric clinicians to address the social determinants of child health.

**APPENDIX 4**

# LAW HELP ONTARIO APPLICATION FORM

LawHelpOntario PBLO

Welcome to Law Help Ontario, a Pro Bono Law Ontario Project.

Law Help Ontario is a self-help centre for low income, unrepresented litigants appearing before Superior Court (limited civil matters – no family, criminal, etc.) Individuals are served on a first come, first served basis; however, priority may be given to litigants with urgent matters.

## APPLICATION FORM

| **Part A: Your Contact Information:** | | | |
|---|---|---|---|
| ❒ Male<br>❒ Female | First Name | Last/Family Name | |
| Address | | City | Province |
| Postal Code | Home Phone | Work Phone | |
| Cell Phone | Email Address | | |
| What is your Court File Number? (If you have one) | | | |
| I am the Plaintiff/Applicant in this action ❒ | | I am the Defendant/Respondent in this action ❒ | |

### Please pick **one** area of law that best describes your situation

- ❒ Bankruptcy or insolvency law
- ❒ Condominium
- ❒ Construction Lien
- ❒ Construction/Renovation dispute
- ❒ Contract law
- ❒ Damage to Property
- ❒ Defamation
- ❒ Employment Law/Wrongful Dismissal
- ❒ Insurance (other than motor vehicle)
- ❒ Intellectual Property
- ❒ Landlord Tenant
- ❒ Lawyer's Invoice Dispute
- ❒ Loan or Credit Card Default (other than mortgage default)
- ❒ Medical Malpractice
- ❒ Mortgage Default
- ❒ Motor Vehicle Accident
- ❒ Negligence
- ❒ Personal Injury
- ❒ Police misconduct
- ❒ Professional Malpractice (other than medical)
- ❒ Real Estate litigation/disputes (other than mortgage default)
- ❒ Wills/Estates
- ❒ Other _____

| **Part B: Persons and Companies involved (or potentially involved) in your matter.** | |
|---|---|
| Please list all of the **Plaintiffs/Applicants** in this matter. (Please include first and last names, company names, and trade names) | Please list the **Law Firm** that's representing each Plaintiff/Applicant. If they are not represented, write "None" |
| 1. | |
| 2. | |
| 3. | |
| 4. | |
| 5. | |
| 6. | |
| Please list all of the **Defendants/Respondents** in this matter. (Please include first and last names, company names, and trade names) | Please list the **Law Firm** that's representing each Defendant. If they are not represented, write "None" |
| 1. | |
| 2. | |
| 3. | |
| 4. | |
| 5. | |
| 6. | |
| Please list any **other** persons or companies that might be involved in your matter. Please include First and last names, company names, and trade names. | Please list the **Law Firm** that's representing the other parties. If they are not represented, write "None" |
| | |
| | |
| | |

**If you need additional space, please ask for an additional form.** See Additional page attached ☐

LawHelpOntario PBLO

## Part C: Financial Eligibility – This section must be completed in order to apply for assistance

The number of people in my household, including me, my spouse and dependent children is:
❒1 ❒2 ❒3 ❒4 ❒5+

My Marital Status: ❒ Single ❒ Separated ❒ Married/Common Law ❒Widowed

The primary source of my household income is from one or more of the following sources(s):
❒ Income assistance from Ontario Works,
❒ Income assistance from Ontario Disability Support Program,
❒ Family Benefits Act allowance,
❒ Old Age Security Pension together with Guaranteed Income Supplement,
❒ War Veterans Allowance
❒ Canada Pension Plan benefits

**Please tell us about your household's employment situation:**

❒ I am Self Employed
❒ I am Employed
❒ I am Unemployed
❒ I am Retired
My Occupation : _____

❒ My Spouse is Self Employed
❒ My Spouse is Employed
❒ My Spouse is Unemployed
❒ My Spouse is Retired
My Spouse's Occupation: _____

**Please tell us about your living situation:**
❒ Own your home. If you own, what percentage of equity do you own?_____%
❒ Rent
❒ Live with parents
❒ Other _____

**My Household's Assets:**
❒I/we have more than $3000.00 in liquid assets (This includes RRSP's, cash/money)
❒I/we own additional properties (cottage, rental properties, etc.)

**My Income (Per Month) In Total, from all sources**
I receive $_____ per month from an estate or trust
I receive $_____ per month from a rental property
I receive $_____ per month from salaries/commissions
I receive $_____ per month from other investment sources

**My Spouse's Income (Per Month) In Total, from all sources**
My Spouse receives $_____ per month from an estate or trust
My Spouse receives $_____ per month from a rental property
My Spouse receives $_____ per month from salaries/commissions
My Spouse receives $_____ per month from other investment sources

**My Household's Expenses (Per Month)**
I/we pay $_____ in child support payments
I/we pay $_____ in spousal support payments
I/we pay $_____ in rent/mortgage payments
I/we pay $_____ in child care fees

## Part D: Demographics

**What was your highest level of education?**

❒ Grade School
❒ Some High School
❒ High School Diploma
❒ Some University/College
❒ University Degree/College Diploma
❒ Post Graduate Degree

**Is English your first language?** Yes ❒ No❒
Do you need services in another language? Yes ❒ No❒
If ***yes***, what language?

**Which age group do you belong to?**

❒ 18 – 24 ❒ 25 – 34 ❒ 35 – 44 ❒ 45 – 54 ❒ 55 – 64 ❒ 65+

## Part E: Other Questions

**1. How did you hear about Law Help Ontario?**

❒ Walking by the office
❒ Legal Aid Ontario
❒ Another Legal Clinic
❒ The Newspaper
❒ The Internet
❒ The Law Society
❒ Friend/Family Member
❒ TV
❒ A Judge or Master
❒ Court Staff Member (10th Floor)
❒Other _____

**2.** Is this the first time you tried to get any legal help with this case? Yes ❒ No❒
*If **no**, what other places have you tried to obtain assistance?*

**3.** Do you currently have a lawyer (or other representative) assisting you with this case? Yes ❒ No❒

**4.** If you answered ***no***, has a lawyer (that was hired or worked on a contingency arrangement) ever assisted you with this case? Yes ❒ No❒
If ***yes***, why is that lawyer not assisting you now?

**5.** Why are you representing yourself? ***Make one selection only***

❒ I can't afford to hire a lawyer
❒ I could pay some legal fees, but not all
❒ I ran out of money to continue paying my lawyer
❒ I didn't qualify for legal aid, or they said that they couldn't help with my case
❒ I believe that my case is straightforward and I can handle the litigation on my own
❒ I can afford a lawyer, but I don't want to pay a lawyer
❒ I don't trust lawyers
❒ My lawyer had himself/herself removed from my case
❒ Other _____

**6.** Have ever you tried using the Lawyer Referral Service? Yes ❒ No❒
If ***yes***, what was the result?

**7.** Do you have any other cases pending at the moment? Yes ❒ No❒

**8.** Have you tried to settle or mediate this case without going to court? Yes ❒ No❒

**9.** Does the opposing party have a lawyer? ❒ Unsure Yes ❒ No❒

**10.** Is this your first meeting with a Duty Counsel Lawyer at Law Help Ontario? Yes ❒ No❒

**11.** Do you have access to the internet? Yes ❒ No❒

**12.** May we contact you at a later date, and leave a voicemail message, if necessary, to get your feedback about the program? Yes ❒ No❒

LawHelpOntario PBLO

## Part F: Acknowledgement & Consent Section

I **swear/affirm** the information I provided is accurate to the best of my knowledge and belief. I agree to provide financial information and records to Pro Bono Law Ontario, if requested, to confirm the financial information in this application form. I am aware that Pro Bono Law Ontario, its employees, designates, and volunteers may need access to my Court File.

I **authorize** Pro Bono Law Ontario, its employees, designates, and volunteers, to access my Court File for the purpose of administering and evaluating Law Help Ontario and the services offered.

**I authorize** Pro Bono Law Ontario, its employees, designates, and volunteers, to photocopy this application and retain its copy on file for record keeping purposes.

I **authorize** the Pro Bono Law Ontario, its employees, designates, and volunteers to provide any information set out in this application and acknowledgement form (including any document I provide, or will provide in the future, to Pro Bono Law Ontario) to any person volunteering to assist me and any lawyer or law firm that the Intake Coordinator considers may agree to assist me.

**I authorize** Pro Bono Law Ontario, its employees, designates, and volunteers, to send my name, and the names of all of the parties I provided, or will provide in future, to their law firm to verify if conflicts of interest may exist.

_____ _____

Applicant 1 Signature Date

Hours: 9:30 am – 4:00 pm, Monday – Friday. We close for lunch between 12:00 – 1:00 pm
Law Help Ontario is a walk-in centre only. No appointments. We do not accept phone calls, emails, or faxes. You must visit us in person for assistance.

Law Help Ontario
393 University Avenue
Toronto, ON M5G 1E6

LawHelpOntario PBLO

# ACKNOWLEDGMENT & WAIVER FORM

*This acknowledgment and waiver form is for all applicants of the Pro Bono Law Ontario (PBLO) Law Help Centre seeking assistance at Law Help Ontario located at the Superior Court of Justice at 393 University Avenue, Toronto, Ontario.*

## *Applications for Assistance*

**1.** **I acknowledge** that all applications for assistance are assessed individually and that assistance can be declined for any reason, as determined by the PBLO Intake Coordinator and/or Duty Counsel Lawyer.[1]

**2.** **I acknowledge** that clients are not always assisted in the order of arrival.

## *Limited Scope of Duty Counsel Services*

**3.** **I acknowledge** that the PBLO Intake Coordinator(s) cannot provide legal advice.

**4.** **I acknowledge** that the Duty Counsel Lawyer cannot replicate the quantity or quality of legal assistance that I might get from a lawyer hired privately to represent me fully in this matter.

**5.** **I acknowledge** that the Duty Counsel Lawyer can only provide me with a maximum of 30 minutes of legal assistance today. If my meeting is extended longer than 30 minutes, I agree that all terms in this acknowledgement and waiver form remain in effect.

**6.** **I acknowledge** that I cannot request a meeting with a specific Duty Counsel Lawyer or a Duty Counsel Lawyer that assisted me in the past.

---

[1] The Duty Counsel Lawyer may only assist by:

- Providing general information on the rules and procedures of the Superior Court of Justice;
- Guiding me on how to complete some court forms;
- Helping to identify the legal issues of my case;
- Helping to understand my legal options based on the information I provide; and
- Speaking to my legal issues at certain kinds of limited appearances, such as motion hearings.

The Duty Counsel Lawyer **cannot:**

- Help me if I already have a lawyer;
- Commission or notarize my court documents, forms, or any other legal documents;
- Act as a commissioner for taking affidavits or a notary public;
- Help me with any legal problems that are unrelated to my Superior Court of Justice civil case;
- Serve or accept service of any court documents;
- Predict or guarantee the outcome of my case or how Judges or Masters will rule; or
- Be responsible for the accuracy of the information I have in any forms or papers I file or use in court.

**7.** **I acknowledge** that I may reapply to seek further assistance but that the PBLO Intake Coordinator and Duty Counsel Lawyers reserve the right to deny future assistance to me where they deem it appropriate to do so.

***No Ongoing Solicitor-Client Relationship with PBLO or Duty Counsel Lawyer***

**8.** **I acknowledge** that I am **not** forming an ongoing solicitor-client relationship with PBLO, Law Help Ontario or any of its officers or employees and that I am not forming an ongoing solicitor-client relationship with the Duty Counsel Lawyer or the Duty Counsel's law firm.

**9.** **I acknowledge** that neither PBLO, Law Help Ontario nor any of its officers or employees or the Duty Counsel Lawyer or the Duty Counsel's law firm has any further duty to look after my legal interests in the matter that I receive assistance with today or any other matters.

***Waiver of Solicitor-Client Privilege to PBLO and Duty Counsel Lawyer***

**10.** **I acknowledge** that I do not have an expectation of confidentiality concerning any information that is shared with the Intake Coordinator or other PBLO employees and that if I wish to have a confidential consultation, I should consult or retain a private lawyer. **I further acknowledge** that the Law Help Ontario Office is an open concept and that conversations I may have may be overheard by other Law Help Ontario clients, staff, volunteers, and Duty Counsel Lawyers that may represent other parties involved in my case.

**11.** **I acknowledge** that any information that I share with the PBLO Intake Coordinator or other PBLO employees or that the Duty Counsel Lawyer shares with the Intake Coordinator and staff of PBLO is not protected by solicitor client privilege.

**12.** **I acknowledge** that any verbal information and any information set out in my application, acknowledgement and waiver form, case disposition form and any other form or document that I provide to, or is prepared by, the Law Help Ontario or the Duty Counsel Lawyer can be:

- stored at Law Help Ontario or another PBLO office;
- reviewed by staff members of PBLO, its employees, designates, volunteers, and other Duty Counsel Lawyers;
- photocopied;
- typed, scanned, transcribed, and stored in PBLO's computer system; and
- uploaded and backed up *via* the internet to a third party data protection service.

***Right to Verify Conflicts of Interest***

**13.** **I authorize** the Duty Counsel Lawyer to send my name, and the names of all of the parties listed in my application to their law firm to verify if conflicts of interest may exist.

**14.** **I acknowledge** that the Duty Counsel Lawyer cannot assist me where a conflict of interest is discovered or arises, which makes it inappropriate for the Duty Counsel Lawyer to continue to provide assistance.

**15.** **I acknowledge** that the Duty Counsel Lawyer is free to act for other clients against me on other unrelated matters in the future, without notice to me.

***Right for PBLO to Retain Documents***

**16.** **I acknowledge** that any document that forms part of my file may be kept by PBLO for the following reasons:

- administrative record keeping;
- maintaining a database of people served;
- conducting conflict of interest searches;
- assessing the quality of services provided;
- gathering general statistics about Law Help Ontario's clients;
- evaluating types of services utilized; and
- sharing with Law Help Ontario staff or volunteers whom I may visit in the future.

**17.** **I acknowledge** that Law Help Ontario is a pilot project and, in the future, that I may be contacted by a PBLO representative to answer questions about its value. If contacted, I may refuse to participate.

***Full and Final Release***

**18.** **I release** PBLO, Law Help Ontario, Duty Counsel Lawyers and all other parties and participating law firms together with all of their respective officers, employees, and volunteers from all claims whatsoever with respect to use of the premises and to advice/services given or advice/services that should or should not have been given at Law Help Ontario.

**19.** **I acknowledge** that I was able to read and understand all of the contents of this Acknowledgment Form.

| | | |
|---|---|---|
| Applicant (Print your full name Here) | Law Help Ontario – Form Explained by | |
| Applicant Signature | Signature | Date |

**APPENDIX 5**

## EXCERPT FROM "REPORT OF THE UNBUNDLING OF LEGAL SERVICES TASK FORCE – LIMITED RETAINERS: PROFESSIONALISM AND PRACTICE" (LAW SOCIETY OF BRITISH COLUMBIA)

**Recommendation 15:**

Because the current conflict of interest rules, and rules regarding duty of loyalty, can create impediments to lawyers providing legal services at court-annexed and non-profit legal clinics or programs, and because of the summary nature of those services and the importance of those service for enhancing access to justice, the *Professional Conduct Handbook* should be amended to encompass the following principles:

1. The recommendations for modifying the conflicts of interest rules apply only to circumstances where a lawyer, under the auspices of a program operated by a court or a non-profit organization, provides short term limited legal services to a client in circumstances where neither the lawyer or client expect that the lawyer will provide continuing representation in the matter (the "Exempted Services").

2. In circumstances where it is practicable to do so, a lawyer should conduct a conflict of interest search prior to providing Exempted Services;

3. If the lawyer is providing legal services other than Exempted Services, the regular conflicts rules apply;

4. If a lawyer provides Exempted Services the following principles apply:

    a. The scope of the Exempted Services retainer is limited to the summary services provided through the court-annexed or non-profit program. While the duty of confidentiality and loyalty endure, the lawyer-client relationship terminates at the end of the provision of the Exempted Services;
    b. If a lawyer is aware of a conflict, the lawyer may not provide legal advice to the limited scope client ("LSC"), but may assess the LSC's suitability for services provided through the court-annexed or non-profit program and refer the LSC to another lawyer at the program or clinic;
    c. If a lawyer is not aware of a conflict, the lawyer may provide Exempted Services. As the services are summary in nature and the risk associated with not performing the conflicts search is outweighed by the social benefit of the Exempted Services, the lawyer is not required to check for conflicts prior to, or following, providing the Exempted Services;

    d. If, at any time during provision of the Exempted Services, a lawyer becomes aware of a conflict, the lawyer must immediately cease providing legal advice or

services and refer the LSC and the notes taken to another lawyer at the clinic or program. If no lawyer is available, the LSC should be put in touch with a program staff person to coordinate the appointment of a new lawyer;

e. Privileged information to anyone including other lawyers at the lawyer's firm, save as provided by law. Maintaining the LSC's confidences is an important safeguard in protecting the LSC's information and guarding against the inference that other people at the lawyer's firm possess the confidential information;

f. A lawyer who provides Exempted Services should not personally retain notes of the advice given; rather, the court-annexed program or non-profit clinic should be responsible for record keeping.

5. Because the exemption from performing a conflicts search is predicated, in part, on the concept that the Exempted Services are summary in nature, the following rules apply to circumstances where a lawyer has contact with the LSC on subsequent occasions:

   a. If the LSC contacts the lawyer, the lawyer must conduct a conflicts search prior to engaging the LSC in a new retainer;

   b. If the lawyer has advance notice that the lawyer will be speaking with the LSC on a subsequent occasion, the lawyer must conduct the conflicts search prior to that meeting;

   c. If the lawyer happens to be assigned the LSC a subsequent time while providing Exempted Services, and in circumstances not captured in 5(b), the lawyer may provide summary legal advice on that occasion but must conduct a conflicts search upon returning to the lawyer's firm.

6. If, following the provision of the Exempted Services, a lawyer becomes aware of a conflict between the LSC and a firm client:

   a. The regular rules for determining whether the lawyer may act for or against the existing client, the LSC, or a future firm client, apply. The Exempted Services will be treated as an isolated event that do not require prior informed consent;

   b. Despite the duty the lawyer owes to his or her clients, the lawyer must not divulge the confidential information received by the LSC during provision of Exempted Services, and the lawyer must not divulge the existing client's confidential information to the LSC.

7. No conflict of interest that arises as a result of a lawyer providing Exempted Services will be imputed to the lawyer's firm, and the firm may continue to act for its clients who are adverse in interest, or future clients who are adverse in interest, to the LSC.

8. In order to enhance access to justice, individuals who are adverse in interest should be able to obtain legal advice from the same court-annexed or non-profit program regarding their common dispute, provided the program has sufficient safeguards in place to ensure that lawyers who provide Exempted Services to clients opposed in interest do not obtain confidential information arising from the opposing client's consultation. If the lawyers become aware of a conflict within the court-annexed or non-profit program, the clients

must be advised of the conflict and the steps that will be taken to protect the clients' confidential information.

### 2.3.1 Conflicts of interest in limited scope retainers

A lawyer may provide limited scope legal services as part of the lawyer's regular practice, or through a court-annexed or non-profit legal service provider. The Task Force considered whether:

> In order to enhance the delivery of limited scope legal services as a means of increasing access to justice, should the Law Society's Conflicts of Interest Rules be amended for situations where it may not be feasible for a lawyer to systematically screen for conflicts of interest while providing legal services at a court-annexed or non-profit program?

Most jurisdictions that have amended rules to allow for unbundled legal services have relaxed their conflicts of interest rules to facilitate lawyers providing legal services through non-profit and court-annexed limited legal advice programs. The SHC, *Final Evaluation Report*, found that "the availability of legal advice is the area of greatest unmet need identified by the evaluation" (p.74), and that:

> The provision of legal advice at the Centre is not possible under the current Law Society Rules concerning professional liability. In addition, it would be necessary to do a conflict check for each client. (p. 61)

As noted, Civil Justice Reform Working Group identified changes to the conflict of interest rules as an important component of encouraging lawyers to engage in *pro bono* work with clinics.

The Task Force believes that a lawyer who, as part of his or her regular practice, provides limited scope legal services is required to conduct the regular searches for conflicts of interest. This is not difficult, as the lawyer should have a conflicts checking system in place that captures conflicts both at the beginning of the representation, and as they arise throughout the course of the retainer. The lawyer in this scenario is presumed to have access to his or her conflicts database when approached by a potential client.

A lawyer who is providing legal services through a court-annexed or non-profit legal services provider will not likely have access to his or her conflict's database at the time of initial contact with the client. Contact may occur over the phone, and/or at an external facility and it is also possible for clients to drop-in. The Task Force has heard from representatives of the Legal Services Society and the SHC, amongst others, that there is a need to relax the current conflicts rules in circumstances where it is not feasible for a lawyer to systematically screen for conflicts of interest (e.g. at a drop-in centre where the lawyer provides limited, summary legal advice, or where the lawyer provides limited legal advice through a duty counsel program). A distinguishing feature of these services is that neither the lawyer nor the client expects that the legal services will be ongoing, although it is possible for a client to be a repeat user of a facility through which the services were provided and this should be taken into account.

### 2.3.2 American models for conflicts of interest in unbundled matters

ABA Model Rule 6.5 has the effect of excusing a lawyer who is participating in a non-profit or court-based program offering limited services from the obligation to check for conflicts of interest prior to providing the limited legal services. However, if the lawyer has actual knowledge of a conflict he or she may not act and the general conflict of interest rules apply, including the rules for imputed conflicts of interest. The rationale behind this approach was a desire to make it less onerous for lawyer to provide services through these programs.

The Task Force considers the approach taken by Washington State to be the most flexible and principled. The Washington State Court Rules: Rules of Professional Conduct, Rule 6.5 reads:

> (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter and without expectation that the lawyer will receive a fee from the client for the services provided:
>
> > (1) is subject to Rules 1.7, 1.9(a), and 1.18(c) only if the lawyer knows that the representation of the client involves a conflict of interest, except that those Rules shall not prohibit a lawyer from providing limited legal services sufficient only to determine eligibility of the client for assistance by the program and to make an appropriate referral of the client to another program;
> >
> > (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter; and
> >
> > (3) notwithstanding paragraphs (1) and (2), is not subject to Rules 1.7, 1.9(a), 1.10, or 1.18(c) in providing limited legal services to a client if:
> >
> > > (i) the program lawyers representing the opposing clients are screened by effective means from information relating to the representation of the opposing client;
> > >
> > > (ii) each client is notified of the conflict and the screening mechanism used to prohibit dissemination of information relating to the representation; and
> > >
> > > (iii) the program is able to demonstrate by convincing evidence that no material information relating to the representation of the opposing client was transmitted by the personally disqualified lawyers to the lawyer representing the conflicting client before implementation of the screening mechanism and notice to the opposing client.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

The Washington State approach allows for lawyers who work at, or volunteer their time to, non-profit and court-annexed legal service providers to give limited term legal advice to clients without performing the standard conflicts of interest search. A lawyer who is aware of a conflict may not act for the client, but may still provide limited services sufficient to determine whether the client is eligible under the program and to refer the client to another lawyer. The rule also establishes a framework for determining whether two lawyers providing legal advice through a program can represent clients with conflicts of interest. If, during the course of providing legal advice to the client, the lawyer becomes aware of a conflict of interest the regular conflict rules apply, save that the lawyer could refer the client to a suitable lawyer within the program. If, after the initial consultation, the client desires to retain the lawyer, the lawyer will be required to perform the regular conflicts check.

The Washington State approach, the ABA Model Rule, and other models are intended to encourage lawyers to participate in non-profit and court-annexed legal service programs. The present conflict of interest rules create a barrier to lawyers providing assistance through these programs, and can frustrate access to justice. The Task Force recognizes, however, that it is not sufficient to put a rule in place that only deals with whether the lawyer is aware of a conflict at the time the limited scope legal services are being provided at the court-annexed or non-profit service. The conflicts rules have to address what happens when the lawyer returns to his or her firm and discovers that the firm is representing a client in circumstances that create a conflict between the existing client and the clinic/program client. The rules also have to address what happens in circumstances where the lawyer or his or her firm later wish to act for a person, and such a representation would create a conflict based on the prior limited scope legal work provided through the court-annexed or non-profit service.

### 2.3.3 Examples of how non-profit and court-annexed service providers in British Columbia deal with conflicts

The delivery of limited scope legal services is already a reality for non-profit and court-annexed legal service providers. The Legal Services Society (“LSS”) has, as a result of budget cuts, had to reduce its services from prior levels. This has required providing services and programs that are limited in scope. The LSS provides legal information, legal advice and legal representation. An individual who is applying for legal aid or receiving legal information is not deemed to be a client. An individual who is receiving legal advice or legal representation is deemed to be a client. Once an individual is a client, no individual adverse in interest may receive legal information (save for written material on display or at hand), legal advice, or legal representation from that office. The individual may seek legal assistance through another office. Each legal aid office is treated as a distinct unit for these purposes.

Criminal duty counsel also provide limited scope legal services. It is less likely, but not unheard of, for a conflict of interest to arise (e.g. co-accused). The Task Force heard from duty counsel, and was advised that the standard practise is to deal with conflicts based on having actual knowledge of the conflict. While duty counsel do not wish to run afoul of the Law Society’s

conflicts rules, they believe their approach provides a practical method that balances the duty to protect a client's interest with making sure as many accused as possible have access to justice.

### 2.3.4 Justification for amending the conflicts of interest rules for lawyers providing pro bono services at court-annexed and non-profit programs

The Task Force believes that if firms were to be disqualified from continuing to represent existing clients, or would be shutting the door on potential future retainers that may be lucrative, based on a lawyer of the firm providing legal advice at court-annexed or non-profit clinics, the objectives of increasing access to limited scope legal services could be frustrated. However, the duty of loyalty to a client is a core principle of the lawyer/client relationship, and rules protecting the interest and expectations of clients regarding confidentiality and a duty of loyalty are not to be cast aside or transformed to favour expeditiousness over ethics.

The Task Force considered the potential use of waivers for conflicts of interest, but concluded that such an approach presents several problems. For the waiver to be valid, it would require both the existing client and the new client to waive the conflict, and with informed consent. This would be administratively impractical, and there are some conflicts that cannot be waived in any event. Having a waiver that was only signed by one party would not amount to a true waiver, and while it would serve to alert the client to the concept of conflicts it would do little to resolve the concern. The Task Force is of the view that the better approach would be to clearly limit the scope of the retainer, and to have a mechanism for alerting the client to the concept of conflicts of interest and how conflicts would be handled should they arise. Providing the client with a clear and comprehensible limited retainer form is only part of the equation, however, and the Task Force recognizes that the conflicts of interest rules would have to be amended to create a narrow exemption for the conflict of interest rules. This exemption should seek to balance the competing demands of the duty of loyalty to a client with the increasing need for limited scope legal services at court-annexed and non-profit programs, to assist litigants who may otherwise be self-represented.

The Task Force acknowledges that modifying the Law Society rules that govern conflicts of interest in order to facilitate limited scope legal services at court-annexed and non-profit programs is only part of the equation. The courts have inherent jurisdiction over conflicts before the court. As such, the concern remains that a lawyer who complies with the modified conflict of interest rules will be at risk of being found in conflict when appearing before the court, or that a lawyer from that lawyer's firm will have the conflict imputed to him or her. The Task Force hopes that the judiciary will be mindful of this risk and give due weight to the important public value in litigants of modest means receiving legal advice through court-annexed and non-profit programs, and that some firms will be wary of allowing lawyers to provide such services if the firm risks disqualification with respect to present and future paying clients.

The Task Force limits its recommendations regarding conflicts of interest to situations governing lawyers providing short-term legal advice and/or representation at court-annexed and non-profit programs. The recommendations should not be taken to mean the Task Force approves of a general relaxation of the conflicts of interest rules.

The Law Society of Upper Canada | Barreau du Haut-Canada

# Report to Convocation
# January 27, 2011

## Tribunals Committee

**Committee Members**
**Mark Sandler (Co-Chair)**
**Linda Rothstein (Co-Chair)**
**Alan Gold (Vice-Chair)**
**Raj Anand**
**Jack Braithwaite**
**Christopher Bredt**
**Paul Dray**
**Jennifer Halajian**
**Tom Heintzman**
**Heather Ross**
**Paul Schabas**
**Beth Symes**
**Bonnie Tough**

**Purposes of Report:** **Decision**
**Information**

**Prepared by the Policy Secretariat**
**(Sophia Sperdakos 416-947-5209)**

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Two Year Review on Non-Bencher Adjudicator Initiative

## COMMITTEE PROCESS

1. The Committee met on January 13, 2011. Committee members Mark Sandler (Co-Chair), Alan Gold (Vice Chair), Raj Anand, Jack Braithwaite, Christopher Bredt, Jennifer Halajian, Paul Schabas and Beth Symes attended. CEO Malcolm Heins attended. Staff members Helena Jankovic, Grace Knakowski, Denise McCourtie, Elliot Spears and Sophia Sperdakos also attended.

# FOR DECISION

## a) PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE: RULES OF PRACTICE AND PROCEDURE

**Motion**

**2. That Convocation amend the Rules of Practice and Procedure applicable to proceedings before the Law Society Hearing Panel to implement the pre-proceeding consent resolution conference, as set out in the official bilingual version provided at Convocation, the English version also set out at Appendix 2.**

**Background and Information**

3. In April 2009 the Professional Regulation Committee began consideration of a proposal for an expedited investigations and hearing process for lawyers and paralegals who,
   a. admit to conduct allegations against them; and
   b. agree to a joint penalty or range of appropriate penalty to be submitted to a Hearing Panel to obtain an Order.

4. The proposal necessitated discussions with the Tribunals Committee and the Paralegal Standing Committee and culminated in a joint meeting of the Committees in November 2009.

5. In January 2010 Convocation approved the proposed policy for a Pre-Proceeding Consent Resolution Conference as a two-year pilot project. The full report Convocation approved is set out at **Appendix 1**.

6. The proposed English amendments to the Rules of Practice and Procedure to implement the policy are set out at **Appendix 2.** The official bilingual version of the proposed rules will be provided under separate cover to Convocation for approval.

**APPENDIX 1**

## PRE-PROCEEDING CONSENT RESOLUTION CONFERENCE (JOINT REPORT WITH THE PARALEGAL STANDING COMMITTEE AND THE TRIBUNALS COMMITTEE)

### Motion

**1. That Convocation approve the policy for the Pre-Proceeding Consent Resolution Conference for a two-year pilot project.**

### Introduction and Background

2. In April 2009, the Committee began consideration of a proposal for an expedited investigations and hearing process for lawyers and paralegals who admit to conduct allegations against them and agree to a joint penalty to be submitted to a Hearing Panel to obtain an Order. The proposal necessitated discussions with the Tribunals Committee and the Paralegal Standing Committee, and culminated in a joint meeting of the Committees in November 2009.

3. This report includes the Committees' joint proposal for the new process, which is titled the Pre-Proceeding Consent Resolution Conference ("the Conference"), for Convocation's consideration.

4. If approved, amendments to the *Rules of Practice and Procedure* to implement the proposal will be required. These amendments will be presented at a future Convocation.

### Why the Conference is Being Proposed

5. The Conference is intended to provide lawyers and paralegals with an alternative process to the regular investigations and hearing stream. Through this process, they may admit to conduct allegations and consent to a joint penalty to be submitted to a Hearing Panel for an Order.

6. The proposed process:

a. is flexible in that it provides for negotiations at an early stage for lawyers and paralegals who are interested in making early admissions in aid of a fast outcome that is more certain;

b. has the potential to reduce the time and resources required for full investigation and prosecution of some cases in an environment where caseloads that require a discipline response are increasing[1];

c. will save significant costs for the licensee[2]; and

d. with increased efficiencies, will continue to provide the public with a transparent and appropriate outcome in response to a conduct issue.

**Cases Suitable for the Process**

7. The Conference would be suitable for cases that meet the criteria discussed below, regardless of the nature of the conduct.[3]

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[1] In 2008, the Professional Regulation Division received 15% more cases than in the previous year, including an approximately 7% increase in conduct allegations. In 2009, this number has increased a further 3% and is expected to rise before the end of the year. The increasing number of lawyers and paralegals licensed in Ontario each year makes it unlikely that there will be an overall decrease in the number of complaints.

As the caseload increases, inevitably there is a related increase in cases that will require a formal response up to and including prosecution. An extensive investment of resources is required for any case that is taken to the Proceedings Authorization Committee (PAC) for either resolution or authorization for prosecution. Cases that are prosecuted require even more extensive investigatory and discipline resources. For example, in a mortgage fraud case, Discipline Counsel typically spend 200 to 400 hours working on each case. In more complex cases, Counsel spend in excess of 400 hours.

[2] Under the current process, where the evidence suggests that an investigation is likely to require authorization for a conduct application, the full investigation and discipline process must be deployed. This is the case even where the lawyer or paralegal who is the subject of the investigation admits to the wrongdoing and is seeking an early conclusion with sanction. There is no alternative fast track process. Although many hearings are streamlined at the hearing stage through Agreed Statements of Fact (ASF), this occurs after the completion of the full investigation (Investigation Report, Authorization Memorandum, witness statements, disclosure completed). In the absence of an ASF, Discipline Counsel must prepare for a fully contested hearing. Moreover, the experience of staff with lawyer complaints is that in cases where a lawyer considers admitting to wrongdoing to complete the matter quickly at the investigation stage, the lawyer's willingness to cooperate is significantly diminished by the time the lawyer reaches discipline. By that point, the lawyer has invested time and resources in the process and is often inclined to resist full engagement in the process.

[3] To elaborate:
Mortgage fraud. The evidence used in a mortgage fraud case is largely documentary. In this type of case, the Society can often be certain that the lawyer's admissions are supported by the evidence, and can assess the appropriate penalty to be proposed to the lawyer and his or her counsel. Given the size of mortgage

8. Since the public interest is paramount in the Law Society's regulatory processes, cases of a serious nature and that present a novel issue that should be fully tried at a hearing will not be appropriate for the process. Further, a case will not be appropriate for the process if there is a concern that sufficient facts cannot be included in the record of the hearing resulting from the Conference to satisfy the Law Society's obligation to have a transparent and fair process.

9. There will also be other cases where the public interest requires that there be a full hearing on the merits. The Proceedings Authorization Committee (PAC), which will be involved in approving a case for the process, as described below, will have the opportunity to apply these criteria when reviewing cases that may be suitable for a Conference.

**Overview of the Process**

10. Lawyers and paralegals would be notified of the availability of the Conference at the start of an investigation. A decision to move a matter to a Conference would be made only after an investigation sufficient to ensure that the regulatory issues are known and complete. The process would be available only where no disciplinary proceedings have been authorized in the case.

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fraud investigation files, the time saved by not having to prepare the file for disclosure and for hearing, not having to prepare witnesses and forgoing the hearing, are significant.
Financial transactions. The evidence used in cases of financial misconduct is often supported by documents. Where documentary evidence is lacking, for example, where a lawyer or paralegal's books and records are not up to date, the lawyer's or paralegal's admissions would assist the Society in completing its investigation and would save the time and resources required for a contested hearing.
Fail to serve. Where a lawyer or paralegal fails to serve his or her clients, evidence is obtained from the client file, court documents and from the lawyer or paralegal and clients. Where the lawyer or paralegal does not admit to the allegations, they can take a significant amount of time to prove. If a lawyer or paralegal is willing to admit to a failure to serve his or her clients, consideration should be given to the appropriateness of the consent process.
Professionalism. Where allegations of incivility or misleading the court arise out of proceedings, the factual issue of what the lawyer or paralegal said or did may not be in dispute and is often supported by transcripts or documents. However, the lawyer or paralegal often raises a defence justifying his or her conduct, for example, on the basis of the actions of the opposing party or the adjudicator. Investigating and prosecuting these cases is very time-consuming. If a lawyer or paralegal is willing to agree to a discipline outcome and penalty, consideration should be given to the appropriateness of the consent process and the fact that it will result in a public order and record of this conduct.

11. Cases dealt with through the Conference process would result in a Hearing Panel Order or would be returned to the Society for further investigation.

12. If the parties agree on the facts and penalty, after authorization by the PAC, the agreement would be considered at the Conference (a meeting of a three-person panel similar to a pre-hearing conference). If the agreement is approved, the Notice of Application in the matter would be issued and served. The Conference panel would then convene as the Hearing Panel and order the agreed-upon result. Some matters may be heard by a single member of the Hearing Panel, selected from the three panel members who convened for the Conference.

13. If the Conference panel rejects the agreement, the Law Society would resume its investigation.

**Pilot Project**

14. As this is a new process, the Committees are proposing a pilot project. The pilot project would provide for a two year review on the anniversary of the approval of the policy by Convocation, at which time it could be continued, amended or ended.

**Details of the Conference Process**

15. The following is a narrative description of the steps in the proposed Conference. A diagram following paragraph 35 illustrates the process.

Step 1 - Initiating the Conference

16. Either the lawyer/paralegal or the Law Society may initiate discussion about the Conference. The Director, Professional Regulation must approve a case in order for it to be diverted to this process. The Director will only approve a case where, in the Director's opinion, diversion would fulfill the Law Society's duty to act in a timely, open and efficient manner and its duty to protect the public interest.

17. In addition to the general test set out in paragraph 16 above, before approving a case, the Director must ensure that the following criteria are met:

a. The public interest can be addressed through a consent order. Cases will not be included in the process if they present novel issues, or issues which, for reasons of regulatory effectiveness or transparency, require a full hearing.
b. There is sufficient Law Society jurisprudence on the issue of conduct and penalty for the Society to be able to agree to the process (the jurisprudence forms the basis for the Society's agreement to a penalty or range of penalties on the basis of the applicable law and facts);
c. Discipline proceedings have not yet been authorized in the matter;
d. The lawyer or paralegal is prepared to admit to the allegations made by the Society;
e. There is no issue of failure to cooperate with the Law Society; for example, the lawyer or paralegal is responding promptly to the Law Society;
f. The lawyer or paralegal agrees to abide by the timeline of 30 days to arrive at an agreement;
g. The Law Society has no concerns about the lawyer's or paralegal's capacity to engage in negotiations;
h. The lawyer or paralegal understands that the result of the Conference will be a public hearing, although it will be abbreviated, and a public Order;
i. The lawyer or paralegal has legal representation, failing which the lawyer or paralegal affirms that he or she has been advised to obtain independent legal advice about his or her rights in the Conference process.

18. The Law Society has the right to decide that a case is not suitable for the Conference where any of the factors listed in paragraphs 16 and 17 above would make it unsuitable or where the Law Society is not satisfied that there has been sufficient investigation to make a determination on the suitability of the process.

19. Other matters may affect the Law Society decision to continue with the process. For example, if new evidence relevant to the subject of the Conference comes to

the Law Society's attention, or if allegations of misconduct about the lawyer or paralegal arise after the process has begun, it may not be appropriate for the Law Society to continue with the resolution of the original matter pending the assessment of the evidence or the outcome of the new investigation.

Step 2 - Diversion into the Conference Process

20. The Law Society and the lawyer or paralegal would negotiate a tentative agreement on admissions and penalty. The Law Society would conduct a fast-track investigation before finalizing the agreement. The Law Society would obtain the lawyer's or paralegal's admissions and such evidence as necessary to satisfy the Law Society that the admissions are accurate and would support a finding of professional misconduct or conduct unbecoming.

21. The consent proposal would be prepared by the Law Society and presented to the lawyer or paralegal. The lawyer or paralegal would have 30 days to accept or reject the agreement, or to negotiate changes with the Law Society. The consent proposal would be based on a standard template that includes the lawyer's or paralegal's admissions and the joint penalty proposal, including an explanation of the basis for the penalty recommendation. The template will include the lawyer's or paralegal's declaration that the information provided is complete and accurate.

22. Where there is no agreement on penalty, the parties may still use the process if there is agreement on a finding of professional misconduct and agreement on the range of an appropriate penalty. In that case, the parties would provide their position on the range of penalty and this will be included in the documentation filed for the Conference.

23. With agreement as described above, the case will proceed to hearing based on the penalty or the range of penalty submitted.

24. If one of the parties is unable to agree to the outcome, the consent process would terminate and the matter would be returned to the Investigation department. The

documents prepared in support of the Conference would be excluded from any further proceedings.

Step 3 - Submission of the Consent Proposal to the PAC

25. Upon approval of the agreement by the Director, Professional Regulation, the consent proposal would be presented to the PAC for authorization of a conduct proceeding and authorization to proceed with the Conference.

26. As with all conduct proceedings, pursuant to By-Law 11[4], section 51(2)), the PAC must be satisfied that there are reasonable grounds for believing that the lawyer or paralegal has contravened section 33 of the *Law Society Act*.

27. If the PAC approves the agreement, the matter would be submitted to a three-person Conference panel for consideration. The Notice of Application would not be issued at this stage.

28. If the PAC is not satisfied to the requisite standard that discipline proceedings are warranted, the consent agreement would fail and the matter would be returned to the Investigation department to proceed in the normal course.

Step 4 - Presentation to a Conference Panel

29. The proposal would be presented at the Conference for approval. The submission would include a draft Notice of Application, a draft Order and the consents from the lawyer or paralegal and the Law Society that if the individuals who convene as the Conference panel accept the proposal, they may subsequently convene as the Hearing Panel to determine the matter. The Hearing Panel would not meet until after the Notice of Application is issued and served.

30. Consistent with the current Convocation policy on joint submissions (attached as [TAB 1]), the members of the Conference panel should accept the consent

[4] Regulation of Conduct, Capacity and Professional Competence.

proposal unless the panel concludes that the joint submission on penalty is outside the reasonable range, in the circumstances.

31. Where the Conference panel does not accept the joint submission, the panel may reject the consent proposal, or may give its views to the parties about the case, including penalty. The parties may agree to adopt the Conference panel's views about the case and the penalty the panel proposes. The decision resulting from the Conference is by consent only. If the panel or either party disagrees, the proposal would fail. No costs are to be awarded to either party in a subsequent proceeding for failure to accept an alternate proposal by the Conference panel.

32. If the Conference panel does not approve the proposal, the Law Society would complete its investigation and proceed through the process in the normal manner. The draft agreement and Order are not admissible for the purpose of any subsequent investigation and prosecution of the same allegations.

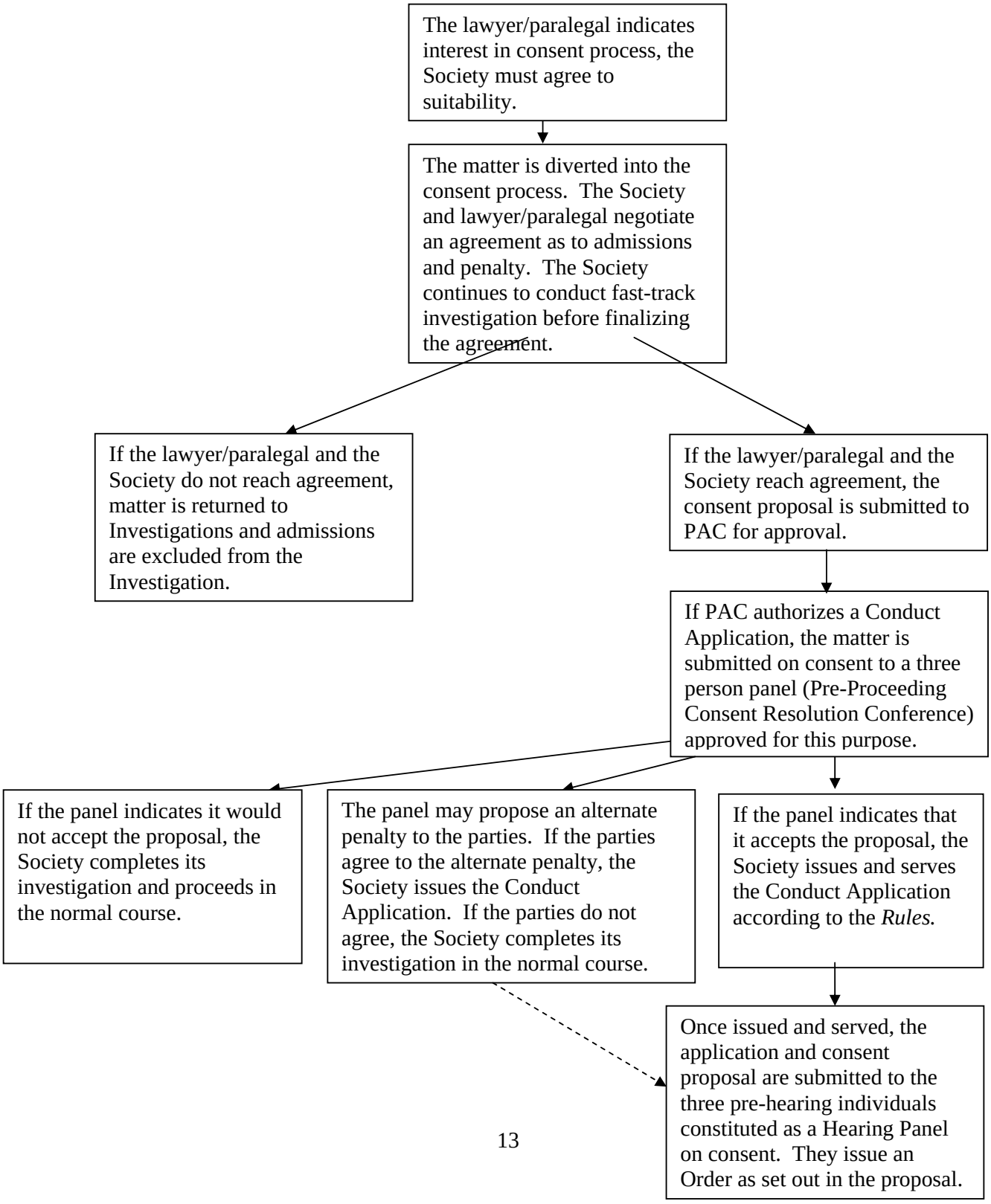
Step 5 – The Hearing

33. If the Conference panel approves the proposal, the Law Society would then issue the Notice of Application. Once issued, the Notice would be served according to the *Rules of Practice and Procedure* and would become a public document.

34. A hearing would be held before the individuals who convened as the Conference panel and who now sit as the Hearing Panel for the purpose of making a determination on the consent proposal. Some matters may be heard by a single member of the Hearing Panel, who would be selected from the three persons who convened for the Conference.

35. The proposal, which includes the lawyer's or paralegal's admissions, would be filed as an exhibit at the hearing to become part of the public record. The Hearing Panel would issue an Order in the normal course. Reasons for the Order are an important component of the public nature of this process.

## PROPOSED CONSENT PROCESS



**Key Elements of the Process**

36. The following highlights some key elements of this consent process.

Transparency

37. If the proposed agreement is approved by the PAC and at the Conference, it will result in public notice, a public hearing and a public Order. From a public perspective, there is no significant difference between the current process in which matters are resolved through an Agreed Statement of Fact (ASF), and the Conference process. The following chart illustrates the similarities and differences between the two processes.

| Current Process | Conference Process |
|---|---|
| Non-public investigation | Non-public investigation |
| Non-public, off-the-record settlement discussions | Non-public, off-the-record consent resolution discussions |
| | Non-public drafting of consent agreement |
| | Non-public agreement on disposition |
| Non-public consideration by PAC | Non-public consideration by PAC |
| **Public** Notice of Application | Non-public settlement conf. |
| Non-public Pre-Hearing Conf. | **Public** Notice of Application |
| Non-public drafting of ASF | |
| Non-public agreement on disposition | |
| **Public** hearing; revelation of ASF and joint submission on disposition | **Public** hearing; revelation of consent agreement and joint submission on disposition |

38. As illustrated above, the Notice of Application is issued and served following the approval at the Conference, and this is necessary for the following reason. If the Conference panel were to reject an agreement, the proposal would fail, and the Society would complete its investigation. If the Notice was public at that time and the Conference panel rejected the proposal, it would be unfair to the licensee and difficult for the Society to complete its confidential investigation.

39. Once the Notice of Application is issued and served, it becomes public. As with all investigations, new complaints are sometimes received as a result of this public notice. If a new complaint was received after the issuance of the Notice of Application that results from the Conference, that complaint would be investigated separately from the complaint that is the subject of the consent proposal, as is done in the regular discipline stream.

Penalties and Mitigation

40. The agreed penalty in the consent proposal must be proportionate. It should reflect penalties imposed in cases with comparable findings, taking into account the costs saved by making the early admission. All penalties would be available in this process, including revocation.

41. There may be a range of possible penalties. A number of factors informing penalty are described in *Law Society of Upper Canada v. Ricardo Max Aguirre*, 2007 ONLSHP 0046 and these are all relevant to the consent process as well. The following factors inform the appropriate penalty to be proposed, with those most relevant to the consent process emphasized:

*a.* The existence or absence of a prior disciplinary record;

*b.* *The existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others;*

c. Whether the member has since complied with his or her obligations by responding to or otherwise co-operating with the Society;

d. The extent and duration of the misconduct;

e. The potential impact of the member's misconduct upon others;

*f.* *Whether the member has admitted misconduct, and obviated the necessity of its proof;*

g. Whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct);

h. Whether the misconduct is out-of-character, or, conversely, likely to recur.

Three-Member Conference Panel and Hearing Panel

42. The proposed process provides that the same individuals would convene for the Conference and the Hearing Panel, by consent of the parties.

43. This feature of the proposed process resembles the process that may be followed when agreement is reached on facts and issues at a pre-hearing conference before a single panelist and, with the consent of the parties, the single panelist presides at the hearing on the merits. Rule 22.10 (2) of the *Rules of Practice and Procedure* provides that a single panel member may hear a case, on consent of the parties. This is an alternative dispute resolution process which, with adequate protections, is useful for the parties and the tribunal. In the proposed Conference process, rather than a single individual convening for the pre-proceeding Conference, three individuals would convene as the Conference panel.

44. There are two reasons for having a three-person panel at the Conference. First, the agreement of a three-person panel on the outcome between the Society and a lawyer or paralegal would have greater weight. Secondly, if only one member of a three-person panel were to preside at the Conference, the Hearing Panel might reject the agreement that the Conference panel had accepted.

45. At the hearing stage that follows the Conference, in some cases, it may be appropriate for a single member of the Hearing Panel to preside at the hearing. This person would be selected from the three persons who convened as the Conference panel, as he or she would be familiar with the facts and the issues that led to the consent agreement. Similar to the process described in paragraph 43, this person would sit as a single member with the consent of the parties.[5]

[5] Ontario Regulation 167/07 (Hearings Before the Hearing and Appeal Panels) provides as follows:

**Proceedings to be heard by one member**
2. (1) Subject to subsection (2), the chair or, in the absence of the chair, the vice-chair, shall assign either one member or three members of the Hearing Panel to a hearing to determine the merits of any of the following applications:
…

Legal Representation

46. The process is predicated on the lawyer or paralegal having legal representation. The lawyer's or paralegal's admissions and agreement to the proposal are essential to the success of the consent process. While legal representation is not a prerequisite to participating in the Conference, it would be strongly encouraged by the Society. Lawyers and paralegals who participate in the process would be advised by the Law Society to obtain legal advice.

Timelines

47. Since the Conference is a diversionary, "without prejudice" process, it is not in the public interest to stall the investigation during protracted negotiations and delay. The Committees propose that the timeline for arriving at an agreement be 30 days from the time that the agreement is presented to the lawyer or paralegal by the Law Society. If agreement is not reached in 30 days, the Law Society would resume its investigation.

Documents and the Record

48. The documents filed before the Hearing Panel should be public in the normal course, with the notation that it is the result of a consent proposal that would also be public as part of the Tribunal record.

**Tribunals Office's Administration of the Process**

49. Attached at [TAB 2] is a proposed template prepared by the Tribunals Office for the administration of the process, with particular emphasis on ensuring the process is open and transparent and in keeping with general Tribunals administration.

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2. An application under subsection 34 (1) of the Act, if the parties to the application consent, in accordance with the rules of practice and procedure, to the application being heard by one member of the Hearing Panel.

**Amendments to the *Rules of Practice and Procedure***

50. To implement the Conference process, amendments to the *Rules of Practice and Procedure* would be required. They would refer to the process as a "pre-proceeding consent resolution conference", and codify the procedural elements of the process described in this report. Consequential amendments to certain Rules may also be required.

51. Amendments to the Rules will be provided at a future Convocation should Convocation agree to the proposal for the Conference.

TAB 1

## CONVOCATION POLICY ON JOINT SUBMISSIONS
## (Discipline Policy Committee Report to Convocation)

B.l. Joint Submissions of Counsel

B.1.1. The Committee was asked to consider the manner in which the joint submissions of counsel are currently treated by Discipline Panels, in light of the principles adopted by Convocation on March 27, 1992 in respect of joint submissions.

B.1.2. On March 27, 1992, Convocation adopted the recommendations of this Committee which provided, inter alia,

"5(a) Convocation encourages benchers sitting on discipline committees to accept a joint submission except where the committee concludes that the joint submission is outside a range of penalties that is reasonable in the circumstances.

"5(b) If the Committee, after hearing and considering submissions of counsel, does not accept the joint submission as to a particular penalty or as to the shared submission as to a range of penalties, the Committee will be at liberty to impose the penalty that it deems proper and should give reasons for not accepting the joint submission."

B.l.3. Some members of the Committee expressed concern that these principles are not being followed at the Committee level or at Convocation and that a lack of certainty in the process might discourage counsel from entering into Agreed Statements. The Committee noted that where, following negotiations of an Agreed Statement of Facts on the basis of a joint submission as to penalty, the proposed penalty is rejected, it might be appropriate to provide the Solicitor the option of commencing the hearing anew before another Committee.

B.l.4. Your Committee established a Sub-Committee, chaired by Robert J. Carter, Q.C., to consider the present practice regarding joint submissions at both the Committee level and at Convocation, to consider the consequences of the practice and to report to the Committee with recommendations.

…

ALL OF WHICH is respectfully submitted
DATED this 24th day of February, l995
D. Scott, Chair

THE REPORT WAS ADOPTED

TAB 2

## Tribunals Offices' Administration of the Proposed Consent Process

1. Discipline Counsel will request in writing a date from the Hearings Coordinator, Tribunals Office for the Pre-Proceeding Consent Resolution Conference ("the Conference"), and provide a time estimate.

2. The Hearings Coordinator will schedule the Conference date and secure a three person panel as assigned by the Chair of the Hearing Panel.

3. The composition of the Conference panel will mirror the requirements of *Ontario Regulation 167/07* to allow this panel to convert to a Hearing Panel should the parties' proposal to the Conference panel be accepted.

4. The Hearings Coordinator will advise Discipline Counsel and the lawyer or paralegal of the assigned Conference date and panel. The parties will immediately advise the Hearings Coordinator of any conflicts with the date or panel.

5. If the parties' proposal is accepted by the Conference panel, the Hearings Coordinator will attend in person at the Conference to facilitate scheduling a hearing date for the Hearing Panel and parties to convene at a future date.

6. If the matter is to be heard by a single member of the Hearing Panel, the members of the Conference panel shall elect one member to preside on the hearing date as a Hearing Panel and will so notify the Hearings Coordinator.

7. The matter will now follow the same protocol applied by the Tribunals Office as in other hearings.

8. In accordance with Rule 9 of the *Rules of Practice and Procedure*, Discipline Counsel will request the Tribunals Office to issue and file the notice of application and will serve it.

9. Once filed, the notice of application will be publicly available.

10. The notice of application will refer to the hearing date scheduled in paragraph 5 above. The matter will by-pass the Proceedings Management Conference (PMC) and go straight to a hearing date.

11. To satisfy transparency requirements, two to four weeks prior to the hearing date, the Tribunals Office will prepare a summary of the notice of application for publication on the Law Society's "Current Hearings" website.

12. During the hearing, the accepted proposal referred to in paragraph 5 above will be marked as an exhibit and thereby form part of the public record. The Hearing Panel will endorse the notice of application to reflect its Decision and Order as set out in the accepted proposal.

13. After the hearing, the Office will
    - prepare any required formal orders from the Hearing Panel's endorsement;
    - deliver the Decision and Order and reasons of the Hearing Panel, if any, to the parties;
    - publish an order summary on the Law Society's "Tribunal Orders and Dispositions" website and in the *Ontario Reports*; and
    - publish the Hearing Panel's reasons, if any on the Canadian Legal Information Institute (CanLII) and Quicklaw databases.

14. The matter will then be closed, catalogued and archived off site.

15. After the matter is closed and on request, it would be made available to the public for viewing or copies of content, unless the Hearing Panel had ordered otherwise in the course of the hearing.

**APPENDIX 2**

THE LAW SOCIETY OF UPPER CANADA

**RULES OF PRACTICE AND PROCEDURE**
**(applicable to proceedings before the Law Society Hearing Panel)**
**MADE UNDER**
**SECTION 61.2 OF THE *LAW SOCIETY ACT***

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON JANUARY 27, 2011

MOVED BY

SECONDED BY

THAT the rules of practice and procedure applicable to proceedings before the Law Society Hearing Panel, made by Convocation on February 26, 2009 and amended by Convocation on June 25, 2009 and June 29, 2010, (the "Rules") be amended as follows:

**1. The definition of "hearing" in subrule 1.02 (1) of the English version of the Rules is revoked and the following substituted:**

"hearing" does not include a consent resolution conference, a proceeding management conference or a pre-hearing conference;

**2. Rule 25.01 of the English version of the Rules is amended by adding the following subrule:**

**Consent resolution conference: no costs**

(4) Despite subrules (1) and (2), no costs shall be awarded against the Society or the subject of the proceeding based on,

(a) either party's refusal to participate or either party's withdrawal from participation in a consent resolution conference; or

(b) the fact that a consent resolution conference did not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding.

**3. The English version of the Rules are further amended by adding the following Rule:**

## RULE 29

## CONSENT RESOLUTION CONFERENCE

### Definitions

**29.01** In this Rule,

"consent resolution conference" means a conference between the Society and the subject of a potential proceeding, that is conducted by a consent resolution panel, held prior to the commencement of the conduct proceeding for the purposes of settling,

(a) the decision and order to be made by the Hearing Panel in the conduct proceeding; or

(b) the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding;

"consent resolution panel" means the panelist or, collectively, the panelists assigned to conduct a consent resolution conference;

"potential proceeding" means a conduct proceeding that has not been commenced;

"subject of a potential proceeding" means the person who will be the subject of a conduct proceeding once it has been commenced.

### Consent resolution conference: when shall be conducted

**29.02** (1) The chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel shall direct that a consent resolution conference be conducted if the following conditions are present:

1. The Society has obtained the authorization of the Proceedings Authorization Committee,

   i. to commence a conduct proceeding, and

   ii. to request the Hearing Panel to direct that a consent resolution conference be conducted.

2. The conduct proceeding has not been commenced.

3. The Society and the subject of the potential proceeding have agreed to,

i. the decision and order to be made by the Hearing Panel in the conduct proceeding; or

ii. the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding.

4. The subject of the potential proceeding has consented to participate in a consent resolution conference.

5. The Society has requested a consent resolution conference.

**Who conducts consent resolution conference**

(2) Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted under subrule (1), the chair, or, in the absence of the chair, the vice-chair, shall assign either one or three panelists to conduct the consent resolution conference.

**Request to Tribunals Office**

**29.03** (1) The Society may request a consent resolution conference by submitting a request in writing to the Tribunals Office.

**Information re conditions**

(2) The Society shall include in its written request for a consent resolution conference sufficient information to satisfy the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel of the existence of the conditions set out in rule 29.02.

**Contact information of subject of potential proceeding**

(3) The Society shall also include in its written request for a consent resolution conference the name of the subject of the potential proceeding and her or his address for service, telephone number, fax number, if any, and e-mail address, if any.

**Notice of consent resolution conference: Society**

**29.04** Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted, the Tribunals Office shall send to the Society and to the subject of the potential proceeding notice of the date, time and location of the consent resolution conference.

**Procedure applicable to consent resolution conference**

**29.05** (1) The practices and procedures applicable to proceedings before the Hearing Panel that are set out in Rules 2 to 20 and Rules 22 to 28 do not apply with respect to a consent resolution conference.

(2) Subject to this Rule, the practices and procedures applicable with respect to a consent resolution conference shall be determined by the consent resolution panel conducting the consent resolution conference.

**Consent resolution conference not open to public**

(3) A consent resolution conference shall be conducted in the absence of the public.

**Withdrawing participation in consent resolution conference**

**29.06** (1) At any time before or during the conduct of a consent resolution conference, the Society or the subject of the potential proceeding may withdraw from participating in the consent resolution conference.

**Notice of withdrawal**

(2) Where the Society or the subject of the potential proceeding wishes to withdraw from participating in the consent resolution conference under subrule (1), the withdrawing party shall so notify in writing the other party and the Tribunals Office.

**Settlement at consent resolution conference: commencement of conduct proceeding**

**29.07** (1) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding the Society shall,

(a) commence the conduct proceeding; and

(b) notify the Tribunals Office in writing of the fact and general nature of the settlement at the consent resolution conference not later than the day on which the conduct proceeding is commenced.

**Settlement at consent resolution conference: non-application of certain Rules**

(2) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, despite rule 1.01, the following Rules do not apply to the conduct proceeding:

1. Rule 6.

2. Rule 7.

3. Rule 8.

4. Rule 12.

5. Rule 13.

6. Rule 14.

7. Rule 16.

8. Rule 19.

9. Rule 20.

10. Rule 21.

11. Rule 22.

**No settlement at or withdrawal from consent resolution conference: subsequent hearings**

**29.08** Where a consent resolution conference does not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

(a) no communication shall be made to any member of the Hearing Panel assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and

(b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

## INFORMATION

### b) TWO YEAR REVIEW ON NON-BENCHER ADJUDICATOR INITIATIVE

**Summary**

7. In April 2007 Convocation approved the addition of four non-bencher lawyers and four non-bencher non-lawyers to become members of the Law Society's Hearing Panel. It also directed that two years after implementing the recommendation there be a review for Convocation of the manner in which the non-bencher lawyers and the non-bencher non-lawyers have served as adjudicators.

8. The non-bencher lawyers and non-lawyers were appointed in January 2009. As directed by Convocation the Committee is providing the two year review, for Convocation's information.

9. The Committee has concluded that although it is still early to obtain a full picture of the non-bencher adjudicator initiative, indications are that it,

a. enhances the Law Society's ability to effectively adjudicate and manage its hearings process in the public interest,

b. has made it possible to provide important human resources to the Hearing Panel; and

c. offers an opportunity for non-benchers to play a valuable role in Law Society matters and become more aware of issues related to professional regulation.

**Introduction and Background**

10. In April 2007 Convocation approved a number of recommendations of the Tribunals Composition Task Force including,

> **Recommendation 1**
> That Convocation approves the eligibility of,
> a. four non-bencher lawyers, and
> b. four non-bencher non-lawyer persons
> to be members of the Law Society's Hearing Panel.

**Recommendation 2**
That if Convocation approves recommendation 1, all Hearing Panel members be remunerated on the same basis, except that the non-bencher lawyer and non-bencher non-lawyer members are not required to donate 26 days to the Law Society before being eligible for remuneration.

**Recommendation 3**
That Convocation budget annually an amount not exceeding $100,000 for the remuneration and expenses associated with adding non-bencher lawyers and non-bencher non-lawyer persons to the Hearing Panel.

**Recommendation 4**
That if Convocation approves Recommendation 1, two years after implementing the recommendation, Convocation authorize a review of the manner in which the non-bencher lawyers and the non-bencher non-lawyer persons have served as adjudicators on the Law Society's Hearing Panel, the results of which are to be reported to Convocation.

11. A process was developed to seek applicants for the adjudicator positions. A notice was placed in the *Ontario Reports* in English and French for lawyer applicants. Copies of the notices are set out at **Appendix 3**. A description of the process followed for both non-bencher lawyer and non-bencher non-lawyer adjudicator appointments is set out at **Appendix 4**. The appointments were made in 2009.

**Scope of this Report**

12. Convocation directed that a review take place after two years of operation of the non-bencher adjudicator initiative. Although it is possible to provide some assessment of the initiative, in the Committee's view there has been insufficient time to fully assess qualitative issues that require the benefit of a longer period. Accordingly, the Committee's report is impressionistic, with a general overview of the initiative over the last two years.

**Use of Non-bencher Adjudicators**

13. In discussing usage of non-bencher adjudicators it is important to note, as well, that in addition to the four non-bencher lawyer appointees and the four non-bencher non-lawyer appointees, the Law Society has on occasion appointed "temporary" panelists (lawyer and non-lawyer) where needed for French

language hearings and temporary paralegal panelists for good character or appeal hearings. The Law Society has authority to do this pursuant to section 49.24.1 of the *Law Society Act*.

14. The issue of French language hearings illustrates one of the benefits of the non-bencher adjudicator initiative in enhancing adjudicative resources. As benchers and lay benchers are elected and appointed, respectively, those able or available to hear French language hearings can vary from time to time. To provide more continuity, three of the four non-bencher lawyer adjudicators and two of the non-bencher non-lawyer adjudicators are bilingual. This reduces the need to use "temporary" panelists. From a public interest perspective it has enhanced resources available to ensure the public and licensees are able to avail themselves of the opportunity to be heard in French.

15. Since Convocation passed the non-bencher adjudicator initiative the Law Society has also been required to populate a significant number of panels to hear paralegal good character matters. This has required extensive use of lay benchers and non-bencher non-lawyer adjudicators as well as temporary paralegal panelists. The non-bencher adjudicator initiative did not include appointments of additional non-bencher paralegal adjudicators. Given that the paralegal good character hearings are currently winding down, the need for additional temporary paralegal panelists may diminish, although this issue may require further discussion in the future.

16. The four non-bencher lawyer candidates and the four non-bencher non-lawyer appointees are sent a hearings schedule, in the same way as bencher adjudicators, and provide their availability to sit on Law Society hearings and other matters. Like all adjudicators they may be scheduled to sit on pre-hearing conferences, hearings, summary hearings, appeals, interlocutory motions, motions in hearings and appeals, short matter dates (hearings estimated by the parties to require less than one day), long matter dates (hearings estimated by the parties to require more than one day) in lawyer and paralegal matters in both English and French.

17. As with all adjudicators the non-bencher adjudicators may be assigned to a matter, with an anticipated time commitment, only to be required to participate for less time because a matter does not proceed or takes less time than anticipated. The reverse may also be true; a matter may take more time than initially anticipated.

18. The non-bencher non-lawyer adjudicators have been used on a number of matters. Their availability has assisted in scheduling hearings over the last two years. The non-bencher lawyers, in particular those who are bilingual, have also had a number of occasions to sit on hearings or otherwise participate.

19. The existence of an additional pool of adjudicators has provided the Chair of the Hearing Panel with additional scheduling flexibility. On occasion these adjudicators have made the difference between being able to schedule a hearing or not when the time commitment involved or the last minute change in scheduling made it impossible to schedule a bencher adjudicator. The availability of additional lay and French speaking adjudicators has also facilitated flexibility in scheduling.

20. The information at **Appendix 5** sets out the number of times a non-bencher adjudicator was assigned to matters in 2009 and 2010 and how much actual participation time this represented.[6] It reveals some unevenness in the use of non-bencher adjudicators, particularly non-bencher lawyers. The Committee is of the view that the non-bencher adjudicators must be given ample opportunity to participate in hearings and matters. The goal of the initiative is to develop additional and experienced adjudicative resources to enhance the operation of the Tribunal. This means that it is important to regularly schedule these adjudicators to participate on panels. Greater effort to do so will be made in 2011.

[6] Setting out "no. of times assigned" provides a snapshot of opportunities provided to the non-bencher adjudicator to participate. Often, however, an assigned matter will not proceed, (adjournments, withdrawals, resolutions by ASF, etc.) so the actual participation is reflected in the second number.

**Expenses and Remuneration for Non-Bencher Adjudicators**

21. In 2009 the total expenses and remuneration for non-bencher lawyer and non-bencher non-lawyer appointees was $87,099.36, representing the use of five non-lawyers and three lawyers. This was the first year of the initiative and occurred before the paralegal good character hearings were underway. In that year an additional $1,522.02 was spent on two temporary paralegal panelists.

22. From January to November 2010, $153,642.37 was spent on non-bencher lay adjudicators (approximately 60% of the total), non-bencher lawyer adjudicators (approximately 30% of the total), and temporary lawyer and lay adjudicators (approximately 10% of the total). This includes $27,615.75 (18%) for French hearings. Specifically, the expenses and remuneration for,

a. non-bencher lay adjudicators were:

| | | |
|---|---|---|
| Expenses | $31,439.34 | ($3,125.66 of which was for French hearings) |
| Remuneration | $60,274.81 | ($2,300.00 of which was for French hearings) |
| Total | $91,714.15 | ($5,425.66 or which was for French hearings) |

b. non-bencher lawyer adjudicators were:

| | | |
|---|---|---|
| Expenses | $13,455.32 | ($ 4,893.59 of which was for French hearings) |
| Remuneration | $31,873.64 | ($12,700.00 of which was for French hearings) |
| Total | $45,328.96 | **(**$17,593.59 or which was for French hearings) |

a. "temporary" lawyer and lay adjudicators were:

| | | |
|---|---|---|
| Expenses | $ 1,684.45 | ($1,296.50 of which was for French hearings) |
| Remuneration | $14,914.81 | ($3,300.00 of which was for French hearings) |
| Total | $16,599.26 | ($4,596.50 of which was for French hearings) |

2. In November 2010 the Committee reported to Convocation that the $100,000 limit placed on expenses for non-bencher adjudicators had been exceeded. It noted that given,

a. the requirements of Regulation 167/07;

b. the Law Society's commitment to having lay benchers on all hearings; and

c. a licensee's right to a French language hearing,

non-bencher lawyer and non-bencher non-lawyer appointees were necessarily assigned despite the cap having been reached. It noted that in all likelihood additional funds would have to be expended before the end of 2010 and that it was realistic to expect a similar experience and needs in 2011. In the 2011 budget Convocation included an increase to $175,000.

3. As a regulator of the profession in the public interest the importance of regulatory proceedings being scheduled as expeditiously as possible cannot be over-emphasized. The public in general and complainants in particular, have a right to expect that the Law Society will effectively address the issues of lawyer and paralegal competence, conduct and capacity. The non-bencher adjudicator initiative has provided greater flexibility to the Tribunals process.

4. The Committee also believes that the initiative is providing an additional benefit. Small though the numbers are, a new group of lawyers and lay people are becoming familiar with the Law Society, with the intricacies of professional regulation, the responsibilities that accompany it and the issues that affect lawyers and paralegals. Expanding adjudicative responsibilities beyond benchers strengthens the Law Society's work.

**Conclusion**

5. The Committee is of the view that the non-bencher adjudicator initiative is proceeding well, has added to the Law Society's capacity to regulate in the public interest and represents an important component of the Law Society's ongoing commitment to transparent, fair, and effective regulatory processes.

LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

## Invitation to Lawyers to apply for Appointment to the Law Society of Upper Canada's Hearing Panel

**The Law Society of Upper Canada exists to govern Ontario's legal profession in the public interest.**

The Law Society of Upper Canada is seeking four qualified lawyers for appointment to its Hearing Panel. The term of appointment shall be at the pleasure of Convocation.

The Law Society of Upper Canada governs legal service providers in the public interest by ensuring that the people of Ontario are served by lawyers and paralegals who meet high standards of learning, competence and professional conduct. In furtherance of that mandate, the Law Society's Hearing Panel hears cases related to the conduct, capacity and competence of lawyers and paralegals. The Hearing Panel consists of benchers, lawyers, paralegals and public appointees.

This is a part-time position that is remunerated on a *per diem* basis. Reasonable expenses are paid/refunded. Assignment to hearings will be on an *as needed* basis.

Successful applicants must be currently licensed by the Law Society of Upper Canada, be called to the bar for a minimum of ten years, have no disciplinary record in any jurisdiction, and must be able to devote time to the role of an adjudicator. Bilingualism (French/English) is an asset. Consideration will be given to the following qualifications:

i. adjudicative experience and legal expertise
ii. commitment to the public interest
iii. understanding of the role of an adjudicator
iv. familiarity with administrative tribunals
v. open-mindedness, empathy and the ability to consider argument
vi. commitment to preparing timely and reasoned decisions
vii. willingness to be trained as an adjudicator and to attend mandatory training sessions
viii. commitment to tribunal standards of procedure, consistency, quality and performance
ix. good oral and written communication skills

*The Law Society of Upper Canada encourages applicants that reflect the diversity of Ontario. We appreciate all interest and will directly contact candidates under consideration.*

Qualified individuals are invited to send a curriculum vitae **no later than February 14, 2008** to the Human Resources Department, Law Society of Upper Canada, 130 Queen Street West, Toronto Ontario, M5H 2N6; fax 416.947.3448; e-mail *hr@lsuc.on.ca*.

LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

## Le Barreau du Haut-Canada invite les avocats et avocates à faire demande comme membre de son comité d'audition

**Le Barreau du Haut-Canada a pour mission de réglementer la profession juridique dans l'intérêt public.**

Le Barreau du Haut-Canada cherche quatre avocats compétents pour faire partie de son comité d'audition. Les conditions de la nomination seront établies par le Conseil.

Le Barreau du Haut-Canada réglemente les fournisseurs de services juridiques dans l'intérêt du public en veillant à ce que les avocates, les avocats et les parajuristes qui sont au service de la population de l'Ontario répondent à des normes élevées en matière de formation, de compétence et de déontologie. Dans le cadre de son mandat, le comité d'audition du Barreau entend des causes portant sur la conduite, la capacité et la compétence des avocats et des parajuristes. Le comité d'audition est formé de conseillers, d'avocats, de parajuristes et de membres du public.

Il s'agit d'un poste à temps partiel qui est rémunéré selon un forfait quotidien. Les dépenses raisonnables sont payées ou remboursées. Les mandats d'audition sont assignés selon les besoins.

Pour être acceptés, les candidats et candidates doivent détenir une licence du Barreau du Haut-Canada, être assermentés depuis au moins dix ans, ne pas avoir de dossier disciplinaire dans aucun ressort et être capables d'accorder du temps à leur rôle de membre du comité. Le bilinguisme (français/anglais) est un atout. Les compétences suivantes seront prises en compte :

(i) Expérience en arbitrage et expertise judiciaire
(ii) Engagement envers l'intérêt public
(iii) Compréhension du rôle d'arbitre
(iv) Connaissance du fonctionnement des tribunaux administratifs
(v) Ouverture d'esprit, empathie et habileté à analyser un argument
(vi) Engagement à préparer des décisions opportunes et raisonnées
(vii) Volonté de participer à des séances obligatoires de formation d'arbitre
(viii) Engagement envers les normes de procédure des tribunaux, la cohérence, la qualité et le rendement
(ix) Bonnes habiletés de communication orale et écrite

Les personnes qualifiées sont invitées à envoyer leur curriculum vitae le **14 février 2008 au plus tard** aux Ressources humaines, Barreau du Haut-Canada, 130, rue Queen Ouest, Toronto (Ontario) M5H 2N6; téléc. 416.947.3448; courriel *hr@lsuc.on.ca*

*Le Barreau du Haut-Canada encourage les candidats et candidates qui représentent la diversité de l'Ontario. Nous vous remercions de votre intérêt et contacterons directement les personnes dont la candidature sera retenue.*

**APPENDIX 4**

## APPOINTMENTS PROCESS FOR NON-BENCHER ADJUDICATORS

1. The Law Society placed advertisements in the *Ontario Reports* for lawyer applicants. For non-lawyer applicants, it wrote to previous lay benchers and solicited from other regulators the names of lay adjudicators who might meet the Law Society's appointment criteria.

### Lawyer Applicants

2. The Law Society received 229 applications from lawyers and 13 applications from non-lawyers. Of these, 133 applications were from lawyers inside Toronto and 96 were from lawyers outside of Toronto. There were 153 male applicants, and 76 female applicants.

3. The then Director, Policy and Tribunals read every lawyer resumé. Only those applicants with prior adjudicator experience were selected for further review. This reduced the number to 70.

4. The Director and other designated staff then reviewed the 70 lawyer applicants against the criteria set out in the advertisement, and selected a short list of 27 lawyers.

5. In June 2008, the Director provided the names of all 229 lawyers, including the 70 with adjudicator experience, and the short list and resumés of the 27 short-listed applicants to a bencher working group of Alan Gold, Larry Banack and Bonnie Warkentin.

6. The Working Group met on July 8, 2008 to review the applicants. It selected a short list of 6 lawyers (three from within Toronto and three from outside Toronto).

7. The shortlisted applicants were then vetted for any Law Society regulatory issues, and their references were checked. The remaining members of the working group, Alan Gold and Larry Banack reviewed the shortlist.

**Non-Lawyer Applicants**

8. The Law Society received 13 applications from non-lawyers. The Director reviewed the applicants and provided their resumés to the Working Group in June 2008. The Working Group discussed these applicants at its July 8 meeting, and selected a short list of five applicants. The references of the five applicants were checked.

9. Alan Gold and Larry Banack reviewed the applicants following the reference and regulatory checks, and recommended four lawyer and four non-lawyer adjudicators to the Committee for appointment to the Hearing Panel. The Committee reviewed the names and information about their experience and recommends that Convocation invite them to become members of the Hearing Panel.

**APPENDIX 5**

## 2009 NON BENCHER HEARING PANEL APPOINTEE ADJUDICATOR ATTENDANCE

| Appointee | Lawyer or non-lawyer[7] appointee | Number of times assigned to a hearing panel | Hearing participation (in hours)[8] |
|---|---|---|---|
| 1 | Lawyer | 3 | 13 |
| 2 | Lawyer | 1 | 7 |
| 3 | Lawyer | 0 | 0 |
| 4 | Lawyer | 0 | 0 |
| 5 | Non-lawyer | 12 | 244 |
| 6 | Non-lawyer | 10 | 151 |
| 7a | Non-lawyer | 4 | 59 |
| 7b[9] | Non-lawyer | 1 | 9 |
| 8 | Non-lawyer | 3 | 21 |
| **Totals** | | **34**<br>**lawyer appointees (4)**<br>**non-lawyer appointees (30)** | **504**<br>**lawyer appointees (20)**<br>**non-lawyer appointees (484)** |

[7] In 2009, the four lawyer appointees to the Hearing Panel were Margot Blight, Adriana Doyle, Jacques Ménard and Howard Ungerman. The five non-lawyer appointees were Andrea Alexander, Anne-Marie Doyle, Barbara Laskin, Maurice Portelance and Sarah Walker.
[8] Includes participation for continuation hearing dates.
[9] Non-lawyer appointee adjudicator 7b replaced non-lawyer appointee adjudicator 7a.

## 2010 NON BENCHER HEARING PANEL APPOINTEE ADJUDICATOR ATTENDANCE

| Appointee | Lawyer or non-lawyer[10] appointee | Number of times assigned to a hearing panel | Hearing participation (in hours) |
|---|---|---|---|
| 1 | Lawyer | 11 | 35 |
| 2 | Lawyer | 12 | 26 |
| 3 | Lawyer | 13 | 87 |
| 4 | Lawyer | 4 | 11 |
| 5 | Non-lawyer | 21 | 255 |
| 6 | Non-lawyer | 17 | 111 |
| 7 | Non-lawyer | 5 | 44 |
| 8 | Non-lawyer | 14 | 81 |
| **Totals** | | **97**<br>**lawyer appointees (40)**<br>**non-lawyer appointees (57)** | **650**<br>**lawyer appointees (159)**<br>**non-lawyer appointees (491)** |

[10] In 2010, the four lawyer appointees to the Hearing Panel were Margot Blight, Adriana Doyle, Jacques Ménard and Howard Ungerman. The four non-lawyer appointees to the Hearing Panel were Andrea Alexander, Barbara Laskin, Maurice Portelance and Sarah Walker.

## RULE 29

## CONSENT RESOLUTION CONFERENCE

**Definitions**

**29.01** In this Rule,

"consent resolution conference" means a conference between the Society and the subject of a potential proceeding, that is conducted by a consent resolution panel, held prior to the commencement of the conduct proceeding for the purposes of settling,

(a) the decision and order to be made by the Hearing Panel in the conduct proceeding; or

(b) the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding;

"consent resolution panel" means the panelist or, collectively, the panelists assigned to conduct a consent resolution conference;

"potential proceeding" means a conduct proceeding that has not been commenced;

"subject of a potential proceeding" means the person who will be the subject of a conduct proceeding once it has been commenced.

**Consent resolution conference: when shall be conducted**

**29.02** (1) The chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel shall direct that a consent resolution conference be conducted if the following conditions are present:

1. The Society has obtained the authorization of the Proceedings Authorization Committee,

   i. to commence a conduct proceeding, and

   ii. to request the Hearing Panel to direct that a consent resolution conference be conducted.

2. The conduct proceeding has not been commenced.

3. The Society and the subject of the potential proceeding have agreed to,

   i. the decision and order to be made by the Hearing Panel in the conduct proceeding; or

ii. the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding.

4. The subject of the potential proceeding has consented to participate in a consent resolution conference.

5. The Society has requested a consent resolution conference.

**Who conducts consent resolution conference**

(2) Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted under subrule (1), the chair, or, in the absence of the chair, the vice-chair, shall assign either one or three panelists to conduct the consent resolution conference.

**Request to Tribunals Office**

**29.03** (1) The Society may request a consent resolution conference by submitting a request in writing to the Tribunals Office.

**Information re conditions**

(2) The Society shall include in its written request for a consent resolution conference sufficient information to satisfy the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel of the existence of the conditions set out in rule 29.02.

**Contact information of subject of potential proceeding**

(3) The Society shall also include in its written request for a consent resolution conference the name of the subject of the potential proceeding and her or his address for service, telephone number, fax number, if any, and e-mail address, if any.

**Notice of consent resolution conference: Society**

**29.04** Where the chair, or, in the absence of the chair, the vice-chair, of the Hearing Panel directs that a consent resolution conference be conducted, the Tribunals Office shall send to the Society and to the subject of the potential proceeding notice of the date, time and location of the consent resolution conference.

**Procedure applicable to consent resolution conference**

**29.05** (1) The practices and procedures applicable to proceedings before the Hearing Panel that are set out in Rules 2 to 20 and Rules 22 to 28 do not apply with respect to a consent resolution conference.

(2) Subject to this Rule, the practices and procedures applicable with respect to a

consent resolution conference shall be determined by the consent resolution panel conducting the consent resolution conference.

**Consent resolution conference not open to public**

(3) A consent resolution conference shall be conducted in the absence of the public.

**Withdrawing participation in consent resolution conference**

**29.06** (1) At any time before or during the conduct of a consent resolution conference, the Society or the subject of the potential proceeding may withdraw from participating in the consent resolution conference.

**Notice of withdrawal**

(2) Where the Society or the subject of the potential proceeding wishes to withdraw from participating in the consent resolution conference under subrule (1), the withdrawing party shall so notify in writing the other party and the Tribunals Office.

**Settlement at consent resolution conference: commencement of conduct proceeding**

**29.07** (1) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding the Society shall,

(a) commence the conduct proceeding; and

(b) notify the Tribunals Office in writing of the fact and general nature of the settlement at the consent resolution conference not later than the day on which the conduct proceeding is commenced.

**Settlement at consent resolution conference: non-application of certain Rules**

(2) Where a consent resolution conference results in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, despite rule 1.01, the following Rules do not apply to the conduct proceeding:

1. Rule 6.

2. Rule 7.

3. Rule 8.

4. Rule 12.

5. Rule 13.

6. Rule 14.

7. Rule 16.

8. Rule 19.

9. Rule 20.

10. Rule 21.

11. Rule 22.

**No settlement at or withdrawal from consent resolution conference: subsequent hearings**

**29.08** Where a consent resolution conference does not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

(a) no communication shall be made to any member of the Hearing Panel assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and

(b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

1. Rule 6.

2. Rule 7.

3. Rule 8.

4. Rule 12.

5. Rule 13.

6. Rule 14.

7. Rule 16.

8. Rule 19.

9. Rule 20.

10. Rule 21.

11. Rule 22.

**No settlement at or withdrawal from consent resolution conference: subsequent hearings**

**29.08** Where a consent resolution conference does not result in the settlement of the decision and order to be made by the Hearing Panel in the conduct proceeding, or the settlement of the decision to be and a range of orders that may be made by the Hearing Panel in the conduct proceeding, or the Society or the subject of the potential proceeding withdraws from participating in the consent resolution conference under rule 29.06,

(a) no communication shall be made to any member of the Hearing Panel assigned to any hearing in the conduct proceeding with respect to any document specifically created for and any statement made at the consent resolution conference; and

(b) no member of the consent resolution panel that conducted the consent resolution conference shall be assigned to any hearing in the conduct proceeding.

The Law Society of Upper Canada | Barreau du Haut-Canada

**TAB 6**

# Report to Convocation
# January 23rd, 2014

## Paralegal Standing Committee

**Committee Members**
**Cathy Corsetti, Chair**
**Susan McGrath, Vice-Chair**
**Marion Boyd**
**Robert Burd**
**Paul Dray**
**Ross Earnshaw**
**Robert Evans**
**Michelle Haigh**
**Jacqueline Horvat**
**Dow Marmur**
**Malcolm M. Mercer**
**Kenneth Mitchell**
**Jan Richardson**

**Purpose of Report: Decision and Information**

**Prepared by the Policy Secretariat**
**Julia Bass 416 947 5228**

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**For Decision**

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**For Information** ..... **TAB 6.2**

Consent Resolution Process

Progress Report on Changes to the Paralegal Licensing Process

## Committee Process

1. The Committee met on January 9th, 2014. Committee members present were Cathy Corsetti (Chair), Susan McGrath (Vice-Chair), Marion Boyd, Robert Burd (by telephone), Ross Earnshaw, Robert Evans, Michelle Haigh, Jacqueline Horvat, Malcolm Mercer, Ken Mitchell and Jan Richardson (by telephone). Staff members attending were Diana Miles, Zeynep Onen, Jim Varro, Lesley Cameron, Naomi Bussin, and Julia Bass.

**TAB 6.1**

# AMENDMENTS TO THE *PARALEGAL RULES*: GENDER IDENTITY

## Motion

2. **That Convocation approve the amendments to Rule 2.03 of the *Paralegal Rules of Conduct* shown at TAB 6.1.1.**

## Background

3. In 2012, the *Human Rights Code* was amended to specify that every person has a right to equal treatment without discrimination because of "gender identity or gender expression". The *Code* was also amended to specify that every person has a right to be free from harassment because of sexual orientation, gender identity or gender expression.[1]

4. It is proposed that the *Paralegal Rules of Conduct* and the lawyers' *Rules of Professional Conduct* should be amended to reflect these changes.

5. A black-line version of the current Rules with the proposed amendments is shown at **TAB 6.1.1**.

## The Committee's Deliberations

6. The Committee considered the proposed amendments, and approved them for incorporation into the *Paralegal Rules.*

[1] The *Human Rights Code* was amended in 2012 by Bill 33, *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression), 2012*, online at http://www.ontla.on.ca/bills/bills-files/40_Parliament/Session1/b033ra.pdf.

**TAB 6.1.1**

## 2.03 HARASSMENT AND DISCRIMINATION

### Application of *Human Rights Code*

2.03 (1) The principles of the Ontario *Human Rights Code* and related case law apply to the interpretation of this rule.

(2) A term used in this rule that is defined in the *Human Rights Code* has the same meaning as in the *Human Rights Code.*

### Harassment

(3) A paralegal shall not engage in sexual or other forms of harassment of a colleague, a staff member, a client or any other person on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.

### Discrimination

(4) A paralegal shall respect the requirements of human rights laws in force in Ontario and without restricting the generality of the foregoing, a paralegal shall not discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, or disability with respect to the employment of others or in dealings with other licensees or any other person.

(5) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

### Services

(6) A paralegal shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

### Employment Practices

(7) A paralegal shall ensure that his or her employment practices do not offend this rule.

**TAB 6.2**

## FOR INFORMATION

## CONSENT RESOLUTION PROCESS

7. The Committee approved the continuation of this pilot project, as discussed in the report being submitted by the Professional Regulation Committee.

## PROGRESS REPORT ON CHANGESS TO THE LICENSING PROCESS

8. In October 2012, Convocation approved a Report from the Committee on proposed revisions to the paralegal licensing process. The Director of Professional Development & Competence provided the Committee with a progress report on the project, indicating that work is on time as set out in the 2012 Report.

*THIS SECTION CONTAINS*

*IN CAMERA MATERIAL*

The Law Society of Upper Canada | Barreau du Haut-Canada

**Tab 9**

# Report to Convocation
# January 23, 2014

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# Report of the Treasurer's Advisory Group on Access to Justice Working Group

**WORKING GROUP MEMBERS**
**Treasurer Thomas Conway (Chair)**
**Howard Goldblatt (Vice-Chair)**
**Chris Bredt**
**Marion Boyd**
**Cathy Corsetti**
**Adriana Doyle**
**Michael Lerner**
**William McDowell**
**Janet Minor**

**Purpose of Report:**

**January 23, 2014: For Information and Discussion**
**February 27, 2014: For Debate and Decision**

**Prepared by Public Affairs**
**(Sally Ashton, Strategic Issues Counsel)**

# PROPOSAL FOR A NEW LAW SOCIETY APPROACH TO ACCESS TO JUSTICE

**Motion**

1. **That Convocation approve the creation of a framework to facilitate the reinforcement and integration of access to justice objectives into the core business, functions and operational planning of the Law Society, the key components of which are as follows, and as further described in this report:**
    a. **An internal focus on access to justice as a strategic objective underpinning all of the Law Society's work, which will include:**
        i. **designating appropriate resources to enhance the Law Society's approach to developing access to justice objectives integrated across program areas;**
        ii. **strategically reviewing, reconsidering and, where appropriate, amending the Law Society's rules, regulations, policies and practices to foster change and innovation and achieve the Law Society's access to justice objectives; and**
        iii. **developing metrics to measure the effectiveness of actions taken.**
    b. **An external focus through which the Law Society will provide facilitation of a standing forum for collaboration on access to justice by:**
        i. **Reconstituting the Treasurer's Advisory Group on Access to Justice as a standing forum called the Treasurer's Action Group on Access to Justice; and**
        ii. **Providing administrative and other resources necessary to convene and support the ongoing functioning of the standing forum.**
2. **That Convocation approve the following changes to the Law Society's committee structure to support the development and implementation of the new framework:**
    a. **Merger of the Access to Justice Committee and the Equity and Aboriginal Issues Committee to become the Access, Equity and Aboriginal Issues Committee;**

**b. Appointment of members of the Access, Equity and Aboriginal Issues Committee to serve as one of the vice chairs of each of the Professional Development and Competence, Professional Regulation and Paralegal Standing Committees; and**

**c. Creation of a new Access to Justice Coordinating Committee.**

## INTRODUCTION

3. There are major access to justice gaps in this country. The National Action Committee on Access to Justice in Civil and Family Matters and others have highlighted:

    a. As many as 1 in 3 people will experience at least one legal problem in a given three year period. Few will have the resources to solve them.

    b. Members of poor and vulnerable groups are particularly prone to legal problems. They experience more legal problems than higher income earners and more secure groups.

    c. People's problems multiply; that is, having one kind of legal problem can often lead to other legal, social and health related problems.

    d. Legal problems have social and economic costs. Unresolved legal problems adversely affect people's lives and the public purse.

    The current system, which is inaccessible to so many and unable to respond adequately to the problem, is unsustainable.

4. In addition, the legal professions themselves are facing significant change as they endeavour to remain viable, competitive and relevant in the face of challenges presented by globalization, technology and changing client demands (see most recently the CBA's *Legal Futures Initiative*). Not least of the challenges facing the profession is access to justice and a perception that the legal profession is out of touch and itself creates barriers to low and middle income Ontarians accessing legal services and justice.

5. In the face of this growing understanding of the challenges, the legal professions are urged to redefine professionalism and regain a focus on serving the public. In this context, the Law Society has an opportunity to profoundly influence change and respond, within the scope of its authority, to the challenges people are facing in accessing justice in this province.

6. This report from the Treasurer' Advisory Group on Access to Justice (TAG) Working Group proposes a framework for change which would see the Law Society lead and innovate on these important issues, rather than have change imposed upon it.

## BACKGROUND

7. The Law Society has been responding to the call for greater access to justice for years: from the work of the standing Committee on Access to Justice, to the regulation of paralegals introduced in 2007. In fact, the Law Society's mandate was enhanced with the legislative amendments introducing paralegal regulation to include a specific duty with regard to access to justice:

> **Principles to be applied by the Society**
> **4.2** In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> …
>
> 2. The Society has a duty *to act so as to facilitate access to justice* for the people of Ontario. 2006, c. 21, Sched. C, s. 7.

8. Law Societies across the country have been engaged in a number of diverse initiatives aimed at improving public access to legal services, ranging from those designed to prevent legal problems from arising, to those aimed at expanding knowledge and services for the self-represented, to those that increase access to legal assistance. There is growing recognition, however, of the limitations of these one-off, ad hoc approaches.

9. Despite significant individual and organizational efforts, including those of the Law Societies, the "crisis" only seems to be growing, highlighted perhaps most starkly by the numbers of self-represented litigants appearing in courts across the country. As a result, the attention being focussed on the need to address the obvious and growing imperative to provide more effective and meaningful access to justice in the last few years has been unprecedented.

10. The Law Society has responsibility for a broad range of regulatory activities, including standard setting, rule making, policy development and implementation, licensing, investigation and prosecution of complaints against lawyers and paralegals, adjudication of conduct, competence and capacity matters and imposition and monitoring of penalties. Across this range of activities there is significant scope to influence a cultural shift, foster innovation, and stimulate change that will better "facilitate access to justice for the people of Ontario."

11. In response to growing pressures and to further explore opportunities for the Law Society to enhance its role and provide leadership on these issues, the Treasurer identified access to justice as a priority during his term as Treasurer. In January 2013 he met with the Chairs of the Access to Justice, Government Relations, and Equity and Aboriginal Issues Committees. The Chairs were overwhelmingly supportive of seeking an enhanced role for the Law Society on these issues and agreed that focussed consultations within the profession and stakeholder groups would help to inform what that role should or could be.

12. Accordingly, the Treasurer's Advisory Group on Access to Justice (TAG) was established to seek information and advice from a broad cross-section of those involved in the justice sector: organizations whose core mandate involves addressing access to justice, lawyer and paralegal associations, courts and government representatives, and academics (list of the groups and organizations who have participated in TAG meetings attached as **Tab 9.1**).

13. In establishing this group, the Treasurer was also mindful of the report of the Ontario Civil Legal Needs project: *Listening to Ontarians*. That report recommended that accessibility "would improve if organizations committed to access to justice committed to sharing information and working together."

14. Although established for a specific and limited purpose, TAG has already had the effect of facilitating a broader collaborative dialogue and galvanizing interest and energy. Posts to the Treasurer's Blog over the past year, as well as regular updates provided to Convocation, have helped to keep the profession informed about the Law Society's activities and evolving plans in regard to a new approach to access to justice issues.

**TAG - What the Law Society Has Heard**

15. Numerous meetings of TAG participants have occurred, both formally and informally, over the past year. Those dialogues culminated in a symposium in October 2013: *Creating a Climate for Change*. Eighty individuals dedicated to improving access to justice gathered for concrete and practical discussions about structures and mechanisms for implementing change. The day was also designed to solicit further input and ideas about an appropriate role for the Law Society on these issues in fulfilling its legislative mandate.

16. Two background papers were prepared for the symposium: one to highlight key themes emerging from the many reports and recommendations of the last several years; and one to provide an overview of the scope of activities and organizations focused on improving access to justice in Ontario (*Access to Justice Themes: "Quotable Quotes,"* **Tab 9.2**; *Legal Organizations and Access to Justice Activities in Ontario,* **Tab 9.3**). The final report from the symposium summarizes the nature of input and ideas the Law Society received about an appropriate role (*Creating a Climate for Change: Report from the TAG Symposium, October 29, 2013,* **Tab 9.4**).

17. The core of the advice and input received through the TAG dialogues and symposium has been remarkably consistent and includes:

a. Meaningful change will require changing the discourse – finding a common voice; engaging the public; creating a political climate for change.
b. In changing the discourse, the Law Society is perhaps best positioned to act as a catalyst/facilitator/educator:
    i. Providing a forum for dialogue and collaboration – bringing diverse actors together and enabling "those in charge" to work together;
    ii. Exploring and developing mechanisms to ensure broader public awareness: of the services available and how to access them; and of the importance of access to justice for all Ontarians more generally.
c. Change - focussed and systemic - is necessary across the justice sector and across disciplinary boundaries; as an agent of change, the Law Society can lead and foster innovation within its own regulatory context by, for instance:
    i. addressing any regulatory impediments to, or creating inducements for, innovation generally in the delivery of legal services;
    ii. ensuring regulation of professional competence and conduct is appropriately balanced against the broader public interest in access to justice;
    iii. examining alternative structures that could better facilitate innovative approaches to the provision of legal services;
    iv. providing education and inducement for the professions to be better engaged on the issues and solutions;
    v. considering the scope of paralegal practice;
    vi. considering inducements for rural and other service delivery methods that would help address geographic barriers to access to justice.

18. Collaboration, and mechanisms to facilitate it, were central topics at every TAG meeting over the past year and were emphasized again at the TAG Symposium in October. Participants there strongly encouraged the Law Society to maintain the leadership it has shown in bringing diverse players together. There is now momentum and an expectation

created that the Law Society will have an ongoing role in facilitating a collaborative dialogue in Ontario.

**National Initiatives that Have Informed the Law Society's Approach**

19. Many reports were reviewed and highlighted for the TAG Symposium. Three national reports released in 2013 were of particular significance in informing and shaping the TAG Working Group's proposal for a new Law Society approach to access to justice:

    a. *A Roadmap for Change*, Report of the National Action Committee on Access to Justice in Civil and Family Matters (October 2013) (**Tab 9.5**)

    b. *Reaching Equal Justice: an Invitation to Envision and Act*, Report of the Canadian Bar Association's Envisioning Equal Justice Initiative (November 2013) (**Tab 9.6**)

    c. *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, final report, Dr. Julie Macfarlane (May 2013) (**Tab 9.7**)

20. Each of these reports (and their supporting background papers) has specific recommendations pertaining to Law Societies and professional regulation. The reports are consistent in the types of innovations they say Law Societies should be contemplating. As summarized by the Action Committee on Access to Civil and Family Justice in *A Roadmap for Change* (at page 14):

> "Specific innovations and improvements that should be considered and potentially developed include:
>
> - Limited scope retainers – "unbundling";
> - Alternative business and delivery models;
> - Increased opportunities for paralegal services;
> - Increased legal information services by lawyers and qualified non-lawyers;
> - Appropriate outsourcing of legal services;

- Summary advice and referrals;
- Alternative billing models;
- Legal expense insurance and broad-based legal care;
- Pro bono and low bono services;
- Creative partnerships ad initiatives designed to encourage expanding access to legal services – particularly to low income clients;
- Programs to promote justice services to rural and remote communities as well as marginalized and equity seeking communities; and
- Programs that match unmet legal needs with unmet legal markets."

21. All of these reports also agree that access to justice is a multi-faceted issue that requires responses within and beyond the formal justice system. Most importantly, each report highlights the lack of leadership and collaboration on access to justice issues as being central to the reason that change and improvement continue to be such a challenge. The system's players are urged to change their focus:

> "Within our current constitutional, administrative and sectoral frameworks, much more collaboration and coordination is not only needed but achievable. We can and must improve collaboration and coordination not only across and within jurisdictions, but also across and within all sectors and aspects of the justice system (civil, family, early dispute resolution, courts, tribunals, the Bar, the Bench, court administration, the academy, the public, etc.). We can and must improve collaboration, coordination and service integration with other social service sectors and providers as well." (NAC, *A Roadmap for Change*, p. 7)

22. The importance of collaboration is highlighted in each report with specific recommendations for the creation of a collaborative forum, in one form or another, which brings together system players and its users and stimulates action for change.

23. These reports have provided, in effect, a menu of innovations and changes that the Law Society must embrace, pursue and support. The challenge is to do so in an organized and strategic way, coordinated across program areas of the Law Society, and across partners

within and beyond the justice sector who can contribute collectively to systemic and lasting changes.

## A NEW LAW SOCIETY APPROACH TO ACCESS TO JUSTICE

24. It is apparent from reading all of the attached papers and reports that access to justice comprises a broad category of issues and responses that cannot all be addressed at once or by one entity. While not alone in shouldering the responsibility for promoting access to justice, it must be recognized that the Law Society does play and must play a central role in shaping and guiding the legal professions and in influencing change and innovation.

25. In order to be most effective, the Law Society needs a clear and new framework within which these issues and emerging recommendations must be considered. That framework should ensure that access to justice is fully integrated into the core business and functions of the Law Society. In this framework, access to justice would be a strategic objective underpinning all of the Law Society's work.

26. The TAG Working Group acknowledges that this proposal is not "the answer" to the access to justice issues facing this province. It is a proposal to develop a new framework within which the Law Society can consider the issues and emerging recommendations in a strategic, systematic and sustained way and stimulate action and innovation, consistent with - and integrated into - the Law Society's core functions with regard to professional competence and professional conduct.

27. As many have said, "enough talk, it's time for action." Creating a new framework with structural and resource supports within which these issues can be considered allows the Law Society to take the many reports and recommendations that already exist and begin to consider what they mean for the regulator and for system partners more broadly in working collaboratively to achieve meaningful and long lasting change.

28. The TAG Working Group proposes that the details of this new framework, including mechanisms for engagement with the users of the system and other stakeholders in order to identify priorities and processes for change, be developed over the next few months. With Convocation's approval, the details of the framework would be developed around two key components, one with an internal focus and one - a forum - focusing externally.

**Key Component – Internal**

29. The first key component of the proposed framework would require a critical, holistic and ongoing examination of the Law Society's own rules, regulations, policies and programs – both existing and proposed – to assess their effectiveness in meeting access to justice objectives. Where such objectives have not been identified, they should be considered.

30. This exercise would be informed to a great extent by the reports and recommendations that have emerged over the last year or so. The framework will ensure that those reports and recommendations are considered in a systematic and coordinated way across program areas, as they must be. This will include a process and timeline to address, specifically and practically, proposals including those recommended by the Action Committee, Canadian Bar Association, and others:

    a. Alternative business and delivery models;
    b. Increased opportunities for paralegal services;
    c. Increased legal information services by lawyers and qualified non-lawyers;
    d. Regulation with respect to outsourcing of legal services;
    e. Regulation with respect to the provision of summary advice and referrals.

31. In conjunction with the proposed external forum, the framework will also allow for further consideration of the possible development of new programs – or the reinforcement of existing programs – including those related to:

a. Alternative billing models;
b. Legal expense insurance and broad-based legal care;
c. Pro bono and low bono services;
d. Creative partnerships ad initiatives designed to encourage expanding access to legal services – particularly to low income clients;
e. Programs to promote justice services to rural and remote communities as well as marginalized and equity seeking communities; and
f. Programs that match unmet legal needs with unmet legal markets.

32. Ensuring that appropriate resources are devoted to the development and implementation of the framework within which this examination would take place will be critical to its success. Operational changes already planned by the Chief Executive Officer present an opportunity to designate resources to this task.

33. The CEO has begun a reorganization of certain program areas to more efficiently and effectively deliver and support the Law Society's core functions. A new Division – Strategic Policy, Communications and Corporate Relations - has been created with a new Executive Director appointed to begin February 3, 2014. This new Division will integrate issues management, access and equity, government and stakeholder relations, strategic communications, and Convocation and Committee support, into a new reporting and operating structure.

34. A core task of the new Division, with guidance from Convocation, would be to develop the details of the proposed framework necessary to fully integrate and implement a new approach to access to justice issues, including through identification of its guiding principles, objectives, work plans and outcomes/deliverables.

35. The new Division would serve to ensure that a consistent and supported approach is taken across the organization in articulating and meeting access to justice objectives. The

Division would position itself to provide expert advice and perspective to support the coordinated integration of access to justice objectives across program areas and core functions of the Law Society. It would liaise with the Canadian Bar Association, the Action Committee, and others to continue to discuss the implementation of the recommendations they have made.

36. As more support, focus and structure is brought to the Law Society's approach to thinking about and responding to access to justice issues and the recommendations emerging over the last year or so, the ability is created to more nimbly and effectively respond to opportunities for dialogue and partnerships. The Law Society can be better positioned to develop informed, innovative and lasting change on a systemic basis.

37. As example, establishing this framework and integrating access to justice issues into the Law Society's core business and operational planning will allow more strategic and coordinated responses to emerging issues such as the challenges faced by Aboriginal people, French-speaking Ontarians, and other equity-seeking groups in accessing legal services. All of these issues have highlighted the need to be informed by the system users and to respond collaboratively with system partners. The framework proposed will better position the Law Society to do that in a more informed and coordinated way.

38. As the Law Society continues to reach out to Aboriginal leadership over the next year, for example, it can do so better equipped and informed about the role the Law Society has and the scope of its ability to respond to the challenges Aboriginal people face. As the Law Society continues to engage with the Aboriginal bar on access to justice issues, it can do so knowing it has a structured framework within which feedback can be returned to the Law Society and effectively considered and applied. Similarly, as the Law Society responds to the *Access to Justice in French* report, or others, it can do so in a more coordinated, focused and effective way.

39. Committing to and fulfilling this component of the proposed framework also positions the Law Society to better support the second key component, an external forum. By integrating access to justice objectives into its core business and functions, the Law Society can lead by example and maintain the credibility needed to lead and support external partners.

**Key Component – External – Standing Forum on Access to Justice**

40. The second key component recommended by the TAG Working Group would see the Law Society provide the coordination and infrastructure support necessary to create and sustain a standing forum for collaboration on access to justice. This external forum will help to ensure that the Law Society's activities are complementary and supportive of the work of other key partners and, importantly, informed by users and service providers most familiar with issue-specific challenges and opportunities. The Law Society recognizes that broad support of these partners and Ontarians generally is essential to achieving and sustaining meaningful change.

41. This type of cooperation and collaboration has been repeatedly identified as a necessary precursor to practical and long-lasting change. The lack of a single department or agency with sole responsibility for the delivery of justice in Canada has been identified as a key "implementation gap" or impediment to moving forward with systemic change. Reports of the last year have recommended various strategies and structures to foster the leadership and collaboration all agree is needed.

42. This proposal should be seen as a first step in realizing the structures that the Action Committee and Canadian Bar Association have recommended. No other body in Ontario has yet stepped forward to provide the infrastructure necessary to the collaborative forum all have recommended. The Law Society is uniquely positioned to do so and to convene meetings of a broad cross-section of system partners and beyond.

43. The TAG Working Group proposes that TAG be reconstituted to become the Treasurer's "Action" Group on Access to Justice. The types of support proposed to be provided to TAG by the Law Society include:
    a. Convening and facilitating meetings
    b. Relying on the Law Society's significant and positive government and stakeholder relations to build and sustain strategic partnerships necessary for success, and to influence change, as appropriate
    c. Providing administrative and related support in the coordination of meetings and tasks flowing therefrom
    d. Assisting in the collection, analysis and dissemination of information.

44. Here again, the operational changes already underway present an opportunity to offer this support. The newly created Division would liaise with and provide the administrative and outreach support to the ongoing work of TAG. This is not anticipated to require new resources but would be accomplished largely through redeployment and efficiencies found as the new Division reorganizes staff and functions.

45. The reconstituted TAG would seek to convene a core membership of leaders representing governments, courts, academia, bar and paralegal associations, and legal aid (specific participation to be determined over the coming months as TAG is reconstituted and reconvened). Other participation, including non-legal and system users, would be solicited as appropriate to specific issues.

46. It is proposed that the core TAG membership would together develop a shared vision and common agenda for change. The various studies, reports and recommendations of the last several years provide a solid foundation from which to quickly achieve that task. TAG would also benefit from continued liaison and advice from, for example, members of the Canadian Bar Association and Action Committee who have themselves participated in TAG dialogues and provided such detailed and thoughtful advice to date.

47. Once developed, the common agenda could, in turn, lead to agreed-upon actions and strategies to be implemented in a complementary and cooperative way by TAG participants. In this respect, it would be essential that TAG participants be prepared to pursue the implementation of identified activities that are mutually reinforcing of one another and clearly linked back to the common agenda.

48. TAG could meet regularly as a whole or in topic-focused sub-groups. TAG could also host an annual symposium to serve both as a mechanism to "report out" the work it has undertaken in the previous year, and to build and sustain interest and momentum around a common agenda for the following year.

49. Funding for actions and strategies agreed to by TAG participants would come from the participants' usual funding sources. As TAG participants cooperate and collaborate toward a common agenda and vision, there is opportunity to leverage funding much more effectively and efficiently. This approach will also allow the Law Society to facilitate access to justice in ways more consistent with the requirements of the *Law Society Act,* rather than being perceived as a funder of access initiatives. The Law Society's "funding" contribution would be through its facilitative leadership and infrastructure support to TAG and through its own internal efforts to consider its policies and practices in light of access to justice objectives (see paragraphs 61-62).

50. As stated, TAG would serve, at least initially, as the mechanism by which diverse partners are brought together, supported by the facilitation and infrastructure the Law Society is able to provide. The Law Society would maintain policy governance oversight of the functioning of TAG only to the extent of satisfying itself that its contribution of facilitation and infrastructure remains consistent with the Law Society's access to justice objectives more generally.

51. In addition to providing the infrastructure and facilitative support, the Law Society would participate in a substantive way as a member of TAG in developing the common agenda and translating TAG-identified priorities into action items for consideration in Law Society business and approaches. This would contribute to the first key component of the proposed framework by further informing the Law Society on strategic priorities and actions it can take within its regulatory scope that will best support a more systemic reform effort.

**Supporting Changes to the Law Society's Committee Structure**

52. Structures supporting Convocation's decision-making should continually evolve to meet changing needs and advance changing agendas. A new Law Society approach to access to justice presents an opportunity to rejuvenate the work of committees and build upon the solid foundations already established. Governance changes have already been the subject of deliberations of the Governance Issues Working Group and the new approach presents an opportunity to better rationalize changes being considered.

53. Accordingly, the TAG Working Group is proposing the merger of the Access to Justice and Equity and Aboriginal Issues Committees. This is not proposed in any way to dilute or diminish the work currently undertaken by these committees. Rather, this is seen as a logical evolution in light of the increasing cross-over in work of the two committees and the number of joint meetings they regularly require. The new approach to access to justice and operational realignment would be best supported by a complementary committee structure that enhances the focus and mandate within the new framework proposed.

54. The combined committee - proposed to be called the Access, Equity and Aboriginal Issues Committee – would have an enhanced and coordinated agenda, confirmed through a clearer mandate and operating principles. It would provide fundamental policy advice and guidance as the new operational Division further develops the details of the proposed framework and, on an ongoing basis, would provide policy advice and direction with regard to implementation of the framework and integration of access to justice objectives across policy and program areas.

55. As the proposed framework is further developed and implemented, it is also proposed that a member of the Access, Equity and Aboriginal Issues Committee serve as a vice chair of the other core committees: Professional Development and Competence Committee, Professional Regulation Committee, and Paralegal Standing Committee. It is proposed that this would assist in the coordination and integration of agendas across policy and program areas.

56. The framework proposed includes an ambitious goal of more fully integrating access to justice objectives across policy and program areas, by engaging in a holistic, systematic and ongoing examination of Law Society rules, regulations, policies and practices. At the outset at least, this will engage staff and benchers in a different and challenging dialogue and require considerable coordination and cooperation organizationally.

57. To support the implementation of this coordinated and cooperative approach, the TAG Working Group also proposes that a new committee – an Access to Justice Coordinating Committee – be struck. The mandate of this committee may be adopted by a policy decision of Convocation or may be formalized through specific by-law changes.

58. The Coordinating Committee would include, at a minimum, the Chairs of the Access Equity and Aboriginal Issues, Professional Development and Competence, Professional Regulation and Paralegal Standing Committees, and the Chair or designate of the Aboriginal Working Group. The purpose of the Committee would be to provide a forum for discussions of the overall access to justice agenda and practical means of ensuring its integration across policy and program areas, working closely with senior management.

59. The Coordinating Committee would seek to provide some overall guidance and direction for consideration by the various Committees but, importantly, is not proposed as a decision-making body. The Coordinating Committee would provide assistance to the various Committees as they, themselves, respond to access to justice objectives and could

conceivably be short-lived, depending on the success or ease of development and implementation of the new framework.

60. In addition, however, the Law Society will also be participating in a substantive way as a member of TAG and will need a mechanism through which commitments sought to be made through TAG can be brought back through Law Society governance and policy development and decision-making processes. It is therefore proposed that the new Coordinating Committee also serve as a "steering committee" for the Law Society's participation in and support of TAG. Depending on the evolution of TAG and its functioning, this could be a more long-standing function of the Coordinating Committee.

61. If Convocation adopts these committee proposals, necessary by-law amendments will be prepared and referred back to Convocation for approval.

**Financial Implications**

62. The TAG Working Group has considered the potential costs of this proposal and has determined that it would be premature to provide exact cost figures. In large measure, policy and administrative support to reorganized Committees and TAG would be realized through efficiencies achieved in the operational restructuring.

63. Operating budgets, particularly to support the TAG forum, are unknown until TAG has been reconstituted and agreement reached with participants on how it will function. To support regular meetings and an annual symposium, costs of $100,000 - $125,000 would likely be required. Also unknown at this time is the extent to which other sources might be prepared to contribute to ongoing TAG funding. For 2014, operating expenses will be drawn from existing budgets; requests for funding for 2015 and subsequent years will go through usual review and approval processes.

## CONCLUSION

64. As the Honourable Mr. Justice Thomas Cromwell has said: access to justice is at a critical stage in this country; change is urgently needed. The Law Society has a unique role to play in shaping the profession and fostering change within the scope of its regulatory authority.

65. It is time for the Law Society to adopt a more strategic and holistic approach to access to justice issues. The framework proposed provides a path to proceed forward in a focused and supported way. It is the next step in achieving a long-identified strategic priority of the Law Society and critical to better fulfilling its legislative mandate.

**Tab 9.1**

# Treasurer's Advisory Group on Access to Justice
# Participant Groups and Organizations[1]

Law Foundation of Ontario
Law Commission of Ontario
Legal Aid Ontario
Pro Bono Law Ontario
Ontario Justice Education Network
Community Legal Education Network
The Association in Defence of the Wrongly Convicted
Canadian Civil Liberties Association
Association of Community Legal Clinics of Ontario

Ontario Bar Association
The Advocate's Society
County and District Law President's Association
Paralegal Association of Ontario
Licenced Paralegals Association

Equity Advisory Group

Treasurer's Liaison Group – which includes representatives from the above and:

Association des juristes d'expression française de l'Ontario (AJEFO)
Indigenous Bar Association
Federation of Asian Canadian Lawyers
South Asian Bar Association of Toronto
Canadian Association of Black Lawyers
Criminal Lawyers' Association
Family Lawyers' Association
Women's Law Association of Ontario

Federal and Provincial governments – courts administration; justice policy

Offices of the Chief Justices of the Ontario Courts

Deans – Ontario Law programs

[1] Participation in the TAG Symposium included even broader representation – see the final report from the TAG Symposium for a list of participants (**Tab 9.4**).

# ACCESS TO JUSTICE THEMES:

# "Quotable Quotes"

Background Paper for The Law Society of Ontario's

Access to Justice Symposium: "Creating a Climate for Change"

October 29, 2013

Prepared by Karen Cohl
for The Law Society of Upper Canada
**DRAFT – OCT 20, 2013**

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## Introduction

This is the second of two background papers prepared for participants of the Access to Justice Symposium hosted by the Law Society of Upper Canada on October 29, 2013. It briefly sets out themes observed from reviewing selected Ontario and national reports on access to justice issues from the past several years. The themes are illustrated with quotations, primarily from the reports listed on the following page.

This paper does not attempt to summarize or synthesize the extensive content and recommendations contained in these reports. Nor does it draw on the many articles, books, additional reports, conferences, and symposia on access to justice issues. The themes and quotations have been put forward as "food for thought" to generate ideas, discussion and dialogue at the Symposium.

| Ontario and National Access to Justice Reports 2007 - 2013 | Short Title used for Citations in this Report |
|---|---|
| **Access to Civil and Family Justice: A Roadmap for Change**<br>Action Committee on Access to Justice in Civil & Family Matters, Oct 2013 | **"NAC: Roadmap"** |
| **Reaching Equal Justice: An Invitation to Envision and Act**<br>A summary report by the CBA Access to Justice Committee, Aug 2013 | **"Equal Justice"** |
| **Public Legal Education and Information in Ontario Communities: Formats and Delivery Channels**<br>CLEO Centre for Research & Innovation, Aug 2013 | **"Public Legal Education"** |
| **CBA Legal Futures Initiative: The Future of Legal Services in Canada: Trends and Issues**<br>The Canadian Bar Association, June 2013 | **"Legal Futures"** |
| **The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants**<br>Dr. Julie Macfarlane, Final Report, May 2013 | **"National SRL"** |
| **Meaningful Change for Family Justice: Beyond Wise Words**<br>Final report of the Family Justice Working Group<br>Action Committee on Access to Justice in Civil and Family Matters, April 2013 | **"NAC: Family Justice"** |
| **Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector.**<br>Final report of the Prevention, Triage and Referral Working Group<br>Action Committee on Access to Justice in Civil and Family Matters, Feb 2013 | **"NAC: Prevention, Triage, Referral"** |
| **Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity**<br>The Law Commission of Ontario, Feb 2013 | **"LCO: Family Justice"** |
| **First Nations Representation on Ontario Juries**<br>Report of the Independent Review by Honourable Frank Iacobucci, Feb 2013 | **"First Nations/Juries"** |
| **Access to Justice in French**<br>French Language Services Bench and Bar Advisory Committee to the Attorney General of Ontario, June 2012 | **"Access in French"** |
| **Report of the Court Processes Simplification Working Group**<br>Action Committee on Access to Justice in Civil and Family Matters, May 2012 | **"NAC: Court Processes"** |
| **Report of the Access to Legal Services Working Group**<br>Alison MacPhail for the Working Group on Access to Legal Services<br>Action Committee on Access to Justice in Civil and Family Matters, May 2012 | **"NAC: Legal Services"** |
| **Addressing the Needs of Self-Represented Litigants in the Canadian Justice System**<br>Trevor Farrow, Diana Lowe, Bradley Albrecht, Heather Manweiller, Martha Simmons<br>White Paper for the Association of Canadian Court Administrators, March 2012 | **"SRL White Paper"** |
| **The Geography of Civil Legal Services in Ontario: Report of the Mapping Phase of the Ontario Civil Legal Needs Project**<br>Jamie Baxter and Albert Yoon, Nov 2011 | **"Mapping"** |
| **Listening to Ontarians: Report of the Ontario Civil Legal Needs Project**<br>A report of the project Steering Committee, May 2010 | **"Listening""** |
| **Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services**<br>Karen Cohl and George Thomson for The Law Foundation of Ontario, Dec 2008 | **"Connecting"** |
| **Report of the Legal Aid Review 2008**<br>Michael Trebilcock, 2008 | **"Legal Aid Review"** |
| **Report of the Review of Large and Complex Criminal Case Procedures**<br>Honourable Patrick J. Lesage and Professor Michael Code, Nov 2008 | **"Large Criminal Cases"** |
| **Civil Justice Reform Project: Summary of Findings & Recommendations**<br>Honourable Coulter A. Osborne, Q.C., Nov 2007 | **"Civil Justice Reform"** |

## Importance of Access to Justice and the Need for Change

### Theme #1: Access to justice is an issue of fundamental importance.

An explicit and underlying theme is the vital importance of ensuring that members of the public have access to justice, both in terms of process and substantive outcomes.

> Most people agree that access to justice is a fundamental right in a democratic society.
>
> – Listening to Ontarians, p.2

> 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.
>
> – Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada, 2007, *Justice in our courts and the challenges we face* (Address to the Empire Club of Canada)

### Theme #2: There is an urgent need for significant change.

Despite the innovations and progress achieved by governments, legal organizations, community groups, and multi-stakeholder partnerships, the need for systemic change remains. The reports examined for this paper describe issues that require urgent attention, systems that are unsustainable in many respects, and the need for fundamental transformation as opposed to more modest reform.

> [There is a] broad consensus on the need for significant change to improve access to justice, and an evolving consensus on the central directions for reform…. The civil justice system is too badly broken for a quick fix.
>
> – Equal Justice, pp.1 and 13

> We must make changes urgently….The current system is unsustainable. ….. Change is urgently needed…. Now it is time to act.
>
> – NAC: Roadmap, pp. v, 5, 24

> As long as justice has existed, there have been those who struggled to access it. But as Canadians celebrated the new millennium, it became clear that we were increasingly failing in our responsibility to provide a justice system that was accessible, responsive and citizen-focused. Reports told us that cost, delays, long trials, complex procedures and other barriers were making it impossible for more and more Canadians to exercise their legal rights.
>
> – Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada, in Foreword to NAC: Roadmap, p.i

> [T]he justice system, as it relates to First Nations peoples, and particularly in Northern Ontario, is in crisis."
>
> – First Nations/Juries, p.2

> There is today an overwhelming consensus that if the justice system as we know it is to survive, it must undergo significant change to provide greater access to justice for the public.
>
> – Hon. Warren K. Winkler, Chief Justice of Ontario, Opening of the Courts of Ontario, September, 2013

## Theme #3: There is no common definition but a common understanding is emerging.

There is no common definition of "access to justice" and the emphasis of what it comprises has evolved over time. However, a review of recent reports indicates a commonality of thinking on the concept, especially for civil and family law. For example, there is recognition that access to justice extends beyond access to lawyers and courts; that it requires a range of ways to prevent and resolve everyday legal problems; and that it includes fair processes and just outcomes.

> [Access to justice] can perhaps be thought of as encompassing a hierarchy of approaches:
> 1) Helping the largest number of people to use the system as it is (by such means as legal aid);
> 2) Changing the justice system to make it more responsive and more user-friendly;
> 3) Helping people to find other ways to avoid or resolve problems such that they do not require access to the justice system.
>
> – Law Society of Upper Canada, Access to Justice Committee Report to Convocation, June 28, 2002, p.8

> [A]ccess to justice refers broadly to the access that citizens have to dispute resolution tools of justice including but not limited to courts. Effective access to justice does not only refer to reductions in costs, access to lawyers and access to courts; but rather, it is a broad term that refers more generally to the efficaciousness of a justice system in meeting the dispute resolution needs of its citizens.
>
> – Canadian Forum of Civil Justice website

> [W]e believe that an accessible family justice system must be affordable and easy to navigate but we also believe that ensuring access to justice in the area of family law requires attention to other factors which create barriers…
>
> – LCO: Family Justice, p.16

> Our central animating principle must be envisioning a truly equal justice system, one that provides meaningful and effective access to all, taking into account the diverse lives that people live.
>
> – Equal Justice, p.2

> Providing justice – not just in the form of fair and just process but also in the form of fair and just outcomes – must be our primary concern.
>
> – NAC: Roadmap, p.9

> In general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters.
>
> – Hon. Justice Thomas Cromwell of the Supreme Court of Canada, cited in NAC: Roadmap, p.27

The NAC's "Roadmap" report succinctly summarizes problems identified with the civil and family justice system: too complex, too slow, too expensive, and often incapable of producing just outcomes (NAC: Roadmap, p.1). One approach to defining access to justice would be to state this in the positive:

> Access to justice exists when the public can understand, use and afford information and services to prevent and resolve their legal disputes and to achieve just outcomes without delay.

## New Directions – Cultural Shift

### Theme #4: We need to put the public first

There is a strong sense that justice system structures, processes and reforms have too often been designed to serve the needs of legal professionals and service providers. This has created barriers for members of the public in addressing their legal issues and asserting their legal rights. Some reports articulate the need for a major cultural shift within the justice system to focus more on the needs of the public in general and on vulnerable groups in particular.

> An inclusive justice system…focuses on people's needs, not those of justice system professionals and institutions …. Getting to equal justice demands that we first focus on the people who are most disadvantaged by their social and economic situation.
>
> – Equal Justice, pp.14 and 16

> The justice system, through those that work in it, must shift its focus fundamentally and see itself through a more user-centred, rather than provider-centered, lens of service.
>
> – SRL White Paper, p.5

> [M]any people continue to face significant barriers to accessing legal information, including language, literacy, disability, distance, and skill level or confidence.
>
> – Public Legal Education, p.30

> The focus must be on the people who need to use the system. This focus must include all people, especially members of immigrant, aboriginal and rural populations and other vulnerable groups.
>
> – NAC: Roadmap, p.7

> These systemic issues include…the almost universally-held view of First Nations individuals that the justice system is alien or foreign [and] the problem of inadequate legal representation of First Nations individuals, particularly in the north, resulting in virtually automatic guilty pleas.
>
> – First Nations/Juries, p.87

> [P]ersons with disabilities… are more likely to identify a civil legal problem they encounter as being very disruptive in their lives.
>
> – Listening, p.12

> [A]ccessing justice in French in Ontario can be more difficult, time consuming and expensive than accessing justice in English….In spite of the goodwill on the part of participants in the justice system, the French-speaking community continues to experience barriers to accessing justice in French.
>
> – Access in French, pp.7 and 48

## Theme #5: We need to do more at the front end and on prevention.

Many reports stress the importance of prevention strategies and the need for integrated, front-end services. Early information and access to a range of assistance and tools can help to prevent legal issues from escalating and leading to other problems in an individual's life.

> [W]e should not lose sight of the value of prevention as a means of avoiding civil legal needs altogether.
>
> – Listening, p.56

> Perhaps the most pressing access innovation is to develop effective triage and referral systems in each jurisdiction.
>
> – Equal Justice, p.20

> We have adopted an underlying premise that early intervention in family law disputes can minimize the likelihood of an unnecessary protracted dispute before the court and result in better outcomes for families.
>
> – LCO: Family Justice, p.57

> The justice system must acknowledge this reality by widening its focus from its current (and expensive) court-based "emergency room" orientation to include education and dispute prevention.
>
> – NAC: Roadmap, p.11

> …[T]he "front end" of the justice system…precedes – and often obviates the need for – formal representation in the court system.
>
> – NAC: Prevention, Triage, Referral, p.i

> As with medicine where there is now a greater emphasis on prevention and health promotion, there is already a demand in certain sectors for more preventative lawyering to avoid disputes in the first place and reduce legal costs over the longer term.
>
> – Legal Futures, p.21

> A triage role should be identified for frontline staff who help diagnose the specific needs of particular SRLs and then assist those people to obtain the required information or services….
>
> – SRL White Paper, p.42

> [C]ase management initiated early on in a matter may promote the earlier resolution of the dispute.
>
> – NAC: Court Processes, p.9

## Theme #6: We need more integrated and holistic responses

The reports recognize the inter-connectedness of legal problems and various health, social and financial problems that individuals face. This calls for more integrated and holistic approaches to serve people with legal issues. Some suggest greater collaboration among legal service providers and other disciplines, for example by working with social workers and others in multidisciplinary teams.

> The initial problem may be a legal problem, but without early intervention this problem may trigger subsequent problems, legal or otherwise, such as greater demands on other social welfare programs, social housing programs, physical or mental health programs, etc. Early intervention…calls for a more holistic or integrated institutional response….
>
> – Legal Aid Review, p.vi

> [A culture shift is required to] move away from the adversarial model and a reorientation to problem-solving in a multi-professional context.
>
> – Self-Represented Litigants, p.128

> [Services can be provided] through teams of lawyers, other legal service providers (like paralegals) and providers of related services (like social workers). Teams can deliver more comprehensive and holistic services tailored to people's needs. … Target: By 2030, 80% of lawyers in people-centred law practices work with an integrated team of service providers.
>
> – Equal Justice, pp.27 and 28

> Viable solutions require collaboration to create synergy and to respond to people's needs in a holistic way.
>
> – Connecting, p.5

> With some (important) exceptions, our system presumes homogeneity on the part of users... and for the most part, it divorces the legal problem from the other issues that attend relationship breakdown.
>
> – LCO: Family Justice, p.53

## Issues to Address

Collectively, the reports examined for this paper press for change in many areas and for various population groups. This section selects three areas that multiple reports indicate as priorities. However, this should not be taken to indicate that these three areas are necessarily the most important issues to be addressed. Other issues may be viewed as equally or more urgent.

### Theme #7: The family law system requires urgent attention.

Despite many improvements in the family justice system, many reports call for further and more dramatic changes, including a greater emphasis on non-adversarial approaches and early intervention.

> [F]amily relationship breakdown is the primary reason why most Ontarians enter the civil justice system.
>
> – Listening, p.57

> Major change is urgently needed in the family justice system.
>
> – NAC: Roadmap, p.17

> Canadians do not have adequate access to family justice…. Without access to the mechanisms to implement them, the substantive rules have limited value.
>
> – NAC: Family Justice, p.1 Exec Summary

> The problem [of unrepresented litigants] is particularly pronounced in family law matters.
>
> – Equal Justice, p.9

> Over the past few years, there has been considerable study and reform of the family law system. Yet problems of complexity and difficulties for unrepresented litigants in particular remain.
>
> LCO: Family Justice, p.1

> Extending paralegals' scope of practice to include family law is controversial; however we conclude that this possibility should not simply be dismissed.
>
> – LCO: Family Justice, p.2

> Respondents frequently questioned the limitations placed on the provision of assistance by paralegals, especially in relation to family matters.
>
> – National SRL, p.13

> We must concentrate our efforts on the specific areas of law with the greatest societal need and where we can have the highest impact. It is for this reason that I continue to advocate for ongoing family law reform.
>
> – Chief Justice Warren K. Winkler, Opening of the Courts of Ontario, September 2012

## Theme #8: Self-represented parties are not going away

Many reports raise the need for justice system changes in light of high numbers of self-represented persons, whether in civil, family or criminal cases. The phenomenon of self-represented persons is not expected to go away.

> There is an urgent need to address the consequences of the large and growing numbers of people representing themselves in both family and civil court….[It is] likely that a substantial SRL population in the courts is here to stay.
>
> – National SRL, pp.113 and 128

> Litigants, and particularly self-represented litigants, are not, as they are too often seen, an inconvenience; they are why the system exists…. Court and tribunal services must provide appropriate services for self-represented litigants.
>
> – NAC: Roadmap, pp.7 and 16

> The system's design is premised on the presence of lawyers.
>
> – LCO: Family Justice, p.24

> [T]here is a growing gap between what most SRLs need and the services that are available at courts.
>
> – SRL White Paper, p.5

> Judges, especially in family court, now find themselves dealing with SRL's as often as with lawyers representing clients…. The influx of SRL's into the family and civil courts has dramatically altered the judicial role.
>
> – National SRL, pp.13 and 124

> Both represented and unrepresented litigants must have real access to the civil justice system.
>
> – Civil Justice Reform, p. 4

> [W]ithin a short time almost all the SRL respondents became disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming.
>
> – National SRL, p.9

> Figures from Ontario show that …in 2011/12, 64% of individuals involved in applications under the Family Law Act, the Children's Law Reform Act or the Divorce Act were self-represented at the time of filing.
>
> – National SRL, p.33

> The criminal justice system often does not work as it should when an accused is not represented and cannot present or challenge the evidence in a meaningful way….Particularly in the context of long complex cases, the trial judge may find it necessary to appoint *amicus curiae* to assist the court or, in some exceptional circumstances, to appoint counsel for the accused in order to preserve the integrity of the process and ensure a fair trial.
>
> – Large Criminal Cases, p.156

## Theme #9: Creative solutions are required to make legal services more affordable

The affordability of legal services remains a critical aspect of access to justice that seriously affects low- and middle-income residents across Ontario. This is a huge factor that leads people to proceed without legal representation or to abandon attempts to resolve their legal issues. Recent reports comment on the future of legal billing practices, the need to increase legal aid funding and eligibility, and ways to increase affordability through early intervention and greater use of paralegals and multi-disciplinary teams.

> A commitment to the availability of affordable legal services to a broad range of Canadians must be part of any responses to change in the next decade.
>
> – Legal Futures, p.6

> A critical barrier to the public's access to the justice system is the cost of legal services, which can be prohibitive not only for the poor but also for the middle class.
>
> – NAC: Legal Services, p.3

Today legal representation is primarily limited to persons with relatively high incomes or the very poor, and full legal representation only in the case of those with considerable discretionary resources. Yet the system is still for the most part based on the need for a lawyer.

– LCO: Family Justice, p.23

[M]eaningful improvement in access to justice can be achieved only if the justice system can provide mechanisms for the more timely resolution of litigated disputes at a reasonable cost to both the plaintiff and the defendant.

– Civil Justice Reform, p.8

By far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel…. Financial retainers and services billed at a rate of $350-400 an hour are beyond the means of many Canadians.

– National SRL, pp.8 and 12

In many cases economic power has shifted to the consumer or client side, with buyers demanding more say on what lawyers do, how they do it, and how much and how they charge for it….. There is considerable resistance by clients to current pricing structures, including billable hours.

– Legal Futures, pp.4 and 21

Ontario lawyers should be encouraged to consider new and innovative billing methods that promote access to justice for litigants with civil legal issues who would not otherwise be able to afford counsel.

– Civil Justice Reform, p.ix

There is a growing consensus that [multidisciplinary teams are] a positive way forward, providing more affordable services to clients and adequate income to lawyers.

– Equal Justice, p.27

[Legal Aid] financial eligibility criteria need to be significantly raised to a more realistic level that bears some relationship to the actual circumstances of those in need.

– Legal Aid Review, p.177

Target: By 2020, all Canadians living at and below the poverty line… are eligible for full coverage of essential public legal services.

– Equal Justice, p.30

# Making it Happen

## Theme #10: Non-legal organizations have a vital role to play

Non-legal organizations play a vital role in prevention, legal information, triage and referral. They often serve as "trusted intermediaries" that help people recognize that they have a legal problem, provide preliminary information, and make referrals to legal service providers. Examples include Indian Friendship Centres, immigrant settlement agencies, shelters, violence prevention groups, disability organizations, health and social service providers, cultural and religious bodies, community centres, public libraries, and information and referral services (such as 211 Ontario). Efforts to enhance access to justice, especially at the front end, require collaboration among legal and non-legal organizations.

> The key is to provide a seamless continuum of legal and non-legal services, and ensure that representation is available when needed to have meaningful access to justice.
>
> – Equal Justice, p.16

> When individuals do not recognize the legal aspect of their problem, trusted intermediaries trained to refer to appropriate legal services can provide a conduit to the justice system.
>
> – NAC: Prevention, Triage, Referral, p.20

> Trusted intermediaries play a critical role in ensuring low-income and disadvantaged people access and understand PLEI.
>
> – Public Legal Education, p.27

> Access to a "trusted intermediary" in a health, social service, or other organization is particularly important for persons who are isolated, not comfortable with technology, and less able to pursue self-help options.
>
> – Connecting, p. 54

> A more vulnerable person may need the assistance of a lawyer or paralegal while another individual may require access to clear and correct information.
>
> – Mapping, p.7

> One theory worth examining is that the market for legal services in Canada is actually growing, but that the lawyers' share of this market is declining relative to non-lawyer providers.
>
> – Legal Futures, p.17

> The most common source of legal information for SRL's are court staff…. The conventional distinction between legal information and legal advice requires urgent re-examination.
>
> – National SRL, pp.10 and 117

## Theme #11: Technology in the justice system has not kept pace

Various reports comment on the lack of technology developments in the justice sector, the need for specific technology solutions, and concerns about the impact of technology on vulnerable populations. Potential technology solutions include the expansion of online dispute resolution, videoconferencing, interactive court forms, simplified scheduling, e-filing and docket management, and electronic accessibility of court and tribunal documents.

> While technological innovations are transforming much of modern life, they appear to be bypassing the justice system.
>
> – NAC: Legal Services, p.3

> Overall, the justice system has not been subject to the same technological transformation as other institutions.
>
> – Equal Justice, p.10

> The technology in all courts and tribunals must be modernized to a level that reflects the electronic needs, abilities and expectations of a modern society.
>
> – NAC: Roadmap, p.16

> Although online information may be helpful for many people, others will require in-person assistance to understand it.
>
> – LCO: Family Justice, p.1

> Clients will likely expect their services to be delivered to them in familiar ways, such as over the internet
>
> – Legal Futures, p.17

> [T]he trend away from professional services and towards a "Do It Yourself" approach may be more closely related to the availability of information on the internet…than any particular dislike or mistrust of lawyers.
>
> – National SRL, p.35

> In the coming years, technology will play both a disruptive role in challenging the status quo and a transformative role in assisting the legal industry into new forms of service delivery, knowledge development, communications, management and administration.
>
> – Legal Futures, p.27

## Theme #12: Leadership and collaboration can help to bridge the "implementation gap"

A key concern is an apparent lack of capacity to move from sound recommendations in a report (or series of reports) to implementing those recommendations. This has been referred to as "the Implementation Gap" (NAC: Family Justice, p.8). There is the obvious challenge of finding resources in times of fiscal restraint. However, the divided responsibilities for different elements of the system also create impediments to moving forward with systemic change. Several recent reports therefore recommend strategies and structures to foster leadership and collaboration. This includes recommendations to create coordinated local Access to Justice Implementation Commissions (NAC: Roadmap, p.20) and to appoint Access to Justice Commissioners (CBA: Equal Justice, p.37). Collaboration is seen as a vital element for bridging the implementation gap.

> [T]he responsibility for access to justice transcends organizational boundaries.
>
> – Listening, p.54

> No one department or agency has sole responsibility for the delivery of justice in Canada. That, in our view, is a core reason for why the improvement of access to justice continues to be such a challenge.
>
> – NAC: Roadmap, p.20

> Improving access to justice in Canada is the responsibility of all players in the justice system, including judges, lawyers, all levels of government, paralegals, academics, NGOs, public legal educators and the public.
>
> – NAC: Court Processes, p.25

> [T]he most effective overall leadership could come by appointing access to justice commissioners, individuals given adequate resources and the mandate of striving for equal justice.
>
> – Equal Justice, p.37

> While cost is an extremely important consideration, there must also be consideration for the heavy cost both directly and indirectly in continuing to operate a confusing family justice system primarily premised on services that many people cannot afford.
>
> – LCO: Family Justice, p.85

> [T]here are many reasons to be optimistic….People within and beyond the civil and family justice system are increasingly engaged by access to justice challenges and many individuals and organizations are already working hard for change.
>
> – NAC: Roadmap, p.24

> [I]t is going to take more than wise advice to change the system.
>
> – NAC: Family Justice, p.9

# LEGAL ORGANIZATIONS AND ACCESS TO JUSTICE ACIVITIES IN ONTARIO

Background Paper for The Law Society of Ontario's

Access to Justice Symposium: "Creating a Climate for Change"

October 29, 2013

Prepared by Karen Cohl
for The Law Society of Upper Canada
**DRAFT – OCT 20, 2013**

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## Introduction

This is the first of two background papers prepared for participants of the Access to Justice Symposium hosted by the Law Society of Upper Canada on October 29, 2013. It briefly describes legal organizations in Ontario and provides examples of their access to justice activities. The purpose is to stimulate discussion among Symposium participants about potential solutions, gaps and opportunities for collaboration. The paper is not intended to be comprehensive; rather it provides a brief “snapshot” and high level overview of access to roles and activities within the legal community.

Efforts to enhance access to justice involve a multitude of legal and non-legal organizations, often working in partnership with each other. The fact that this paper looks at legal organizations should not detract from the many non-legal organizations that play a vital role in legal information, referral, triage and prevention. They include Indian Friendship Centres, immigrant settlement agencies, shelters, violence prevention groups, disability organizations, health and social service providers, cultural and religious bodies, community centres, public libraries, and information and referral services (such as 211 Ontario).

The descriptions of legal organizations and their access to justice activities have been prepared with input from contacts from the organizations. The focus is on Ontario organizations, although some nationally based organizations have been included, especially those doing on the ground work in Ontario. We recognize that there is not always a clear line between a “legal” and “non-legal” organization, especially in the case of community organizations that provide information or education on legal topics. This paper is a draft that will be revised to add, modify or correct information following the Symposium discussions. Apologies to those we may have inadvertently omitted or insufficiently described.

## Table: Examples of Legal Organizations in Ontario

| | | |
|---|---|---|
| **Legal Institutions**<br>• The Law Society of Upper Canada<br>• The Law Foundation of Ontario<br>• Legal Aid Ontario<br>• The Law Commission of Ontario | **Provincial and Local Services**<br>• Community legal clinics<br>• Pro Bono Law Ontario<br>• Ontario Justice Education Network<br>• Community Legal Education Ontario<br>• Barbra Schlifer Commemorative Clinic<br>• Office of the Worker Adviser<br>• Office of the Employer Adviser<br>• Human Rights Legal Support Centre | **National Services**<br>• Association in Defence of the Wrongly Convicted<br>• Canadian Civil Liberties Association<br>• Pro Bono Students Canada<br>• Women's Legal Education and Advocacy Fund |
| **Legal Associations: General**<br>• Ontario Bar Association/Canadian Bar Association<br>• The Advocates' Society<br>• County and District Law Presidents' Association<br>• Criminal Lawyers' Association<br>• Family Lawyers Association<br>• Ontario Trial Lawyers Association<br>• Refugee Lawyers' Association of Ontario<br>• Paralegal Society of Ontario<br>• Licensed Paralegals Association | **Legal Associations: Demographic**<br>• Arab Canadian Lawyers Association<br>• Association des juristes d'expression française de l'Ontario<br>• Canadian Association of Black Lawyers<br>• Canadian Muslim Lawyers Association<br>• Federation of Asian Canadian Lawyers<br>• Hellenic Canadian Lawyers Association<br>• Hispanic Ontario Lawyers Association<br>• Indigenous Bar Association<br>• Iranian Canadian Lawyers' Association<br>• Korean Canadian Lawyers Association<br>• South Asian Bar Association of Toronto<br>• Women's Law Association of Ontario | **Faculties of Law**<br>• Lakehead University, Faculty of Law<br>• Osgoode Hall Law School, York University<br>• Queen's University, Faculty of Law<br>• University of Ottawa, Faculty of Law<br>• University of Toronto, Faculty of Law<br>• University of Western Ontario, Faculty of Law<br>• University of Windsor, Faculty of Law |
| **Courts and Tribunals**<br>• Court of Appeal for Ontario<br>• Superior Court of Justice<br>• Ontario Court of Justice<br>• Administrative Tribunals | **Governments**<br>• Ontario Ministry of the Attorney General<br>• Department of Justice Canada | **Partnerships**<br>• Local, provincial and national partnerships and collaborations, involving legal and community organizations |

# Legal Institutions

## The Law Society of Upper Canada

The Law Society of Upper Canada governs Ontario's lawyers and paralegals in the public interest to ensure that the people of Ontario are served by professionals who meet high standards of learning, competence and professional conduct. In 2006, the Law Society was given an explicit statutory mandate to facilitate access to justice for the people of Ontario. To further this objective, the Law Society established standing committees on Access to Justice and on Equity and Aboriginal Issues and co-sponsored the Ontario Civil Legal Needs research project which laid the groundwork for recent and future initiatives. Throughout 2013, the Law Society has been seeking advice on an enhanced role for itself through the Treasurer's Advisory Group on Access to Justice ("TAG"). TAG has also served to facilitate broader dialogue on access to justice in Ontario and is proposed to become a standing forum for this dialogue.

### Sample Access to Justice Activities

- Law Society Referral Service – up to 30 minutes free consultation with a lawyer or paralegal
- "Your Law: Ontario Law" videos on basic concepts such as hiring a lawyer or a paralegal, real estate transactions, wills and powers of attorney, family law, and personal injury matters
- Family Law Portal – designed to integrate Internet information on family law for the public
- Five-year review of the implementation of paralegal regulation
- Review and revision of regulations and rules – unbundled legal services; alternative billing structures; etc.
- Equity and diversity training and model policies; public education in partnership with community groups

## The Law Foundation of Ontario (LFO)

The Law Foundation of Ontario funds programs that help people to understand the law and the justice system; help people to use the law to improve their lives; and foster excellence in the work of legal professionals. A priority for the LFO is improving access to justice for disadvantaged groups. The LFO's main source of revenue is interest received from lawyers' and paralegals' mixed trust accounts. Other sources of revenue are court ordered cy-près awards and investment income. LFO grantees include many legal and non-legal organizations that further access to justice including Legal Aid Ontario, law schools and other organizations mentioned in this paper (e.g., Association in Defence of the Wrongly Convicted, Barbra Schlifer Commemorative Clinic, Canadian Civil Liberties Education Trust, Law Commission of Ontario, Ontario Justice Education Network, Pro Bono Law Ontario, Pro Bono Students Canada).

### Sample Access to Justice Activities

- Grants that fund ideas generated by non-profit community groups to improve access to justice
- Access to Justice Fund: using cy-près awards to fund national and regional projects
- Connecting Project: improving linguistic and rural access to justice
- Administration of the Class Proceedings Fund: providing financial assistance to parties involved in class action lawsuits in the public interest

- Payment of 75% of net income from mixed trust accounts to Legal Aid Ontario, as required by the Law Society Act

## Legal Aid Ontario (LAO)

Legal Aid Ontario has a statutory mandate to promote access to justice for low-income individuals throughout Ontario. Its role is to provide high-quality legal aid services in a cost-effective and efficient manner, to facilitate flexibility and innovation in the provision of legal aid services, to identify, assess and recognize the diverse legal needs of low-income individuals and of disadvantaged communities in Ontario, and to operate independently from the Government of Ontario but within a framework of accountability for the expenditure of public funds.

### Sample Access to Justice Activities

- Toll-free number, including summary legal advice for family and criminal law matters, available in 120 languages
- 56 legal aid offices in courthouses throughout the province
- Duty counsel services for people who arrive in criminal, family or youth courts without a lawyer
- Francophone legal advice line
- Issuing certificates to enable eligible low-income clients to retain a private lawyer for the most serious and complex cases
- Funding independent, community-based clinics to provide poverty law services
- Funding Student Legal Aid Services Societies operating out of Ontario law schools
- Refugee Law Office and current review of delivery of refugee law services
- Renewed Aboriginal Justice Strategy
- Mental Health strategy
- Public Legal Education website, LawFacts.ca, providing in-depth legal information and resources pertaining to criminal and refugee law. Content for Family, Aboriginal, and mental health law is coming Fall 2013.

## The Law Commission of Ontario (LCO)

The Law Commission of Ontario is an independent organization that researches issues and recommends law reform measures to make the law accessible to all Ontario communities. Its mandate includes stimulating critical debate about the law. It works on a wide range of projects, from short and narrow projects (focused on specific laws) to long projects that require multidisciplinary research and analysis (that might affect many laws). The LCO was created by an Agreement among The Law Foundation of Ontario, the Ontario Ministry of the Attorney General, the Dean of Osgoode Hall Law School, and The Law Society of Upper Canada (all of whom provide funding) and the Ontario law deans. It receives funding and in-kind support from York University.

### Sample Access to Justice Activities

Research Projects Underway

- Class Actions and Review of Class Proceedings Act
- Capacity of Adults with Mental Disabilities and the Federal Registered Disability Savings Plan
- Legal Capacity, Decision-making and Guardianship
- Modernization of the Forestry Workers Lien for Wages Act

- Specialized Procedure for Administration of Small Estates

Completed Projects
- Charging Fees for Cashing Government Cheques
- Division of Pensions on Marital Breakdown
- Family Law Reform
- Vulnerable Workers and Precarious Work
- Modernization of the Provincial Offences Act
- Framework for the Law as It Affects Persons with Disabilities
- Framework for the Law as It Affects Older Adults
- Law school curriculum modules for teaching about violence against women

Other Activities
- Roundtables on joint and several liability under Ontario Business Corporations Act and on family law
- Symposium on conversations about law reform
- Co-hosting conferences on elder law, e-health law and policy, and the law and ethics of investigative journalism

## Provincial and Local Services

### Community Legal Clinics

Ontario's community legal clinics are independent, non-profit corporations that receive the bulk of their funding from Legal Aid Ontario. Clinic lawyers and legal workers provide poverty law services that help low-income and disadvantaged people to meet their most basic needs: a source of income, a roof over their heads, human rights, access to health care, education, etc. The three defining characteristics of the clinics are local community governance, practice in poverty law, and legal response through a broad array of services.

| ONTARIO COMMUNITY LEGAL CLINICS –SNAPSHOT | | |
|---|---|---|
| There are **77** community legal clinics in Ontario. | | |
| **60** clinics serve specific geographic communities. | | |
| **17** clinics are "specialty clinics" that focus on particular areas of poverty law or client populations: | | |
| • African Canadian<br>• Chinese and Southeast Asian<br>• Children and youth<br>• Community legal education<br>• Corrections<br>• Disability | • Elderly<br>• Environment<br>• HIV and AIDS<br>• Income security<br>• Injured workers (2) | • Landlords self-help<br>• South Asian<br>• Spanish-speaking<br>• Tenants<br>• Workers health and safety |

The Association of Community Legal Clinics of Ontario (ACLCO) serves its members as the voice of the clinic system to Legal Aid Ontario, the Law Society of Upper Canada, government, law schools, the media, and the general public.

### Sample Access to Justice Activities

Ongoing Work

- Case work and legal representation in areas of law that particularly affect low-income individuals and communities
- Community development, public legal education and law reform activities to achieve systemic solutions to systemic legal issues confronting low income communities

Examples of Strategic Initiatives and Partnerships

- Co-location of Rexdale clinic in a community hub, sharing space with local community agencies serving mutual clients
- A "connecting region" initiative led by the South Ottawa clinic to formally link agencies serving the low-income population in the South Ottawa community
- "Housing as a Right" test case led by Advocacy Centre for Tenants Ontario (ACTO) on behalf of four individuals and a community organization under ss. 7 and 15 of the Charter of Rights and Freedoms
- International conference on workers compensation - organized by academics, legal clinics, and injured workers - to be attended by injured workers from across the province (with Law Foundation funding)
- A Strategic Plan for Ontario's community legal clinic system to expand client access to poverty law services; enhance capacity for systemic work; strengthen community connections; and enhance system-wide coordination and support
- The Knowledge Now project to enhance knowledge sharing among clinics, with support from the Legal Aid Ontario Innovations Fund

## Pro Bono Law Ontario (PBLO)

Pro Bono Law Ontario is a charity founded in 2001 to bridge the justice gap between lawyers who want to give back and the many Ontarians who can't afford legal services and have a legal problem not covered by legal aid. PBLO creates and manages volunteer programs that connect these lawyers with low-income Ontarians – either directly or in partnership with charitable organizations working in the community. PBLO serves over 13,000 clients each year who have nowhere else to turn. The demand for these services increases each year. PBLO is funded by The Law Foundation of Ontario, The Law Society of Upper Canada, and private donations.

### Sample Access to Justice Activities

- Creating and managing pro bono projects, brokering partnerships and providing consulting services to other groups interested in organized pro bono projects, and addressing regulatory barriers to participation
- Creating and directly managing three streams of programs serving at-risk children and youth, unrepresented litigants, and charitable organizations
- Brokering partnerships to connect charitable organizations with law firms, law associations, and legal departments
- Working with law firms, law associations and legal departments to develop policies that facilitate pro bono participation on an institutional level
- Using technology to deliver legal information and self-help resources (like court form completion software) to the public
- Bringing legal services to people in need, e.g. Court based self-help centres and medical legal partnerships in Ontario's children's hospitals

## Ontario Justice Education Network (OJEN)

The Ontario Justice Education Network promotes understanding, education, and dialogue to support a responsive and inclusive justice system in Ontario. OJEN carries out its mandate through education and advocacy programs that focus on engaging Ontario's youth in a positive way with Ontario's justice system. OJEN receives funding from the Law Foundation of Ontario, the Department of Justice Canada, and the Ontario Trillium Foundation.

### Sample Access to Justice Activities

- Delivery of justice education projects across the province for approximately 200,000 young people annually, facilitating direct access to judges, justices of the peace, lawyers, and legal professionals, at no cost, in both official languages
- Development of preventative strategies for meaningful justice education provincially, nationally and internationally
- Training high school law teachers and providing free classroom resources
- Working with the Ontario Ministry of the Education to revise the high school curriculum relating to legal issues to reflect pressing and emerging legal needs
- Outreach to communities with historically negative interactions with the justice system to build knowledge and confidence and to introduce youth and families to sources of help (high-risk, newcomer, Aboriginal and Francophone youth and children)

## Community Legal Education Ontario (CLEO)

CLEO is an independent non-profit organization that specializes in public legal education and information. It produces clear, accurate, and practical legal rights information to help people who have low incomes or face other barriers, such as language or literacy, to understand and exercise their legal rights. It also supports other community groups in their public legal education work.

### Sample Access to Justice Activities

- Specialty community legal clinic produces clear language legal information resources on high-need legal topics, in a variety of languages and formats
- "Your Legal Rights" website offers legal information on a wide range of topics, in a variety of languages, compiled from legal information resources of more than 800 organizations
- Centre for Research & Innovation conducts research and projects to help build the capacity of community organizations to develop and deliver effective legal rights information
- Connecting Communities project fosters training partnerships between legal and community organizations to improve access to legal information and referral for people who do not speak English or French or who live in rural or remote communities
- Public Legal Education Learning Exchange supports organizations across Ontario in providing effective PLE for their communities by hosting a website and networking opportunities to share research, tools, and promising practices

## Barbra Schlifer Commemorative Clinic

The Barbra Schlifer Commemorative Clinic is a not for profit organization providing multi-disciplinary services (legal, counselling and language interpretation) to women who are victims of violence. The Clinic assists women build lives free from violence and ensures women's access justice and other vital services they require for their protection and long term well-being. This Clinic is not part of the LAO funded system of community legal clinics. It is funded primarily by the province of Ontario as well as the Ontario Women's Directorate, the City of Toronto, the United Way of Greater Toronto, the Canadian Women's Foundation, The Law Foundation of Ontario, the Pacifica Fund at the Toronto Community Foundation, and many other corporate and individuals donors.

### Sample Access to Justice Activities

- Legal help in family, immigration and criminal law
- Counselling support
- Interpretation and translation in more than 90 languages
- Advocacy for law reform and social changes that benefit women

## Office of the Worker Adviser (OWA)

The Office of the Worker Adviser educates, advises and represents non-union workers and their survivors when the worker has been injured at work. The OWA also represents non-union workers who have been threatened or punished for following health and safety laws. The OWA is an independent agency of the Ontario Ministry of Labour. Its services are free and confidential. The OWA was established by statute in 1985, along with the Office of the Employer Adviser and the Workplace Safety and Insurance Appeals Tribunal.

### Sample Access to Justice Activities

- Advice, education, and representation at the Workplace Safety and Insurance Board, the Workplace Safety and Insurance Appeals Tribunal, and the Ontario Labour Relations Board
- Self-help information for workers to handle their own claims or applications where appropriate
- Community partnerships with other groups that assist injured workers or who promote health and safety in the workplace
- Educational services in local communities on topics related to the OWA mandate
- System improvement partnerships and activities

## Office of the Employer Adviser (OEA)

The Office of the Employer Adviser provides Ontario employers with free and confidential advice, representation and education on workers' compensation issues under the *Workplace Safety and Insurance Act*, and on unjust reprisal issues under the *Occupational Health and Safety Act*. The OEA was created by statute in 1985 as an independent agency of the Minstry of Labour. It provides advice to any size employer and represents primarily employers who employ fewer than 100 employees in workers' compensation matters. It represents employers with fewer than 50 employees in reprisal disputes.

### Sample Access to Justice Activities

- Advice and representation of employers in workers' compensation appeals at the Workplace Safety and Insurance Board and the Workplace Safety and Insurance Appeals Tribunal
- Advice and representation of employers in unjust reprisal matters at the Ontario Labour Relations Board
- Publications designed to meet the day-to-day needs of employers regarding the workplace safety and insurance system
- Proactive strategies for employers to help them avoid becoming involved in unjust reprisal proceedings
- Online webinars and educational seminars to inform and educate employers about their rights and obligations

## Human Rights Legal Support Centre

The Human Rights Legal Support Centre is an independent agency funded by the Ontario Government through the Ministry of the Attorney General. It offers human rights legal services to people who have experienced discrimination contrary to Ontario's *Human Rights Code*. The Centre has regional staff in Windsor, Sault Ste. Marie, Thunder Bay, Guelph, Ottawa and Brampton.

### Sample Access to Justice Activities

- Legal assistance in filing applications at the Human Rights Tribunal of Ontario and legal representation at mediations and hearings
- Interpretation services in 140 languages, including American Sign Language
- Eligibility guidelines that give priority to disadvantaged applicants
- Special service protocol enabling Aboriginal clients to be served by an Aboriginal lawyer
- Policy to accommodate a variety of physical, mental, language and cultural needs
- Outreach to communities that face cultural and linguistic barriers in accessing the Centre's services
- Community and continuing legal educational programs on human rights

# National Services

## Association in Defence of the Wrongly Convicted (AIDWYC)

AIDWYC is dedicated to identifying, advocating for, and exonerating individuals convicted of a crime that they did not commit and to preventing such injustices in the future through education and reform. AIDWYC has played a significant role in the exoneration of eighteen wrongly convicted Canadians.

### Sample Access to Justice Activities

- Reviewing and supporting claims of innocence in homicide cases
- Delivering Public Legal Education on topics related to wrongful convictions in marginalized communities
- Coordinating Continuing Legal Education events for lawyers, police, the judiciary and Aboriginal court workers in the hopes of preventing wrongful convictions
- Raising public awareness about miscarriages of justice through speaking engagements and the AIDWYC website and blog

- Intervening in legal cases which seek to rectify miscarriages of justice
- Participating in public inquiries related to wrongful convictions

## Canadian Civil Liberties Association (CCLA)

The Canadian Civil Liberties Association is a national, non-partisan, independent, non-profit organization that promotes respect for and observance of fundamental human rights and civil liberties and that defends, extends, and fosters recognition of these rights and liberties. The CCLA's work focuses on four thematic areas: fundamental freedoms, public safety, national security, and equality. CCLA has always been backed financially only by its members and supporters. It has neither sought nor received any government money.

### Sample Access to Justice Activities

- Defending human rights and civil liberties through public education, litigation, citizen's engagement, monitoring and research
- Convening conferences and public education programs through its foundation, the Canadian Civil Liberties Education Trust
- Engaging volunteers to keep informed of how civil liberties are observed throughout the country
- Intervention in court cases to represent a human rights and civil liberties perspective

## Pro Bono Students Canada (PBSC)

Pro Bono Students Canada is a national, award-winning program with chapters at 21 law schools across the country, including every Ontario law school. By exposing law students to the value of public service, PBSC aims to encourage the next generation of lawyers to make *pro bono* an everyday part of their practice.

### Sample Access to Justice Activities

- Placement of law student volunteers in community organizations, legal centres and clinics, law firms and courts and tribunals, training them to provide high quality, professional legal assistance to vulnerable populations and individuals and to non-profit organizations
- Supervised opportunities for students to develop legal skills while increasing access to justice in diverse communities across Canada. Flagship projects include:
    - Family Law Project: document preparation for unrepresented litigants
    - Tax Advocacy project: representing appellants in the informal procedure in the Tax Court of Canada
    - Wills Clinic: preparing wills and powers of attorney, and delivering public legal information sessions
- Campus events to promote the value of public interest lawyering and pro bono service

## Women's Legal Education and Advocacy Fund (LEAF)

Founded in 1985, LEAF is a national, non-profit organization that exists to advance the equality of women and girls through litigation, law reform and public education. LEAF addresses inequality and injustice issues experienced by the most marginalized women who are disproportionately disadvantaged

by poverty, racism, disability, colonialism and sexism. LEAF works to ensure Canadian courts provide the equality rights guaranteed to women and girls by Section 15 of the *Canadian Charter*.

#### Sample Access to Justice Activities

- Intervention to help win landmark legal victories in crucial areas such as violence against women, discrimination, sexual harassment, sex discrimination in employment standards, social assistance, unfair pensions, family law and reproductive rights
- Involvement over the past twenty-eight years in over 150 cases on equality rights, addressing issues such as reproductive freedoms, pay equity, employment, housing, immigration, family law, sexual violence, sexual orientation and disability accommodation for women and marginalized groups

## Legal Associations: General

Individual lawyers and paralegals contribute to access to justice in many ways. This can include pro bono services, unbundled legal services, alternative billing arrangements, and specialized firms. They also contribute through the legal associations to which they belong.

### Ontario Bar Association (OBA) and Canadian Bar Association (CBA)

The Canadian Bar Association (CBA) represents some 37,000 lawyers, judges, notaries, law teachers, and law students from across Canada. Approximately two-thirds of all practising lawyers in Canada belong to the CBA. The Ontario Bar Association (OBA) is a branch of the CBA and is the largest voluntary legal advocacy organization in Ontario, representing some 18,000 members on the frontlines of our justice system in no fewer than 38 different sectors and in every region of the province. The CBA-OBA mandate is, among other things, to improve and promote access to justice and equality in the legal profession and the justice system.

#### Sample Access to Justice Activities

CBA Reaching Equal Justice

- Ongoing CBA initiative offering a comprehensive strategic framework to overcome existing barriers, with 31 targets for attaining equal justice by 2030. Each target offers actions that can begin immediately, interim actions or milestones to mark progress along the way, as well as the final target or end goal. The Reaching Equal Justice Report invites collaborative action by all members of the justice community, in an attempt to “balance the scales” of justice in Canada. http://www.cba.org/CBA/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf

CBA Legal Futures Initiative

- Report on the Future of Legal Services in Canada http://www.cbafutures.org/

Additional Activities: OBA

- OBA Access to Justice Committee, with pro-bono and paralegal subcommittees
- OBA Working Group on Court Delay
- OBA “Find a Lawyer” service for the public

Additional Activities: CBA

- CBA Access to Justice Committee
- CBA Legal Aid Liaison Committee, including Legal Aid Leader recognition program and Legal Aid Watch
- CBA Pro Bono Committee

## The Advocates' Society

The Advocates' Society is a professional association for advocates with over 5,000 members from the bench and bar throughout Ontario and across Canada. The Society is dedicated to promoting excellence in advocacy and the highest standards of professionalism within a fair and accessible system of justice. The Society is Canada's premier provider of advocacy skills training and plays a prominent role in contributing to justice reform initiatives, preserving and strengthening the role of advocates, and ensuring access to justice. The Society is also committed to giving back to the community, and administers and participates in a number of pro bono initiatives.

## County and District Law Presidents' Association (CDLPA)

The County & District Law Presidents' Association provides insight and comment on issues affecting the legal profession in Ontario, particularly around access to justice. In affiliation with the Toronto Lawyers Association, the CDLPA represents the interests of over 12,000 practicing lawyers through a volunteer Executive Board that is elected from among Ontario's 46 county law associations. Many of these lawyers are directly engaged in practice areas which focus on the legal needs of individuals in the province of Ontario, such as family, criminal, wills and estates and small business. They see and understand first-hand the challenges that exist within the current legal system, and are committed to finding solutions on behalf of the public they serve. This broad-based voice of the practicing bar of Ontario gives CDLPA a unique and powerful voice at the grassroots of the practice of law.

### Sample Access to Justice Activities

- Finding ways to support solo practitioners and small/midsize firms in order to maintain their presence in all jurisdictions around the province for the benefit of their local communities
- Participation in the Alliance for Sustainable Legal Aid
- Participation in the Working Group on Real Estate
- Providing comments on other important practice issues impacting on the operation and accessibility of the justice system as they arise
- Regular submissions to the Law Society, the Province of Ontario, community justice partners, the media and the general public as part of CDLPA's commitment to being the voice of the practicing Bar in Ontario

## Criminal Lawyers' Association (CLA)

The Criminal Lawyers' Association is a specialty legal organization that serves as a voice for criminal justice and civil liberties in Canada. The CLA provides advice and perspective to governments and the judiciary on issues relating to legislation and the administration of criminal justice. It also assists its members in every aspect of the practice of criminal litigation. The Association is often called upon to seek intervenor status in cases before the Court of Appeal and the Supreme Court of Canada.

### Sample Access to Justice Activities

- Routinely make submissions to Legislative Committees at both the Commons and Senate level as well as Provincial Legislatures on all proposed Bills affecting criminal justice
- Advocacy for a strong, independent and well-funded legal aid program as a key to equal access to justice for persons charged with criminal offences
- Provision of continuing professional development programs for criminal law practitioners
- Active participant in court administrative committees throughout the province

## Family Lawyers Association (FLA)

The Family Lawyers Association is a group of lawyers in Ontario who are actively involved in family law and who wish to share their experiences with other lawyers throughout the province. The Family Lawyers Association provides information to its members and serves as a voice for its members on issues affecting the practice of family law.

### Sample Access to Justice Activities

- Participating in committees and initiatives in the areas of Legal Aid, law reform and various family law Bench and Bar Associations

## Ontario Trial Lawyers Association (OTLA)

The Ontario Trial Lawyers Association is an organization of more than 1,400 plaintiff lawyers, law clerks, articling students and law students. Its purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating strongly for safety initiatives. Priorities include a continued focus on advocacy for a fair civil justice system.

### Sample Access to Justice Activities

- Standing committee on Access to Justice
- Collaboration with community partners on initiatives that work for access to justice and a fair insurance system
- Regular submissions to promote fair access to court system without undue delays
- Safety initiatives to prevent injury from occurring
- Safety awards to recognize work in community
- Award for outstanding contribution to the goals of a fair trial and access to justice, as an advocate, in legal scholarship, continuing legal education, legal writing, journalism, politics or government
- Regular continuing legal education and promoting ongoing public education on access to justice

## Refugee Lawyers' Association of Ontario (RLA)

The Refugee Lawyers' Association of Ontario is an association of approximately 200 lawyers in the Province of Ontario in Canada advocating on behalf of refugees. The RLA shares information and updates regarding refugee determination in Canada, provides links to source country information, and comments on important court decisions in refugee law. The Association includes lawyers in private practice as well as Legal Aid clinic and staff lawyers.

### Sample Access to Justice Activities

- Advocating to ensure accessibility of lawyers for refugees and refugee claimants, adequate funding for Legal Aid, and minimum standards of representation for refugees and refugee claimants
- Working in cooperation with other legal service providers and associations to support a sustainable Legal Aid plan
- Sharing legal education and information for refugee lawyers

## Paralegal Society of Ontario (PSO)

The Paralegal Society of Ontario represents the interests of licensed paralegals across Ontario. It provides educational events, engages in government and college relations, and advocates for paralegals.

### Sample Access to Justice Activities

- Assists the public in finding a paralegal in various practice areas
- Commitment to educating the public about paralegals and the paralegal profession

## Licensed Paralegals Association (Ontario) (LPA)

The Licensed Paralegals Association (Ontario) is the largest collective of licensed paralegals directly offering legal services to Ontarians. By providing continuing professional development courses, current practice management tips, and ongoing mentoring, the LPA fosters an environment of continuous learning.

### Sample Access to Justice Activities

- Supports access to justice and encourages the public to confidently utilize the services of licensed paralegals in permitted areas of practice

# Legal Associations: Demographic

Arab Canadian Lawyers Association (ACLA)

Association des juristes d'expression française de l'Ontario (AJEFO)

Canadian Association of Black Lawyers (CABL)

Canadian Muslim Lawyers Association (CMLA)

Federation of Asian Canadian Lawyers (FACL)

Hellenic Canadian Lawyers Association (HCLA)

Hispanic Ontario Lawyers Association (HOLA)

Indigenous Bar Association (IBA)

Iranian Canadian Lawyers' Association (ICLA)

Korean Canadian Lawyers Association (KCLA)

South Asian Bar Association of Toronto (SABA-Toronto)

Women's Law Association of Ontario (WLAO)

Many associations, such as the examples listed above, serve as a voice for members of the legal profession from specific demographic groups. These associations play an important role in access to justice by helping to ensure that people from the groups have access to a strong cadre of legal professionals who understand their culture, language or specific needs and by advocating on public policy issues to advance legal and social justice.

Activities of such associations typically include:

- Serving as a spokesperson and networking forum for their members
- Promoting public awareness and reform of policies and laws affecting the target populations
- Promoting equal opportunity, legal scholarship, professional excellence, and community involvement
- Offering mentorship for students and practitioners
- Providing seminars, speakers' forums and other educational opportunities

# Courts and Tribunals

## Court of Appeal for Ontario

The jurisdiction of the Court of Appeal for Ontario includes the consideration of civil and criminal appeals from decisions of Ontario's two trial courts, the Superior Court of Justice and the Ontario Court of Justice. At the Opening of the Courts of Ontario in September 2012, Chief Justice Warren K. Winkler stressed the importance of access to justice in upholding the rule of law. At the Opening in 2013, he said, "There is today an overwhelming consensus that if the justice system as we know it is to survive, it must undergo significant change to provide greater access to justice for the public".

### Sample Access to Justice Activities

- Ontario Courts Accessibility Committee which is helping to increase the accessibility of courthouse facilities and proceedings, with membership from all levels of court, the Bar, the Ministry of the Attorney General, and people with disabilities
- Programs initiated with the bar, Pro Bono Law Ontario and Legal Aid Ontario to provide legal services for unrepresented persons during inmate appeals, mental health appeals, civil appeals, and motions
- Self-help packages on the website to guide individuals through the steps to bring an appeal or motion, with links to organizations that might be of assistance
- Chief Justice's Committee on Professionalism which gets lawyers more involved in making the system work smoothly

## Superior Court of Justice

The Superior Court of Justice has jurisdiction over criminal, civil and family cases, presiding in fifty-one locations in Ontario. In "Mapping the Way Forward", the Court's 2012 Annual Report, Chief Justice

Heather J. Smith stated, “In each of these three areas of law, the Superior Court remains dedicated to providing meaningful, effective, and timely access to justice”.

Prioritizing Children

Chief Justice Smith indicated in her Opening of Courts speeches, in both September 2012 and 2013, that in 2012 the Superior Court embarked on the “Prioritizing Children” initiative, which focussed on improving access to justice for families in crisis and children at risk, particularly in child protection proceedings. The Chief Justice has met with and has received commitments to support this initiative from the Treasurer, the law deans, CBA and OBA representatives, the Children’s Lawyer, and legal assistance organizations.

Scheduling Practices

Chief Justice Smith recently announced the 2013 strategic priority for the court. The court has embarked on a full scale internal review of its judicial scheduling practices, to maximize the effectiveness of its judicial resources and available facilities, to provide more timely access to justice, particularly in civil interlocutory proceedings

Reducing Wait Times

The court has begun an initiative for the Greater Toronto Area, to reduce the undue wait times for long motions and long trials, principally in Toronto. The judicial lead for this initiative, Justice Geoffrey Morawetz, will value the Bar’s input in resolving this issue.

Technology

To more effectively harness technology to improve access to justice, the Superior Court led two significant initiatives in 2013. First, the court developed its own protocol to allow all parties to easily access copies of the court’s digital audio recordings. Second, the court crafted and implemented a court-wide policy that permits the use of electronic devices in the courtroom for parties and their counsel, and for members of the press, because they function as the eyes and ears of the public.

E-Filing

While the court eagerly awaits the technology-based initiatives the Attorney General has planned, the court’s judges have proactively joined with the Bar to move towards the kind of accessible “e-filing” system that will ultimately become the backbone for the administration of justice. The thoughtful and detailed standards developed for delivering e-documents in Commercial List and Divisional Court cases will, no doubt, become the standard for the true “e-filing” system of the future.

## Ontario Court of Justice

The Ontario Court of Justice presides over adult criminal, youth criminal, family law, child protection, and provincial offence matters. The Ontario Court of Justice is the largest court in the country, with judges and justices of the peace sitting in close to 200 locations throughout Ontario. In her remarks at the Opening of the Courts of Ontario in September 2012, Chief Justice Annemarie E. Bonkalo stated that, “As society evolves, so too must our courts. Whether in family, criminal, youth or provincial offences matters, our Court always seeks opportunities to provide more innovative and accessible service delivery options.” During the 2013 Opening, she stressed the Court’s focus on access to justice and efforts to modernize the court and demystify the court process.

### Sample Access to Justice Activities

- Web-based user guides for defendants in provincial offences cases, accused persons in criminal trials, and self-represented persons at family law trials
- Fly-In Court Working Group report to enhance operations of criminal and family fly-in courts held in First Nations communities in the Northwest and Northeast Regions of Ontario
- Public legal education activities of judges and justices of the peace, in classrooms and other settings
- Streamlining of criminal, family and provincial offence processes
- Implementing in-court orders to reduce waiting time for litigants regarding document preparation
- Posting of court statistics for public transparency

## Administrative Tribunals

Many legal matters in Ontario are resolved through specialized adjudicative tribunals established by provincial or federal legislation. The nature and extent of access to justice activities in the tribunal sector can vary considerably depending on the individual tribunal or cluster of tribunals.

### Sample Access to Justice Activities

Policies and Procedures

- Service Equity Policy: created by the Society of Ontario Adjudicators and Regulators (SOAR) to provide equity and access for disadvantaged persons
- Training in cultural competencies by SOAR and the Council of Canadian Administrative Tribunals
- Training for adjudicators in mediation and accessibility
- Training on the impact of poverty and mental health on parties' ability to interact with the legal process (Social Justice Tribunals Ontario)
- "Active adjudication" to assist self-represented parties
- Voluntary mediation programs
- Access to interpreters during tribunal hearings
- Production of decisions in accessible formats

Clustering

- Improving access to justice is one of the goals behind the recent creation of three "clusters" involving seventeen of Ontario's tribunals:
    - Environment and Land Tribunals Ontario (ELTO)
    - Social Justice Tribunals Ontario (SJTO)
    - Safety, Licence Appeals and Standards Tribunals Ontario (SLASTO)
- Common information portals for clusters of tribunals

# Governments

## Ontario Ministry of the Attorney General (MAG)

The Ministry of the Attorney General's role includes court services to support an independent judiciary, prosecution of offences, conducting civil litigation on behalf of government, services for victims and vulnerable persons, justice policy, and legislative drafting. MAG liaises with other Ontario government

ministries on access to justice issues and is responsible for a variety of arms-length agencies and tribunals.

### Sample Access to Justice Activities

Information and Guides

- Justice Ontario: a one-stop source of information about Ontario's legal system, including a toll-free telephone line with service in 173 languages. Topics include: Finding a lawyer, Tickets and fines, Lawsuits and disputes, Family and criminal law, Human rights, Wills and estates
- Nine guides for bringing or replying to a Small Claims Court claim, including the enforcement of court orders
- Culturally appropriate family law information for Aboriginal families, with materials in English, French, Ojibway, Cree and Oji-Cree

Technology

- Ontario Court Forms Assistant, an online program that guides litigants through a series of plain language questions to populate commonly used Small Claims Court and family law forms
- Pre-formatted, fillable forms available on the Ontario Court Forms website for Small Claims Court actions and non-contentious estate applications

Family Justice Services

- Expansion of mediation, mandatory information, and Information and Referral Co-ordinator services to all family courts in the province

Justice on Target (JOT)

- Addressing criminal court delay by using an evidence-based approach to increase the effectiveness of criminal court practices, e.g.:
    - Early information, forms and orientation to help accused persons prepare for court
    - Putting legal aid on-site in Ontario’s courthouses so accused persons can apply immediately for legal aid and those who qualify can quickly retain counsel
    - Guidelines for holding low-risk offenders accountable through community service, restitution, charitable donation, or attending programming or counselling

## Department of Justice Canada (DOJ)

The federal Department of Justice acts as a policy department to oversee matters relating to the administration of justice that fall within the federal domain, helping to ensure a fair, relevant and accessible justice system for all Canadians. In addition to policy advice and program services, it provides a range of legal advisory, litigation and legislative services to government departments and agencies. The Department also serves as a central agency to support the Minister in advising Cabinet on all legal matters.

### Sample Access to Justice Activities

- Published research and reports on a variety of access to justice issues including criminal justice, family law, Aboriginal communities, and creating a more efficient and accessible justice system
- Participation in the National Action Committee on Access to Justice in Civil and Family Matters
- Aboriginal Court Worker Program
- Aboriginal Justice Strategy

- Legal Aid Program
- International Legal Programs
- Public Legal Education and Information Support
- Official Languages Initiatives
- Department of Justice Canada Pro Bono Pilot Project

## Faculties of Law

### Student Legal Aid Societies

Student Legal Aid Services Societies operate out of Ontario's law schools. Under the supervision of full time lawyers, volunteer law students provide legal advice and represent clients in cases involving minor crimes, landlord and tenant disputes, immigration issues and tribunals. Funding and support are provided from the universities and Legal Aid Ontario. Law Schools also collaborate with community legal clinics such as the University of Windsor's Legal Assistance of Windsor program and Osgoode Hall Law School's long-standing partnership with Parkdale Community Legal Services.

### Clinical Programs

In additional to regular classroom courses, Ontario's law schools offer clinical programs with an intensive focus on particular areas of law, legal skills or client communities. Clinical programs provide law students with advanced skills and experience through experiential learning. Many clinical programs – including placement at a student legal aid society – focus on vulnerable groups. A recent example is the Disability Law program created by Osgoode Hall Law School in partnership with ARCH Disability Law Centre.

### Pro Bono Services

As described earlier, Ontario law students provide volunteer legal services through chapters of Pro Bono Students Canada. Students also volunteer through pro bono law school clinics such as the Ecojustice Clinic at the University of Ottawa.

### New Faculty of Law at Lakehead University

The Lakehead University Faculty of Law is Ontario's first new law school in Ontario in forty-four years. Its first class of students began in September, 2013. This law school is committed to improving access to legal services in Northern Ontario and throughout rural Canada – all places where there is a need for lawyers. It will focus on admitting students from towns across the north, as well as throughout the rest of Ontario and rural or small town Canada. It will emphasize access to justice in non-metropolitan communities by preparing graduates to practise in smaller centres and in smaller firms. In addition to the core curriculum, the program will focus on three main areas: Aboriginal Law and issues related to Aboriginal peoples; establishing a law practice in a small centre; and an emphasis on Natural Resources, with specialties in mining and forestry.

## Faculties of Law: Selected Access to Justice Activities

The table below provides additional examples of access to justice activities at Ontario faculties of law. The examples were drawn from a larger table entitled "Access to Justice Initiatives in Canadian Law Schools" that was submitted to the National Action Committee on Access to Justice in Civil and Family Matters (NAC).

| **Osgoode Hall Law School, York University** | **Queen's University, Faculty of Law** |
|---|---|
| • Public interest requirements: all students must complete 40 hours of unpaid, public interest work before graduation<br>• Innocence Project clinic: researches and investigates claims of wrongful conviction<br>• Innovation Clinic: provides pro bono support to start-up companies | • Correctional Law Program: provides legal support to inmates<br>• Queen's Elder Law Clinic<br>• Tory's Public Interest Summer Internship and Dean's Excellence Fund: awards to students completing internships in public interest programs |
| **University of Ottawa, Faculty of Law** | **University of Toronto, Faculty of Law** |
| • Public interest, social justice and sole practitioner fellowship programs: encourage law students to work in access to justice areas<br>• Access to Justice & Elder Law Community Legal Research Projects<br>• University of Ottawa Refugee Assistance Project | • Advocates for Injured Workers<br>• Centre for Spanish-Speaking People<br>• International Human Rights Clinic<br>• Engaged in multi-year Middle Income Access to Justice Initiative, culminating in international conference in 2011 |
| **University of Western Ontario, Faculty of Law** | **University of Windsor, Faculty of Law** |
| • Dispute Resolution Centre<br>• Sport Solution Clinic: offers legal services to athletes<br>• Western Business Law Clinic: offers legal services to small businesses | • Compulsory course on Access to Justice<br>• Law Enforcement Accountability Project on police accountability<br>• Centre for Enterprise and Law clinic: provides legal information to start-up companies<br>• Windsor Yearbook of Access to Justice: peer-reviewed journal |

# Creating a Climate for Change
## Report from TAG Symposium, October 29, 2013

In January of 2013, Treasurer Thomas G. Conway established the Treasurer's Advisory Group on Access to Justice (TAG) to gather input and advice as the Law Society of Upper Canada considered how to enhance its role on these issues and better fulfill its statutory mandate to "act so as to facilitate access to justice for the people of Ontario."

On October 29, 2013, eighty individuals dedicated to improving access to justice gathered for a symposium that furthered the goals of TAG. The objectives were to:

- Facilitate dialogue with a cross-section of individuals committed to access to justice in Ontario
- Enhance awareness of current activities and recommendations
- Discuss ways to enhance collaboration, coordination and engagement on access to justice issues
- Solicit further ideas about the role of the Law Society in meeting its statutory mandate

In his opening remarks, Treasure Conway encouraged participants to engage in concrete and practical discussions about structures and mechanisms for implementing change to make the justice system more accessible for the people of Ontario.

See Appendix A: Agenda and Appendix B: Participant List.

## Setting the Stage

### Dark Sky / Blue Sky

A multi-media presentation entitled *Dark Sky/Blue Sky* was shown to the symposium participants. The presentation contains video clips and quotes gathered from members of the public during the Canadian Bar Association's *Envisioning Equal Justice* initiative, in collaboration with Pro Bono Students Canada and the Canadian Forum on Civil Justice.

> *In the video, "Dark Sky/Blue Sky", you heard voices explaining clearly and eloquently that today, justice is not accessible to them. --Chief Justice Bonkalo, Ontario Court of Justice*

### Address by Chief Justice Annemarie Bonkalo, Ontario Court of Justice

Chief Justice Bonkalo thanked the Treasurer for establishing the Treasurer's Advisory Group on Access to Justice and for bringing everyone together for the symposium. She recommends defining our work ahead as achievable goals to achieve concrete access to justice objectives. She cautioned that we can no longer accept the status quo and continue doing things simply

because we have always done them that way. Chief Justice Bonkalo highlighted areas where her Court has led initiatives to meet the needs of communities, promote accessible and useful information about the workings of the Court, build a network of services for families in crisis, and harness technology to modernize operations.

## Overview of Symposium Background Papers

Karen Cohl provided an overview of the two background papers she had prepared for symposium participants. The papers were created to provide "food for thought" in discussions about potential solutions, gaps and opportunities for collaboration.

*Although one theme is that there is an urgent need for change, it is important to remember and to give credit for the many positive activities and developments taking place.*
*--Karen Cohl*

The first paper, *Legal Organizations and Access to Justice Activities in Ontario,* contains a brief description of legal organizations in Ontario and examples of their access to justice activities. The second paper, *Access to Justice Themes: "Quotable Quotes",* proposes themes from recent Ontario and national access to justice reports, using quotations from the reports to illustrate each theme.

| THEMES FROM ACCESS TO JUSTICE REPORTS |
|---|
| **Importance of Access to Justice and the Need for Change**<br>• Access to justice is an issue of fundamental importance.<br>• There is an urgent need for significant change.<br>• There is no common definition but a common understanding is emerging. |
| **New Directions – Cultural Shift**<br>• We need to put the public first.<br>• We need to do more at the front end and on prevention.<br>• We need more integrated and holistic responses. |
| **Issues to Address**<br>• The family law system requires urgent attention.<br>• Self-represented parties are not going away.<br>• Creative solutions are required to make legal services more affordable. |
| **Making it Happen**<br>• Non-legal organizations have a vital role to play.<br>• Technology in the justice system has not kept pace.<br>• Leadership and collaboration can help to bridge the "implementation gap". |

The background paper, *Legal Organizations and Access to Justice Activities in Ontario*, is a draft that the Law Society hopes to update over time. Comments for future versions can be sent to publicaffairs@lsuc.on.ca.

# Roadmap for Change: Where do we go from here?

## Presentation by Justice Thomas Cromwell, Supreme Court of Canada

Justice Cromwell presented *A Roadmap for Change*, the final report of the National Action Committee on Access to Justice in Civil and Family Matters. The report promotes a broad understanding of access to justice; promotes a new way of thinking to guide reform; and provides a roadmap for change governed by six guiding principles. Justice Cromwell encouraged the group to think about why there are so many ideas and so little action. He noted that a major impediment is the lack of coherent leadership and institutional structures to design, implement and coordinate change. He also encouraged the group to find ways to connect people to lawyers and cautioned that we not just accept that there are so many self-represented litigants.

> *There will be no change until the people who can make change believe it is necessary.*
> *--Justice Thomas Cromwell*

| SIX GUIDING PRINCIPLES FOR CHANGE |
|---|
| • Put the public first<br>• Collaborate and coordinate<br>• Prevent and educate<br>• Simplify, make coherent, proportional and sustainable<br>• Take action<br>• Focus on outcomes |

| NINE POINTS ON THE ROADMAP |
|---|
| **Innovation Goals**<br>• Refocus on everyday legal problems<br>• Access to essential legal services<br>• Multi-service centres<br>• Family services |
| **Institutional and Structural Goals**<br>• Local and national access to justice implementation mechanisms<br>• Legal education<br>• Innovation capacity |
| **Research and Funding Goals**<br>• Research to support evidence-based policy making<br>• Coherent, integrated and sustained funding strategies |

## Question and Answer Session

Following the presentation, Law Society bencher William McDowell facilitated a question and answer session with the symposium participants and Justice Cromwell and the Treasurer. The following list summarizes ideas and perspectives put forward during this session.

- Consult with business leaders and entrepreneurs for change management ideas.

- Ensure that "putting people first" encompasses an equity principle that includes racialized, low-income people.
- Include tribunal reform in access to justice.
- We must keep pace with technology to hear from youth and how they prefer to communicate with their lawyers.
- The Law Society needs to be less distant and exclusive in order to engage with civil society.
- Provide professional development on legal topics to settlement and social workers.
- Create a "529 LAW" number as a triage line that refers people to an organization that can help with a legal problem.
- Encourage local access to justice working groups – it is at the local level where we help people find paths to justice.
- The system should not regard self-represented litigants as aberrant or as second class citizens. Judicial training is an important component of addressing this issue.
- Some self-represented litigants who participated in the National SRL project are available to participate in justice system reform activities.
- Education about the justice system should begin in elementary school.
- Include paralegals in multi-disciplinary and team approaches to legal services.
- Courts and tribunals should think about self-represented litigants as an institutional responsibility. That will lead to greater consistency and confidence.

## Workshops

Symposium participants broke into groups for workshop sessions in the afternoon. Each of the five workshops had a different topic for discussion, with the primary objective of soliciting input into an appropriate role for the Law Society on these issues. Each workshop was chaired by a team of two Law Society benchers from the TAG Working Group and was held twice so that each participant could engage on two topics. Overall leadership for the workshops was provided by Howard Goldblatt, vice-chair of the TAG Working Group.

### Workshop #1:
### Engaging the Public

**Questions for Discussion**

- How do we ensure that the voice of the public/user is reflected as we change and innovate?
- What mechanisms exist or can be created to gather input from system users and to reflect back to them how their input or ideas have been used or considered?
- Can we influence Ontarians' investment in justice issues, in turn generating the political will for change and innovation? How?

#### Discussion and Input:

- Create a role for the Law Society – not to deliver services but to build partnerships with others.
- Create a campaign about how important access to justice is for every citizen – whether they have a legal problem now or in the future.

- Replicate this symposium in regions across the province, with CDLPA as a partner.
- Offer public education and outreach for the public where they are (e.g. libraries, community organizations) and before they are in crisis.
- As part of the regulator's role in entrance into the profession, find ways in which demand and supply issues can benefit the general population seeking justice.
- Discuss possible role for paralegals under supervision in family law
- Pro bono: institute a pay or play requirement for lawyers.
- Help members of the Law Society to understand that if the law Society is not seen to be taking a role in facilitating access to justice, it will not be fulfilling its mandate under the Act.

### Workshop #2:
## The Regulator's Role in Changing the Culture and Fostering Innovation

**Questions for Discussion**

- How do our regulatory approaches currently promote or impede change and innovation?
- What regulatory innovations should be of priority in changing the culture?
- How do we protect the public interest while innovating to meet the demand and need for quicker, cheaper and less complicated services – what is necessary to regulate?
- What educational an regulatory trends and issues arising as a result of global, technological and other marketplace changes create opportunities to respond to access to justice needs?

**Discussion and Input**:

- Establish a mandatory duty to provide pro bono legal services.
- Develop law school curricula for an access to justice course.
- Encourage law schools to educate students about access to justice.
- Review the scope of paralegal practice, especially in family law.
- Enumerate competencies required by a person who works in family law.
- Find ways to provide legal services in remote communities.
- Regulate and leverage the use of technology.
- Pick an area in most crisis, e.g. family law, and set a 5-year goal.
- Communicate more about referral function; legal information websites; unbundling; alternative legal service models.

### Workshop #3
## Breaking Silos- Ensuring a Collaborative Future – A Role for the Law Society in Ontario?

**Questions for Discussion**

- How do we become better coordinated and collectively more efficient and effective?
- What structures or mechanisms are needed to ensure ongoing collaboration?
- If the Law Society maintained a standing forum to facilitate collaboration, how should it operate?

**Discussion and Input**:

- Enhance the Law Society's role as a facilitator and coordinator.
- Be inclusive, but target groups per issue.

- Convene a roundtable to generate momentum. Include government and judiciary. Set the first agenda and let the process unfold organically. Create a new structure so the Law Society can fade into the background.
- Do something!

### Workshop #4

## Access to "Legal Services" – Early and Ongoing

**Questions for Discussion**

- What are "legal services" and how might they best be redefined, refocused or reorganized to allow more people to access the assistance they need, when they need it?
- Where is the line between legal advice and legal information and assistance appropriately drawn?
- Can we develop more precise parameters for the tasks that require the attention of a lawyer and those that could be completed by others?
- How do current regulations help or hinder in this area?

### Discussion and Input:

#### *Categories of legal providers*

There are six categories of legal providers: (1) information providers; (2) navigators, tour guides and referrers; (3) triagers and issue identifiers; (4) form assisters; (5) front line community workers and social workers; (6) paralegals and lawyers.

- Reach out to the first five categories and to their regulars and educators.
- Provide information and clarity about the roles of all six categories.
- Enable all six categories to work together.
- Consider credentialing so that the public can be confident of unregulated providers.

#### *Other*

- Simplify forms and make them interactive.
- Educate "trusted intermediaries" (e.g., social workers, librarians, settlement workers) to provide legal information. Clarify the boundaries of information vs. advice.
- Provide on-site legal personnel at community sites (St. Mike's model).
- Establish a mandatory pro bono requirement, with capacity to do it online.
- Lower fees by greater use of paralegals under a lawyer's supervision.
- Designate which online legal information is reliable through a stamp of approval ("reviewed by law Society licensee").

### Workshop #5

## How do we Measure Success?

**Questions for Discussion**

- Do we have a common vision of where we want to be or what success would look like in Ontario?
- How should success be measured and by whom?
- What approaches have others taken to measurement?
- What is missing that would better enable us to measure success or progress?

### Discussion and Input:

- Pick one or two things the Law Society can do well – a few urgent projects – and measure their success. Define metrics after defining what the Law Society is trying to accomplish.
- Focus on the users, ordinary people.
- Reach out to marginalized communities and conduct research on their needs and perspectives.
- Establish quantitative and qualitative measures – we need both.
- There is no universal measure of access to justice. Measures should be context driven (e.g. very different in criminal and civil law). Engage the public and legal sectors in the dialogue.
- Convene more events like this and measure what comes out of them.
- Measure success at the local level.
- Measure confidence in the justice system, taking into account that people who lose their cases will be unsatisfied.
- Measure changes to the gap between people who need legal services and legal professionals who can provide service.

## Wrap Up and Discussion of Next Steps

### Remarks from Chief Justice Heather Smith, Superior Court of Justice

Chief Justice Smith indicated that this is an issue whose time has come. She referred to the National Action Committee report as a wonderful roadmap which serves as a clarion call for meaningful change by all justice sector components. She indicated that the Superior Court of Justice will try to implement the NAC recommendations that apply to it and to make each court event meaningful. She noted the importance of making a business case to government for pilot projects.

### Treasurer's Concluding Remarks

The Treasurer thanked all presenters, facilitators, participants and staff. He noted that while there are no easy answers, inaction is not an answer. He is committed to doing more to better fulfill the Law Society's access to justice mandate. The Law Society is uniquely positioned to provide leadership – facilitative leadership – by establishing a standing forum for dialogue to help identify priorities, commit to specific actions, and facilitate collaboration. As a regulator, the Law Society also needs to examine its rules and regulations to ensure that they do not themselves constitute access to justice barriers. The next steps for the Law Society are to:

*When we see things that work, we should support them and implement them.*
*--Chief Justice Smith, Superior Court of Justice*

- Summarize the input from the Symposium and create a report.
- Formulate a detailed proposal for the Law Society's role within a couple of months.
- Present the proposal to Convocation - a bold proposal that will help to move us from talk to action.

## Appendix A: Agenda

# Symposium Agenda - *Creating a Climate for Change*

Tuesday, October 29, 2013
Donald Lamont Learning Centre, The Law Society of Upper Canada, Toronto, Ontario

| | |
|---|---|
| 9:30–10:00 a.m. | REGISTRATION |
| 10:00–10:15 a.m. | Welcome and Opening Remarks<br>Thomas G. Conway, Treasurer, The Law Society of Upper Canada |
| 10:15-11:15 a.m. | Setting the Stage:<br>• *Dark Sky / Blue Sky* (Video courtesy Canadian Bar Association)<br>• Address by Chief Justice Bonkalo, Ontario Court of Justice<br>• Overview of Symposium background papers by Karen Cohl:<br>o *Legal Organizations and Access to Justice Activities in Ontario*<br>o *Access to Justice Themes: "Quotable Quotes"* |
| 11:15 a.m. –12:00 p.m. | Action Committee on Access to Justice in Civil and Family Matters: *A Roadmap for Change*<br><br>Justice Thomas Cromwell – *Where do we go from here?* |
| 12:00–1:00 p.m. | NETWORKING LUNCH |
| 1:00 – 3:30 p.m. | Workshops<br>Five themes – participants assigned to workshop two different themes:<br>• Engaging the Public<br>• The Regulator's Role in Changing the Culture and Fostering Innovation<br>• Breaking Silos – Ensuring a Collaborative Future – A Role for the Law Society in Ontario?<br>• Access to "Legal Services" – Early and Ongoing<br>• How do we Measure Success? |
| 3:30 – 3:45 p.m. | NETWORKING BREAK |
| 3:45 – 4:30 p.m. | Wrap Up and Discussion of Next Steps |
| 4:30 - 5:30 p.m. | Reception – Upper and Lower Barristers' Lounges |

*Photographs and video taken at this event may be used in Law Society of Upper Canada publications

## Appendix B: Participant List

Thomas G. Conway, Treasurer, The Law Society of Upper Canada

Marion Boyd, Bencher, The Law Society of Upper Canada, TAG Working Group
Christopher Bredt, Bencher, The Law Society of Upper Canada, TAG Working Group
Cathy Corsetti, Bencher, The Law Society of Upper Canada, TAG Working Group
Howard Goldblatt, Bencher, The Law Society of Upper Canada, TAG Working Group
Michelle Haigh, Bencher, The Law Society of Upper Canada, TAG Working Group
Michael Lerner, Bencher, The Law Society of Upper Canada, TAG Working Group
Susan McGrath, Bencher, The Law Society of Upper Canada
Malcolm Mercer, Bencher, The Law Society of Upper Canada
Janet Minor, Bencher, The Law Society of Upper Canada, TAG Working Group
William C. McDowell, Bencher, The Law Society of Upper Canada, TAG Working Group

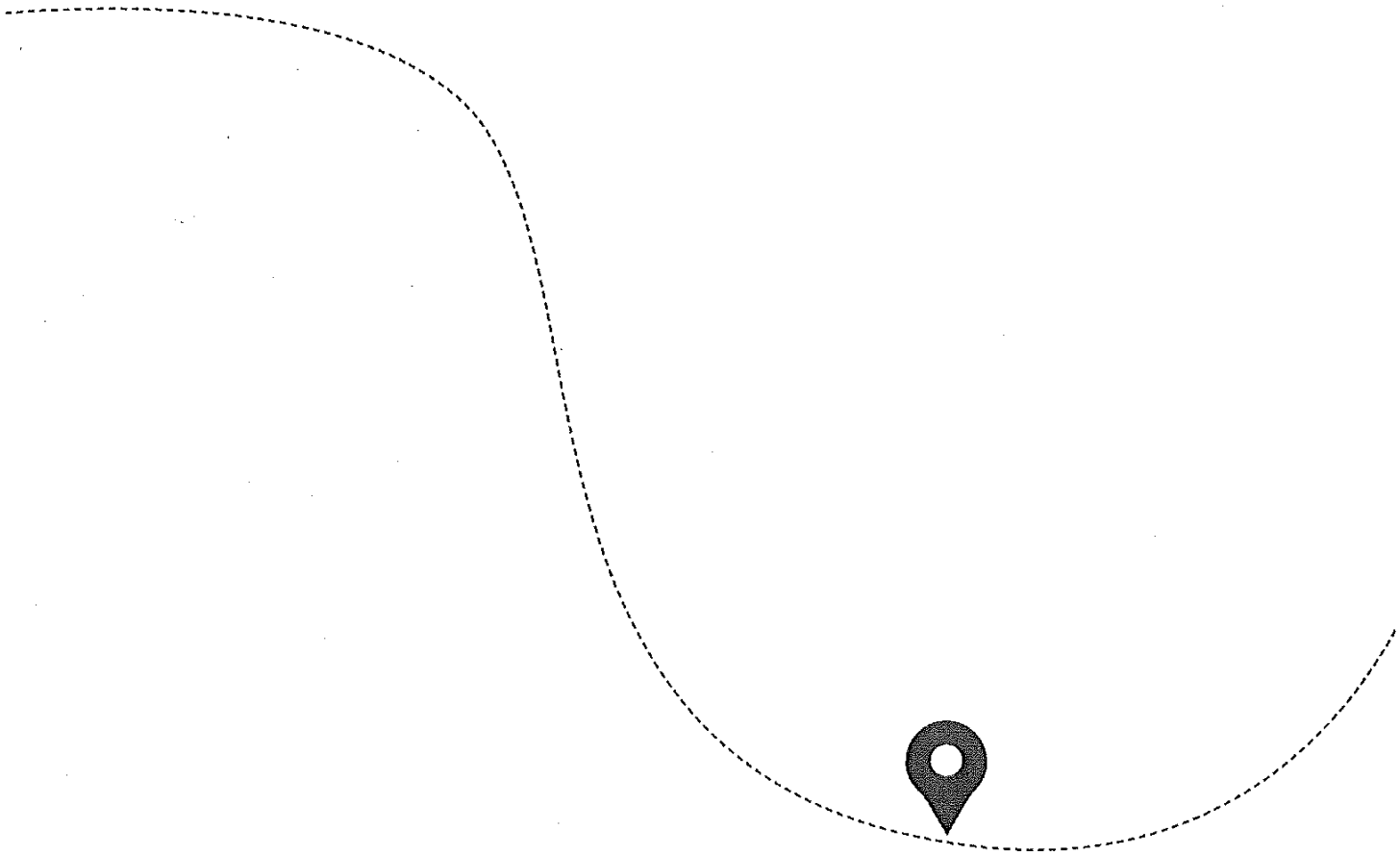
Lenny Abramowicz, Association of Community Legal Clinics of Ontario
Sally Ashton, Public Affairs, The Law Society of Upper Canada
The Honourable Chief Justice Annemarie Bonkalo, Ontario Court of Justice
Meredith Brown, Ministry of the Attorney General
Camille Cameron, Dean, Faculty of Law, University of Windsor
Margaret Capes, Community Law School
Amanda Carling, The Association In Defence of the Wrongly Convicted
Susan Charendoff, Civil Policy and Programs Branch, Ministry of the Attorney General
Chris Cheung, Ontario Bar Association
Karen Cohl, Consultant for the Law Society of Upper Canada
The Honourable Justice Thomas Cromwell, National Action Committee
Pascale Daigneault, Ontario Bar Association
Peter Doody, The Advocates' Society
Bruce Elman, Law Commission of Ontario
Trevor Farrow, National Action Committee
Wanda Forsythe, School of Legal and Public Administration, Seneca College
Jonathan Freedman, The Association In Defence of the Wrongly Convicted
Dada Gasirabo, Oasis Centre des Femmes
Nikki Gershbain, Pro Bono Students
Irwin Glasberg, Ministry of the Attorney General, Policy and Adjudicative Tribunals Division
Avvy Go, Metro Toronto Chinese & Southeast Asian Legal Clinic
Elizabeth Goldberg, The Law Foundation of Ontario
Michael Gottheil, Social Justice Tribunals Ontario
Jeff Hirsch, National Action Committee
Alia Hogben, Canadian Council of Muslim Women
Patricia Hughes, Law Commission of Ontario
Wendy Komiotis, METRAC
Robert Lapper, Chief Executive Officer, The Law Society of Upper Canada
Paul Le Vay, Association des juristes d'expression française de l'Ontario
Michele Leering, Workers Action Centre
The Honourable Regional Senior Justice Timothy Lipson, Ontario Court of Justice
Danielle Manton, Association des juristes d'expression française de l'Ontario
Julie Mathews, Community Legal Education Ontario

Deepa Mattoo, South Asian Legal Clinic of Ontario
John McCamus, Legal Aid Ontario
Trudy McCormick, Association of Community Legal Clinics of Ontario
Sarah McCoubrey, Ontario Justice Education Network
Lucy McSweeney, Office of the Children's Lawyer
Kirsten Mercer, Senior Policy Advisor, Justice - Policy & Research, Office of the Premier
David Mollica, The Advocates' Society
Mayo Moran, Dean, Faculty of Law, University of Toronto
Tami Moscoe, Family Initiatives, Ministry of the Attorney General
Virginia Nelder, African Canadian Legal Clinic
Lori Newton, Office of the Chief Justice, Ontario Court of Justice
Sandra Nishikawa, Federation of Asian Canadian Lawyers
Debbie Oakley, The Association In Defence of the Wrongly Convicted
Dennis O'Connor, Pro Bono Canada
Zeynep Onen, Director, Professional Regulation, The Law Society of Upper Canada
Sue Rice, National Self-Represented Litigants Project
Francisco Rico-Martinez, FCJ Refugee Centre
Paul Saguil, Federation of Asian Canadian Lawyers
Mark Sandler, The Law Foundation of Ontario
Rami Shoucri, St. Michael's Hospital
John Sims, National Action Committee
The Honourable Chief Justice Heather Smith, Superior Court of Justice
Lorne Sossin, Dean, Osgoode Hall Law School, York University,
Lee Stuesser, Dean, Faculty of Law, Lakehead University
John Tzanis, Paralegal Society of Ontario
Frank Walwyn, Community Legal Education Ontario
Bob Ward, Legal Aid Ontario
Sheena Weir, Director, Public Affairs, The Law Society of Upper Canada
Janet M. Whitehead, The County & District Law Presidents' Association
Miriam Young, Toronto Lawyers' Association

# ACCESS TO CIVIL & FAMILY JUSTICE

## A Roadmap for Change

October 2013



Action Committee on
Access to Justice in
Civil and Family Matters

This report is published by the Action Committee on Access to Justice in Civil and Family Matters, Ottawa, Canada, October 2013.

Comments on this report can be sent to the Action Committee through the Canadian Forum on Civil Justice, online at: <communications@cfcj-fcjc.org>.

Action Committee on
Access to Justice in
Civil and Family Matters

# FOREWORD

**It is a great pleasure and honour** to acknowledge the tireless dedication and endless commitment of the members of the Action Committee on Access to Justice in Civil and Family Matters by writing a foreword to this final report. As this report marks the conclusion of the first phase of the Action Committee's work, allow me to reflect on how we arrived this far.

Let me start by saying that the problem of access to justice is not a new one. As long as justice has existed, there have been those who struggled to access it. But as Canadians celebrated the new millennium, it became clear that we were increasingly failing in our responsibility to provide a justice system that was accessible, responsive and citizen-focused. Reports told us that cost, delays, long trials, complex procedures and other barriers were making it impossible for more and more Canadians to exercise their legal rights.

Fortunately, governments, organizations, and many individuals responded to the plea for change. Across the country they embarked on initiatives aimed at improving access to justice. However, too often, these initiatives proceeded in isolation from one another. Despite much hard work, it became increasingly clear that what was required was a national discussion and a coordinated action strategy to access to justice. So, in 2008, the Action Committee was convened.

The Action Committee is composed of leaders in the civil and family justice community and a public representative, each representing a different part of the justice system. Its aim is to help all stakeholders in the justice system develop consensus priorities for civil and family justice reform and to encourage them to work together in a cooperative and collaborative way to improve access to justice.

The Action Committee identified four priority areas: access to legal services, court processes simplification, family law, and prevention, triage and referral. In each area, a working group was formed to look at specific ways of improving access to justice. Each working group has now issued its final report, identifying how accessible justice can be achieved, the tools that can assist people in dealing with their legal needs effectively and expeditiously, and changes to the system that will improve access to justice.

Under the leadership of the Honourable Thomas A. Cromwell and each working group's chair, the working groups have produced reports that outline the concrete challenges and provide a rational, coherent and imaginative vision for meeting those challenges. They focus not only on good ideas, but on concrete actions to change the *status quo*. The Action Committee's final report bridges the work of the four working groups and identifies a national roadmap for improving the ability of every Canadian to access the justice system.

Our task is far from complete. The next step is implementation – to put the Action Committee's vision into action. But it is not amiss to celebrate what we have achieved thus far: a plan for practical and achievable actions that will improve access to family and civil justice across Canada. This could not have been accomplished without the contribution of all the individuals and organizations involved with the Action Committee. I thank you all for bringing accessible justice for all Canadians a significant step closer to reality.

**Beverley McLachlin, P.C.**
**Chief Justice of Canada**

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# EXECUTIVE SUMMARY

**There is a serious access to justice problem** in Canada. The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve. While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform. Major change is needed.

This report has three purposes:

- to promote a broad understanding of what we mean by access to justice and of the access to justice problem facing our civil and family justice system;
- to identify and promote a new way of thinking — a culture shift — to guide our approach to reform; and
- to provide an access to justice roadmap for real improvement.

The report does not set out to provide detailed guidance on how to improve all aspects of the civil and family justice system across Canada's ten provinces and three territories. That needs to come largely from the ground up, through strong mechanisms and institutions developed locally. Local service providers, justice system stakeholders and individual champions must be the change makers. This report can, however, help fill the need for a coordinated and collaborative national voice — a change agent — providing a multi-party justice system vision and an overall goal-based roadmap for change. The ways of the past — often working in silos and reinventing wheels — are not sustainable. A coordinated, although not centralized, national reform effort is needed. Innovative thinking at all levels will be critical for success.

When thinking about access to justice, the starting point and consistent focus of the Action Committee is on the broad range of legal problems experienced by the public — not just those that are adjudicated by courts. As we detail in part 1 of this report, there are clearly major access to justice gaps in Canada. For example:

- Nearly 12 million Canadians will experience at least 1 legal problem in a given 3 year period. Few will have the resources to solve them.
- Members of poor and vulnerable groups are particularly prone to legal problems. They experience more legal problems than higher income earners and more secure groups.
- People's problems multiply; that is, having one kind of legal problem can often lead to other legal, social and health related problems.
- Finally, legal problems have social and economic costs. Unresolved legal problems adversely affect people's lives and the public purse.

The current system, which is inaccessible to so many and unable to respond adequately to the problem, is unsustainable.

In part 2 of this report we offer six guiding principles for change, which amount to a shift in culture:

1. Put the Public First
2. Collaborate and Coordinate
3. Prevent and Educate
4. Simplify, Make Coherent, Proportional and Sustainable
5. Take Action
6. Focus on Outcomes

Taken together, these principles spell out the elements of an overriding culture of reform that is a precondition for developing specific measures of change and implementation.

Part 3 of this report provides a nine-point access to justice roadmap designed to bridge the implementation gap between ideas and action. It sets out three main areas for reform: (A) specific civil and family justice innovations, (B) institutions and structures, and (C) research and funding:

**A. Innovation Goals**

1. Refocus the Justice System to Reflect and Address Everyday Legal Problems

2. Make Essential Legal Services Available to Everyone

3. Make Courts and Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution

4. Make Coordinated and Appropriate Multidisciplinary Family Services Easily Accessible

**B. Institutional and Structural Goals**

5. Create Local and National Access to Justice Implementation Mechanisms

6. Promote a Sustainable, Accessible and Integrated Justice Agenda through Legal Education

7. Enhance the Innovation Capacity of the Civil and Family Justice System

**C. Research and Funding Goals**

8. Support Access to Justice Research to Promote Evidence-Based Policy Making

9. Promote Coherent, Integrated and Sustained Funding Strategies

Access to justice is at a critical stage in Canada. What is needed is major, sustained and collaborative system-wide change - in the form of cultural and institutional innovation, research and funding-based reform. This report provides a multi-sector national plan for reform. The approach is to provide leadership through the promotion of concrete development goals. These are recommended goals, not dictates. Specific local conditions or problems call for locally tailored approaches and solutions.

Although we face serious access to justice challenges, there are many reasons to be optimistic about our ability to bridge the current implementation gap by pursuing concrete access to justice reforms. People within and beyond the civil and family justice system are increasingly engaged by access to justice challenges and many individuals and organizations are already working hard for change. We hope that the work of the Action Committee and in particular this report will lead to:

- a measurable and significant increase in civil and family access to justice within 5 years;
- a national access to justice policy framework that is widely accepted and adopted;
- local jurisdictions putting in place strategies and mechanisms for meaningful and sustainable change;
- a permanent national body being created and supported to promote, guide and monitor meaningful local and national access to justice initiatives;
- access to civil and family justice becoming a topic of general civic discussion and engagement - an issue of everyday individual and community interest and wellbeing; and
- the public being placed squarely at the centre of all meaningful civil and family justice education and reform efforts.

# INTRODUCTION

**Today we take an important step** on the road to improved access to civil and family justice in Canada. Through this report, the Action Committee on Access to Justice in Civil and Family Matters makes the case that we must make changes urgently, that we must take a collaborative, cooperative and systemic approach and, above all else, that we must act in a sustained and focused way. We are building on firm foundations, but the structure urgently needs attention. The goal should be nothing less than to make our system of civil and family justice the most just and accessible in the world. As one speaker put it recently, we must think big together.

The Action Committee is a group broadly representative of all sectors of the civil and family justice system as well as of the public. Its report is the product of a stakeholder driven process and it is offered as a report back to all of the stakeholders in the civil and family justice system for their consideration and action. While the release of this report is the culmination of the work of the Action Committee, it is only the beginning of the process for reform. We must build the mechanisms that can instigate, manage and evaluate change in ways that are suitable to the widely varying needs and priorities of jurisdictions and regions. We must define specific problems, design solutions, and implement and monitor their success or failure. We must learn how to work together more effectively in the public interest.

I hope that this report will provide an impetus for meaningful change, some effective models to facilitate the sort of collaborative and cooperative work that I believe is essential and a menu of innovative ideas and possibilities for everyone working at the provincial, territorial and local levels. The real work begins now.

The members of the Action Committee, its Steering Committee and its four Working Groups have all worked tirelessly and as volunteers to make the Committee's work possible. Working with these accomplished and committed people has been a highlight of my professional life. We were greatly assisted by the logistical support of the Canadian Forum on Civil Justice, the Canadian Judicial Council, the Justice Education Society of British Columbia and the Department of Justice for Canada where a dedicated group of people made up our highly efficient and effective secretariat without which we could not have completed our work.

We were also assisted by funding from Alberta Justice and Solicitor General, the Law Foundation of British Columbia and the Federation of Law Societies of Canada. Owen Rees, the Executive Legal Officer to the Chief Justice of Canada and my judicial assistant, Me Michelle Fournier have contributed far beyond the call of duty. Diana Lowe, Q.C., the founding Executive Director of the Forum was instrumental in the launch of the Action Committee. Professor Trevor Farrow of Osgoode Hall Law School and Chair of the Board of the Forum has played an invaluable role not only as an active member of the Action Committee but also as the one who held the pen during the preparation of this report.

Finally, I offer my thanks to Chief Justice McLachlin for having the vision to establish the Action Committee and for providing me with the opportunity to be part of it.

**Thomas A. Cromwell**

# PART 1

## Access to Civil and Family Justice: *Urgent Need for Change*

> "[A]ccess to justice is the most important issue facing the legal system."[1]

### OVERVIEW

**There is a serious access to justice problem in Canada.**

The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.[2] While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost effective reform. Major change is needed.

### PURPOSE

**This report has three purposes:**

(in part 1) to promote a broad understanding of what we mean by access to justice and of the access to justice problem facing our civil and family justice system; (in part 2) to identify and promote a new way of thinking — a culture shift — to guide our approach to reform; and (in part 3) to provide an access to justice roadmap for real improvement. The report does not set out to provide detailed, line-item guidance on how to improve all aspects of the civil and family justice system across Canada's ten provinces and three territories. That needs to come largely from the ground up, through strong mechanisms and institutions developed locally. Local service providers, justice system stakeholders and individual champions must be the change makers. This report can, however, help fill the need for a coordinated and collaborative national voice — a change agent — providing a multi-party justice system vision and an overall goal-based roadmap for change. The ways of the past — often working in silos and reinventing wheels — are not sustainable. A coordinated, although not centralized, national reform effort is needed. Put simply, we should "think systemically and act locally."[3] Innovative thinking at all levels will be critical for success.

The formal system is, of course, important. **But a more expansive, user-centered vision of an accessible civil and family justice system is required.**

## ACCESS TO JUSTICE: AN EXPANSIVE VISION

When thinking about access to justice, the starting point and consistent focus of the Action Committee is on the broad range of legal problems experienced by the public — not just those that are adjudicated by courts.[4] Key to this understanding of the justice system is that it looks at everyday legal problems from the point of view of the people experiencing them. Historically, access to justice has been a concept that centered on the formal justice system (courts, tribunals, lawyers and judges) and its procedures.[5] The formal system is, of course, important. But a more expansive, user-centered vision of an accessible civil and family justice system is required. We need a system that provides the necessary institutions, knowledge, resources and services to avoid, manage and resolve civil and family legal problems and disputes. That system must be able to do so in ways that are as timely, efficient, effective, proportional and just as possible:

- by preventing disputes and by early management of legal issues;
- through negotiation and informal dispute resolution services; and
- where necessary, through formal dispute resolution by tribunals and courts.

Important elements of this vision include:

- public awareness of rights, entitlements, obligations and responsibilities;
- public awareness of ways to avoid or prevent legal problems;
- ability to participate effectively in negotiations to achieve a just outcome;
- ability to effectively utilize non-court and court dispute resolution procedures; and
- institutions and mechanisms designed to implement accessible civil and family justice reforms.

## CURRENT GAPS IN ACCESS TO JUSTICE — THE PROBLEM

**1. Everyday Legal Problems**

Civil justice problems are "pervasive in the lives of Canadians" and frequently have negative impacts on them.[6]

- **Many People Have Everyday Legal Problems.** Nearly 12 million Canadians will experience at least 1 legal problem in a given 3 year period.[7] In the area of family law alone, annual averages indicate that approximately 40% of marriages will end in divorce.[8] These are the problems of everyday people in everyday life.[9]
- **The Poor and the Vulnerable are Particularly Prone to Legal Problems.** Individuals with lower incomes and members of vulnerable groups experience more legal problems than higher income earners and members of more secure groups.[10] For example, people who self-identify as disabled are more than 4 times more likely to experience social assistance problems and 3 times more likely to experience housing related problems, and people who self-identify as aboriginal are nearly 4 times more likely to experience social assistance problems.[11]

**We need a stronger and more effective civil and family justice system** that is viewed and experienced as such by the public

- **Problems Multiply.** One kind of legal problem (for example, domestic violence) often leads to, or is aggravated by, others (such as relationship breakdown, child education issues, etc.).[12] Legal problems also have momentum: the more legal problems an individual experiences, the greater the likelihood that she or he will experience others.[13] Legal problems also tend to lead to other problems of other types. For example, almost 40% of people with one or more legal problems reported having other social or health related problems that they directly attributed to a justiciable problem.[14]
- **Legal Problems Have Social and Economic Costs.** Unresolved legal problems adversely affect people's lives, their finances and the public purse. They of course tend to make people's lives difficult.[15] Unresolved problems relating (for example) to debt, housing, and social services lead to social exclusion, which may in turn lead to a dependency on government assistance.[16] One recent U.K. study reported that unresolved legal problems cost individuals and the public £13 billion over a 3.5 year period.[17]

**2. Importance Of Accessible Justice**

To address these problems, we need a stronger and more effective civil and family justice system that is viewed and experienced as such by the public. This is critically important for the daily lives of people and for the social, political and economic well-being of society. For the system to be strong and effective, people must have meaningful access to it.[18]

**3. The Current System Has Serious Gaps In Access**

According to a wide range of justice system indicators and stakeholders, Canada is facing major access to justice challenges. For example, in the area of access to civil justice Canada ranked 13th out of 29 high-income countries in 2012-2013 and 16th out of 23 high-income countries in 2011.[19] According to the 2011 study, Canada's ranking was "partially explained by shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases."[20]

These international indicators tell us two things. First, Canada has a functioning justice system that is well regarded by many countries in the world. Second, improvement is urgently needed. There is a major gap between what legal services cost and what the vast majority of Canadians can afford. Some cost indicators are:

- **Legal Aid Funding and Coverage is Not Available for Most People and Problems.** Legal aid funding is available only for those of extremely modest means. For example in Ontario, legal aid funding is generally only available for individuals with a gross annual salary of less than $18,000, or for a family of 4 with a total gross annual salary of $37,000.[21] In Alberta, legal aid funding is generally only available for individuals with a net annual salary of approximately $16,000, or for a family of 4 with a total net annual salary of approximately $30,000.[22] In Manitoba[23] and Saskatchewan,[24] the eligibility levels for individuals and families of 4 are, respectively, gross annual salaries of $14,000 and $27,000 and net annual salaries of $11,800 and $22,800. Even within these financial eligibility ranges,

> **The "language of justice tends to be ... foreign to most people"**
>
> - participant in a recent survey on access to justice

legal aid covers only a limited number of areas of legal services.[25] For example, in Ontario, but for some civil matters covered by community, specialty and student clinics, legal aid coverage for civil matters does not exist.[26]

- **The Cost of Legal Services and Length of Proceedings is Increasing.** Legal fees in Canada vary significantly; however, one recent report provides a rough range of national average hourly rates from approximately $195 (for lawyers called in 2012) to $380 (for lawyers called in 1992 and earlier).[27] Rates can vary from this range significantly depending on jurisdiction, type of case, seniority and experience. The cost of civil and family matters also varies significantly. For example, national ranges of legal fees are recently reported to be $13,561 - $37,229 for a civil action up to trial (2 days), $23,083 - $79,750 for a civil action up to trial (5 days), $38,296 - $124,574 for a civil action up to trial (7 days), and $12,333 - $36,750 for a civil action appeal.[28] The length and cost of legal matters have continued to increase.[29]

**4. Unmet Legal Needs**

Most people earn too much money to qualify for legal aid, but too little to afford the legal services necessary to meaningfully address any significant legal problem. The system is essentially inaccessible for all of these people.[30] Below are some of the indicators.

- **Unmet Legal Needs.** According to one recent American study, as much as 70%-90% of legal needs in society go unmet.[31] This statistic is particularly troubling given what we know about the negative impacts of justiciable problems, particularly those that go unresolved.[32] In Canada, over 20% of the population take no meaningful action with respect to their legal problems, and over 65% think that nothing can be done, are uncertain about their rights, do not know what to do, think it will take too much time, cost too much money or are simply afraid.[33]
- **Cost is a Major Factor.** Of those who do not seek legal assistance, recent reports indicate that between 42% and 90% identified cost — or at least perceived cost — as the reason for not doing so.[34] An important result of the inaccessibility of legal services and the fact that many people do nothing to address their legal problems is that a proportion of legal problems that could be resolved relatively easily at an earlier stage escalate and shift to ones that require expensive legal services and court time down the road.[35]
- **Self-Representation.** As a result of the inaccessibility of early assistance, legal services and dispute resolution assistance, as well as the complexity and length of formal procedures, approximately 50% of people try to solve their problems on their own with no or minimal legal or authoritative non-legal assistance.[36] Many people — often well over 50% (depending on the court and jurisdiction) — represent themselves in judicial proceedings (usually not by choice).[37] The number is equally — and often more — significant and troubling in family court proceedings.[38] And statistics indicate that individuals who receive legal assistance are between 17% and 1,380% more likely to receive better results than those who do not.[39]

**What is needed is major, sustained and collaborative system-wide change** — in the form of cultural and institutional innovation, research and funding-based reform.

Not surprisingly, people's attitudes towards the system reflect this reality. According to a recent study of self-represented litigants in the Canadian court system, various court workers were of the view that the "civil system [is] ... very much open to abuse by those with more money at their disposal"; and the "general public has no idea about court procedures, requirements, the language, who or where to go for help".[40]

Further, according to a recent study, people expressed similar concerns about access to justice, including the following:

- "I don't have much faith in the lawyers and the system";
- the "language of justice tends to be ... foreign to most people";
- "[p]eople with money have access to more justice than people without";
- I think there are a lot of people who don't ... understand what the justice system is or how to use it - struggling to earn a living, dealing with addictions..."; and
- the justice system "should be equally important as our health care system...."[41]

**5. What is Needed?**

There are clearly major access to justice gaps in Canada.[42] The current system, which is inaccessible to so many and unable to respond adequately to the problem, is unsustainable.[43] Two things are urgently needed.

- **First,** a new way of thinking — a culture shift — is required to move away from old patterns and old approaches. We offer six guiding principles for change reflecting this culture shift in part 2 of this report.
- **Second,** a specific action plan — a goal-oriented access to justice roadmap — is urgently needed. That roadmap, which is set out in part 3 of this report, proposes goals relating to innovation, institutions and structures, and research and funding.

Taken together, what is needed is major, sustained and collaborative system-wide change — in the form of cultural and institutional innovation, research and funding-based reform.

# PART 2

# Moving Forward: *Six Guiding Principles for Change*

**We need a fresh approach and a new way of thinking**

## CULTURE SHIFT

Many dedicated people in our civil and family justice system do their best to make the system work and many reform efforts have been put forward in past years. However, it is now clear that the previous approach to access to justice problems and solutions, far from succeeding, has produced our present, unsustainable situation.

We need a fresh approach and a new way of thinking. In short, we need a significant shift in culture to achieve meaningful improvement to access to justice in Canada — a new culture of reform. As Lawrence M. Friedman observed, "law reform is doomed to failure if it does not take legal culture into account."[44]

This new culture of reform should be based on six guiding principles. Taken together, these principles spell out the elements of an overriding culture of reform. A new way of thinking, while important, is not enough. We also need innovative ideas, creative solutions and specific goals, as we set out in part 3. A full embrace of a new culture of reform is a precondition for developing those more specific measures.[45]

## SIX GUIDING PRINCIPLES FOR CHANGE

Here are six guiding principles that make up this new culture.

### Guiding Principles For Change

1. Put the Public First
2. Collaborate and Coordinate
3. Prevent and Educate
4. Simplify, Make Coherent, Proportional and Sustainable
5. Take Action
6. Focus on Outcomes

**The focus must be on the people who need to use the system**

**1. Put the Public First**

We need to change our primary focus. Too often, we focus inward on how the system operates from the point of view of those who work in it. For example, court processes — language, location, operating times, administrative systems, paper and filing requirements, etc. — typically make sense and work for lawyers, judges and court staff. They often do not make sense or do not work for litigants.

The focus must be on the people who need to use the system. This focus must include all people, especially members of immigrant, aboriginal and rural populations and other vulnerable groups. Litigants, and particularly self-represented litigants, are not, as they are too often seen, an inconvenience; they are why the system exists.[46]

Until we involve those who use the system in the reform process, the system will not really work for those who use it. As one court administrator recently commented, we need to "change ... how we do business within the context of courts."[47] Those of us working within the system need to remember that it exists to serve the public. That must be the focus of all reform efforts.

**2. Collaborate and Coordinate**

We also need to focus on collaboration and coordination. The administration of justice in Canada is fragmented. In fact, it is hard to say that there is a system — as opposed to many systems and parts of systems. Justice services are delivered at various levels in this country — national, provincial and territorial, and often regional, local and sectoral as well.[48]

Within our current constitutional, administrative and sectoral frameworks, much more collaboration and coordination is not only needed but achievable. We can and must improve collaboration and coordination not only across and within jurisdictions, but also across and within all sectors and aspects of the justice system (civil, family, early dispute resolution, courts, tribunals, the Bar, the Bench, court administration, the academy, the public, etc.). We can and must improve collaboration, coordination and service integration with other social service sectors and providers as well.

We are long past the time for reinventing wheels. We can no longer afford to ignore what is going on in different regions and sectors and miss opportunities for sharing and collaboration.[49] Openness, proactivity, collaboration and coordination must animate how we approach improving access to justice at all levels and across all sectors of the system.[50] In sum, we all — those who use the justice system and those who work within the justice community — are in this project together. A just society is in all of our interest.

**3. Prevent and Educate**

We need to focus not only on resolving disputes but on preventing them as well. Access to justice has often been thought of as access to courts and lawyers.[51] However, we know that everyday legal problems mostly occur outside of formal justice structures.[52] This insight should lead us to fundamentally re-think how we approach legal problems in terms of preventing them from happening where possible, and when they do occur, providing those who experience them with adequate

To make a meaningful difference in the lives of the people who rely on the justice system, **we need to move beyond "wise words" and bridge the "implementation gap"**

information and resources to deal with them in an efficient and effective way.[53] As the Action Committee's Prevention, Triage and Referral Working Group indicated, "Avoiding problems or the escalation of problems, and/or early resolution of problems is generally cheaper and less disruptive than resolution using the courts. To borrow Richard Susskind's observation, 'it is much less expensive to build a fence at the top of a cliff than to have need of an expensive ambulance at the bottom.'"[54]

**4. Simplify, Make Coherent, Proportional and Sustainable**

**We must work to make things simple, coherent, proportional and sustainable.** One aspect of this task, building on the "public first" principle set out above, is the public's understanding of the system. The Canadian Bar Association acknowledged the system's complexity in its 1996 *Systems of Civil Justice Task Force Report*:

"Many aspects of the civil justice system are difficult to understand for those untrained in the law. Without assistance it is difficult, if not impossible, to gain access to a system one does not comprehend. Barriers to understanding include:

- unavailability and inaccessibility of legal information;
- complexity of the law, its vocabulary, procedures and institutions; and
- linguistic, cultural and communication barriers."[55]

In spite of recent efforts, the civil and family justice system is still too complicated and largely incomprehensible to all but those with legal training. As one participant in a recent access to justice survey of the public put it, we need to "make the whole thing much less complex."[56] Similarly, in a recent study of self-represented litigants, respondents regularly indicated feeling overwhelmed by the complexity of the system. One respondent indicated that the "procedure as I read it sounded easy ... but it was anything but."[57] Another indicated that, as a result of the system's many procedural steps, "I was eaten alive."[58]

Our current formal procedures seem to grow ever more complicated and disproportionate to the needs of the litigants and the matters involved. Everyday legal problems need everyday solutions that are timely, fair and cost-effective. Procedures must be simple and proportional for the entire system to be sustainable. To improve the system, we need a new way of thinking that concentrates on simplicity, coherence, proportionality and sustainability at every stage of the process.

**5. Take Action**

We need research, thinking and deliberation. But for meaningful change to occur, they are not enough. We also need action. We cannot put off, to another day, formulating and carrying out a specific and effective action plan. There have been many reports and reform initiatives, but the concrete results have been extremely modest. As the Family Justice Working Group indicated, to make a meaningful difference in the lives of the people who rely on the justice system, we need to move beyond "wise words" and bridge the "implementation gap."[59]

### 6. Focus On Outcomes

Our final guiding principle calls for a shift in focus from process to outcomes. We must be sure our process is just. But we must not just focus on process. We should not be preoccupied with fair processes for their own sake, but with achieving fair and just **results** for those who use the system. Of course fair process is important. But at the end of the day, what people want most is a safe, healthy and productive life for themselves, their children and their loved ones. In a recent survey of public views about justice, one respondent defined justice as "access to society."[60] According to another respondent: "We're not even talking access to justice ... we're talking access to food, to shelter, to security, to opportunities for ourselves and our kids and until we deal with that, the other stuff doesn't make sense."[61]

In order to make justice more accessible, we must keep in mind that we are trying to improve law and process not for their own sake, but rather for the sake of providing and improving justice in the lives of Canadians. Providing justice — not just in the form of fair and just process but also in the form of fair and just outcomes — must be our primary concern.

# PART 3

## Bridging the Implementation Gap Through Justice Development Goals: *A Nine-Point Access To Justice Roadmap*

The third part of this report sets out an access to justice roadmap, designed to bridge the implementation gap between reform ideas and real reform. It sets out three main areas for reform: (A) specific innovations, (B) institutions and structures, and (C) research and funding. Within each, we offer specific justice development goals.[62] Each of the goals has been significantly influenced by the Action Committee's working group reports.[63] This part of the report lays out an overall approach to respond to the serious access to justice problems facing the public within our civil and family justice system.

### Access to Justice Roadmap

A. INNOVATION GOALS

1. Refocus the Justice System to Reflect and Address Everyday Legal Problems
2. Make Essential Legal Services Available to Everyone
3. Make Courts and Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution
4. Make Coordinated and Appropriate Multidisciplinary Family Services Easily Accessible

B. INSTITUTIONAL AND STRUCTURAL GOALS

5. Create Local and National Access to Justice Implementation Mechanisms
6. Promote a Sustainable, Accessible and Integrated Justice Agenda through Legal Education
7. Enhance the Innovation Capacity of the Civil and Family Justice System

C. RESEARCH AND FUNDING GOALS

8. Support Access to Justice Research to Promote Evidence-Based Policy Making
9. Promote Coherent, Integrated and Sustained Funding Strategies

## A. INNOVATION GOALS[64]

### 1. Refocus the Justice System to Reflect and Address Everyday Legal Problems - By 2018[65]

#### 1.1 Widen the Focus from Dispute Resolution to Education and Prevention

As we saw earlier in part 1,[66] people experience and deal with most everyday legal problems outside of the traditional formal justice system; or put differently, only a small portion of legal problems — approximately 6.5%[67] — ever reach the formal justice system.[68]

The justice system must acknowledge this reality by widening its focus from its current (and expensive) court-based "emergency room" orientation to include education and dispute prevention. As one member of the public recently commented, it would be helpful if "a little more money can be spent on education ... to prevent heading to jail or court, to prevent it before it starts...."[69] This shift in focus is designed to help the most people in the most efficient, effective and just way at the earliest point in the process.

To achieve this shift, the justice system must be significantly enhanced so that it provides a flexible continuum of justice services, which includes court services of course, but which is not dominated by those more expensive services (see Figs. 1 and 2).[70] The motto might be: "court if necessary, but not necessarily court."

#### 1.2 Build a Robust "Front End": Early Resolution Services Sector

A key element of this expanded continuum of services is a robust, coherent and coordinated "front end" (prior to more formal court and tribunal related services), which is referred to by the Action Committee as the Early Resolution Services Sector (ERSS).[71] It is the ERSS that will provide accessible justice services at a time and place at which most everyday legal problems occur (see Fig. 1).

Figure 1: **Involvement of the ERSS and the Formal Justice System in the Overall Volume of Legal Problems**

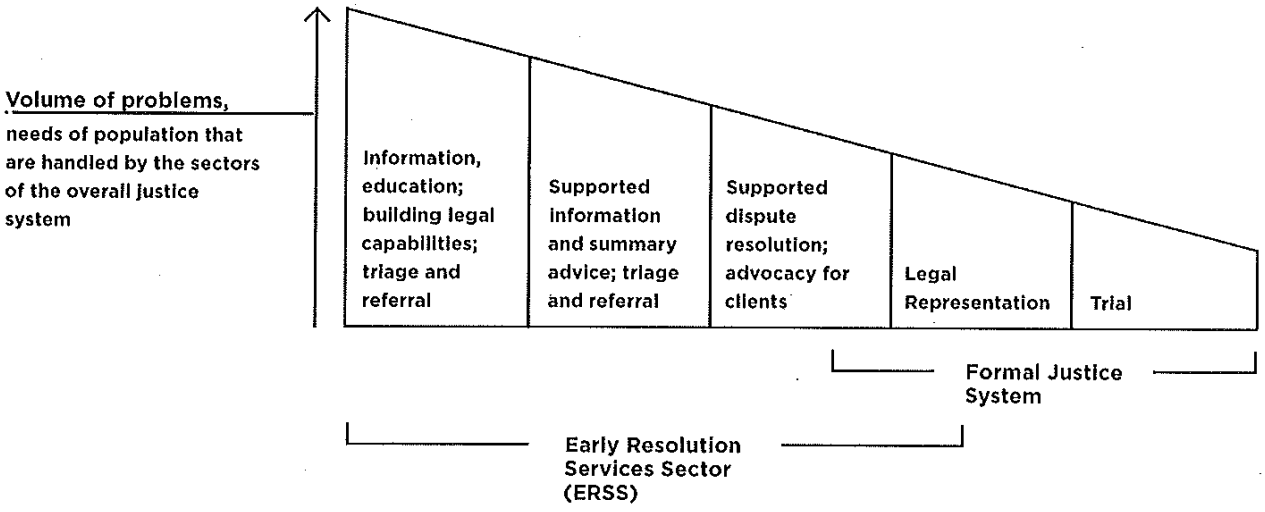
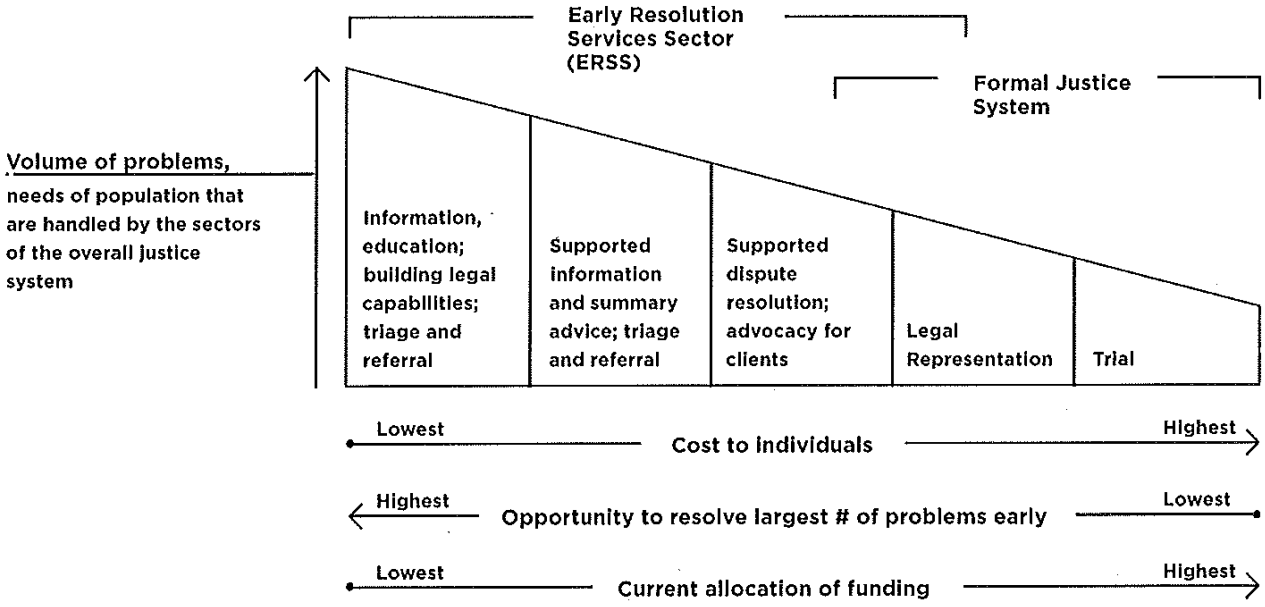


Figure 2: **The ERSS and Formal Justice System: Volume of needs vs. cost and funding allocations**




The ERSS is made up of services such as:

- community and public legal education;
- triage (i.e. effective channeling of people to needed services);
- pro bono services;
- other in-person, telephone and e-referral services;
- intermediary referral assistance (help in recognizing legal problems and connecting them with legal and other services);
- telephone and e-legal information services;[72]
- legal publications programs and in-person and e-law library services;[73]
- dispute resolution programs (e.g. family mediation and conciliation services, small claims mediation, lower cost civil mediation, etc.);
- various legal aid services, including legal clinics, certificate programs, duty counsel, etc.;
- community justice hubs;[74]
- co-location of services;[75]
- student support services including clinical services, student mediation initiatives, public interest programs, etc.; and
- others.[76]

Collectively, the ERSS is designed to provide resources that:

- assist people in clarifying the nature of law and problems that have a legal component;
- help people to develop their legal capacity to manage conflicts, resolve problems earlier by themselves and/or seek early and appropriate assistance;
- promote early understanding and resolution of legal problems outside the court system through alternative dispute resolution mechanisms and/or directly by parties themselves;
- assist people in navigating the court system efficiently and effectively; and
- provide effective referrals.

Given the breadth of servies available as part of the ERSS, it is critical that:

- the ERSS be developed in a coordinated, deliberate and collaborative way (in the context of all justice services) in order to avoid the kinds of overlap, gaps and inefficiencies that currently exist;
- means be established by all those active in this sector and all those providing funding to engage in action-oriented consultation to define and rationalize this sector;
- adequate training for ERSS personnel be provided, including training on how to coordinate services across the ERSS; and
- the ERSS be integrated into the formal justice system as part of an expanded justice system continuum, coordinated as far as possible with the provision of other services, including social services, health services,[77] education, etc., all with a view to meeting complex and often clustered everyday legal needs.[78] Coordination and communication will be critical for this further integration to take place. Examples of this kind of coordination include community hubs, coordinated community service centres, etc.[79]

**1.3 Improve Accessibility to and Coordination of Public Legal Information**

Providing access to legal information is an important aspect of the ERSS. The good news is that there is an enormous amount of publicly available legal information in Canada and that there are active and creative information providers.[80] But there are significant challenges. It is not always clear to the user what information is authoritative, current or reliable. There is work to be done to improve the accessibility and in some cases the quality of these resources. The biggest challenge, however, is the lack of integration and coordination among information providers. A much greater degree of coordination and integration is required to avoid duplication of effort and to provide clear paths for the public to reliable information. This could be achieved through enhanced coordination and cooperation among providers, the development of regional, sector or national information portals, authoritative online information hubs,[81] virtual self-help information services, certification protocols, a complaints process, etc.[82]

**1.4 Justice Continuum Must Be Reflective of the Population it Serves**

Services within the justice continuum must reflect and be responsive to Canada's culturally and geographically diverse population.[83] We need to focus on the needs of

**Access to justice must become more than a vague and aspirational principle.**

marginalized groups and communities and to recognize that there are many barriers to accessing the formal and informal systems — language, financial status, mental health capacity, geographical remoteness, gender, class, religion, sexual orientation, immigration status, culture and aboriginal status. We need to identify these barriers to access to justice and take steps to eliminate them.

### 2. Make Essential Legal Services Available to Everyone - By 2018[84]

#### 2.1 Modernize and Expand the Legal Services Sector

Many everyday problems require legal services from legal professionals. For many, those services are not accessible. Innovations are needed in the way we provide essential legal services in order to make them available to everyone. The profession — including the Canadian Bar Association, the Federation of Law Societies of Canada, law societies, regional and other lawyer associations — will, together with the national and local access to justice organizations discussed below (see pt.3.B.5), take a leadership role in this important innovation process.[85]

Specific innovations and improvements that should be considered and potentially developed include:[86]

- limited scope retainers - "unbundling";[87]
- alternative business and delivery models;[88]
- increased opportunities for paralegal services;[89]
- increased legal information services by lawyers and qualified non-lawyers;[90]
- appropriate outsourcing of legal services;[91]
- summary advice and referrals;[92]
- alternative billing models;[93]
- legal expense insurance[94] and broad-based legal care;
- pro bono and low bono services;[95]
- creative partnerships and initiatives designed to encourage expanding access to legal services - particularly to low income clients;[96]
- programs to promote justice services to rural and remote communities as well as marginalized and equity seeking communities;[97] and
- programs that match unmet legal needs with unmet legal markets.[98]

#### 2.2 Increase Legal Aid Services and Funding

Legal services provided by lawyers, paralegals and other trained legal service providers are vital to assuring access to justice in all sectors, particularly for low and moderate income communities and other rural, remote and marginalized groups in society. To assist with the provision of these services for civil and family legal problems, it is essential that the availability of legal aid services for civil and family legal problems be increased.

The Canadian justice system is currently served by **excellent lawyers, judges, courts and tribunals.**

**2.3 Make Access to Justice a Central Aspect of Professionalism**

Access to justice[99] must become more than a vague and aspirational principle. Law societies and lawyers must see it as part of a modern — "sustainable"[100] — notion of legal professionalism.[101] Access to justice should feature prominently in law school curricula, bar admission and continuing education programs, codes of conduct, etc.[102] Mentoring will be important to sustained success. Serving the public — in the form of concrete and measurable outcomes — should be an increasingly central feature of professionalism.[103]

**3. Make Courts And Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution - By 2019[104]**

**3.1 Courts and Tribunals Must Be Accessible to and Reflective of the Society they Serve[105]**

The Canadian justice system is currently served by excellent lawyers, judges, courts and tribunals. The problem is not their quality, but rather their accessibility. While many of the goals and recommendations considered elsewhere in this report focus on the parts of the justice system that lie outside of formal dispute resolution processes (see e.g. Fig. 1), there is still a central role for robust and accessible public dispute resolution venues. Justice — including a robust court and tribunal system — is very much a central part of any access to justice discussion. However, to make courts and tribunals more accessible to more people and more cases, they must be significantly reformed with the user centrally in mind.[106]

While maintaining their constitutional and administrative importance in the context of a democracy governed by the rule of law, courts and tribunals must become much more accessible to and reflective of the needs of the society they serve. Put simply, just, creative and proportional processes should be available for all legal problems that need dispute resolution assistance. We recognize that much has been done. We also recognize that much more can be done. Further, the resources and support that are needed for initiatives discussed elsewhere in this report should not come at the expense of service to the public and respect for other important and ongoing initiatives that are working to improve access to justice in courts and tribunals.

**3.2 Courts and Tribunals Should Become Multi-Service Dispute Resolution Centres**

In the spirit of the "multi-door courthouse",[107] a range of dispute resolution services — negotiation, conciliation and mediation, judicial dispute resolution, mini-trials, etc., as well as motions, applications, full trials, hearings and appeals — should be offered within most courts and tribunals.[108] Some form of court-annexed dispute resolution process — mediation, judicial dispute resolution, etc. — should be more readily available in virtually all cases. While masters, judges and panel members will do some of this work, some of it can also be offered by trained court staff, duty counsel, dispute resolution officers, court-based mediators and others.[109]

Building on the current administrative law model, specialized court services — e.g. mental health courts, municipal courts,[110] commercial lists, expanded and accessible small claims and consumer courts, etc. — should be offered within the court or tribunal structure.

> **"We may well have something to learn from online dispute resolution on eBay and elsewhere...."**
>
> - Lord Neuberger, President of U.K. Supreme Court

Online dispute resolution options, including court and non-court-based online dispute resolution services, should also be expanded where possible and appropriate, particularly for small claims matters,[111] debt and consumer issues,[112] property assessment appeals[113] and others. As Lord Neuberger, President of the U.K. Supreme Court recently stated, "We may well have something to learn from online dispute resolution on eBay and elsewhere...."[114]

**3.3 Court and Tribunal Services Must Provide Appropriate Services for Self-Represented Litigants**

Appropriate and accessible processes must be readily available for litigants who represent themselves on their own, or with limited scope retainers. All who work in the formal dispute resolution system must be properly trained to assist litigants in ways that meet their dispute resolution needs to the extent that it is reasonably possible to do so.[115] To achieve this goal, courts and tribunals must be coordinated and integrated with the ERSS information and service providers (some of which may be located within courts and tribunal buildings).[116] Law and family law information centres should be expanded and integrated with all court services.[117] Civil and family duty counsel and pro bono programs (including lawyers and students) should also be expanded.[118]

**3.4 Case Management Should be Promoted and Available in All Appropriate Cases**

Timely — often early — judicial case management should be readily available. In addition, where necessary, case management officers, who may be lawyers, duty counsel, or other appropriately trained people, should be readily available at all courts and tribunals for all cases, with the authority to assist parties to manage their cases and to help resolve their disputes.[119]

Parties should be encouraged to agree on common experts; to use simplified notices; to plead orally where appropriate (to reduce the cost and time of preparing legal materials); and, generally, to talk to one another about solving problems in a timely and cost-effective manner.[120] Judges and tribunal members should not hesitate to use their powers to limit the number of issues to be tried and the number of witnesses to be examined. Scheduling procedures should also be put into place to allow for fast-track trials where possible.

Overall, judges, tribunal members, masters, registrars and all other such court officers should take a strong leadership role in promoting a culture shift toward high efficiency, proportionality and effectiveness through the management of cases. Of course, justice according to law must always be the ultimate guide by which to evaluate the efficiency and effectiveness of judicial and tribunal processes.

**3.5 Court and Tribunal Processes and Procedures Must Be More Accessible and User-Friendly**

The guiding principles in part 2 of the report — specifically including (pt.2.1) putting the public first, (pt.2.4) simplification, coherence, proportionality and sustainability, and (pt.2.6) a focus on outcomes - must animate court and tribunal innovations and reforms. The technology in all courts and tribunals must be modernized to a level that reflects the electronic needs, abilities and expectations of a modern society. Interactive court forms should be widely accessible. Scheduling, e-filing[121] and docket management should all be simplified and made easily accessible and all court and

tribunal documents must be accessible electronically (both on site and remotely).[122] Courts and tribunals should be encouraged to develop the ability to generate real time court orders.[123] Courthouse electronic systems should be integrated with other ERSS electronic and self-help services.

Teleconferencing, videoconferencing and internet-based conferencing (e.g. Skype) should be widely available for all appearance types, including case management, status hearings, motions, applications, judicial dispute resolution proceedings, mediation,[124] trials and appeals, etc.[125]

Better public communication, including through the use of social and other media, should be encouraged to demystify the court and tribunal process.[126] Overall, and in all cases, rules and processes should be simplified to promote and balance the principles of proportionality, simplification, efficiency, fairness and justice.[127]

**3.6 Judicial Independence and Ethical Responsibilities**

The innovations advanced in this report do not and must not undermine the importance of judicial independence or the ethical standards that judges strive to meet.[128] Rather, they must complement and reinforce these important principles.

**4. Make Coordinated and Appropriate Multidisciplinary Family Services Easily Accessible - By 2018[129]**

Major change is urgently needed in the family justice system.[130] The Family Justice Working Group Report sets out a comprehensive list of suggested reforms. That report is readily accessible and it is not necessary to reproduce all of its recommendations here. Instead we set out some of the main themes.

**4.1 Progressive Values Must Guide All Family Justice Services**

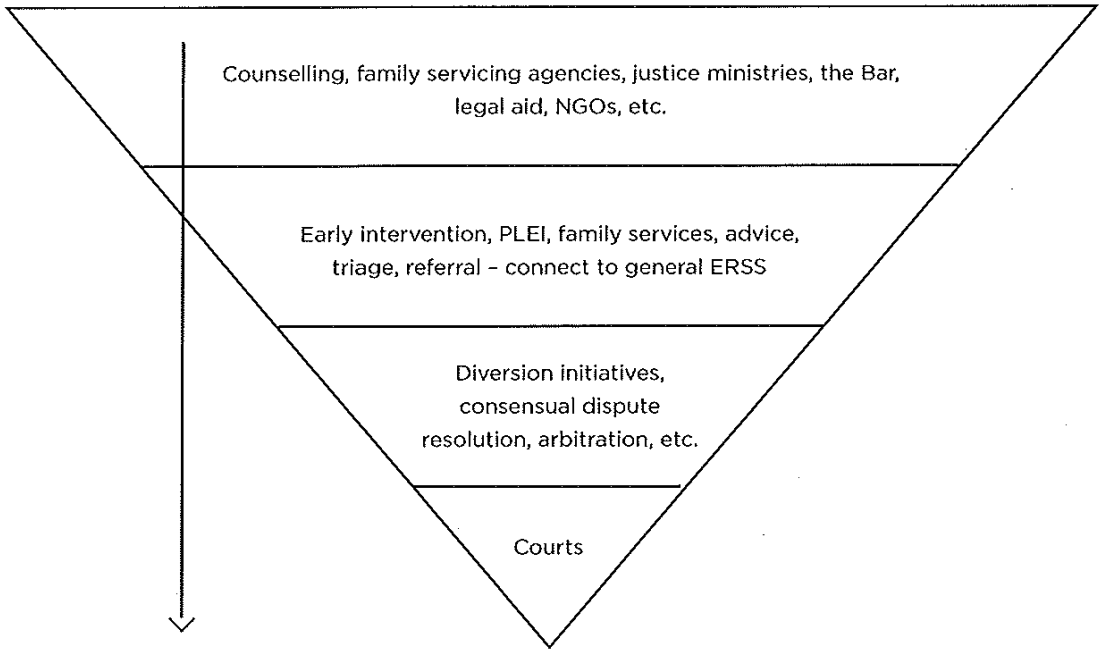
The core values, aims and principles that should guide all family justice reforms include: conflict minimization; collaboration; client-focus; empowered families; integration of multidisciplinary services; timely resolution; affordability; voice, fairness, safety; and proportionality.[131]

**4.2 A Range of Family Services Must be Provided**

A range of accessible and affordable services and options — in the form of a family justice services continuum — must be available and affordable for all family law problems (see Fig. 3). The family justice services system should offer an array of dispute resolution options to help families resolve their disputes, including information, mediation, collaborative law, parenting coordination, and adjudication.

Early "front end" services in the family justice services system should be expanded.[132] Specifically, this means allocating resources so as to make front-end services highly visible, easy to access and user-friendly; coordinating and integrating the delivery of all services for separating families; and making triage services (i.e. effective channeling of people to required services), including assessment, information and referral, available for all people with family law problems.

Figure 3: **Family Justice Services Continuum**[133]




**4.3 Consensual Approaches to Dispute Resolution Should Be Integrated as Far as Possible into the Family Justice System**

We need to expand significantly the availability of integrated family programs and services to support the proactive management of family law-related problems and to facilitate early, consensual family dispute resolution and to support a broader and deeper integration of consensual values and problem-solving approaches into the justice system culture.[134]

**4.4 Innovation Across the Family Justice System Must Be Encouraged**[135]

A number of specific family justice innovations are suggested below.

- Law society regulation of family lawyers should explicitly address and support the non-traditional knowledge, skills, abilities, traits and attitudes required by lawyers optimally to manage family law files.[136]
- Ministries of Justice, Bar associations, law schools, mediators, collaborative practitioners, PLEI providers and — to the extent appropriate — the judiciary, should contribute to and advocate for enhanced public education and understanding about the nature of collaborative values and the availability of consensual dispute resolution (CDR) procedures in the family justice system.
- Before filing a contested application in a family matter (but after filing initial pleadings), parties should be required to participate in a single non-judicial CDR session. Rules should indicate the types of processes that are included and ensure they are delivered by qualified professionals. Exemptions should be available

**Free or subsidized CDR services should be available to those who cannot afford them.**

where the parties have already participated in CDR, for cases involving family violence, or where it is otherwise urgent for one or both parties to appear before the court. Free or subsidized CDR services should be available to those who cannot afford them.

- Except in cases of urgency and consent orders, information sessions should be mandatory for self-represented litigants and all parents with dependent children. The sessions should take place as early as possible and before parties can appear in court. At a minimum, the following information should be provided: how to parent after separation and the effects of conflict on children; basic legal information; information about mediation and other procedural options; and information about available non-legal family services.
- Jurisdictions should expand reliance upon properly trained and supervised paralegals, law students, articling students and non-lawyer experts to provide a range of services to families with legal problems.

**4.5 Courts Should Be Restructured to Better Handle Family Law Issues[137]**

Recognizing that each jurisdiction would have its own version of the unified court model, to meet the needs of families and children, jurisdictions should consider whether implementation of a unified family court would be desirable.

A unified family court should retain the benefits of provincial family courts, including their distinctive and simplified procedures, and should have its own simplified rules, forms and dispute resolution processes that are attuned to the distinctive needs and limited means of family law participants. The judges presiding over proceedings in the court should be specialized. They should have or be willing to acquire substantive and procedural expertise in family law; the ability to bring strong dispute resolution skills to bear on family cases; training in and sensitivity to the psychological and social dimensions of family law cases (in particular, family violence and the impact of separation and divorce on children); and an awareness of the range of family justice services available to the families appearing before them.

Jurisdictions that do not consider implementation of a unified family court to be desirable or feasible should take into consideration the hallmarks of unified family courts as set out above and strive to provide them as far as appropriate and possible.

Family courts should adopt simplified procedures for smaller or more limited family law disputes. The same judge should preside over all pre-trial motions, conferences and hearings in family cases.

**4.6 Substantive Family Law Should Be Modernized to Reflect More Consensual and Supportive Approaches to Dispute Resolution[138]**

Canadian family law statutes should encourage CDR processes as the norm in family law, and the language of substantive law should be revised to reflect that orientation. Substantive family laws should provide more support for early and complete disclosure by providing for positive obligations to govern all stages of a case as well as serious consequences for failure to comply. Overall, substantive family laws should be simpler and offer more guidance by way of rules, guidelines and presumptions.

## B. INSTITUTIONAL AND STRUCTURAL GOALS

### 5. Create Local and National Access to Justice Implementation Mechanisms – By 2016

#### 5.1 Create and Support Coordinated Local Access to Justice Implementation Commissions (AJICs)

No one department or agency has sole responsibility for the delivery of justice in Canada.[139] That, in our view, is a core reason for why the improvement of access to justice continues to be such a challenge. For coherent, collaborative and coordinated change to occur, mechanisms need to be available in all provinces and territories. Where such collaborative mechanisms already exist, they need to be supported and perhaps reformed where necessary. Where they do not already exist, they need to be created and supported. While each region will have to identify or design a structure to suit its own particular needs, some structure or institution is needed to promote, design and implement change on a sustained and ongoing basis.[140] Where new financial or other support is required, it should not come at the expense of service to the public and respect for local organizations and providers. After all, it will be these local organizations, along with others, who will have the important ideas for moving forward together.

In order to provide some assistance in terms of what these mechanisms might look like, particularly in jurisdictions in which such mechanisms do not already exist or are not adequately developed and supported, we set out here an example of the kind of mechanism and approach we have in mind. For the purpose of this report, we call these mechanisms local standing access to justice implementation commissions (AJICs).

#### 5.2 Broad-Based Membership

The membership of AJICs should be broadly based, with judicial and court administration participation, combined with multi-stakeholder collaboration, through top down and bottom up coherent, collaborative and consultative approaches. The public – through various representative organizations – should play a central role. The kinds of individuals and organizations that should be part of these committees include the member organizations of the Action Committee, as well as other relevant stakeholder groups and individuals.[141]

Members from the justice sector must be directly linked at a leadership level with their organizations and must commit for a minimum of three years. In addition to volunteer individual members, AJICs need to have administrative staff and support. The modest support needed for AJICs should come from stakeholders. The AJICs must consist of leaders who are champions of change who will form strong guiding coalitions for change.[142]

There are innovative and efficient ways of bringing these sorts of mechanisms together. Local centres, in-person meetings, electronic and distance participation, and other accessible methods – including the use of social media, streaming, blogging, and other broad-based and participatory tools – should be considered. These tools should also allow for meaningful public engagement and feedback where possible.

The AJICs must consist of leaders who are champions of change who will form **strong guiding coalitions for change**

**5.3 Innovation and Action-Oriented Terms of Reference**

AJICs must be innovative and action-oriented, not just advisory. They need to inspire, lead and support change by clearly defining problems and crafting solutions and assisting with the piloting, implementation and evaluation of reforms. Early on in the process, AJICs should follow up on various recent mapping initiatives[143] to build on some of the good work that has been done in identifying key players and important initiatives in the access to justice communities.

Key priority areas need to be targeted and promising initiatives developed and pursued, likely through the formation of innovation and implementation working groups within the various AJICs. For example, priority areas could include legal and court services, family law, early resolution services,[144] legal aid, legal education in schools, homelessness, poverty and administrative law, etc. The work and recommendations of the Action Committee, it is hoped, will provide a good place to start.

**5.4 Other Sector and Institution Specific Access to Justice Groups**

In addition to standing AJICs, other access to justice groups should be encouraged where appropriate in the context of individual organizations and sectors. For example, all courts and tribunals should have an access to justice committee designed to conduct self-studies, share best practices, review performance, develop innovations, etc. Further, all law societies,[145] Bar associations[146] and law schools should create internal standing access to justice committees. These groups should be connected to the AJICs, to avoid duplication and facilitate coordination.

**5.5 Establish Permanent National Access to Justice Organization**

In addition to the AJICs, a national organization should be established or created within an existing organization or organizations to promote and monitor, on a long-term basis, access to civil and family justice in Canada.[147] Specifically, it will monitor and promote a national access to justice policy framework, best practices and standards,[148] identify and share information, review international developments, potentially conduct and support research on pressing access to justice issues, support "train-the-trainer" programs in the context of AJICs, etc. This organization, which will be critical for continuing the reform agenda following the completion of the Action Committee's work, will provide a coordinated voice to the access to justice agenda in Canada.

**6. Promote a Sustainable, Accessible and Integrated Justice Agenda through Legal Education – By 2016**

**6.1 Law School, Bar Admission and Continuing Life Long Learning**

Law schools, bar admission programs and continuing legal education providers should put a modern access to justice agenda at the forefront of Canadian legal education. This agenda will be an important part of a new legal reform culture. While

> **"[J]ustice incorporates our life ... perhaps it can be taught in school** as a life skill so that kids are more aware of what it means to make a choice and do the right thing for themselves and each other."

- participant in a recent survey on access to justice

law faculties will need to develop their own particular research and teaching agendas, and recognizing that many innovative initiatives have already begun, the following initiatives should be developed and expanded.

- Modules, courses and research agendas focused specifically on access to justice, professionalism, public service, diversity, pluralism and globalization.[149] The needs of all individuals, groups and communities, and in particular self-represented litigants, aboriginal communities, immigrants, other marginalized and vulnerable groups and rural communities should be specifically considered.
- Increased skills based learning that focuses on consensual dispute resolution,[150] alternative dispute resolution and other non-adversarial skills.[151]
- Social, community, poverty law, mediation and other clinical, intensive and experiential programs.
- The theory and practice of family law should be promoted as a central feature of the law school program.
- Research and promotion of different ways of delivering legal services that provide affordable and accessible services to the public as well as a meaningful professional experience for lawyers, including a reasonable standard of living.[152]

Similarly, bar admission programs and continuing legal education providers should promote access to justice as a central feature of essentially all lawyering programs.[153]

**6.2 Promote Access to Justice Education in Primary, Secondary and Post-Secondary Education**

Primary, secondary and post-secondary education should promote teaching and learning about access to justice, law and a just society. Building legal capacity through education helps people to manage their lives, property and relationships, to avoid problems and also to understand and address them effectively when they do arise. As one respondent to a recent access to justice survey put it: "[J]ustice incorporates our life ... perhaps it can be taught in school as a life skill so that kids are more aware of what it means to make a choice and do the right thing for themselves and each other."[154]

A national dialogue involving Ministries of Education, Ministries of Justice, legal educators, relevant community groups and others should be promoted to push forward a common access to justice framework for schools,[155] colleges and universities. AJICs should play an important role here.

**7. Enhance the Innovation Capacity of the Civil and Family Justice System - By 2016**

We need to expand the innovation capacity at all levels and in all sectors of the justice system. The national access to justice organization could be a key leader in this capacity building process, along with the AJICs, other access to justice groups, researchers and others. Research on what exists, what works and what is needed, along with evaluations and metrics of success, will all be important aspects of building innovation capacity.[156]

Money spent on the resolution of legal problems results in **individual and collective social, health and economic benefits**

## C. RESEARCH AND FUNDING GOALS

**8. Support Access to Justice Research to Promote Evidence-Based Policy Making - By 2015**

**8.1 Promote a National Access to Justice Research and Innovation Agenda that is both Aspirational and Practical**

This goal is directed primarily to researchers and governments, but additionally to all those who care about working with and improving the system - including AJICs, etc.

A national research and innovation agenda should be both aspirational and practical. Innovative and forward thinking will be central to this project.[157] Equally important to this process, however, will be to look at what works.[158] Collaboration among legal researchers, economists, social scientists, health care researchers and others should be encouraged.

**8.2 Develop Metrics of Success and Systems of Evaluation**

Reliable and meaningful metrics and benchmarks need to be established across all levels of the system in order to evaluate the effects of reform measures. We need better information in the context of increasing demand, increasing costs and stretched fiscal realities.[159]

**9. Promote Coherent, Integrated and Sustained Funding Strategies - By 2016**

Although research on the costs and benefits of delivering and not delivering accessible justice is still developing,[160] there is meaningful evidence tending to establish the benefits of sound civil and family economic investment.[161] Money spent on the resolution of legal problems results in individual and collective social, health and economic benefits.[162]

Based on this developing body of research, a sustainable justice funding model — recognizing the realities of current fiscal challenges but also recognizing the long term individual and collective social and economic benefits that flow from sound justice investment — needs to be encouraged and developed. There are several aspects to this proposed funding model:

- increased legal aid;
- governments working with participants from all sectors of the justice community;
- funding reallocation within the justice system and across public institutions as better coordination, more effective front end services and better education produce efficiencies;[163] and
- AJICs (which will require sustained funding themselves) to identify key research, innovation and action items and to work collaboratively with the national access to justice organization and others toward developing realistic and sustainable funding goals and strategies.

# CONCLUSION

Access to justice is at a critical stage in Canada.... Now is the time to act.

**Access to justice is at a critical stage in Canada.** Change is urgently needed.[164] This report provides a multi-sector national plan for reform. It is a roadmap, not a repair manual. The approach is to provide leadership through the promotion of concrete development goals. These are recommended goals, not dictates. Specific local conditions or problems call for locally tailored approaches and solutions. We believe that those responsible for implementing change — all local, provincial, territorial and national justice system stakeholders — will find this roadmap useful for making meaningful reforms in the service of the everyday justice needs of Canadians. The timeframes attached to each development goal are suggestions. They may change depending on the scope of the goal as well as on local needs and conditions.

Although we face serious access to justice challenges, there are many reasons to be optimistic about our ability to bridge the current implementation gap by pursuing concrete access to justice reforms. People within and beyond the civil and family justice system are increasingly engaged by access to justice challenges and many individuals and organizations are already working hard for change.

We hope that the work of the Action Committee and in particular this report will lead to:

- a measurable and significant increase in civil and family access to justice within 5 years;
- a national access to justice policy framework that is widely accepted and adopted;
- local jurisdictions, through AJICs with strong multi-sector leadership, putting in place strategies and mechanisms for meaningful and sustainable change;
- a permanent national body being created and supported to promote, guide and monitor meaningful local and national access to justice initiatives;
- access to civil and family justice becoming a topic of general civic discussion and engagement - an issue of everyday individual and community interest and wellbeing; and
- the public being placed squarely at the centre of all meaningful civil and family justice education and reform efforts.

In this report we have described the need, set out the guiding principles and provided a roadmap for change. Now it is time to act.

# ACKNOWLEDGMENTS

*Access to Civil and Family Justice: A Roadmap for Change* is the final report of the Action Committee on Access to Justice in Civil and Family Matters.

The Action Committee is grateful for the tireless efforts of Professor Trevor C.W. Farrow, Osgoode Hall Law School and Chair of the Canadian Forum on Civil Justice, who was the "holder of the pen" for this final report.

## ACTION COMMITTEE

The Action Committee was convened in late 2008 at the invitation of the Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada as a catalyst for meaningful action to justice reform. The Action Committee, which is a collaborative, consultative and stakeholder-driven initiative, includes:

- The Right Honourable Beverley McLachlin, P.C., Chief Justice of Canada (Honourary Chair)
- The Honourable Mr. Justice Thomas A. Cromwell, Supreme Court of Canada (Chair)
- Alberta Justice
- Association of Legal Aid Plans
- Canadian Association of Provincial Court Judges
- Canadian Bar Association
- Canadian Council of Chief Judges
- Canadian Forum on Civil Justice
- Canadian Institute for the Administration of Justice
- Canadian Judicial Council
- Canadian Superior Court Judges Association
- Canadian Public (represented by Mary Ellen Hodgins)
- Council of Canadian Law Deans
- Department of Justice Canada
- Federation of Law Societies of Canada
- Heads of Court Administration
- British Columbia Ministry of Justice
- Pro Bono Law Ontario
- Public Legal Education Association of Canada

## STEERING COMMITTEE, WORKING GROUPS AND SECRETARIAT

The individual members of the Steering Committee of the Action Committee include:

- The Honourable Mr. Justice Thomas A. Cromwell (Chair)
- Mark Benton, Q.C. (Association of Legal Aid Plans)
- Deputy Minister of Justice Raymond Bodnarek, Q.C. (Alberta Justice)
- Melina Buckley, Ph.D. (Canadian Bar Association)
- The Honourable juge en chef Élizabeth Corte (Canadian Council of Chief Judges)
- Rick Craig (Public Legal Education Association of Canada)
- Professor Trevor C.W. Farrow, Ph.D. (Canadian Forum on Civil Justice)
- Jeff Hirsch (Federation of Law Societies of Canada)
- M. Jerry McHale, Q.C. (British Columbia Ministry of Justice)

The Action Committee is extremely grateful to all members of the Steering Committee for their constant leadership and guidance throughout the work of the Action Committee. Much of the work of the Action Committee, designed to look at four key priority areas, was done by four working groups: the Court Processes Simplification Working Group, the Access to Legal Services Working Group, the Prevention, Triage and Referral Working Group, and the Family Justice Working Group. Reports from these working groups (which include lists of their members) were released as a collection of final working group reports in April 2013. The Action Committee is very grateful to the

members of these working groups for their significant efforts. The working group reports can be found on the website of the Canadian Forum on Civil Justice **(http://www.cfcj-fcjc.org/collaborations).**

The Action Committee would also like to thank members of its effective and efficient secretariat at the Department of Justice for Canada who have worked tirelessly to support the work of the Action Committee, the Steering Committee and the working groups.

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This report was prepared as part of the Action Committee's overall collaborative and consultative process, with direct guidance from the Steering Committee and in consultation with Mary Ellen Hodgins (on behalf of the Canadian public). Research and publication assistance was provided by the Canadian Forum on Civil Justice. The Action Committee has also relied heavily — and at times directly — on the reports of the Action Committee's four working groups.

Comments on this report can be sent to the Action Committee through the Canadian Forum on Civil Justice, online at: <**communications@cfcj-fcjc.org**>.

The Action Committee consists of senior representatives from many organizations in the justice system and a representative of the Canadian public, who share a commitment to working together to improve access to justice for the Canadian public. This report offers a general consensus on the issues discussed, but does not necessarily reflect the formal position of each of the respective organizations represented.

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# ENDNOTES

[1]Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face", citing the former Chief Justice of Ontario (remarks presented at Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>.

[2]As the Chief Justice of Canada recently acknowledged, "Regrettably, we do not have adequate access to justice in Canada." Rt. Hon. Beverley McLachlin, P.C., from "Forward" in Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds., *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at ix. Similarly, according to Justice Thomas Cromwell: "By nearly any standard, our current situation falls far short of providing access to the knowledge, resources and services that allow people to deal effectively with civil and family legal matters. There is a mountain of evidence to support this view." Hon. Thomas A. Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach", Viscount Bennett Memorial Lecture, (2012) 63 U.N.B.L.J. 38 at 39.

[3]Melina Buckley, Plenary Address (Canadian Bar Association "Envisioning Equal Justice Summit: Building Justice for Everyone", Vancouver, 26 April 2013). See also Canadian Bar Association, Envisioning Equal Justice Project, *Equal Justice Report: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, August 2013).

[4]See, for example, the following comments from Justice Thomas Cromwell:

> In general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters. I emphasize that I do not have a "court-centric" view of what this knowledge in these resources and services include. They include a range of out-of-court services, including access to knowledge about the law and the legal process and both formal and informal dispute resolution services, including those available through the courts. I do not view access to justice ... as simply access to litigation or even simply as access to lawyers, judges and courts, although these are, of course, aspects of what access to justice requires.

Hon. Thomas A. Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach", *supra* note 2 at 39.

[5]See e.g. Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About?" (2008) 46 Osgoode Hall L.J. 773 at 777-779. See generally Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W.A. Bogart, Frederick H. Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 19.

[6]Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) at 88.

[7]See Currie, *The Legal Problems of Everyday Life*, *ibid.* at 2, 10-12.

[8]Mary Bess Kelly, "Divorce cases in civil court, 2010/2011" (Ottawa: Minister of Industry, 28 March 2012) at 7-9, online: Statistics Canada <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.pdf> (this figure is based on marriages ending before a couple's 30th wedding anniversary). For a discussion of the public costs of family breakdown, see Rebecca Walberg and Andrea Mrozek, *Private Choice, Public Costs: How Failing Families Cost Us All* (Ottawa: Institute of Marriage and Family Canada, June 2009).

[9]Everyday legal problems -- often termed "justiciable problems" -- include a broad range of problems that might raise legal issues and/or might be addressed by way of legal solutions. See e.g. Hazel Genn *et al.*, *Paths to Justice: What People do and Think About Going to Law* (Oxford: Hart, 1999) at v-vi, 12, and generally c. 2. See further Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 5-6; Pascoe Pleasence *et al.*, *Causes of Action: Civil Law and Social Justice* (Norwich: Legal Services Commission, 2004) at 1. For a recent Australian study, see Christine Coumarelos *et al.*, *Legal*

*Australia-Wide Survey: Legal Need in Australia* (Sydney: Law and Justice Foundation of New South Wales, August 2012).

[10]See Currie, *The Legal Problems of Everyday Life*, *ibid.* at 23-26. More vulnerable groups include, for example, people who self-report as aboriginal, being part of a visible minority, disabled, or being on social assistance. See *ibid.* See further Pleasence *et al.*, *Causes of Action*, *ibid.* at 14-31.

[11]Currie, *The Legal Problems of Everyday Life*, *ibid.* at 23-25.

[12]See e.g. Pleasence *et al.*, *Causes of Action*, *supra* note 9 at 37-44; Currie, *The Legal Problems of Everyday Life*, *ibid.* at 49-51. See further Pascoe Pleasence *et al.*, "Multiple Justiciable Problems: Common Clusters and their Social and Demographic Indicators" (2004) 1 J. Emp. Legal Stud. 301.

[13]See Currie, *The Legal Problems of Everyday Life*, *ibid.* at 42-48.

[14]*Ibid.* at 73. See further Nigel J. Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems* (London: Public Legal Education Network, March 2010) at 25-26, 42-43. See further Mary Stratton and Travis Anderson, *Social, Economic and Health Problems Associated with a Lack of Access to the Courts* (Edmonton: Canadian Forum on Civil Justice, March 2006).

[15]See Currie, *The Legal Problems of Everyday Life*, *ibid.* at 33. See further Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems*, *ibid.* at 20-21.

[16]See e.g. Currie, *The Legal Problems of Everyday Life*, *ibid.* at 88-89. See further Alexy Buck, Pascoe Pleasence and Nigel J. Balmer, "Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups" (2005) 39(3) Soc. Pol'y Admin. 302.

[17]See Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems*, *supra* note 14 at 3 [citation omitted]. See further Pleasence *et al.*, *Causes of Action*, *supra* note 9. For current research on the cost of civil justice in Canada, see Canadian Forum on Civil Justice, "The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems", online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/cost-of-justice>.

[18]As the Chief Justice of Canada has further recognized, 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." Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face", *supra* note 1 [citation omitted].

[19]Mark D. Agrast *et al.*, *Rule of Law Index 2012-2013* (Washington, D.C.: The World Justice Project, 2012) at 27; Mark D. Agrast *et al.*, *Rule of Law Index 2011* (Washington, D.C.: The World Justice Project, 2011) at 23.

[20]*Rule of Law Index 2011*, *ibid.* at 23.

[21]Legal Aid Ontario, "Am I eligible for legal aid?", online: LAO <http://www.legalaid.on.ca/en/getting/eligibility.asp>.

[22]Legal Aid Alberta, "Accessing Legal Aid: Eligibility", online: LAA <http://www.legalaid.ab.ca/help/Pages/Eligibility.aspx>. In some cases certain limited advice may be available for individuals and families earning slightly more than these amounts. See *ibid.*

[23]Legal Aid Manitoba, "Who Qualifies Financially", online: LAM <http://www.legalaid.mb.ca/>.

[24]Legal Aid Saskatchewan, "Am I eligible for Legal Aid?", online" LAS <http://69.27.116.234/legal_help/eligible.php>.

[25]See e.g. Legal Aid Ontario, "Types of help", online: LAO <http://www.legalaid.on.ca/en/getting/typesofhelp.asp>.

[26]See Jamie Baxter and Albert Yoon, *The Geography of Civil Legal Services in Ontario*, Report of the mapping phase of the Ontario Civil Legal Needs Project (Toronto: The Ontario Civil Legal Needs Project Steering Committee, November 2011) at 63 [citation omitted], online: <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486236>.

[27]Charlotte Santry, "The Going Rate" (2013 Legal Fees Survey), *Canadian Lawyer* (June 2013) 33 at 34, online: <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2013/cljune13legalfees.pdf>.

[28]*Ibid.* at 36. As a general matter, a 3-day civil trial is often considered to cost overall in the range of $60,000 (or more depending on the amounts and issues involved). See e.g. Tracey Tyler, "A 3-day trial likely to cost you $60,000" *Toronto Star* (3 March 2007), online: <http://www.thestar.com/news/2007/03/03/a_3day_trial_likely_to_cost_you_60000.html>.

[29]For example, in the U.K., the cost of family law cases involving children reportedly increased by 71% between 1998 and 2003, while the average length of a family law case rose from 50 weeks in 1998 to 63 weeks in 2003. See Vicky Kemp, Pascoe Pleasence and Nigel J. Balmer, "Incentivising Disputes: The Role of Public Funding in Private Law Children Cases" (2005) 27 J. Soc. Welfare & Fam. L. 125 at 126. Indicators of rising costs and fees have also been reported in Australia and Canada. In Australia, see e.g. PricewaterhouseCoopers, *Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law* (Australia: Legal Aid Queensland, 2009) at 15. One recent Canadian report indicates that "many [law firms] increased their legal fees in 2011 and 2012". See Santry, "The Going Rate", *supra* note 27 at 33. However, according to the same report, of those who responded, 56% plan to freeze their fees in 2013. See *ibid.*

[30]As the Chief Justice of Canada has recognized, "Among the hardest hit are the middle class. They earn too much to qualify for legal aid, but frequently not enough to retain a lawyer for a matter of any complexity or length. When it comes to the justice system, the majority of Canadians do not have access to sufficient resources of their own, nor do they have access to the safety net programs established by the government." Rt. Hon. Beverley McLachlin, P.C., from "Forward" in Trebilcock, Duggan and Sossin, eds., *Middle Income Access to Justice*, *supra* note 2 at ix.

[31]Russell Engler, "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about when Counsel is Most Needed" (2010) 37 Fordham Urban L.J. 37 at 40 (citing Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, updated report (Washington, D.C.: Legal Services Corporation, September 2009).

[32]See *supra* notes 6-17.

[33]See e.g. Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 55-56 and generally 55-67 and 88. Compare Ontario Civil Legal Needs Project, *Listening to Ontarians* (Toronto: Ontario Civil Legal Needs Project Steering Committee, May 2010) at 31.

[34]See e.g. Ontario Civil Legal Needs Project, *Listening to Ontarians*, *ibid.* at 32, 39-40; Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (May 2013) at 39, online: <http://www.representing-yourself.com/doc/report.pdf>. Compare Ipsos Reid Survey (2009) in Law Society of Alberta, "Most Albertans Satisfied with their Lawyers: Ipsos Reid Poll Shows" *The Advisory* 8:3 (June 2010) 7 at 8 ("Other Challenges in Resolving Legal Problems – Expected Cost"), online: LSA <http://www.lawsociety.ab.ca/files/newsletters/Advisory_Volume_8_Issue_3_Jun2010/PollCharts.pdf>; Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 56.

[35]See e.g. Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems*, *supra* note 14 at 31-36. See further Hazel Genn *et al.*, *Tribunals for Diverse Users*, Department for Constitutional Affairs Research Series 1/06 (London: Department for Constitutional Affairs, 2006).

[36]Ab Currie, "Self-Helpers Need Help Too" (2010) [unpublished] at 1, available online: <http://www.lawforlife.org.uk/data/files/self-helpers-need-help-too-ab-currie-2010-283.pdf>. See also Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 14 (citing the number at 44%); Balmer *et al.*, *Knowledge, Capability and the Experience of Rights Problems*, *ibid.* at 14 (citing the number at closer to 34%).

[37]See e.g. Trevor C.W. Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, A White Paper for the Association of Canadian Court Administrators (Toronto and Edmonton: 27 March 2012) at 14-16. See also Macfarlane, *The National Self-Represented Litigants Project*, *supra* note 34 at 33-35.

[38]See e.g. Rachel Birnbaum and Nicholas Bala, "Views of Ontario Lawyers on Family Litigants without Representation" (2012) 63 U.N.B.L.J. 99 at 100; Canadian Bar Association, Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class" (Ottawa: Canadian Bar Association, February 2013) at 3-4 [citation omitted].

[39]Canadian Bar Association, Standing Committee on Access to Justice, "Toward National Standards for Publicly-Funded Legal Services" (Ottawa: Canadian Bar Association, April 2013) at 18, citing Russell Engler, "Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?" (2010) 9:1 Seattle J. for Soc. Just. 97 at 115, citing Rebecca Sandefur, "Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes" (26 March 2008) at 24. See further Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall L.J. 71 at 87 (reporting that in refugee cases, claimants represented by lawyers were 70.1% more likely to succeed than claimants represented by consultants, and 275% more likely to succeed than unrepresented claimants).

[40]Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, *supra* note 37 at 46.

[41]Trevor C.W. Farrow, "What is Access to Justice?" Osgoode Hall L.J. (in progress), excerpts of which were featured as part of the opening plenary presentation at the Canadian Bar Association, "Envisioning Equal Justice Summit: Building Justice for Everyone", *supra* note 3. See also Canadian Bar Association, Envisioning Equal Justice Project, *Equal Justice Report: An Invitation to Envision and Act*, *supra* note 3.

[42]This problem has been acknowledged and described by the Chief Justice of Canada as follows: "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." Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face", *supra* note 1.

[43]As Justice Thomas Cromwell has observed, "I have serious concerns that we have hit the iceberg but are being too slow to recognize the seriousness of the damage.... [T]he problem is real and growing." Hon. Thomas A. Cromwell, Address in 66 *Bulletin* (Spring 2011) 22 at 23 (on the occasion of his induction as an Honorary Fellow of the American College of Trial Lawyers, Washington, D.C., 22 October 2011).

[44]Lawrence M. Friedman, "Is There a Modern Legal Culture?" (July 1994) 7:2 Ratio Juris 117 at 130.

[45]For a recent discussion on shifting culture in the legal profession, see Canadian Bar Association, Legal Futures Initiative, *The Future of Legal Services in Canada: Trends and Issues* (Ottawa: Canadian Bar Association, 2013) at 29, 34 and 39.

[46]See Law Commission of Ontario, "Best Practices at Family Justice System Entry Points: Needs of Users and Responses of Workers in the Justice System" (Toronto, September 2009) at 11, online: LCO <http://www.lco-cdo.org/familylaw/Family%20Law%20Process%20Consultation%20Paper%20-%20September%202009.pdf>; Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, *supra* note 37 at 28-30. See also generally Macfarlane, *The National Self-Represented Litigants Project*, *supra* note 34; Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report* (Ottawa: Canadian Bar Association, August 1996) at 17.

[47]See Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, *supra* note 37 at 29.

[48]See generally Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report*, *supra* note 46 at 19.

[49]See *ibid.* at 76-78.

[50]According to the Chief Justice of Canada, "If we are to have any success in improving access, a coordinated, collaborative approach ... is necessary." Rt. Hon. Beverley McLachlin, P.C., from "Forward" in Trebilcock, Duggan and Sossin, eds., *Middle Income Access to Justice*, *supra* note 2 at x.

[51]See *supra* notes 4-5 and accompanying text.

[52]See *supra* pt.1.1 and *infra* notes 66-68 and accompanying text.

[53]For general discussions, see e.g. Coumarelos *et al.*, *Legal Australia-Wide Survey: Legal Need in Australia*, *supra* note 9 at 207-214. In Canada, see recently Canadian Bar Association, Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class", *supra* note 38 at 8-9.

[54]Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013) at 9 [citations omitted], online: CFCJ <http://www.cfcj-fcjc.org/collaborations>. See further Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2008) at sec. 6.7.

[55]Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report*, *supra* note 46 at 16.

[56]Farrow, "What is Access to Justice?", *supra* note 41.

[57]Macfarlane, *The National Self-Represented Litigants Project, supra* note 34 at 54 [citation omitted].

[58]*Ibid.* [citation omitted].

[59]See e.g. Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013) at 3, online: CFCJ <http://www.cfcj-fcjc.org/collaborations>.

[60]Farrow, "What is Access to Justice?", *supra* note 41.

[61]*Ibid.*

[62]The Action Committee's approach to the use of development goals has been directly influenced by the United Nations Millennium Development Goals (see online: United Nations <http://www.un.org/millenniumgoals/>). The Millennium Development Goals "range from halving extreme poverty rates to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015" and are designed to "form a blueprint agreed to by all the world's countries and all the world's leading development institutions." See *ibid.* The Action Committee has benefitted from the work of Sam Muller and the Hague Institute for the Internationalisation of Law (HiiL). See e.g. HiiL, *Towards Basic Justice Care for Everyone: Challenges and Promising Approaches*, Trend Report/Part 1 (The Hague: HiiL, 2012). For further examples of HiiL's work, see *infra* notes 157-158.

[63]Action Committee on Access to Justice in Civil and Family Matters, Final Working Group Reports, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/collaborations>.

[64]Much of the detail and analysis (and examples) that animate these innovation goals can be found in the four Action Committee working group reports (discussed further in the Acknowledgments section of this report).

[65]Much of the material in this section of the report is very much influenced by, and in some cases directly draws on, the materials and discussions included in: Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector", *supra* note 54.

[66]See *supra* pt.1.1.

[67]Ab Currie, "Self-Helpers Need Help Too", *supra* note 36 at 1. Compare earlier Currie, *The Legal Problems of Everyday Life*, *supra* note 6 at 9 (citing the number at 11.7%). See further Pleasence *et al.*, *Causes of Action*, *supra* note 9 at 96.

[68]As Australia's Attorney-General's Department recently acknowledged:

> "Courts are not the primary means by which people resolve their disputes. They never have been. Very few civil disputes reach formal justice mechanisms such as courts, and fewer reach final determination. Most disputes are resolved without recourse to formal legal institutions or dispute resolution mechanisms. To improve the quality of dispute resolution, justice must be maintained in individuals' daily activities, and dispute resolution mechanisms situated within a community and economic context. Reform should focus on everyday justice, not simply the mechanics of legal institutions which people may not understand or be able to afford...."

Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Australia: Attorney-General's Department, September 2009) at 3. Similarly, according to Marc Galanter:

> Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.

Marc Galanter, "Justice in Many Rooms" in Mauro Cappelletti, ed., *Access to Justice and the Welfare State* (Alphen aan den Rijn: Sijthoff; Brussels: Bruylant; Florence: Le Monnier; Stuttgart: Klett-Cotta, 1981) 147 at 161-162, cited in Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, *ibid.* at 3. It is important to recognize, however, that even in the context of informal mechanisms, the formal justice system - through the production of precedents as well as the potential recourse to its use - plays a significant influencing role. See e.g. Robert H. Mnookin and L. Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L.J. 950.

[69]See Farrow, "What is Access to Justice?", *supra* note 41.

[70]See Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector", *supra* note 54 at 5 and 10.

[71]See e.g. *ibid.* at 5-8.

[72]See e.g. Clicklaw, online: <http://www.clicklaw.bc.ca/>; Legalline, online: <http://www.legalline.ca/>. For a further discussion, see Action Committee on Access to Justice in Civil and Family Matters, "Report of the Access to Legal Services Working Group" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013) at 8-10, online: CFCJ <http://www.cfcj-fcjc.org/collaborations>.

[73]For a discussion of innovations in e-learning, see Mohamed Ally *et al.*, *Expanding Access to Legal Services in Alberta through E-Learning* (Alberta: Alberta Law Foundation, November 2012).

[74]See e.g. B.C.'s Justice Access Centres and Family Justice Centres. Other provinces have similar initiatives.

[75]See e.g. Alberta Justice and Solicitor General's current initiative designed to explore opportunities for combining services in one location to coordinate and deliver comprehensive services to the community, with a particular focus on prevention and early resolution.

[76]For further specific examples of these various initiatives (and others), see Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector", *supra* note 54 at 6-8. See also Canadian Bar Association, Standing Committee on Access to Justice, "Underexplored Alternatives for the Middle Class", *supra* note 38 at 7-9. For the kinds of services that are currently available (and also that are still needed), see e.g. Canadian Forum on Civil Justice, *Alberta Legal Services Mapping Project*, online: CFCJ <http://www.cfcj-fcjc.org/alberta-legal-services>; Carol McEown, *Civil Legal Needs Research Report*, 2d ed. (Vancouver: Law Foundation of British Columbia, March 2009); Baxter and Yoon, *The Geography of Civil Legal Services in Ontario*, *supra* note 26.

[77]See e.g. the B.C. Legal Services Society's initiatives in B.C.'s Women's Hospital and at a drop-in centre in Vancouver's Downtown Eastside, which provide a lawyer for a short period per week at each location who is available to give legal advice with respect to family law, child protection and other issues.

[78]See *supra* pt.1.1. For a useful discussion of multidisciplinary and collaborative approaches to service delivery, see Canadian Bar Association, Standing Committee on Access to Justice, "Future Directions for Legal Aid Delivery" (Ottawa: Canadian Bar Association, April 2013) at 24-28.

[79]See e.g. Unison Health and Community Services, online: <http://unisonhcs.org/>.

[80]See e.g. Community Legal Education Ontario, online: <http://www.cleo.on.ca/en>; Justice Education Society, online: <http://www.justiceeducation.ca/>; Ontario Justice Education Network, online: <http://www.ojen.ca/welcome>, and others.

[81]See e.g. Australia's "Foolkit", online: <http://www.foolkit.com.au/>.

[82]For further detailed discussions, see Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, "Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector", *supra* note 54 at 17-18, 22-25; Action Committee on Access to Justice in Civil and Family Matters, "Report of the Access to Legal Services Working Group", *supra* note 72 at 5-8; Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013) at 10-13, online: CFCJ <http://www.cfcj-fcjc.org/collaborations>.

[83]See e.g. Trevor C.W. Farrow, "Ethical Lawyering in a Global Community" 2012 Isaac Pitblado Lecture, (2013) 36:1 Man. L.J. 141.

[84]Much of the material in this section of the report is very much influenced by, and in some cases directly draws on, the materials and discussions included in: Action Committee on Access to Justice in Civil and Family Matters, "Report of the Access to Legal Services Working Group", *supra* note 82.

[85]See e.g. Canadian Bar Association, Envisioning Equal Justice Project, *Equal Justice Report: An Invitation to Envision and Act, supra* note 3.

[86]For a useful collection, see Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* (September 2012) at 11, online: FLSC <http://www.flsc.ca/_documents/Inventory-of-Access-to-Legal-AccessLawSocietiesInitiativesSept2012.pdf>.

[87]See e.g. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (as amended 12 December 2012) at c. 3.2-1.1. See further the various current limited scope retainer initiatives, including in Ontario and Alberta. The initiative in Alberta, for example, which involves Alberta Justice and Solicitor General, the Law Society of Alberta, Legal Aid Alberta, Pro Bono Law Alberta and the Calgary Legal Guidance Clinic, is a good example of cross sector collaboration and coordination. But see D. James Greiner *et al.*, "The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future" (2013) 126 Harv. L. Rev. 901.

[88]See e.g. Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services, supra* note 54 at sec. 7.6.

[89]See e.g. the various paralegal discussions, regulations and innovations in B.C., Alberta, Manitoba, Ontario and Nova Scotia, discussed in Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada, supra* note 86 at 7-8.

[90]See e.g. *ibid.* at 2-8.

[91]Outsourcing involves a number of initiatives including subcontracting legal work to other domestic or off-shore lawyers and other service providers (often under the supervision of a lawyer). For a discussion of various outsourcing trends, see e.g. Michael D. Greenberg and Geoffrey McGovern, *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?* (Santa Monica, CA: RAND Corporation, 2012) at 35-36. See further Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services, supra* note 54 at sec. 2.5.

[92]See e.g. Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada, supra* note 86 at 8-10.

[93]See e.g. Law Society of Manitoba, Family Law Access Centre, online: LSM <http://www.lawsociety.mb.ca/for-the-public/family-law-access-centre>, which is designed to provide legal services primarily to middle income families. Other options include alternatives to billable hours, competitive tenders, fixed tariffs, etc. See Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada, ibid.* at 16.

[94]See e.g. various initiatives and programs, including most extensively in Québec and also in B.C. and Ontario, discussed in Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada, ibid.* at 13.

[95]For a recent discussion of pro bono initiatives and thinking, see Canadian Bar Association, Standing Committee on Access to Justice, "Tension at the Border: Pro Bono and Legal Aid" (Ottawa: Canadian Bar Association, October 2012). See further Lorne Sossin, "The Public Interest, Professionalism, and Pro Bono Publico" (2008) 46 Osgoode Hall L.J. 131; Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada*, *ibid.* at 14-16.

[96]See e.g. Law Society of Upper Canada, *Rules of Professional Conduct* (adopted 22 June 2000), rr. 2.04 (15)-(19), which can exempt, for example, short-term pro bono legal advice from typical conflicts of interest rules, which is particularly important for lawyers who practice with larger firms and in institutional settings whose clients may have conflicting interests with those of the clients involved in the short term retainers. This initiative is also a good example of the kinds of collaborations that can occur across sectors of the justice system - in this case with the Law Society of Upper Canada and Pro Bono Law Ontario. See also similar provincial initiatives elsewhere, for example, in B.C. and Alberta.

[97]See e.g. Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada*, *supra* note 86 at 16-19.

[98]See e.g. Law Society of Manitoba, Family Law Access Centre, *supra* note 93.

[99]See e.g. *Law Society Act*, R.S.O. 1990, c. L.8 at s. 4.2.

[100]See Trevor C.W. Farrow, "Sustainable Professionalism" (2008) 46 Osgoode Hall L.J. 51 at 96.

[101]See further *infra* note 149 and accompanying text. See generally Farrow, "Sustainable Professionalism", *ibid.*; Brent Cotter, "Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada" (2012) 63 U.N.B.L.J. 54; Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25 Dal. L.J. 335; Alice Woolley, "Imperfect Duty: Lawyers' Obligation to Foster Access to Justice" (2008) 45 Alta. L. Rev. 107.

[102]See further *infra* pt.3.B.6.

[103]The specific legal services innovations discussed above, *supra* pt.3.A.2, should be actively considered and implemented by individual lawyers as well as law societies, bar associations and others.

[104]Much of the material in this section of the report is influenced by, and in some cases directly draws on, the materials and discussions included in: Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *supra* note 82.

[105]For a more detailed discussion of court-based innovations, see Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *ibid.*

[106]As Richard Zorza has argued: "Courts must become institutions that are easy-to-access, regardless of whether the litigant has a lawyer. This can be made possible by the reconsideration and simplification of how the court operates, and by the provision of informational access services and tools to those who must navigate its procedures." Richard Zorza, "Access to justice: The emerging consensus and some questions and implications" (2011) 94 Judicature 156 at 157.

[107]See *e.g.* American Bar Association, Report of the American Bar Association Working Group on Civil Justice System Proposals, *ABA Blueprint for Improving the Civil Justice System* (Chicago: ABA, 1992) at 36. See further Frank E.A. Sander, "Varieties of Dispute Processing" in A. Leo Levin and Russell R. Wheeler, eds., *The Pound Conference: Perspectives on Justice in the Future* (St. Paul: West, 1979) 65; Jeffrey W. Stempel, "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?" (1996) 11 Ohio St. J. Disp. Resol. 297.

[108]See Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *supra* note 82 at 13-17.

[109]For a detailed discussion of current court-based dispute resolution options, see Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *ibid.* at 13-17.

[110]See e.g. Montréal's Municipal Court, online: <http://ville.montreal.qc.ca/portal/page?_dad=portal&_pageid=5977,40497558&_schema=PORTAL>.

[111]See e.g. the newly developed B.C. Civil Resolution Tribunal, online: <http://www.ag.gov.bc.ca/legislation/civil-resolution-tribunal-act/>.

[112]See e.g. Consumer Protection BC, which is an online dispute resolution service for consumer matters (developed in 2011 with funding from the B.C. Ministry of Justice). See Consumer Protection BC, online: <http://consumerprotectionbc.ca/odr>.

[113]See e.g. Property Assessment Appeal Board of B.C., online: <http://www.assessmentappeal.bc.ca/default.aspx>.

[114]Rt. Hon. the Lord Neuberger of Abbotsbury, quoted in Catherine Baksi, "Neuberger defends judges' right to speak out on cuts" *The Law Society Gazette* (19 June 2013), online: <http://www.lawgazette.co.uk/news/neuberger-defends-judges-right-speak-out-cuts?utm_source=emailhosts&utm_medium=email&utm_campaign=GAZ+19/06/2013>.

[115]See e.g. Macfarlane, *The National Self-Represented Litigants Project*, *supra* note 34; Farrow, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, *supra* note 37.

[116]For example, in Québec, the Montréal Bar has prepared a best practices guide for litigation. In Newfoundland and Labrador, there are various booklets available both at the courts and in the Public Legal Information Association's office on a range of legal topics. In Ontario, the Ministry of the Attorney General has created several self-help guides that clarify procedures under the family court rules. Additionally, LawHelp Ontario (a pro bono Ontario project) provides various information booklets and how-to manuals for self-represented litigants.

[117]In Alberta, for example, Law Information Centres provide information about general court procedures and Family Law Information Centres employ staff members who provide advice regarding family law procedures.

[118]See Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *supra* note 82 at 17-19.

[119]See e.g. Court of Queen's Bench of Alberta, Notice to the Profession, "Case Management Counsel Pilot Project", NP#2011-03 (30 September 2011), online: Alberta Courts <http://www.albertacourts.ab.ca/LinkClick.aspx?fileticket=liayJcjYAbI%3D&tabid=92&mid=704>.

[120]See e.g. the Québec Superior Court initiative that uses a panel of judges who encourage early reconciliation and conciliation and, if necessary, the use of simplified procedures for various matters including latent defects, inheritance issues, property boundary issues, etc.

[121]For examples of jurisdictions with e-filing options, see Superior Court and Court of Appeal in British Columbia, the Court of Appeal in Alberta, the Superior Court in Newfoundland and Labrador (in estate matters), and the Federal Court of Canada.

[122]For example, B.C. Court Services Online is an electronic service that provides electronic searches of court files, online access to daily court lists and e-filing capacity. For its part, the Alberta Court of Appeal has a practice direction that supports e-appeals if both parties consent or if the court makes such an order.

[123]See e.g. the real time court order initiatives in provincial court - civil in Edmonton and Calgary.

[124]See e.g. Alberta Justice and Solicitor General's Technology Assisted Mediation program, developed in 2009, which parties can now attend via Skype.

[125]See e.g. *Paiva v. Corpening*, 2012 ONCJ 88. See further Justice Québec, "Justice Access Plan", online: <http://www.justice.gouv.qc.ca/english/ministre/paj/index.htm> (last updated 24 April 2012).

[126]For example, the Superior Court in Nova Scotia employs a communications director to answer questions from the general public and the media. Further, the Supreme Court of Canada, for example, is now on Twitter. See Supreme Court of Canada, online: <http://twitter.com/#!/scc_csc>.

[127]See Action Committee on Access to Justice in Civil and Family Matters, "Report of the Court Processes Simplification Working Group", *supra* note 82 at 19-20. For a discussion on current and future court simplification initiatives in the U.S., see Richard Zorza, "Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation" (2013) 61 Drake U. L. Rev. 845. See generally Trevor C.W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, forthcoming) at cc. 6-7.

[128]See e.g. Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998), online: CJC <https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>.

[129]Much of the material in this section of the report is very much influenced by, and in many cases directly draws on, the materials and discussions included in: Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words", *supra* note 59.

[130]For general discussions, see *ibid.* See also Law Commission of Ontario, *Towards a More Efficient and Responsive Family Law System*, Interim Report (Toronto: Law Commission of Ontario, February 2012); Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, Final Report (Toronto: Law Commission of Ontario, February 2013).

[131]See Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words", *supra* note 59 at 3-4.

[132]See *ibid.* at 36-38.

[133]See *ibid.* at 3.

[134]See *ibid.* at 25-26.

[135]See e.g. *ibid.* at recs. 5, 7, 9, 12 and 17.

[136]See e.g. Canadian Bar Association - B.C., "Best Practice Guidelines for Lawyers Practicing Family Law" (18 June 2011), online: <http://www.cba.org/bc/bartalk_11_15/pdf/best_practice_guidelines.pdf>.

[137]See Action Committee on Access to Justice in Civil and Family Matters, Family Justice Working Group, "Meaningful Change for Family Justice: Beyond Wise Words", *supra* note 59 at e.g. recs. 19-27. The Working Group Report sets out a comprehensive list of reform initiatives. Only a few highlights are given here.

[138]See e.g. *ibid.* at recs. 29-31.

[139]See *supra* pt.2.2.

[140]See e.g. Northern Access to Justice Committee, *Final Report* (Saskatchewan: Ministry of Justice and Attorney General, September 2007), online: Government of Saskatchewan <http://www.justice.gov.sk.ca/Final-Report-Northern-Access-to-Justice.pdf>. See recently the Law Society of Nunavut's Territorial Access to Justice Committee, which it started in 2011, discussed further in Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada*, *supra* note 86 at 11. See generally Chief Justice Karla M. Gray and Robert Echols, *Mobilizing Judges, Lawyers, and Communities: State Access to Justice Commissions* (Summer 2008) 47:3 Judges' J.; Access to Justice Partnerships, "State Access to Justice Tools - Access to Justice Checklist" (Washington, National Legal Aid and Defender Association), online: <http://www.nlada.org/DMS/Documents/1117200283.21/>.

[141]Examples include judicial associations, court administrators, government departments, public interest groups and advocacy organizations, legal aid plans, community clinics and service providers, civil and family rules committees, libraries and information providers, public legal educators, family law specialists, NGOs, academics and researchers, various cultural communities with particular justice interests and/or challenges, members of the bar, paralegals and other service providers, legal insurers and the like.

[142]See e.g. John P. Kotter, "Accelerate!", *Harv. Bus. Rev.* (November 2012) 1 at 10. See earlier John P. Kotter, "Leading Change: Why Transformation Efforts Fail", *Harv. Bus. Rev.* (March-April 1995) 1 at 62-63.

[143]See e.g. Ontario Civil Legal Needs Project, "Listening to Ontarians" and Baxter and Yoon, "The Geography of Civil Legal Services in Ontario", *supra* notes 33 and 26; Canadian Forum on Civil Justice, *Alberta Legal Services Mapping Project*, *supra* note 76.

[144]See further *infra* note 157.

[145]See e.g. Nova Scotia Barristers' Society, Justice Sector Liaison Committee and Access to Justice Working Group; Law Society of Upper Canada, Access to Justice Committee; Federation of Law Societies of Canada, Standing Committee on Access to Legal Services, etc.

[146]See e.g. Canadian Bar Association, Access to Justice Committee.

[147]An example of an organization that could play this role is the Canadian Forum on Civil Justice, which was created largely for a similar purpose following the Canadian Bar Association's earlier review of Canada's systems of civil justice. See Task Force on Systems of Civil Justice, *Systems of Civil Justice Task Force Report*, *supra* note 46 at 76-78.

[148]For a recent discussion on the importance of national standards for access to justice, see Canadian Bar Association, Standing Committee on Access to Justice, "Toward National Standards for Publicly-Funded Legal Services", *supra* note 39.

[149]For a discussion of this shift in focus, see e.g. Farrow, "Ethical Lawyering in a Global Community", *supra* note 83. For recent national regulatory approaches, see Task Force on the Canadian Common Law Degree, *Final Report* (Ottawa: Federation of Law Societies of Canada, October 2009), online: FLSC <http://www.flsc.ca/_documents/Common-Law-Degree-Report-C(1).pdf>; Common Law Degree Implementation Committee, *Final Report* (Ottawa: Federation of Law Societies of Canada, August 2011), online: FLSC <http://www.flsc.ca/_documents/Implementation-Report-ECC-Aug-2011-R.pdf>.

[150]Discussed further *supra* at pt.3.A.4.4.

[151]See e.g. Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 224-232; Farrow, "Sustainable Professionalism", *supra* note 100 at 100-102.

[152]See e.g. Farrow, "Ethical Lawyering in a Global Community", *supra* note 83.

[153]See e.g. Law Society of Upper Canada, "Continuing Professional Development Overview", online: LSUC <http://www.lsuc.on.ca/For-Lawyers/Improve-Your-Practice/Education/Continuing-Professional-Development-Overview/>, as well as other recent provincial continuing professional development ethics requirements. For a general collection, see Stephen G.A. Pitel and Trevor C.W. Farrow, eds., Special Feature – "Life Long Learning in Professionalism" (2010) 4 Can. Legal Ed. Annual Rev. 1-117.

[154]Farrow, "What is Access to Justice?", *supra* note 41.

[155]See e.g Law in Action Within Schools, online: LAWS <http://www.lawinaction.ca/>.

[156]See further *supra* pt.3.A and *infra* pt.3.C.8. See also Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada*, *supra* note 86 at 10-11.

[157]See e.g. HiiL, *Scenarios to 2030: Signposting the legal space for the future* (The Hague: HiiL, 2011); Sam Muller *et al.*, *Innovating Justice: Developing new ways to bring fairness between people* (The Hague: HiiL, 2013). For a recent innovation initiative in Canada, see the Winkler Institute for Dispute Resolution, which is being developed at Osgoode Hall Law School, and which is "devoted to innovation, research, education and the creative practice of methods of dispute resolution through mediation, arbitration and the traditional court system." Winkler Institute for Dispute Resolution, online: <http://winklerinstitute.ca/>.

[158]See e.g. Law and Justice Foundation of New South Wales, "What Works?" research program, online: <http://www.lawfoundation.net.au/ljf/app/&id=7B11620ED3302A0CCA257464001880F4>. See further Hazel Genn, Martin Partington and Sally Wheeler, *Law in the Real World: Improving Our Understanding of How Law Works*, Final Report and Recommendations (London: Nuffield Foundation, November 2006). An example of this kind of innovative research is the Canadian Forum on Civil Justice multi-year collaborative research project, ***"The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems"***, *supra* note 17. See further Maurits Barendrecht *et al.*, *Strategies Towards Basic Justice Care for Everyone* (The Hague: HiiL, 2012) at 17.

[159]For a recent discussion on the importance of metrics in the context of access to justice, see Canadian Bar Association, Standing Committee on Access to Justice, "Access to Justice Metrics: A Discussion Paper" (Ottawa: Canadian Bar Association, April 2013). See further Martin Gramatikov *et al., A Handbook for Measuring the Costs and Quality of Access to Justice* (Apeldoorn, The Netherlands: Maklu, 2009).

[160]For a recent study on costs and the civil and family justice system, see Canadian Forum on Civil Justice, "The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems", *supra* note 17.

[161]For example, according to one Australian study in the specific context of family cases, legal aid assistance in relation to courts and dispute resolution services demonstrated a positive efficiency benefit for the justice system. Specifically, these benefits reportedly outweighed the costs of providing the services in a range from a return of $1.60 to $2.25 for every dollar spent. See PricewaterhouseCoopers, *Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law*, *supra* note 29 at ix and c. 5. According to a different U.S.-based study, the return on investment for every $1 spent on civil legal aid funding was as high as $6. See Public Welfare Foundation, "Natural Allies: Philanthropy and Civil Legal Aid" (Washington, D.C.: Public Welfare Foundation and the Kresge Foundation, 2013) at 3, online: Public Welfare Foundation <http://www.publicwelfare.org/NaturalAllies.pdf> [citation omitted]. See further John Greacen, *The Benefits and Costs of Programs to Assist Self-Represented Litigants, Results from Limited Data Gathering Conducted by Six Trial Courts in California's San Joaquin Valley*, Final Report (San Francisco: Judicial Council of California, Administrative Office of the Courts, Centre for Families, Children and the Courts, 3 May 2009).

[162]For example, according to a recent U.S. study, money spent on civil legal assistance for protecting against domestic violence had a significant positive protective outcome. It also had a significant collective economic impact, reportedly saving costs for the Interest on Lawyers Account Fund of New York State for medical care, lost wages, police resources, counseling for affected children, etc., in the amounts of $6 million in 2009 and $36 million over the years 2005-2009. See the Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York* (New York: State of New York Unified Court System, 23 November 2010) at 25-26. For other reports, see e.g. Jonah Kushner, *Legal Aid in Illinois: Selected Social and Economic Benefits* (Chicago: Social IMPACT Research Center, May 2012); Laura K. Abel, "Economic Benefits of Civil Legal Aid" (National Center for Access to Justice at Cardozo Law School, 4 September 2012); Laura K. Abel and Susan Vignola, "Economic Benefits Associated with the Provision of Civil Legal Aid" (2010-2011) 9 Seattle J. Soc. Just. 139; Maryland Access to Justice Commission, *Economic Impact of Civil Legal Services in Maryland* (Maryland: Access to Justice Commission, 1 January 2013); The Perryman Group, *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential* (Waco, TX: Perryman Group, February 2009). For a useful discussion of these and other studies, see Canadian Bar Association, Standing Committee on Access to Justice, "Future Directions for Legal Aid Delivery", *supra* note 78 at 9-11.

[163]The Canadian Forum on Civil Justice, "*The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems*" research project, *supra* note 17, is considering potential allocation issues related to various costs of civil and family justice.

[164]According to Justice Thomas Cromwell, "We have a window of opportunity that comes along quite rarely. Let's not blow it." Hon. Thomas A. Cromwell, quoted in Jeremy Hainsworth, "'Window of opportunity' closing to fix country's access to justice" *The Lawyers Weekly* (10 May 2013), online: Lawyers Weekly <http://www.lawyersweekly.ca/index.php?section=article&articleid=1895>.

Action Committee on
Access to Justice in
Civil and Family Matters

# reaching equal justice report:
## an invitation to envision and act

# equaljustice

balancing the scales

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
INFLUENCE. LEADERSHIP. PROTECTION.

# reaching equal justice report:
## an invitation to envision and act

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Tel.: (613) 237-2925 / (800) 267-8860 / Fax: (613) 237-0185
**www.cba.org**

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# reaching equal justice:
## an invitation to envision and act

Report of the CBA Access to Justice Committee

THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

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# *An invitation to envision and act*

## Dear Colleagues,

A moment of opportunity is at hand: a moment created by a broad consensus on the need for significant change to improve access to justice, and an evolving consensus on the central directions for reform. This report is an invitation to act, to seize that opportunity. Each of us has a responsibility to contribute to our shared vision of equal access to justice across Canada, from sea to sea to sea.

The term **we** refers to all of us, to affirm the important role and obligation of all justice system stakeholders, including the public, to contribute to equal justice. To refer to the authors, members of the Canadian Bar Association (CBA) Access to Justice Committee, **the Committee** is employed.

Our understanding of the prevalence of legal problems and the severe and disruptive impact of unresolved legal problems has grown exponentially over the past two decades. But we have yet to fully translate that knowledge into action. Many organizations are dedicating a tremendous amount of energy and limited resources to new approaches to improve access to justice. Still, we have been unable to knit this work together to make substantial gains.

I sense here a tremendous level of commitment to making meaningful change in access to justice. That deep commitment is necessary because this will take long term sustained effort. I was reminded recently that Martin Luther King's famous speech did not start with "I have a plan". Of course he had a plan but he first needed to persuade people that change was needed and that things could get better. I hope we leave here with a shared sense of the dream and a commitment to do what we can to make it come true… we need a shared understanding of what success would look like.

So I ask: Is there a widespread firm belief that there is an urgent need for significant change? Do we have the dream and is it widely shared? If not, I doubt we will accomplish very much.

***Justice Thomas Cromwell***
***Keynote Speech at CBA Envisioning Equal Justice Summit***
***April 2013***

To mobilize and take advantage of this moment, we first need to convey the abysmal state of access to justice in Canada today. We need to make visible the pain caused by inadequate access and the huge discrepancies between the promise of justice and the lived reality of barriers and impediments. Inaccessible justice costs us all, but visits its harshest consequences on the poorest people in our communities. We need to illuminate how profoundly unequal access to justice is in Canada. We cannot shy away from the dramatic level of change required: in a very fundamental sense we live in "a world thick in law but thin in legal resources".[1] We need to radically redress this imbalance.

This report and the summary report published last summer provide a strategic framework for action, to set a new direction for the national conversation on access to justice. They are meant to present our current state of knowledge about what is wrong, what types of changes are essential, and the steps and approaches we might take to overcome barriers to equal justice. The objective is to bring together and render the key ideas concrete, to enable and encourage action.

**Both reports are designed to engage, rather than dictate or provide 'the answer'**. The goal is to enlarge and change the conversation about access to justice to invite and inspire action.

Our greatest challenge is to simultaneously focus on individual innovations and the broader context of the interdependence of all aspects of access to justice. Collaboration works best when based on a shared understanding of the problem and a shared vision of the end goals. Our central animating principle must be envisioning a truly equal justice system, one that provides meaningful and effective access to all, taking into account the diverse lives that people live.

We have a lot of work to do and that work needs to be shared over a broader segment of the legal profession and other justice system personnel than are currently engaged in the access project. While there are some signs of exhaustion, regeneration is in the air. At the CBA Envisioning Equal Justice Summit in April 2013,[2] we witnessed and participated in a radically different conversation, an energized and optimistic conversation about equal access to justice. The reports build on this important breakthrough.

We are poised to make gains at this juncture, but need to travel a little farther for the momentum already achieved to become an irresistible force and take over. As Justice Cromwell of the Supreme Court of Canada said in his Keynote Address at the Summit, this is a critical moment.

The CBA has already pledged to take action and continue to play its role in contributing to equal access to justice. Members of the Committee have taken this on as a personal challenge

[1] Gillian K Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans" (2010) 37 Fordham Urban Law Journal 129 at 151.

[2] The CBA Committee held the Envisioning Equal Justice Summit in April 2013 in Vancouver, a national event bringing together over 250 people working for equal justice from every province and territory, as well as international guests.

and we urge you to join us. The challenge is to each think of our roles in the justice system more expansively, each working to produce the best possible results for our individual clients, the individual case, in our association or institution, and simultaneously working to produce the best possible justice system. In a riff on the idea of thinking globally, acting locally, the Committee asks you to **think systemically, act locally.**

Though we are all busy, we can integrate this change in perspective, to work simultaneously on the matter at hand while contributing to broader systemic goals. At first this may appear to conflict with our professional duties to give one hundred percent to the individual client or matter. Yet we know that zero-sum thinking is almost always false: few situations are truly either/or. For lawyers, this challenge can be seen as an extension of our professional duty as officers of the court. By thinking systemically and acting locally, we can create real space for justice innovation.

Rather than simply reading this report, the Committee asks you to engage with it. Consider the targets proposed and the change-oriented ideas and ask yourself: **what can *I* do, either myself or working with others, to contribute to equal access to justice?** Every contact between an individual and the civil justice system is an opportunity for either disempowerment or empowerment, a moment to reinforce inequality and social exclusion or to create equality and inclusion.

As craftily stated in a slogan brainstormed during the Summit's closing plenary, we need to just(ice) do it!

Thank you,
CBA Access to Justice Committee

# Introduction

Through the Equal Justice Initiative, the CBA Access to Justice Committee considers four systemic barriers that are blocking efforts to reach equal justice and proposes means to overcome them. The barriers are:

- Lack of public profile
- Inadequate strategy and coordination
- No effective mechanisms for measuring change
- Gaps in our knowledge about what works and how to achieve substantive change

The initiative focuses on human justice, on people law – legal issues, problems and disputes experienced by people (including small businesses), especially those that involve essential legal needs. We understand *essential legal needs* to be those arising from legal problems or situations that put into jeopardy the security of a person or that person's family's security – including liberty, personal security, health, employment, housing or ability to meet the basic necessities of life and extending to other urgent legal needs. Of course, the justice system has an impact on corporations, organizations and institutions, and access issues can arise for these bodies as well, but they are outside of the scope of this report.[3]

The Equal Justice Initiative focuses for the most part on the civil justice system, touching only indirectly on criminal law matters. The Committee recognizes that reaching equal justice engages both civil and criminal justice issues and the interconnection between the two. The focal point is on non-criminal matters because substantive change in the civil justice system has a particular urgency and timeliness, and current initiatives in this area are especially fragmented and under-resourced. There is no hard and fast dividing line, however, and some proposals made here are also relevant to the criminal justice system.

[3] The CBA Legal Futures Initiative considers some of these broader issues.

### Learn More: about the Equal Justice Initiative

*See Part IV of this report for a project description, acknowledgements of the many individuals and organizations who contributed, and Committee members' reflections.*

This report sets out the Committee's proposed strategic framework for reaching equal justice. Based on research and consultations, the framework contains a series of 'targets' reflecting an emerging consensus on what must be done in 31 key areas. The targets are framed as measurable, concrete goals to be achieved at the latest by 2030. Inspired by other multi-sectoral change movements, including the United Nations Millennium Development Goals and approaches used by the environmental movement, the Committee decided to set long range targets for achieving equal justice across Canada. One strong factor influencing this decision is that time will be required to build capacity to evaluate whether reforms work. Part of the change process is increasing our shared capacity for learning and adaptation. The Committee proposes specific timelines for each target, but recognizes that the time needed will differ across regions – certain targets will be more easily achieved in some places than others.

Each target includes milestones (interim goals), as well as actions that can begin right now. The milestones and actions are indicative rather than comprehensive, a starting point rather than a detailed guide. They propose a way forward, recognizing that more detail is required and should be developed over time by those working most closely on the particular target.

While different organizations and individuals may debate the specifics, the targets reflect what the Committee understands to be a general consensus among those working for equal justice as to the

type of action required. Achieving these targets will require individual, coordinated and collaborative efforts – no target falls to a sole justice system player.

This report also gathers together what the Committee has learned over the course of its Initiative and shares it with all individuals and organizations engaged in justice innovation and committed to equal justice. It is a resource for the implementation process, providing background information and detailed discussion relevant to each target. Wherever practicable, it includes examples of emerging good practices and insights from research and evaluations, as well as links to further information.

A summary version of this report was tabled in August 2013 at the CBA Canadian Legal Conference in Saskatoon.

The Committee solicits feedback to these proposals and looks forward to an active and engaged dialogue. At the end of each section is a link to provide your feedback on the targets, milestones and actions, your suggestions on specific innovations and ideas, and your commitment to become involved on the issues on which you are especially passionate. **Please join the conversation and take action!**

> We have a window of opportunity that only comes along rarely - to put it simply, let's not blow it.
>
> ***Justice Thomas Cromwell, Keynote Speech at CBA Envisioning Equal Justice Summit, April 2013***

The Committee's work complements the work of the National Action Committee on Access to Justice in Civil and Family Matters (National Action Committee). Under the stewardship of Justice Thomas Cromwell, the National Action Committee has created a strong awareness of the need for change. Its working group reports have identified a large range of initiatives that have potential for increasing access to justice. The National Action Committee final report provides additional overall guidance, especially on implementing these suggested reforms. The CBA is a member and supporter of the National Action Committee process. Like all members, the CBA has an obligation to contribute what it can. It is anticipated that both the National Action Committee and CBA reports will assist in making the most of this critical opportunity to achieve the substantive change needed to reach equal justice across Canada.

Contemporaneous to the CBA Equal Justice Initiative is the CBA Legal Futures Initiative, a comprehensive examination of the future of the legal profession in Canada. It examines business structures and innovations, legal education and training and ethics and regulation of the profession. Its mandate is to develop original research, consult widely with the profession and other stakeholders and ultimately create a framework for ideas, approaches and tools to assist the legal profession in adapting to future changes. The Legal Futures Initiative identifies access to justice as a foundational value underlying its work.

## Recognizing the Power of Words

Words are the tools of the justice system's trade, yet finding the right words is not always easy. This is especially true in choosing words to refer to groups of people. We often refer to people involved in the justice system as 'clients' or 'users,' but the Committee has opted to instead employ 'people' wherever feasible to avoid reducing the individual's role in the justice system to a passive category of recipient of services.

A particular challenge is finding an elegant, inclusive way to refer to groups of people who have been or continue to be excluded from systems, structures and institutions, including the justice system. It is difficult to find language that recognizes the diversity of identity, experience and social situation without creating an 'us-them' distinction, or, alternatively, ignoring the reality of different needs, capacities and perspectives. It is important to recognize this tension between language that is inclusive and language that reinforces disadvantage. Our approach is to use the phrase "people living in marginalized conditions"

or "situations of disadvantage". While not a perfect solution, nor one that always works in constructing intelligible sentences, it reflects the Committee's intention to show respect by separating the person, who is always a person, from the social and economic situation in which they live, while recognizing that this situation can and often does have an impact on their justice system experiences.

In the report, particularly in the proposed targets, the Committee uses the term "Canadians" to refer to all people living in Canada regardless of their citizenship status.

# PART I

## why change is necessary

# *Why change is necessary*

Public confidence in the justice system is declining.[4] This was apparent during the consultation phase of the CBA Envisioning Equal Justice Initiative.[5] People interviewed randomly 'on the street', and in meetings with marginalized communities consistently described the justice system as not to be trusted, only for people with money, arbitrary, difficult to navigate and inaccessible to ordinary people. The Committee's findings are not unique. Two recent surveys of people who represented themselves in civil courts concluded that the experience usually led to reduced confidence in the justice system[6] as have other public consultations over the past few years.[7]

While there is generally low public awareness about legal aid, opinion polls have shown that when asked more detailed questions, people express strong and consistent support for providing adequate publicly funded legal aid. Polls have shown overwhelming support (91-96%), with 65-74% expressing the view that legal aid should receive the same funding priority as other important social services.[8] Canadians believe justice systems must be accessible to all to be, in fact, just – and publicly funded services are required to get to equal justice. The current lack of confidence in our justice system suggests instead a perception that justice is inaccessible and even unfair.

## People's Perceptions and Experiences of the Justice System Today

Our change strategies and priorities must be grounded in people's experiences of the justice system today. Amanda Dodge pointed out in her presentation at the CBA's Envisioning Equal Justice Summit[9]: "when we gather to dialogue and strategize about increasing access to justice, if we do so without listening to the voices of those we are trying to serve, we risk developing ineffective measures, as well as the legitimacy of our efforts."

This report reflects the Committee's commitment to a people-centered justice system by bringing in the public voice from the outset. The nine 'stories' in this section illustrate typical experiences with the justice system. The stories are composites of many people's experiences, rather than exact events experienced by a particular person. They allow us in some small way to "come face to face with the anxiety and desperation of ordinary citizens who look to our legal system for their fair share of decent treatment."[10] The stories highlight the complex nature of legal problems and deeply rooted underlying causes. They show non-legal dimensions of the situation that often exist prior

[4] See, for example: Julian Roberts, *Public Confidence in Criminal Justice: A Review of Recent Trends (2004-2005)* (report prepared for Public Safety and Emergency Preparedness Canada, 2004); see also, www.angus-reid.com/polls/47831/most-canadians-dissatisfied-with-the-state-of-the-justice-system/; and www.angus-reid.com/polls/48758/british-columbians-dissatisfied-with-current-state-of-justice-system/.

[5] To benefit from the views of people living in marginalized conditions, the Committee held regional consultations with community organizers familiar to those communities. It also worked with Pro Bono Students Canada and law student volunteers to approach people randomly on the street, in different parts of the country, with similar questions. See paper prepared by Amanda Dodge for the CBA Envisioning Equal Justice Initiative, for a summary of the input received from regional consultations regional consultations (Ottawa: CBA, 2013): www.cba.org/CBA/Access/PDF/Community_Voice_Paper.pdf

[6] See, Rachel Birnbaum, Nick Bala, Lorne Bertrand, "The rise of self-representation in Canada's family courts: The complex picture revealed in surveys of judges, lawyers and litigants" (2013) 91 Canadian Bar Review 67(Birnbaum study); Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (May 2013) (Macfarlane study).

[7] See, for some examples: www.lss.bc.ca/assets/aboutUs/reports/legalAid/legalAidPollReport08.pdf; www.legalaid.on.ca/en/news/June-2006b.asp; and www.legalaid.ab.ca/media/Documents/2006/LegalAidAlberta_NewsReleaseNov2006.pdf.

[8] See: www.lss.bc.ca/assets/aboutUs/reports/legalAid/legalAidPollReport08.pdf.

[9] *Supra* note 2.

[10] Laurence H Tribe, Senior Counselor for Access to Justice, US Department of Justice, *Keynote Remarks at the Annual Conference of Chief Justices* (Vale CO: July 26, 2010).

to contact with the justice system but which must also be confronted. Recent consultation reports and studies have confirmed the widespread nature of barriers to meaningful access to the justice system, but nothing is more compelling than stories like those happening to real people every day.

This section also summarizes consultations: these include the Committee's focus group consultations with people living in marginalized conditions; 'on the street' interviews organized by the Committee and those conducted in a separate initiative of the Canadian Forum on Civil Justice. Altogether, 161 people participated in the CBA sessions. In addition, the findings from two recent studies of people who represented themselves in civil courts are reviewed.

## Consultations with People Living in Marginalized Conditions

As part of the CBA's Envisioning Equal Justice Initiative, the Committee worked with community partners in Calgary, Saskatoon, Toronto, Montreal and the Maritimes to hold 13 consultation sessions. These focus group sessions were held exclusively with people living in marginalized conditions: low-income adults and youth; racialized groups; single mothers; and people with disabilities. The conversations focused on two questions: what happens when access to justice is denied and what happens when it is afforded. The results were profound and often shocking, and sadly replicate the perspectives, experiences and themes heard in other recent public hearings and town hall sessions in Ontario, Manitoba and British Columbia.[11]

The consultation outcomes are reported under four themes of what the Committee heard: legal rights are just on paper; justice systems cannot be trusted; justice is person-dependent, and justice systems are difficult to navigate.

[11] See Dodge, *supra* note 5. For the townhall sessions, see Ontario Bar Association, *Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit* (Toronto: OBA, 2007); Manitoba Bar Association, *Town Hall Meeting on Access to Justice: Report and Summary* (Winnipeg: MBA, 2011): www.cba.org/manitoba/main/PDF/Town%20Hall%20Meetings%20on%20Access%20to%20Justice%20Final%20Report%20and%20Summary.pdf; L.T. Doust, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (Vancouver: March 2011).

### Learn More: Perceptions of (In)Justice - What we heard

- Legal Rights are Just on Paper
- Justice Systems Cannot Be Trusted
- Justice is Person-Dependent
- Justice Systems are Difficult to Navigate

***Legal Rights are Just on Paper***

> "It always feels like, oh, that's the law and there's nothing you can do about it." ***Aboriginal woman, Saskatoon***
>
> "It's just too hard; I guess all you can do is pray." ***Aboriginal woman, Saskatoon***
>
> "Once you finally get there and you get an order, there is nobody there to enforce it. This is what I needed. Now that I have an Order, it's not being respected and there is no one to do anything." ***Single mother, Moncton***
>
> "To me, legal rights are an unfulfilled promise." ***Person with disability, Toronto.***

The vast majority of community members acknowledged that the law affords rights and protections, but felt those rights and protections were not honoured or accessible. When asked about legal rights, most participants stated plainly that they did not feel they had any legal rights.

It seemed that as a person's marginalization increased, so did the distance to being able to enforce their legal rights. The primary barrier to feeling as though one could access legal rights was, not surprisingly, a lack of financial resources.

Community members identified many other barriers to accessing legal rights and protections. Commonly mentioned were literacy and language barriers, disabilities (both physical and mental), racial discrimination and level of education. Lack of knowledge seemed to be the greatest initial hurdle to enforcing legal rights. Lack of knowledge and

information also aggravated the *emotional impact* of going through justice processes.

The community members recognized that impediments sometimes depend on the individual. They pointed to certain personality characteristics, like tenacity, or attitudes, such as optimism, as determinative of whether someone would pursue legal rights and protections.

When community members were asked whether the law would protect them from abuses of power, or hold a person in authority accountable for breaking the rules, the most common response was to *laugh out loud*. They pointed to significant barriers to holding authority figures to account: they did not know how to make a complaint; they did not know where to go; there was not enough information about how to do it; they did not think they would be believed or taken seriously; they thought they would be intimidated and made to feel stupid; and they were afraid.

***Justice Systems Cannot Be Trusted***

> "If you believe in the system and think it will help you, you'll get burned." ***Aboriginal woman, Saskatoon***
>
> "Justice is to protect us, not to abuse us. It has been used to overpower or manipulate us." ***Aboriginal woman, Saskatoon***
>
> "I feel intimidated and bullied by the legal system." ***Domestic violence survivor, Calgary***

A strong message heard throughout the consultations is that, inherently, the system is untrustworthy and broken. Several people reported feeling betrayed and abused by the justice system.

The brokenness of the system was evident in the frustrations expressed by community members. Both parties to disputes and adjudications reported that the systems had failed them: offenders and victims, applicants and respondents. Neither side felt the system was fair or had worked for them. There was a sense that they had to find justice on their own.

Excessive and harmful delay was often cited as a frustration. The system itself creates delay. Community members described having to attend court for repeated adjournments, to wait many months to be heard in court, to miss work for repeated court appearances and to wait for legal aid's help. Delay is a frustrating barrier to enforcing legal rights and attaining some measure of justice.

Second, delay is created by community members' lack of information. Insufficient guidance wastes their time. Often the delay is harmful, leading to negative consequences in other areas of their lives.

Some community members defined justice as the right to be heard. Many reported that they were not afforded an opportunity to tell their stories. Even when they did get a chance to tell their story, they often felt they were not believed or taken seriously.

One clear concern was that the justice system does not recognize or understand the social and personal realities of the people living in marginalized conditions progressing through it.

This results in other sorts of problems. One, the system and its actions actually perpetuate or aggravate the problems that got people involved in the system initially.

The second problem created by the system's ignorance of the social and personal realities of people living in marginalized conditions is that it has a "spiraling and multiplying"[12] effect, so

[12] Doust, *ibid* at 21. The feedback outlined in this section is also supported by recent academic research on civil legal needs. See, Ab Currie, "Legal Problems of Everyday Life" in Rebecca Sandefur, ed, *Access to Justice, The Sociology of Crime, Law and Deviance* (Bingley, UK: Emerald Group Publishing, 2009); Ab Currie, *National Civil Legal Needs Studies 2004 and 2006* (Ottawa: Justice Canada, 2006); Ab Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns" (2006) 13:3 International Journal of the Legal Profession 217; Legal Services Corp, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Washington, DC: Legal Services Corporation, 2005); Carol McEown, *Civil Legal Needs Research* (Vancouver: Law Foundation of British Columbia, 2008); Pascoe Pleasence, Nigel Balmer, Tania Tam, Alexy Buck and Marisol Smith, *Civil Justice in England and Wales: Report of the 2007 English and Welsh Legal Needs Study* (London: Legal Services Commission, 2008); Legal Services Agency, *Report on the 2006 National Survey of Unmet Legal Needs and Access to Services* (Wellington, New Zealand: Legal Services Agency, 2006); Ipsos Reid for the Legal Services Society, *Legal Problems Faced in Everyday Lives of British Columbians* (Vancouver: LSS, 2008).

# Eugene's story

At thirty years of age, Eugene lives in a bachelor apartment in northern British Columbia. He is schizophrenic, a disabling medical condition that is hard to control even with medication, and he cannot hold a job. He receives income assistance from the provincial government but his rent subsidy is not enough, as rent is high and there are few rental units in town. He dips into his food budget for rent, and then goes to the food bank.

Eugene hasn't seen his father since his parents divorced several years ago. His mother lives in Vancouver, like him, on a fixed income. He almost never sees his sister in Ontario, who won't return his phone calls because he owes her a lot of money.

Two months ago, some friends came over to visit with a couple of other guys Eugene didn't know. Later, Eugene realized that someone stole the cash he had in an envelope on the shelf to pay his rent and for food. When his rent was due, his landlord said he would give him 30 days grace, but he would have to pay two month's rent at the end of the 30 days, or he would be evicted. Eugene called his income assistance worker but she said there was nothing she can do.

The 30 days are almost up and Eugene only has enough money for one month's rent. His landlord gave him a paper saying he must move out. The stress has triggered his condition, and he can often not get out of bed in the morning. His income assistance worker told him legal aid doesn't help with landlord-tenant disputes, but gave him a toll-free number for legal help. He called the number, but was embarrassed when he didn't really understand what the person told him, and hung up. Right now he is waiting for the police to come and kick him out of his apartment.

problems spread to other areas of their lives, often worsening them significantly.

Lastly, community members often felt that the remedies they obtained from the justice system were not meaningful or trustworthy. For example, women in particular reported enduring the delay, frustration and trauma of family courts only to obtain an order that was meaningless, as not enforced.

***Justice System is Person-Dependent***

> "Having [the] right person is key." ***Person with disability, Toronto***
>
> "[I]t depends on the person ... have they had experience, sensitivity training, do they or don't they know what [they] need to do[?] Sometimes [I] go to family law clinic and [it] depends on whether the nice lawyer shows up..." ***Deaf woman, Durham***
>
> "Some judges are terrific, some have no patience, some want to listen ... others just want to get through [it]." ***Deaf woman, Waterloo***
>
> "With lawyers you get the good with the bad, some who care, some who don't." ***Deaf man, Toronto***

When community members discussed their satisfaction or dissatisfaction with the justice system, it often reflected on the particular justice professional they encountered. Whether the service or experience was effective, fair or compassionate depended on the *individual*, be it the judge, lawyer or police officer. A frequently repeated phrase was 'it's the luck of the draw'.

There were some commendations but more complaints about the quality and compassion of the justice professionals**.**

There were positive comments about judges being open-minded and good listeners, and making fair decisions. However, more often concerns and criticisms were expressed.

Judges were not fully trusted and sometimes viewed as biased. Many community members felt pre-judged when they walked into the courtroom. Some identified factors seemingly unrelated to their case that affected its outcome, such as judge's relationship with the lawyers before them.

The consensus was that having a lawyer increased the likelihood of having help and guidance through the process. Without a lawyer, marginalized community members felt left to flounder. However, whether a lawyer was helpful or effective, whether legal aid or private, was again seen as the 'the luck of the draw'. It seemed that the 'good ones' are the minority; frequently the comment was that if you get a good lawyer, you're 'lucky'.

Many community members expressed dissatisfaction with legal aid lawyers. They complained about poor service, delay, lack of caring, a focus on just wanting to 'do deals', lawyers not wanting to listen and not wanting to fight for them. Community members often believed the cause of the poor service was that legal aid lawyers were overworked and underpaid.

Regarding legal aid's scope of service, community members complained about the limits in service provision, including low financial eligibility guidelines5, and that the services were always reactive, not proactive.

Community members clearly distinguished between legal aid and private lawyers, and generally had a higher opinion of private lawyers. There were repeated comments that when lawyers were paid more money, they were more likely to fight for and do a better job for clients. Private lawyers were perceived as more effective and acting more quickly than legal aid lawyers. Private lawyers were perceived as friendlier with judges than legal aid lawyers and thus more likely to get their way in court.

In spite of these generally negative observations, several marginalized community members had positive experiences. There was some discussion about how more 'good' lawyers, those committed to social justice, were needed. Community members believed that greater financial reward in other areas of the profession was the main reason

# Phuong's story

Phuong was in her local drugstore in Canora, Saskatchewan. It was hot and she wasn't feeling well. She had spent the night before in the emergency room with her sick daughter.

Her first mistake was to use her cloth shopping bag instead of the store basket. She forgot to get a basket at the door, and was rushing to get back to her daughter. Her second mistake was not to double check the bag at the checkout. Two prescriptions were tucked in a side pocket and she forgot to pay for them.

The security guard and the policewoman who came later to arrest her did not believe that she was exhausted and just forgot. She can't understand it, as she buys all her prescriptions at this store and always pays.

Her friend says to call legal aid in Saskatoon, but they won't help as she wouldn't likely go to jail for this. As a personal support worker, she has no money for a lawyer, but there are no lawyers in her community anyway. She goes to court on the day it says on her papers, and a nice young woman introduces herself as the crown prosecutor. Phuong agrees to plead guilty even though she didn't mean to steal – in Vietnam, it is very frightening to be involved with the police. She received a conditional discharge with six months' supervised probation.

A while later, Phuong's boss asks all employees to update their papers for a criminal record check. Phuong has worked for this agency for five years and her clients all love her so she thinks if it comes up, she'll just explain what happened to her manager. But the results go directly to the management office, and Phuong is fired on the spot. Her manager says the company would be sued if they let someone who had shoplifted go into elderly people's homes.

Phuong has no references to show Canadian experience and can't find another job. Employment Insurance declines her benefits because she was fired due to theft. The relative who sponsored her to come to Canada would have to pay for anything she gets from welfare, so she won't consider applying for welfare. She thinks of ending her life, but wonders who will care for her daughter.

there were too few social justice oriented lawyers, but they were aware that such lawyers existed.

***Justice System is Difficult to Navigate***

> "They're supposed to be there to help you, but that's not what happens. If you're asking for help, it's because there's something wrong with you." ***Single mother, Montréal***
>
> "I feel alone and I don't know who I am supposed to contact." ***Single mother, Moncton***
>
> "It is overwhelming ... you feel incapacitated." ***Single mother, Moncton***
>
> "It is the stress of all the steps prior to getting to the step where you can even act out your rights, and you get so frustrated with process." ***Deaf woman, Toronto***

Community members consistently complained that the justice system is confusing and difficult to navigate. They pointed out that ignorance of one's legal rights renders them useless. Information is not readily available. They were unsure where to go for help or which forms to use. People are not directed to the right place and often have no one to guide them. They reported feeling like they were 'running in circles' as systems are not integrated; they are in 'silos'.

Many community members reported that lack of information, help and direction exacted an emotional toll. They described how scary and intimidating it is not to know what is happening, what the options are, what possible outcomes might be, and so on. They mentioned the anxiety, fear, frustration, discouragement and stress involved in progressing through justice systems, encountering seemingly endless obstacles. They also talked about their need for emotional support.

Community members described a justice system that is simply overwhelming, too complex, too complicated. They talked about the many steps involved in pursuing a right or protection, such as obtaining information, translating the information, paying the fee, finding an advocate, arranging for an interpreter, and then tackling the legal issue and the opposing party. It seems a Herculean effort is required to deal with a formalistic, lengthy and daunting process, something they said was very discouraging and often insurmountable.

Other barriers to navigating the system were fear of facing the opposing party, desire for privacy (concerns about the Court or tribunal being a public forum, and lawyers speaking openly about their cases in an open hallway), poverty and financial constraints, transportation, child care, interpretive services and arranging and funding accommodation.

These difficulties and barriers to navigating the system are so frustrating, upsetting and discouraging that many community members said they would 'just give up' rather than tackle those challenges. When they described experiences where they *did* pursue their legal rights or protections, it was often framed as a fight against the odds.

# Glynnis' story

Glynnis' life is a story of abuse and neglect. Both of her parents grew up in residential schools and had serious problems with alcoholism. Glynnis left her northern Alberta First Nation community when she was 14 and has lived outside of Fort Smith, NWT, ever since. She doesn't read or write very well, but held decent jobs until the last couple of years. Her daughter Destiny was born when she was 20. Destiny is well cared for, excels in school and loves her mother very much.

Glynnis has a criminal record; her last offence was possession of a narcotic about 15 years ago. She has continued to use marijuana for years to dull the pain of her past. Recently, she has not been able to keep a job and has started trafficking marijuana to make ends meet. She knows she cannot keep trafficking or she could lose her daughter but her social assistance, about $1100 a month, is not enough for her and Destiny to live on. Recently, police noticed adults and young people coming and going from her house. She has been charged with trafficking.

Glynnis appeared in court without a lawyer and pled guilty to possession of marijuana for purposes of trafficking. She was later sentenced by a Territorial Court judge to three months' imprisonment with one year probation. The pre-sentence report described her painful childhood, difficulties in school, problems with drugs and alcohol, mental health struggles and the positive parenting she has provided to her daughter. It didn't mention her First Nations ancestry or what services her First Nation might provide. The legal aid lawyer at the sentencing hearing was very busy and did not ask her much. The judge concentrated on the fact that young people, including her daughter, had been exposed to her drug operation and sentenced her to 18 months in jail.

Glynnis has had no contact with her band since leaving Alberta, and never thought she'd have access to treatment programs, either through her First Nation or in her small town. She now lives in a women's correctional centre in Fort Smith, over 700 hundred kilometres from Destiny, who is in a group home in Yellowknife. Glynnis has heard girls at the home are involved in drugs or maybe prostitution. She feels worthless and helpless to make things better. She is now using the harder drugs available in the institution.

### Learn More: about Canadians' Perceptions and Experiences of the Justice System

Click here for the full Envisioning Equal Justice *Community Consultation* report

**Other Resources:**

Ontario Bar Association (2007): "Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit"

Baxter, Jamie Albert Yoon, "The Geography of Civil Legal Services in Ontario: Report of the Mapping Phase of the Ontario Civil Needs Project" (2011): www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486236

Manitoba Bar Association, "Town Hall Meeting on Access to Justice: Report and Summary" (2011): http://www.cba.org/manitoba/main/PDF/Town%20Hall%20Meetings%20on%20Access%20to%20Justice%20Final%20Report%20and%20Summary.pdf

L.T. Doust,"Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia" (March 2011).

The Law Society of British Columbia: 2010 Law Society Commissioned Public Opinion Poll of Lawyers and Effectiveness of Law Society.

Ipsos Reid, "Albertans Satisfied with Lawyers" (May 18, 2010): www.lawsociety.ab.ca/files/home/Ipsos_Reid_Release_18May2010.pdf

Mary Stratton and Diana Lowe, Public Confidence and the Civil Justice System: What we know about the Issues (Toronto: CFCJ, 2006): www.cfcj-fcjc.org/sites/default/files/docs/2006/cjsp-confidence-en.pdf

## On the Street Perceptions

Working with Pro Bono Student Canada volunteers, the Committee conducted random interviews with people on the street to ask for their views on whether there is access to justice in Canada, if they would know what to do if they had a legal problem and what they thought a truly accessible system would look like. The Canadian Forum on Civil Justice implemented a similar project and shared their interviews with the Committee. What these people have to say is surprising and affirming, discouraging and inspiring.

First, people were asked to talk about the "dark sky": what a lack of access to justice really looks and feels like. Some of what was said includes:

> "Horrible! The rich get off. If you have money you can walk." ***Older man, Toronto***
>
> "My husband and I are middle income so we have access to a justice system. Those who can't afford access to lawyers do not have access to a justice system." ***Middle aged woman, Victoria***
>
> "You see it every day on the news. The richer you are the more you get away with, and that's just not fair. That's what the judicial system you'd hope would be out of everything, fair." ***Middle aged man, Windsor***
>
> "Often people with fewer resources experience more persecution, marginalization and injustice, and that's not fair. That's something I would really like to see change in the world." ***Young woman, Victoria***

Interestingly, compared to the representatives of communities living in marginalized conditions who participated in the focus groups, people interviewed on the street had less experience with and demonstrated limited knowledge of the justice system. For example, they held false impressions about the availability of publicly funded legal resources.

# Anna's story

Fleeing violence from her husband in Mexico, Anna and her two daughters arrived in Ottawa to claim asylum. She has 15 days to prepare the government forms, find a home, get her girls into school and hire a lawyer. She has one friend in Ottawa, who helps Anna to apply for legal aid. She is approved and given a list of local lawyers.

Her hearing must be within 45 days of her claim being referred to the Board (60 days from her arrival). When she meets her lawyer, she's told to get more paperwork from Mexico to back up her claim that she was in danger there. She writes to the local police force and her family for help. Meanwhile, she is not entitled to work and has no money, so she applies for social assistance.

Her lawyer says she and her girls will need to go to Montreal for the hearing. The social assistance office won't help with travel costs, and if she can't go, her claim will be called "abandoned" with no appeal. Finally, she gets some work "under the table", enough to pay for the bus fare. Still, the Board member in charge rejects her claim – the documents from Mexico didn't arrive in time.

She has no right of appeal, because Canada has designated Mexico as a 'safe' country. She could seek 'leave' to have the Board's decision reviewed by the Federal Court, but will need a Federal Court judge to give her a 'stay of removal' until the other application is heard. As her legal aid certificate only covered the hearing in Montreal, she must reapply for legal aid. Her lawyer says funding was recently cut that would have paid her to provide an opinion about the merits of the case to legal aid. As that program no longer exists, Anna would have to pay the lawyer.

The legal aid application is denied on the basis of "insufficient merit". Anna and her girls are deported back to the situation they fled in Mexico.

However, some people had a good idea of what they would do when confronted with a legal problem:

> "Generally, these are government matters; I would get in touch with the provincial government responsible. I would want to make sure my voice was heard, and whoever I talked to was the correct individual." ***Middle aged man, Windsor***
>
> "I would try to get someone to mediate the problem and come to a win-win situation." ***Middle aged woman, London***
>
> "I have prepaid legal expense insurance that I prepay monthly. I would just call, and they would get back to me within one business day." ***Middle aged man, London***

At the same time, many recognized that resources make the difference between access or lack of access to justice, and said this was unfair and unacceptable. The majority of people interviewed reported that they would be entirely lost as to what to do if they had a legal problem.

> "If I had a justice problem? I wouldn't know what to do." ***Young woman, Saskatoon***
>
> "Where would I go? I don't know.. (long pause). My MP?" ***Middle aged man, Windsor***
>
> "I don't think many people know where to go or what to do to get access to justice." ***Middle aged man, Ottawa***
>
> "I would go to a lawyer, a free lawyer, I can't afford a lawyer, and I would agree with him on the spot… If I had a problem, where would I go for help? The government of Canada." ***Young man, London***
>
> "I would talk to my mother and get her opinion, and then I would call the police… I just know to call the police." Y***oung woman, London***

People were also asked what justice should be, the 'blue sky' picture:

> "Justice is ensuring everyone gets equal rights and benefits within the country no matter what race, gender, religion and sexual orientation." ***Young man, Toronto***
>
> "Anyone in any circumstance should be treated fairly and equal to any other person." ***Young man, Toronto***
>
> "It should be equally as important as our health care. You just don't know when you could have a legal problem and need access to justice." ***Young woman, Toronto***

Everyone interviewed and consulted held high expectations of what accessible justice should be. Some assumed these ideals are already met, but most knew they are not.

## What Unrepresented Litigants Tell Us

The justice system is not proficient at directly surveying client or user satisfaction with their experiences on an ongoing basis, and then learning from it. This is a significant shortfall. Strides have been made by several legal aid programs, public education and information services and governments when introducing recent access programs. New initiatives and pilot projects often have included a user satisfaction evaluation component. Several law societies have also recently conducted surveys on client satisfaction with legal services. Results of these surveys are generally positive; people often express satisfaction when asked about particular services or resources that they have used. But these surveys rarely measure the impact of services on outcomes or in meeting policy goals such as speedy resolution.[13]

[13] A 2010 Alberta Law Society study found that 91% of people who had recently retained a lawyer were satisfied with the 'good cost value' of the experience (presentation by Susan Billington, Policy and Program Counsel, Law Society of Alberta, to International Legal Ethics Conference, July 2012). The Ontario Civil Needs study also noted a widespread public perception that legal fees are prohibitively expensive, but also that 30% of the study's target population with a civil legal problem found free service, and another 20% had paid less than $1000 for help:

# Jill's story

When Jill and her ex husband decided to get a divorce, she went to legal aid in Fredericton, NB. Jill was eligible for assistance, but was told there would be a long wait to meet the legal aid lawyer and another long wait after that for a court date. Jill didn't have time to wait, so decided to stay with the lawyer who had helped her in the past, knew her case already and had fought hard for her. Meanwhile, her ex got a legal aid lawyer. The divorce took over three years and $30,000, as her ex contested every step of the proceedings and a long wait was involved to get back to court each time.

That wasn't the end. Later, her ex stopped paying child support. Jill decided to represent herself, but the judge wouldn't hear her without a lawyer. She went back to legal aid, and again was found to qualify financially. But, the province won't help people proceeding under the federal Divorce Act rather than provincial laws. As she was divorced, Jill had no choice but to proceed under the Divorce Act. Her ex still had a legal aid lawyer: he was "grandfathered in" because he had help in the earlier proceedings.

Jill's lawyer agreed to take the case, which now involved an application to reduce child support and change the custody agreement. The three children were refusing to see their father so he was seeking custody.

Some family members were able to help Jill, and she will have to repay them over time. But, Jill calls her experience with justice and the legal aid system a "let down." She knew her ex had extra income from under the table jobs and had hidden his farm income and buildings by putting them in her son's name, but how could she prove those things. She says someone other than a working mother making minimum wage needs to find out where the support payer is working, and ensure all income is disclosed.

Two recent in-depth studies of unrepresented litigants in courts in several provinces look at services and resources from a different perspective and paint a dramatically different picture. The Committee uses the term unrepresented litigants to refer to people who go to court without the benefit of legal counsel because the majority of these people would prefer to be represented but cannot access a lawyer's services. The more common practice is to refer to this group as self-represented litigations (SRLs for short). In this report the two terms are used interchangeably. This section summarizes what these recent studies learned about the experience of unrepresented litigants. The next section reports more broadly on what we know about the increased number of unrepresented litigants and the reasons for this phenomenon.

In the first report, Drs. Rachel Birnbaum, Nicolas Bala, and Lorne Bertrand studied unrepresented litigants in family courts[14] (Birnbaum Study). The authors combined four interrelated surveys: one of judges, two of family law lawyers in Ontario and Alberta, respectively; and one of family law litigants in Ontario. While each group had a different perception of the causes and consequences of being self-represented, there were some common themes.

Judges, lawyers and litigants were united in the belief that unrepresented litigants fare worse in court and experience poorer outcomes compared to those who have access to lawyers.

A majority of self-represented litigants (67%) reported that navigating the court system was difficult or very difficult. 49% believed the lack of a lawyer made the process slower or much slower, though a significant portion (31%) felt that lack of representation did not slow down resolution. Many believed that lawyers for the opposing party usually made problems for the self-represented in court worse than they need to be.

From the perspective of represented litigants, 72% reported that they expect a much better outcome as a result of having a lawyer, and many expected the court process takes less time with a lawyer than if they had been unrepresented. Comments from represented litigants about the court process and the value of having a lawyer included:

> "There is a lot of information available for people to learn about the court system but reading all of that information is just too much. I might as well go to law school to learn all of these things. I am happy that I decided to get a lawyer." ***[female]***

> "Custody of my children is an important matter and I would not trust myself if I had to be self-represented. My lawyer handles things for me and explains the system to me which is definitely easier." ***[female]***

(No significant differences were identified between male and female litigants on these issues.)

Judges express concerns about whether SRLs experience fair outcomes, including that they tend to be "unable to articulate their case" or "fail to address the issues that are probative". In addition, judges commented that unrepresented litigants "are often overwhelmed by their emotions" and generally tend not to explore all possible scenarios. Both judges and lawyers expressed particular concerns about the inequalities experienced by SRLs who were victims of domestic violence.

There were greater distinctions in the survey responses about how well SRLs are treated by judges. Most lawyers (57% in Ontario and 77% in Alberta) believe that self-represented litigants are treated "very well" by the judiciary. They report their own clients' perception that judges generally tend to favour unrepresented litigants. However, only 14% of the self-represented and 9% of the represented litigants believe the self-represented are very well treated. On the other hand, only a relatively small percent of each group feel that self-

R. Roy McMurtry, Chair, *Listening to Ontarians, Report of the Ontario Civil Legal Needs Project* (Toronto: the Ontario Civil Legal Needs Project Steering Committee, 2010) at 57. See also: www.lawsociety.bc.ca/newsroom/2010lawsocietycommissionedpoll_table.pdf.

[14] *Supra* note 6. Their results are published in the Canadian Bar Review, "The Rise of Self Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants". The discussion following in this section summarizes their findings.

# Winsome's story

At 75 years of age, Winsome worked as a housecleaner for most of her adult life in the Yukon. She has lived alone since her husband died ten years ago and rarely sees her daughters. She owns the small home where she and her husband raised their children, and has a fixed income that just covers her monthly expenses. She saves what she can.

Winsome recently co-signed a car loan for her grandson, who needs a car to get to work and take his four kids to school and daycare. The used car dealer asked Winsome to sign some papers, and she assumed it must be OK, though she didn't really understand what they said. The dealer and her grandson were in a hurry.

Now, her grandson is behind in his payments, and Winsome is told that if she doesn't pay $2500 immediately, the car dealership will repossess the car and "commence proceedings" to sell her home to get the money owed. Her grandson promises it won't happen again. Her daughters have their own financial stresses and tell her not to pay and hope for the best.

Winsome doesn't know who to call. Her friends say it costs hundreds of dollars just for a lawyer to write a letter. One friend gives her a website address that she says will help, but Winsome has never operated a computer. She has a toll free number for legal information, but after Winsome waits a long time, she doesn't understand what the person tells her to do. She is embarrassed to ask again. In the end, she writes a cheque for $2500 and mails it to the company. She is left with about $500 in her savings account and is terrified this will happen again.

represented litigants are "not well treated at all" by judges.

Some of the comments from those who were unrepresented and who expressed concerns about treatment by judges as a result of not having a lawyer include:

> "Judges can be very disrespectful to litigants who do not have lawyers. For example, they raise their voice and use rude names. I was so surprised that a judge was allowed to call me a name." ***[male]***
>
> "I hope they [judges] do [treat us fairly] but I don't know. ... they [judges] treat them [self-represented] differently cause don't all lawyers know each other and the judges?" ***[male]***
>
> "It seems to depend on the judge. Some judges are friends with some lawyers, and if they are friends with that lawyer, they'll be gentler with their client." ***[male]***
>
> "It's about the judge's character, not about you. That's what I learned early on, to not take things personally cause otherwise you will go crazy." ***[female]***

Some comments from represented litigants reflected similar perceptions about the treatment of the self-represented by judges, which may have influenced their decisions to seek representation:

> "...probably not treated too well. My friend was in court before and she didn't have [a] lawyer and she's the one who told me to get one, so maybe she felt disadvantaged." ***[female]***
>
> "I have previous experiences as self-rep, judge did not listen to me." ***[female]***

The Birnbaum study also found that unrepresented litigants reported that available self-help materials had limited value. Those surveyed recognized that many family litigants did not have the education or literacy skills to benefit from these materials and that some had disabilities that prevented them from using them.[15]

The second study led by Dr. Julie Macfarlane of the University of Windsor Faculty of Law (Macfarlane study) is a scathing indictment of the justice system, and critically important, if uncomfortable, reading for all judges, justice system personnel and the legal profession.[16]

The study involved interviews with over 250 individual SRLs. Participants were broadly representative of the general population. Most were older, had some post-secondary education and an annual income of under $50,000. Over 60% of those interviewed were appearing in court on family law matters, 18% on other civil matters and 13% on small claims matters. More than half the SRLs started with counsel but were unrepresented at the time of the interview (almost always for financial reasons). Over 100 interviews were also conducted with counter staff at court registries, clerks (and some managers) at the courthouses, staff at court programs serving SRLs and duty counsel.

The study details what Macfarlane refers to as the 'arc' of the SRL experience: from optimism to disillusionment, and from bad to worse. She includes some telling quotes from the SRLs surveyed:

> "No more fairy tales about having access to a justice system."
>
> "I am here because I have no other option. I am just a mom, trying to figure this out. It was so complex, daunting, intimidating."
>
> "I didn't think that it would come down like a deck of cards. It's an extremely sharp game… I became a bundle of nerves."

[15] *Ibid*.

[16] Marfarlane, *supra* note 6.

# Monique's story

Monique separated from her husband, a difficult controlling man with bipolar disorder, in 2006. She was relieved when he left, and could not face negotiating with him to get a divorce. The bills continued to come in – credit cards, lines of credit and the mortgage. Her husband provided no financial support. As a 66 year old accounting clerk in Montreal, Monique struggles to pay the bills.

In 2010, Monique borrowed $1000 from her daughter to see a lawyer for a divorce, but after the initial consultation, she did not follow up. She slipped into a depression and had to push herself to get through each day. She also feared what would happen if her husband was served with divorce papers.

Monique tried to keep up with the minimum monthly amounts required, borrowing from one credit card to cover the minimum payment on another. She also borrowed money from her adult children, though she found it embarrassing. By 2012, she was seriously in debt and behind in all payments.

A letter from her bank arrived, saying her mortgage was in arrears and they were going to foreclose. Monique and her son went back to the lawyer. The lawyer dealt with the bank and stopped the foreclosure. He assisted Monique in negotiating a deal with her husband and a separation agreement was signed. Monique found a bank that gave her a mortgage in her own name. But just before this was completed, a review of the property registry uncovered that her husband had been sued on a business debt in 2010 and a judgment was registered against the marital home for $25,000. Monique needs to start a court action to attempt to remove this from her house.

The whole thing seems insurmountable. Monique's stress increased and her health declined. After seven years of struggling, she is no farther ahead. She has borrowed over $40,000 on credit lines and from family since the separation, trying to stave off bankruptcy. Her husband has since retired and his health is declining. She sits alone at home and cries, waiting for the next foreclosure notice.

> "My expectations? I can't even remember my expectations anymore. My life just fell apart."
>
> "When I took the forms in to the court, the clerks told me that I had filled the forms in wrongly. I burst into tears. The journey from my home to the courthouse was a 150 mile drive and a ferry ride."
>
> "…as a person with a chronic illness it has been challenging to learn about court procedures and laws. I chose to represent myself because I am on a fixed income and can no longer afford counsel. I have spent all my life savings and more on a five-year divorce process."
>
> "When you read information on the Internet and then it refers you to something else – which refers you to something else – by this time you are overwhelmed. It is endless mayhem."[17]

Most participants in this study had distressing experiences at legal hearings and felt they had been poorly treated by judges and opposing lawyers. They reported feeling embarrassed and humiliated and that they were the targets of an overwhelming bias. It is important to recognize that these perspectives are one-sided. In the Birnbaum Study, the authors point out that it is difficult to assess the validity of these concerns and some SRLs engage in inappropriate conduct, requiring strong direction from the court, or may be overwhelmed and misunderstand what has happened. While it is important to keep these cautions it mind, they cannot be used to discount these negative experiences or as a reason to ignore these widespread concerns. Both Birnbaum and Macfarlane studies underscore the importance of including all voices, particularly those who come to the justice system for help, in addressing access to justice issues.

The main findings of Macfarlane's research include:

- Some SRLs began with a reasonable sense of confidence; others began with trepidation. However within a short time almost all the SRL respondents became disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming.
- While online court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and SRLs often find they have made mistakes and omissions.
- There has been some progress towards developing user-friendly and simplified court forms, but far too little.
- A law student [employed by the researcher] tried to apply for a divorce in the three provinces and found that even with legal training, the forms were confusing, contained terminology she did not understand, and required an enormous amount of work and concentration.
- Court guides are an important step to assist SRL's to complete forms and understand court procedure but are too often written in a confusing and complex manner.
- SRLs who anticipated that the proliferation of on-line resources would enable them to represent themselves successfully became disillusioned and disappointed once they tried to work with what is presently available on-line. On-line resources often require some level of understanding and knowledge to make the best use of them.
- The study data also shows that no matter how comprehensive and user-friendly (standards we are far from meeting), on-line resources are insufficient to meet SRL needs for face-to-face orientation, education and other support. Enhanced online technologies can be an important component of SRL programming – for example sites developed specifically for SRL's using interactive technology – but cannot provide a complete service.
- Staff working on the court counters and information services are asked to distinguish between offering legal information and advice. Both SRLs and court staff consistently complain about this distinction, at best unclear and at worst practically unworkable. The present situation places an unfair burden on court staff required to make constant determinations of how much

[17] *Ibid* at 51-64.

information they can provide to frustrated SRLs. This leads to inconsistent applications and creates a barrier between SRLs and certain basic information if construed as 'legal advice'.

- Court and agency staff described an almost identical set of frustrations and challenges as SRL respondents. They also mirrored the primary frustrations and challenges of the SRLs. Court and agency staff work under enormous pressure in dealing with the growing SRL population and constantly changing court forms and procedures. These are very stressful jobs, for which they are often poorly trained and remunerated.
- Service providers universally recognized the frustrations of SRLs as a source of pressure on the justice system in general, and on court staff and judicial officers in particular.

Macfarlane's study is a call to action. It details the serious implications of SRLs' experience in attempting to access the justice system with inadequate information, assistance, representation and accommodation by the court system. These implications include: serious personal health issues, financial consequences (including giving up work to prepare for their court case or interference with their employment), social isolation due to the toll of navigating the justice system and failing faith in the justice system.[18]

She concludes that it is difficult to overstate the "depth of skepticism" about the justice system resulting from the direct experiences of SRLs. While accepting that "some of the most extreme reactions border on the paranoid", on the whole SRLs appraise their experience in a rational and balanced way in concluding that the justice system is "broken".[19]

[18] *Ibid* at 108-110.

[19] *Ibid.*

## Learn More: about the Experiences of SRLs in Canada

Macfarlane study:
*The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report* (May 2013)

Birnbaum study: "The rise of self-representation in Canada's family courts: The complex picture revealed in surveys of judges, lawyers and litigants" (May 2013):
www.cba.org/cba_barreview/Search.aspx?VolDate=05/01/2013

Macfarlane et al, *Annotated bibliography of work on SRLS:*
www.representing-yourself.com/bibliography

Ann Sherman, *A Study of Self Represented Litigants in the Supreme Court of Prince Edward Island* (2008):
www.cliapei.ca/sitefiles/File/Project%20Files/SRL%20Report.pdf

Trevor Farrow, Diana Lowe, Bradley Albrecht, Heather Manweiller and Martha E. Simmons, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System* (Toronto: CFCS, 2012):
http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Addressing%20the%20Needs%20of%20SRLs%20ACCA%20White%20Paper%20March%202012%20Final%20Revised%20Version.pdf

Macfarlane blog:
www.drjuliemacfarlane.wordpress.com/

Richard Zorza Access to Justice blog:
www.accesstojustice.net/

**Some Tools for SRLs:**

For international, national and provincial resources, visit The National Self-Represented Litigants Project:
www.representing-yourself.com/resourcessrl.html

American network and resources for self-representation, SelfHelpSupport.org:
www.selfhelpsupport.org/

## What We Know and Don't Know about Access to Justice

We have little hard data about Canada's justice system – especially relative to what we know about our healthcare and education systems. Much of what we do know about the system is anecdotal – descriptions rather than measurements.

> Canada's justice system: how does it measure up? Good intentions, usually, some promising reforms. But too many people still can't enforce basic rights.

An international surge in empirical research on the prevalence of civil justice problems, unmet legal need, and their impact on people's lives provides an important knowledge foundation. But we still know relatively little about what works to increase access to justice and how and why it does. Gaps in our knowledge hinder our progress in achieving equal access to justice.

In this section, the Committee draws together available data to provide a patchwork answer about the dimensions of access to justice problems in Canada. It is not comprehensive but rather a partial picture based on indicia of barriers.

### Prevalence of Civil Legal Problems and Patterns of Resolution

The biggest evolution in our knowledge base comes from large scale civil legal problem surveys by Dr. Ab Currie and his international colleagues. These surveys tell us about the high incidence of civil legal problems and the fact that they have a "pervasive and invasive presence in the lives of many".[20] The results are similar over time and in various countries.

Over three years, **about 45%** of Canadians will experience a justiciable event,[21] meaning that over the course of a lifetime almost everyone will confront such a problem. Dame Hazel Genn, a pioneer in this field, defines a justiciable event as:

> a matter experienced by a respondent which raised legal issues whether or not it was recognized by the respondent as being "legal" and whether any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.[22]

Civil legal needs arise frequently, touch on fundamental issues and can range from creating minor inconvenience to great personal hardship. The disruption caused by unresolved legal problems is significant and can cause cascading problems for individuals and families.

These surveys also draw an important link between unresolved legal problems and issues of health, social welfare and economic well-being, social exclusion and poverty. In addition to fostering problems in non-legal areas of life, people who experience one legal problem are much more likely to experience more than one, and this is especially true for people living on low incomes and conditions of disadvantage, as the stories in this section so vividly illustrate.

Vulnerable groups generally have more contact with the law than others. A broad-scale study by the Law and Justice Foundation of New South Wales found that **22% of people have 85% of legal problems.**[23] Canadian studies have made the same findings: legal problems tend to 'cluster', multiply, and have an additive effect and this pattern of cascading problems disproportionately impacts people living in marginalized conditions.[24] For every additional problem experienced the probability of experiencing more problems increases.

The surveys also provide an overview of the steps people take or do not take to deal with civil legal problems. Both the experience of legal problems and patterns of resolution are different for different

[20] *Supra* note 12. See, press release for *Listening to Ontarians*, *supra* note 13 www.lsuc.on.ca/media/may3110_oclnreport_final.pdf

[21] *Ibid.*

[22] Dame Hazel Genn, *Paths to Justice: What people do and think about going to law* (Oxford: Hart Publishing, 1999) at 12.

[23] Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. MacDonald, Zhigang Wei, Reiny Iriana & Stephanie Ramsey, *Legal Australia-Wide Survey: Legal Need in Australia* (Sydney: Law and Justice Foundation of NSW, 2012) at 14 [LAW Survey].

[24] Currie (2006), *supra* note 12.

# Dave's story

Dave has two children, aged 7 and 5. Their mother, his common-law spouse Mona, aged 26, has not completed high school nor held a job and has had a drug addiction for many years. She kept telling Dave that she quit, but he didn't believe her. Dave works a full-time job in Dartmouth. He had someone in the apartment building keeping a watch on his family, he came home on his lunch hours, and was with the children every weekend while Mona stayed out late. He bought the groceries, cooked the meals and cleaned the house. He knew she wasn't capable of caring for the children alone.

One Friday, Dave refused to give Mona more money for partying, and she told him to leave. On Monday, she went to legal aid in Halifax and got a lawyer. She said she was the primary caregiver and wanted to claim custody of both children. Dave wanted legal advice but could not afford the $5000 retainer charged by most law firms.

He was rejected at legal aid because he earned too much money. Legal aid gave him some pamphlets.

Dave was devastated when he was served with the papers. He approached Mona to talk about a custody agreement, but she knew she would get child support and the child tax benefit if she had custody. Dave raised his voice in frustration and Mona called the police, claiming he was threatening her. Dave spent the night in jail, and was released on the condition that he have no contact with Mona. That means he cannot arrange access except through the legal aid lawyer. It takes days to coordinate a visit, and even then Mona cancels about 50% of the time.

Working 50 hours a week in construction, Dave now spends his nights trying to figure out how to represent himself. He reads the materials from legal aid and talks to friends but he is exhausted and can't figure this out. He can't sleep, and he is very scared for himself and for his children

groups in society, between low income and middle income people.

Most justiciable problems are resolved outside the formal justice system. While positive outcomes can certainly be achieved outside the justice system, it is important to a fair negotiated result that the system be perceived as available and accessible to all parties to get the help they need and enforce their rights. In contrast, the justice system is currently poorly understood or perceived to be inaccessible by many people, and this perception in itself can be seen as a barrier to access. Vulnerable groups in particular may not respond to problems because of perceived or actual barriers to getting help, and research has shown that legal assistance results in better outcomes.[25]

The surveys identify other barriers to finding solutions to civil legal problems, including:

- the complexities of the legal system;
- the qualification process for legal aid;
- too little legal aid coverage for civil legal problems;
- lack of knowledge about the legal system and resources available to support individuals, especially knowledge regarding how to access legal aid or affordable legal services and information;
- fear of becoming involved in the legal system, particularly for those who had previous experience with the civil or criminal legal system;
- the stress of pursuing resolution of legal problems;
- concerns about damaging relationships;
- being intimidated by the court system and generally afraid to take action;
- embarrassment and fear of stigmatization for having a legal problem; and
- fear of loss of privacy.[26]

[25] Russell Engler, "Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?" (2010) 9 Seattle Journal for Social Justice 97 at 117; Rebecca Sandefur, "The Impact of Counsel: An analysis of the empirical evidence" (2010) 9 Seattle Journal for Social Justice 51.

[26] Summary of findings of studies at *supra* note 12.

## Differential Impact of Access Denied

Socially excluded groups are more vulnerable and this vulnerability compounds the effects of unresolved legal problems. It also makes it more challenging to navigate the justice system.

Dr. Patricia Hughes of the Law Commission of Ontario points out that access to justice may be restricted because of geographic factors, institutional limitations, racial, class and gender biases, cultural differences and economic factors. Not only are people living in disadvantaged conditions or socially excluded groups more vulnerable to experiencing multiple legal problems, they are less likely to take action to resolve these problems, less capable of handling their problems alone and more likely to suffer a variety of adverse consequences that may well further entrench their social exclusion.

Individuals and families living on low incomes often experience additional problems that make finding the time and energy to deal with legal issues even more of a hurdle:

> People in poverty who lack services often have legal needs on top of other needs. Even if services could meet the legal needs, the client may not return because their legal needs get subsumed by other needs – accommodation, mental health. Unless other needs are met, legal needs will not be met.[27]

Specific communities have been identified as facing particular barriers in accessing the legal assistance they require to deal effectively with their civil legal problems. Generally, people living in poverty have lower levels of education and literacy. They disproportionately experience physical and mental health and addiction issues, or have experienced significant trauma in their lives compared to people living at higher income levels. According to British Columbia's Legal Services Society report, *Making Justice Work*:

> Legal aid clients are among the most marginalized citizens. They lack the financial

[27] Patricia Hughes, *Inclusivity as a Measure of Access to Justice* (paper prepared for CBA, Envisioning Equal Justice Summit, Vancouver, April 2013).

# Arthur's story

A while after their marriage ended, Arthur and his ex-wife stopped adjusting the child support for their three children every year. Arthur knew his ex-wife was remarried to a doctor and was comfortable financially. But, when the first child was ready to go to university, his ex-wife's lawyer served him with papers, demanding money for university expenses and retroactive support increases for the past three years.

Arthur runs his own business in Winnipeg and makes about $60,000 a year. He had expected his share of university expenses to be about $10,000 a year per child, and didn't want to pay more for legal fees. A child support variation would not be more complicated than running his own business successfully, he thought.

He figured out which forms to complete, but called the courthouse with one question. The clerk said he could not provide legal advice, but gave Arthur an internet site to research. He finished the defence at 2am the day it was due.

He had neglected his business working on the case, and felt relieved to finally deliver the papers to the courthouse for filing. The clerk passed it back to him, saying he'd "not complied with the rules of court". When Arthur asked what was wrong, the clerk said he could not provide legal advice. As a taxpayer, Arthur was furious that the clerk would not help him. He looked on the website again, but couldn't find the answer. He did find a toll free number, and after 45 minutes on hold, he spoke with the volunteer lawyer. He had failed to attach his tax returns.

Once the documents were filed, Arthur started educating himself on the Child Support Guidelines to see what he should expect to pay. His friends all had conflicting advice, so that wasn't helpful. He read case law he found online but didn't know what he was looking for, exactly. He missed the HST filing deadline for his company.

Arthur arrived at the courthouse, exhausted and nervous. His ex-wife's lawyer arrived and spoke to him before the judge came in. Soon he realized that they were talking about a settlement of the issues. Arthur had no idea whether the deal proposed was good or bad for him but he was overwhelmed. He took the deal.

> means to effectively access the justice system when their families, freedom, or security are at risk. Almost 70% have not graduated from high school, and many struggle with basic literacy. Others face linguistic or cultural barriers. Over 25% are Aboriginal; in some communities, this rises to 80%.[28]

The Legal Australia-Wide Survey (LAW Survey), described as the most comprehensive quantitative assessment of legal needs ever conducted in Australia, found that "65% of legal problems were experienced by just 9% of the respondents, and 85% of problems were experienced by 22% of respondents."[29] Specifically, people with disabilities and single parents were twice as likely as other respondents to experience legal problems. Unemployed people and people in poor housing were also especially impacted. Aboriginal people were more likely to experience compounded problems, involving government, health issues and rights related problems.[30]

The Ontario Civil Legal Needs Project looked at the unmet legal needs of people earning less than $20,000 per year, and found a disproportionate number of women (62%) were impacted; most often single, divorced or widowed. They also found disproportionate representation from equality-seeking communities, particularly people with disabilities. The population was more likely to be unemployed, retired or receiving disability benefits – and almost half were receiving income assistance. The conclusion was that "the poorest and most vulnerable Ontarians experience more frequent and more complex and interrelated civil legal problems."[31]

## Private Market Legal Services

The research on civil legal needs demonstrates that many people do not use legal avenues to deal with justiciable problems and only a small minority turn to lawyers. The reasons are complex, including both the perceived and actual cost of a lawyer's services and a tendency to view problems as something that 'just happens', rather than as legal problems.[32] This is an area of active research.

We know little about supply and demand in the legal market for personal legal services. US legal scholar Gillian Hadfield recently noted that the legal marketplace for individuals is poorly documented – meaning it is difficult to understand how well or poorly this marketplace resembles a properly-functioning market.[33] We cannot provide accurate figures for the dollar value of this part of the legal market, the average amounts spent by consumers of legal services, or the amounts earned by lawyers in a comprehensive way.

Surveys on private-market legal services conducted by several Canadian law societies have come to consistent results. The main problem people identify in accessing legal assistance is perceived or actual cost. At the same time, studies show that having legal assistance generally results in better outcomes for the people involved.[34]

One survey found that one quarter of those who resolved their issue alone felt they would have achieved a better outcome had they used a lawyer. One half of respondents, however, felt it would have made no difference, while 16% thought they would have a worse outcome. The main reasons given for hiring a lawyer were that the legal issues were too complex to handle alone and a lawyer would help to achieve a better result.

While complaints about lawyers' fees are often heard, the studies show that clients who have actually retained counsel are generally satisfied, both with the service received and the amount they paid.[35]

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[28] Legal Services Society, *Making Justice Work* (Vancouver: LSS, 2012) at 8.

[29] LAW Survey, *supra* note 23, one page summary: http://www.lawfoundation.net.au/ljf/site/templates/LAW_AUS/$file/LAW_Survey_Summary_FINAL.pdf

[30] *Ibid*.

[31] Ontario Civil Legal Needs Project, *supra* note 13 at 45.

[32] Rebecca L Sandefur, "Money isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services" in Michael Trebilcock, Anthony Duggan and Lorne Sossin, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

[33] Hadfield, *supra* note 1. See also Sandefur, *ibid*.

[34] Engler, *supra* note 25 at 117; Sandefur, *ibid*.

[35] *Supra* note 13.

Another important trend is that people want more active involvement in the management, strategy and decision making about their legal matters, and more certainty in terms of cost. People seek legal information to enable them to make more informed choices, but often get advice from friends and family, rather than legal professionals.

There is also a movement away from 'all or nothing' lawyering, with clients seeking legal advice and assistance for parts of their legal problems rather than following the traditional full representation model. Lawyers are responding through unbundled legal services, alternative billing arrangements, specialized law firms, and in other ways, but significant gaps in private market services remain and contribute to unequal justice. The two current CBA initiatives (Equal Justice and Legal Futures) are considering these means of providing legal services, along with related concepts like preventative lawyering, use of technology in dispute resolution and non-lawyer providers of legal services, as potential innovations for increasing access to justice.

## Public Legal Services

Publicly funded legal services are provided by legal aid plans in each province and territory, but plans cannot meet current demands for legal help. There are huge regional disparities in who can access legal aid based on financial eligibility, the types of legal matters covered, and the amount and type of legal assistance and representation provided. One illustration of these disparities is that the national average annual per capita funding for legal aid (both criminal and civil matters) is $16.21, but it ranges from only $10.32 in one province to close to $30 in another.[36]

In some jurisdictions, there is no legal aid (beyond information) for many civil legal problems that affect areas of vital interest, such as housing. Some legal aid services such as public legal information are generally available to all, but most assistance and representation is available only on the basis of means testing. Often, an individual or family has to be receiving social assistance or earning just above this threshold to qualify for legal aid. Currently in Alberta, even recipients of Assured Income for the Severally Handicapped are ineligible for legal aid. People working full time for minimum wage qualify for legal aid only in a few provinces. The Barreau du Québec implemented an advocacy campaign to raise eligibility rates so that those earning minimum wage qualify for services, and Québec has recently announced a significant increase in eligibility levels.[37]

> "[I was ineligible] simply because [I am] a hardworking, frugal and responsible citizen."
>
> ***B.C. resident***

At the Summit, Nye Thomas, Director General, Policy and Strategic Research at Legal Aid Ontario (LAO) noted that LAO offers a broad range of legal aid programs and covers a range of essential legal issues, but has a lower eligibility threshold than all legal aid standards in Canada and the US. In a recent study, LAO analyzed its financial eligibility guidelines against Statistic Canada's Low income Measure (LIM) – a common measure of poverty in Canada. They found a wide and growing gap between LAO financial eligibility and LIM in Ontario. Today, a single person earning more than $208 per week would not qualify for legal aid representation in Ontario. The impact of this gap has been significant. Since 1996, all demographic groups have lost ground relative to LIM. Fewer than 7% of all Ontarians are currently eligible for full representation legal aid, even though more than 16% live below the LIM.[38] LAO estimates approximately 1 million fewer Ontarians are financially eligible for a legal aid certificate today than in 1996. This means more hardship, less access to justice, more court delays, more court ordered counsel and more unrepresented litigants. Absent corrective action, things will get worse. Other provinces have more generous eligibility guidelines

[36] Statistics Canada, Canadian Centre for Justice Statistics, *Legal Aid in Canada: Resource and Caseload Statistics 2011/2012* (Ottawa: Government of Canada, March 2013).

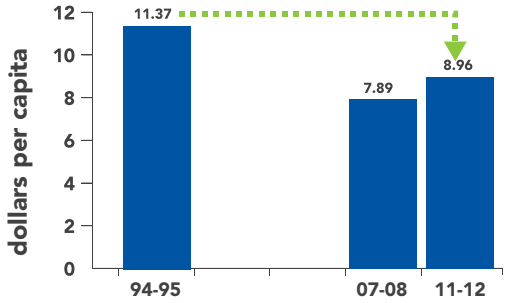
[37] See: www.justice.gouv.qc.ca/english/ministere/dossiers/aide/aide-a.htm

[38] Nye Thomas, Presentation at CBA Envisioning Equal Justice Summit (Vancouver: April 2013): www.cba.org/CBA/cle/PDF/JUST13_Slides_B1.pdf

but ration legal aid by providing it in a smaller range of legal matters.

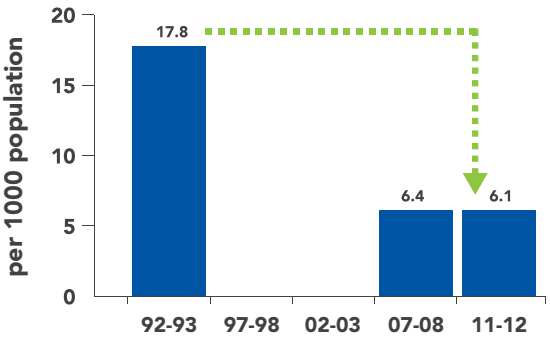
The current inadequacy of civil legal aid is largely attributable to underfunding. Although there has been some increased funding for legal aid in the past five years, a longer range perspective shows a 20% overall decrease from the pre-1994 spending on civil legal aid.[39] This trend is illustrated in Chart 1: Civil legal aid spending per capita, 1994-2012. In 1994-1995, governments spent $11.37 on a per capita basis, declining to a low of $7.89 in 2007-2008 and rebounding slightly in 2011-2012 to $8.96.

**Chart 1: Civil legal aid spending per capita, 1994-2012**[40]



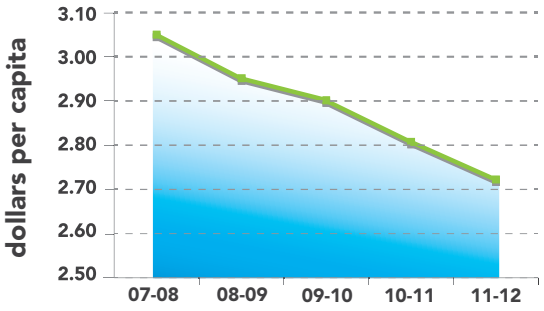

The reduction in legal aid funding and its particular impact on non-criminal matters is illustrated in Chart 2: Approved applications for civil legal aid, 1992-2012. Over two decades, the number of approved civil legal aid applications was reduced to a third: in 1992-1993, there were almost 18 approved applications for every 1000 Canadian residents; by 2011-2011 this number hovered just over six for every 1000 people. This represents a 65.7% decline.

**Chart 2: Approved applications for civil legal aid, 1992-2012**[41]




One major change is that the federal government has gradually reduced contributions to criminal legal aid from a high of 50-50 sharing until 1995, to now contributing about 20-30% of the cost. At the same time, the federal government discontinued dedicated funding for civil legal aid in 1995. Direct per capita spending by the federal government on criminal legal aid is illustrated in Chart 3, Federal contributions to legal aid plans.

**Chart 3: Federal contribution to legal aid plans (criminal legal aid) (per capita, 2002 constant dollars)**[42]




The next chart illustrates rising provincial and territorial spending on legal aid over the same period, for both criminal and civil matters. Any federal contribution to the provinces for civil legal aid is contained in a global transfer (first called the

[39] Ab Currie, "The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012" (Toronto: CFCJ, 2013): www.cfcj-fcjc.org/commentary/the-state-of-civil-legal-aid-in-canada-by-the-numbers-in-2011-2012

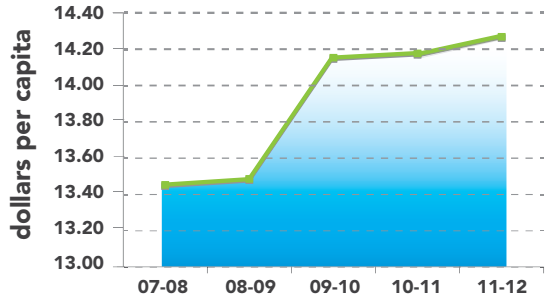
[40] "Current levels of expenditures and services are considerably lower than the historical high levels in the early to mid 1990's. In 1994-1995 direct service expenditures on civil legal aid were $329,787,000. This was $11.37 per capita. In 2007-2008 per capita direct service expenditures had declined to $7.89 per capita ($259,946,000). Per capita direct service expenditures on civil legal aid increased to $8.96 in 2011-2012 ($309,022,000). This represents a 13.6% increase in per capita direct service expenditures over the recent five-year period. However, it reflects a 21.2% decline from the level of per capita direct service expenditure in 1994-1995." *Ibid.*

[41] *Ibid.*

[42] Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t003-eng.htm

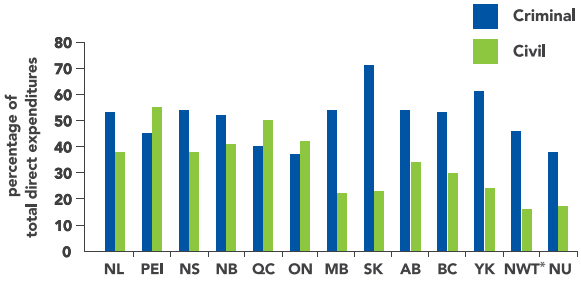
*Canada Health and Social Transfer*, now the *Canada Social Transfer*), to allow regions to determine their own priorities. For that reason, it is impossible to say what, if any, federal contribution actually goes to civil legal aid. Provincial and territorial Ministers of Justice have recently challenged the existence of a federal contribution for civil legal aid in the *Canada Social Transfer*, and called for additional dedicated funding.[43]

**Chart 4: Provincial/territorial contribution to legal aid plans (criminal/civil legal aid) (per capita, 2002 constant dollars)[44]**



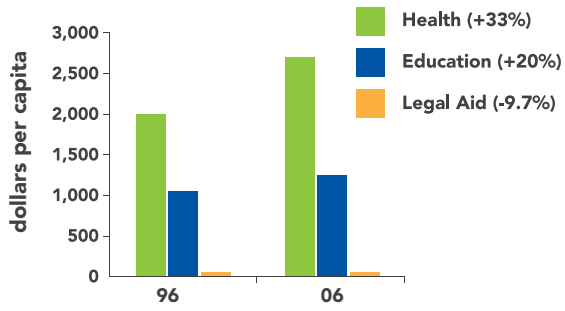

The second important change is that spending on criminal legal aid, some aspects of which have been deemed to be constitutionally required by Canadian courts, accounts for an increasing proportion of overall spending. Of twelve legal aid plans that provided information to StatsCan, nine spent more on criminal matters than on civil matters in 2011/2012. The proportion spent on criminal matters ranged from 52% for New Brunswick to 71% for Saskatchewan.[45] Of the remaining three jurisdictions, Prince Edward Island and Québec allocated 45 and 40% of direct expenditures to criminal matters, respectively, and Ontario 37%. Chart 5 compares the 2011/12 figures for direct expenditures on criminal legal aid compared to civil legal aid, as a percentage of total plan expenditures.

**Chart 5: Regional legal aid spending (criminal/civil)[46] 2011-2012**




Further, spending on legal aid has not kept pace relative to health care and education. In his 2008 study in Ontario, Professor Michael Trebilcock used public accounts data over a decade to demonstrate that while health and education spending had risen 33% and 20% respectively from 1996-2006, legal aid spending over the same period decreased by 9.7%. This trend is illustrated in Chart 6: Ontario Spending on Health, Education and Legal Aid, 1996-2006. There has been some improvement in Ontario's spending on legal aid since 2006, but comparative data is not available for other periods or in other jurisdictions.

**Chart 6: Ontario per capita spending on health, education and legal aid 1996-2006[47]**




[43] See, for example: www.news.gc.ca/web/article-eng.do?mthd=advSrch&nid=182679&crtr.dpt1D=&crtr.tp1D=&crtr.yrndVl=

[44] Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2011000/t003-eng.htm.

[45] Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t006-eng.htm.

[46] Statistics Canada, www.statcan.gc.ca/pub/85f0015x/2012000/t006-eng.htm. *Note that while these figures are mainly for 2011/12, NWT figures are for 2009/10, the most recent data provided to StatsCan for that region.

[47] Michael Trebilcock, *Report of the Legal Aid Review, 2008* (report prepared for Ontario Attorney General, Chris Bentley) (Toronto: AG ON, 2008) at 74. www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf [relying on 1996 and 2006 as ON census years].

The reduction in federal spending overall, increased complexity in the substantive law and growing demands for criminal legal aid have placed pressure on legal aid providers to ration services – in a way often inconsistent with the general purpose and public policy values underlying the program.

Currie notes that the "vitality of the legal aid system is of vital importance."[48] Because the legal aid system is not as healthy as it once was, "it probably will not play the important, and perhaps key, role it might in the evolution of access to justice in Canada, without resources to repair the erosion" that has occurred since the early 1990s.[49]

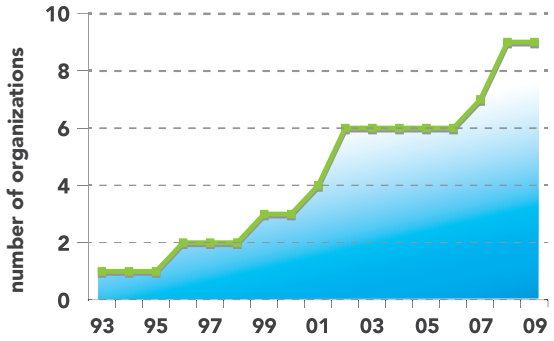
## Exponential Growth of Pro Bono

The Committee defines pro bono work as free legal services provided to people or organizations who cannot otherwise afford them and that have a direct connection to filling unmet legal needs. The legal profession has always provided services to people with modest means on a charitable basis and indeed our legal aid system grew out of these pro bono roots.

The numbers of people assisted through pro bono efforts has grown exponentially. Increasingly institutionalized organizations have developed to act as a broker, taking applications from individuals and small organizations in need of legal assistance and linking them to lawyers willing to volunteer to help.

Pro Bono Students Canada was formed in 1996 and now operates out of 21 law schools across the country. In the last decade, formal pro bono organizations have been established in five provinces, providing an infrastructure and paid staff. (Ontario (Pro Bono Law Ontario); B.C. (Access Pro Bono); Alberta (Pro Bono Law Alberta)); Saskatchewan (Pro Bono Law Saskatchewan) and Québec (Pro Bono Québec)). This growth in pro bono organizations is illustrated in Chart 7.

**Chart 7: Growth in formal pro bono organizations in Canada 1990-2009**




Pro bono organizations play an important role in promoting voluntary services: they develop programs that facilitate lawyer involvement, provide training and match lawyers willing to donate their time to clients with unmet legal needs. Once a client and lawyer are matched, the file might proceed as any other regular paying client file would, or the lawyer or organization might offer assistance with only certain aspects of the file or provide referrals, legal information or self-help materials.

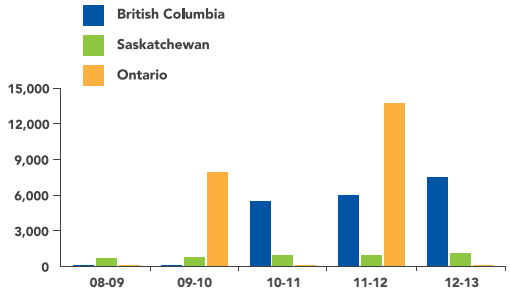
Many pro bono organizations can be more flexible as to who qualifies for help than legal aid programs. The organizations supply administrative support, an intake and screening process to ensure clients meet established financial criteria and need the type of assistance offered by the organization, and a roster of volunteer lawyers to call on as needed, or who regularly attend at a designated location.

As with so many aspects of the access to justice landscape in Canada, there are few firm statistics on the number of lawyers who provide pro bono services, people helped or the value of this contribution. Several law societies collect statistics on pro bono contributions from their members, but reporting that information is optional for lawyers. Anecdotally, most pro bono organizations report that they cannot keep pace with growing demand. Many pro bono organizers describe how quickly their services become oversubscribed, finding it impossible to keep up. The exponential growth in the number of people and matters aided by pro bono lawyers is illustrated in Chart 8, based on information provided by the organizations that have begun to collect comparable data.

[48] Currie, *supra* note 39.

[49] *Ibid.*

**Chart 8: Pro Bono – cases accepted 2008-2013**[50]




There is a growing schism in the profession about pro bono work, between those who believe that lawyers should have a mandatory obligation to donate legal services and those who oppose this trend. Adam Dodek of the University of Ottawa (and member of the CBA Legal Futures Initiative's Ethics and Regulatory Issues Team) recently wrote:[51]

> Unfortunately, no Canadian law societies or bar associations have any rules imposing an ethical let alone a regulatory obligation on Canadian lawyers to provide legal services to those who cannot afford them. The CBA's Code of Professional Conduct rather meekly states that
>
> > Lawyers should make legal services available to the public in an efficient and convenient manner that will command respect and confidence, and by means that are compatible with the integrity, independence and effectiveness of the profession.
>
> (This is in chapter 14 on "Advertising, Solicitation and Making Legal Services Available").
>
> The Federation of Law Societies of Canada does no better. Its now-completed Model Code of Conduct states at Rule 3.01(1) that "A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 3.01(2), may offer legal services to a prospective client by any means." The commentary states:
>
> > As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

However, unmet legal need and the demand for legal services in Canada far exceeds availability and what can reasonably be provided on a charitable basis. Some question the sustainability of increased dependence on volunteerism by the profession. More fundamentally, the increased emphasis on pro bono services as a solution to the access to justice crisis is seen by some to discourage facing the fundamental inadequacies of our justice system. From this end of the spectrum of views regarding pro bono, the profession's work in the public good "does nothing to ensure that there is a healthy *public* commitment" to access to justice, particularly to the disadvantaged, and in fact it can be seen as letting "the government off the hook too easily."[52]

> A distinguished Ontario practitioner, well known for his contributions of low-rate or pro bono services, likened pro bono work to a sort of legal food bank: pro bono services alleviate hunger for some on a daily or monthly basis, but it absorbs the energy of those who provide these so that they have little energy left for changing the underlying conditions that create the hunger.
>
> ***Mary Eberts reference to Andrew Orkin in "Lawyers Feed the Hungry", note 52.***

[50] In the spring of 2013, CBA contacted the five major pro bono organizations for any data they could share in regard to cases accepted annually. The chart reflects data received that could readily be compared.

[51] Adam Dodek, "Mandated or Mandatory Pro Bono", May 3 2012, SLAW: www.slaw.ca/2012/05/03/mandated-or-mandatory-pro-bono/

[52] Mary Eberts, "'Lawyers Feed the Hungry': Access to Justice, the Rule of Law, and the Private Practice of Law" (2013) 76:1 Saskatchewan Law Review 91.

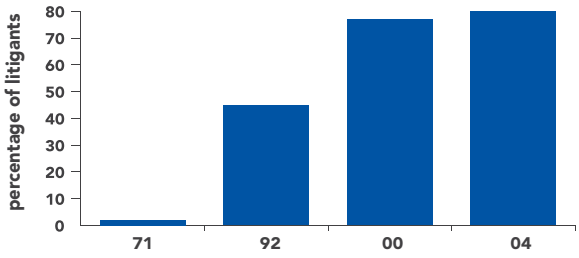
There are many unresolved questions about the extent to which unmet legal needs can reasonably be addressed by pro bono efforts, and the extent to which those efforts are the profession's responsibility.[53]

## Unrepresented Litigants

Perhaps the most obvious consequence of the gap between the prevalence of legal problems and inadequacies in the availability of public and private legal services is the exponential growth in recent years of unrepresented and under-represented[54] litigants in the courts. Unrepresented people are now so common place that we tend to quickly refer to them as 'SRLs' (self-represented litigants), despite the fact that the vast majority state that they would prefer to have access to counsel to assist them with their legal matter.

Historically, we did not keep track of unrepresented litigants and courts do so only inconsistently today. As a result, data on this phenomenon is still limited. Twenty years ago, best estimates are that less than 5% of litigants were not represented by counsel. Today anywhere from 10-80% of litigants are unrepresented, depending on the nature of the claim and the level of court. While provincial court family matters and small claims courts have the highest levels of unrepresented litigants, even the Supreme Court of Canada is experiencing this trend. One recent study estimates that 50% of family law litigants across Canada are unrepresented.[55] Of the few longitudinal studies of unrepresented litigants, one from California's Family Courts shows that in just over 30 years the percentage of unrepresented litigants went from 1% or less to 80% (see Chart 9). At least one international study has demonstrated a link between cuts to legal aid and the growth of unrepresented litigants.[56]

**Chart 9: Percentage of unrepresented litigants: California family courts 1971-2004**[57]




A recent Canadian study[58] examines how lawyers and judges perceive changes in the numbers of unrepresented litigants in recent years, and documents their strong perception that numbers have grown significantly. The majority of litigants in this study reported earning under $30,000 per year although significant numbers reported earning up to $60,000.

They conclude that the reasons for not having counsel are complex. The main reason is financial, including ineligibility for legal aid. Among middle income earners were those able to afford legal fees, but who chose not to because they did not believe they would receive good value relative to other financial priorities. Other reasons for not retaining counsel include that litigants believe they have sufficient knowledge about family law to represent themselves, that lawyers increase the adversarial nature of the proceedings and that lawyers increase the time and cost involved.

While the study identified these various reasons for not retaining counsel, it also found that litigants who had lawyers were almost all satisfied with their decision to have representation. A significant number of lawyers and judges noted gender differences for being unrepresented. The common perception is that women are more likely to be unrepresented because they cannot afford a lawyer, while men are more likely to want to deal directly with their former partner or are confident of their ability to represent themselves. Some comments include:

[53] These questions are explored further in CBA Access to Justice Committee discussion paper, *"Tension at the Border": Pro Bono and Legal Aid* (Ottawa: CBA, 2012) www.cba.org/CBA/groups/PDF/ProBonoPaper_Eng.pdf.

[54] By "under-represented" we mean litigants who may have received some legal help short of full representation but require full representation for their matter.

[55] Birnbaum study, *supra* note 6.

[56] See, Dewar, cited in Birnbaum study, *ibid* at footnote 13.

[57] Macfarlane study, *supra* note 6 at 34.

[58] Birnbaum study, *supra* note 6.

> "For women, it is finances; men think they do as well as a lawyer but without the expense." ***[lawyer]***
>
> "Sometimes abusive men want to be able to have direct contact with their partner." ***[lawyer]***
>
> "Men more often believe they don't need a lawyer. Women do not have the money." ***[judge]***[59]

Again, there is little hard data on the impact of unrepresented persons on court services. There is a strong perception – supported by the quantitative findings in the study by Macfarlane – that unrepresented persons, through no fault of their own, take up more court time and court services. Court registry staff walk the fine line between legal information (which they are authorized to offer) and legal advice (which they must not provide). They are often placed in difficult positions because of requests for information and assistance they are unable to meet. There is a strong perception among judges and lawyers that unrepresented parties are less likely to settle (partially due to unrealistically high expectations about outcomes), proceedings take longer and represented parties bear higher costs when the opposing party is unrepresented because proceedings are less efficient. Judges say they find it challenging to meet the needs of unrepresented litigants while maintaining their neutrality and independence.[60]

> These results indicate that professionals clearly believe that lack of representation makes settlement less likely, takes longer, and therefore implicitly increases the costs to the represented party as well as to the publicly funded justice system.
>
> ***Birnbaum study (note 6).***

[59] *Ibid* at 79.

[60] Macfarlane study, *supra* note 6.

Concerns have been raised about a two-tier justice system – with unrepresented litigants getting less than their fair share. One unrepresented litigant put it this way:

> Either lawyers should charge less, or there should be more legal aid. Something's gotta give or they can't say it's really justice, right?
>
> ***Unrepresented litigant from Macfarlane study (note 6)***

Similarly, in large scale civil legal needs surveys, Currie found that although many respondents were able to resolve problems on their own and get on with their lives, "[m]any of the self-helpers achieve outcomes that they consider to be unfair and, among those, some feel, in retrospect, that some help would have produced a better outcome. Many people who do not resolve their problems feel that the situation is becoming worse."[61]

Unrepresented litigants' perception that they do not receive fair outcomes is validated by empirical research. More than 200 US studies in a wide range of legal proceedings and matters have demonstrated that unrepresented parties lose significantly more often – and in a bigger way – than represented ones. Several studies of this question are now underway using the more rigorous methodology of randomized testing, and early results appear to substantiate the earlier research. Further, recent US studies show that unbundled legal services, where an unrepresented litigant has some assistance from a lawyer (for example the lawyer drafts the court documents but the litigant appears in court on his or her own), make little difference to outcome, although these limited services do contribute to procedural fairness.[62]

[61] Currie (2009), *supra* note 12 at 89.

[62] Jessica Steinberg, "In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services" (2011) 18 Geo. J. Poverty Law & Pol'y 453 at 455; D. James Greiner, Cassandra Wolos Pattanayak and Jonathan Hennessy, "The Limits of Unbundled Legal Assistance: a Randomized Study in a Massachusetts District Court and Prospects for the Future" (draft March 2012). For a more detailed discussion, see CBA Access to Justice Committee, *Toward National Standards for Publicly Funded Legal Services* (Ottawa: CBA, 2013) at 20-22.

As noted above, Macfarlane found serious implications of the SRL experience, including health issues, financial consequences, social isolation and declining faith in the justice system generally.[63] Lack of representation or under-representation has a disproportionately negative effect on individuals living in marginalized conditions. Many reports and studies have shown the increasingly prevalent 'self-help services' are most effective for people with higher levels of literacy and comprehension, while people who face other barriers are less able to effectively use those tools to navigate the legal system.[64]

## Courts and the Civil Justice System

Access to legal services is one piece of the access to justice puzzle. Others include court structures, rules and procedures, administrative tribunals, alternatives to adjudication, and substantive law. Courts and tribunals across Canada face a range of challenges in providing equal access to justice, challenges too complex to sum up here. A scan of recent annual reports shows an ongoing concern in many courts and tribunals with delays and the growing length of proceedings,[65] despite

### Learn More: about Reforming Legal Services to Meet Legal Needs

Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30:2 Queen's Law Journal 825.

Gayla Reid Donna Senniw and John Malcolmson, **"***Developing Models for Coordinated Services for Self-Representing Litigants: Mapping Services, Gaps, Issues and Needs***."** (Vancouver: Justice Education, 2004): http://www.justiceeducation.ca/themes/framework/documents/srl_mapping_repo.pdf

CBA Access to Justice Committee, *Toward National Standards for Publicly Funded Legal Services* (Ottawa: CBA, 2013): http://www.cba.org/cba/equaljustice/PDF/TowardNationalStandards.pdf

Community Legal Education Ontario, *Tapping the Community Voice: Looking at Family law Self-Help through an Access to Justice Lens – Themes and Recommended next Steps* (Toronto: CLEO, September 2009).

Kathryn Alfisi, "Access to Justice: Helping Litigants Help Themselves" (January 2010) *Washington Lawyer***:** www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2010/access_justice.cfm

Benjamin H. Barton, "Against Civil Gideon (and for Pro Se Court Reform)" (2010) 62:5 Florida Law Review 1227.

John M. Greacen, "Self-Represented Litigants: Learning From Ten Years of Experience in Family Courts" (2005) 44:1The Judges' Journal 24.

Richard Moorhead, "Litigants in Person: What the Research Actually Says" (posted 16 December 2010) *Lawyer Watch***:** http://lawyerwatch.wordpress.com/2010/12/16/litigants-in-person-what-the-research-actually-says/

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[63] *Supra* note 6 at 108-110.

[64] See for example, Carol McEown, *Civil Legal Needs Research Report* (Vancouver: Law Foundation of BC, 2nd Edition, March 2009) at 30; Community Legal Education Ontario, *Tapping the Community Voice: Looking at Family law Self-Help through an Access to Justice Lens – Themes and Recommended next Steps* (Toronto: CLEO, September 2009) at 3.

[65] See, for example, the following annual reports:

Supreme Court of BC 2012 *Annual Report* at 24: www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2012%20Annual%20Report.pdf

Alberta Court of Queen's Bench *Annual Report* at 41: www.albertacourts.ab.ca/LinkClick.aspx?fileticket=q1Bq8QoSalk%3D&tabid=92&mid=704

The Provincial Court of Manitoba 2010 *Annual Report* at 10, 17, 18: www.manitobacourts.mb.ca/pdf/annual_report_2010-2011.pdf

Ontario Superior Court of Justice *Annual Report* at 25: www.ontariocourts.ca/scj/en/reports/annualreport/10-12.pdf

Ontario Court of Justice Biennial Report 2008-2009: www.ontariocourts.ca/ocj/ocj/publications/biennial-report-2008-2009

concerted efforts toward reform over more than two decades.[66]

Few justiciable problems are actually resolved through the formal justice system. More informal assisted dispute resolution processes, including mediation in, connected to and separate from court and tribunal processes, are available. While only a small fraction of civil matters are ultimately resolved by a court or tribunal, these institutions have a central and irreplaceable role in maintaining a legal framework for resolving disputes. Reaching equal justice requires the formal and informal aspects of the justice system – courts, tribunals and the broader civil justice system – to work together effectively.

Recent studies emphasize the importance of timely intervention and assistance as key to enhancing access, avoiding problems, achieving positive outcomes and saving money. Public legal education and information providers are leading the way, often relying on online resources as a gateway. This significant trend to provide more online information and tools is important and welcome, as it can reach many people regardless of income. However, it is less helpful to the almost 48% of Canadians[67] who lack the literacy skills to make use of this type of information. As well, many people, especially those already living in situations of disadvantage, need 'human help' in tailoring information and tools to their own problems and to answer their questions.

Currently, courts and tribunals are engaged in an ongoing process of modernization to make their processes efficient and effective. In addition to expanding the range of dispute resolution processes, many courts are streamlining their work, in particular by integrating the principle of proportionality to civil procedures and using other mechanisms to simplify court processes. The National Action Committee Court Simplification Working Group report provides an overview of the current status of these reforms.[68]

Overall, the justice system has not been subject to the same technological transformation as other institutions or sectors. A recent newspaper article highlighted the fact that technological transformation was actually "bypassing the justice system".[69] As one example, there is still a lack of widespread capacity for scheduling of court dates (motions and trials) online. Administrative tribunals have been more nimble than courts in using technology to become more accessible. While technology offers courts "mind-boggling" opportunities to address shortcomings and efficiency gaps, courts have been cautious in embracing this potential.[70] This caution is at least in part for good reason. Technology is never neutral.[71] Reforms must be measured for whether they actually advance meaningful access to justice and questions need to be answered. For example, a report on remote court appearances by phone or video prepared for the Association of Canadian Court Administrators/Canadian Center for Court Technology noted:

> Such questions concern the availability and reliability of the technologies, how they are best used, whether justice would be compromised,

[66] For example, see the Canadian Bar Association Task Force on Court Reform, *Court Reform in Canada* (Ottawa: CBA, 1991); Canadian Bar Association Committee on Court Cost and Delay, *Court Cost and Delay in Canada* (Ottawa: CBA, 1989); Ontario Law Reform Commission, *Report on Administration of Ontario Courts* (Toronto: OLRC, 1973); Ontario Government, *White Paper on Court Reform* (Toronto: Queen's Park, 1976); Thomas Zuber, *Report of the Ontario Courts Inquiry* (Toronto: ON AG, 1987) [Zuber Report]; Deschenes Report, *Masters in Their Own House* (1981); Perry S. Millar and Carl Baar, *Judicial Administration in Canada* (Toronto: Institute of Public Administration in Canada, 1981), Huguette St-Louis, "Reform of Trial Courts in Québec" in Peter H. Russell, ed, *Canada's Trial Courts: Two Tiers or One?* (Toronto: University of Toronto Press, 2007) at 123; British Columbia Minister of Justice and Attorney General, *White Paper on Justice Reform System* (Victoria: British Columbia Attorney General, 2012); Geoffrey Cowper, QC (Chair), *BC Justice Reform Initiative: A Criminal Justice System for the 21st Century* (Victoria: British Columbia Attorney General, 2012).

[67] National Literacy Survey, see: www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=31

[68] Action Committee on Access to Justice in Civil and Family Matters, Report of the Court Processes Simplification Working Group (May 2012): www.cfcj-fcjc.org/sites/default/files/docs/2012/Report%20of%20the%20Court%20Processes%20Simplification%20Working%20Group.pdf

[69] Kirk Makin, "Technology seen as Key to solving Justice System Problems", April 24 2013, *Globe and Mail*: www.theglobeandmail.com/news/national/technology-seen-as-key-to-solving-justice-system-problems/article11539656/

[70] Dr. Erich P. Schellhammer, *A Technology Opportunity for Court Modernization: Remote Appearances* (January 2013) at 2 [A white paper prepared for Association of Canadian Court Administrators and Canadian Centre for Court Technology].

[71] Landgon Winner, *The Whale and the Reactor: A Search for Limits in an Age of High Technology* (Chicago: The University of Chicago Press, 1986), cited in Schellhammer, *ibid* at 2.

whether the common law principle of confrontation can be upheld, how demeanour can be assessed, how the remote location is set up to be suitable for a court proceeding, whether the solemnity of the court can be preserved, and what costs are involved.[72]

In the same vein, innovation has largely bypassed the justice system. Many factors contribute to this deficit, but one looms above all others: the civil justice system is an incoherent system likened by American scholar Rebecca Sandefur to a "body without a brain". Less colorfully, it has been said that the justice system lacks a CEO. The justice system is a system of systems, each with its own diffuse leadership (levels of court, levels of government, professional bodies, service providers) and underdeveloped mechanisms for communication, cooperation and collaboration.

Our lack of capacity for innovation is illustrated in an approach to reform dominated by pilot projects, often with insufficient commitment to follow through even on those that prove successful, let alone integrating learning from less successful ones into the process of trial and error needed for innovation. Pilot projects have become synonymous with disappointed expectations and "nothing reduces trust in a system more than disappointed expectation."[73] Reports have also emphasized how the existing judicial and legal culture itself can serve as a barrier to innovation in courts and the civil justice system.[74]

## Internationally – How are we Doing?

The Chief Justice of Canada has galvanized the national agenda for access to justice, in part by highlighting Canada's poor rating on international access to justice indicators. She has noted with dismay that the World Justice Project found that on civil justice, Canada ranked ninth out of 16 North American and Western European nations and 13th among the world's high-income countries, just ahead of Estonia.[75]

Two particular sub-factors contribute to Canada's low ranking – delays in the resolution of civil matters and inadequate access to legal counsel

### How Canada Ranks in the World on Access to Justice

**9/12 in North America and Western Europe in 2011**

**13/29 of high income countries in 2012**

**54/66 in access to legal counsel (legal aid)**

According to the 2011 World Justice Project report, one of Canada's greatest weaknesses is in access to civil legal aid, especially for marginalized segments of the population. Here Canada ranks a shocking 54th in the world, well behind many countries with lower Gross Domestic Product (GDP). Somewhat surprisingly given the greater volubility of Canada's public commitment to a social safety net, Canada even ranks behind the US, ranked at 50th in the world on this indicator.

[72] Schellhammer, *ibid.*

[73] Geoff Mulherin comment, during Plenary 3: Building Capacity and Creating an Environment for Innovation, at CBA Summit, *supra* note 2.

[74] Report of the Civil Justice Reform Working Group to the Justice Review Task Force, *Effective and Affordable Justice* (Vancouver: British Columbia Justice Review Task Force, 2006), and studies cited at footnote 78 and 79, which says : "For a more detailed analysis of legal culture, see Rodney Macdonald, "Legal Culture" (discussion paper prepared for the British Columbia Justice Review Task Force, February 2005): www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp, and Barbara Young, Q.C., "Change in Legal Culture: Barriers and New Opportunities" (discussion paper prepared for the BC Justice Review Task Force, February 2006): www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp Also cited, Steven J. Kelman, "Changing Big Government Organizations: Easier than Meets the Eye?" (paper prepared for the Ash Institute for Democratic Governance and Innovation, John F. Kennedy School of Government, Harvard University, 2004): www.ssrn.com/abstract=563163. See also, National Action Committee Family Justice Working Group report (Toronto: CFCJ, 2013): www.cfcj-fcjc.org/sites/default/files/docs/2013/Report/%20or%20the%20Family%20Law%20WG%20.

[75] The World Justice Project (2012): http://worldjusticeproject.org/country/canada

## Complexity in Law and Legal Process

The growing complexity of law and legal process, including vocabulary, protocols, procedures and institutions, contributes to an inaccessible justice system. This is perhaps the most evident contributor to barriers to equal justice. This complexity can be traced to various sources, including "the current state of rules of procedure, a multiplicity of practice directions, and the substantive law, which is often obscure and uncertain."[76] The volume of legal materials continues to expand at an exponential rate. Court decisions are longer, legislation runs to hundreds of pages and regulations can be even thousands of pages long. This growing complexity is in large measure a reflection of modern society.

> Gone are the days of basic domestic contracts, which are now the stuff of massive disclosure and debate. Gone are the days of the short, quick interlocutory motion for interim parenting and support, which are now the stuff of lengthy, and often repeated examinations, leading to the requirements for legal briefs preliminary to special chambers motions, such that while a lawyer's billing rate may have increased 100% in a decade or two, the time required to address a matter may have also increased by perhaps even two or three times what would have been contemplated 20 years ago.
>
> ***Comment received from Alberta lawyer during consultations***

Law reform initiatives can help to increase accessibility. For example, the federal child support guidelines are credited with clarifying and simplifying the law. But, when we look back we can see that many other attempts to simplify legal process to save cost and time have had perverse results. While there have been some positive gains from certain reforms, generally procedures are as elaborate as ever and the cost of litigation continues to rise. One example given in our consultations is that recent changes in Alberta court rules for entry of orders actually make it more difficult, time consuming and expensive to resolve orders in dispute because of added demands on court staff (from judges or administration), resulting in greater delays and expense.

Proactive legal regimes such as consumer protection measures and regulatory oversight can contribute to equal justice by shifting the burden of enforcing legal rights and responsibilities and ensuring compliance to the regulator, rather than individual legal claims. In Canada, however, we have witnessed an opposite trend where administrative agencies, such as human rights and employment standards commissions originally intended to protect individuals through systemic enforcement and reliance, now rely almost exclusively on individuals to launch complaints.[77] This move away from state enforcement of standards has led to rising demand for related legal assistance, undermining the original objective of preventing disputes and improving public protection.

The Australian strategic framework for access to justice recognizes this dimension of the access to justice issue, noting that "clearer laws" are critical. It sets out the following principle to guide reform:

> Justice initiatives should reduce the net complexity of the justice system. For example, initiatives that create or alter rights, or give rise to decisions affecting rights, should include mechanisms to allow people to understand and exercise their rights.[78]

[76] CBA Systems of Civil Justice Task Force, The Right Hon. Brian Dickson, Hon. Chair, *Systems of Civil Justice Task Force Report* (Ottawa: CBA, 1996) at 16.

[77] See for example, Report of the Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: CHRA Review Panel, 2000) at 6; Anthony Duggan and Iain Ramsay, "Front-End Strategies for Improving Consumer Access to Justice" in *Middle Income Access to Justice*, *supra* note 32 at 95.

[78] Attorney General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Canberra: Australia Attorney General's Office, 2009) at 62.

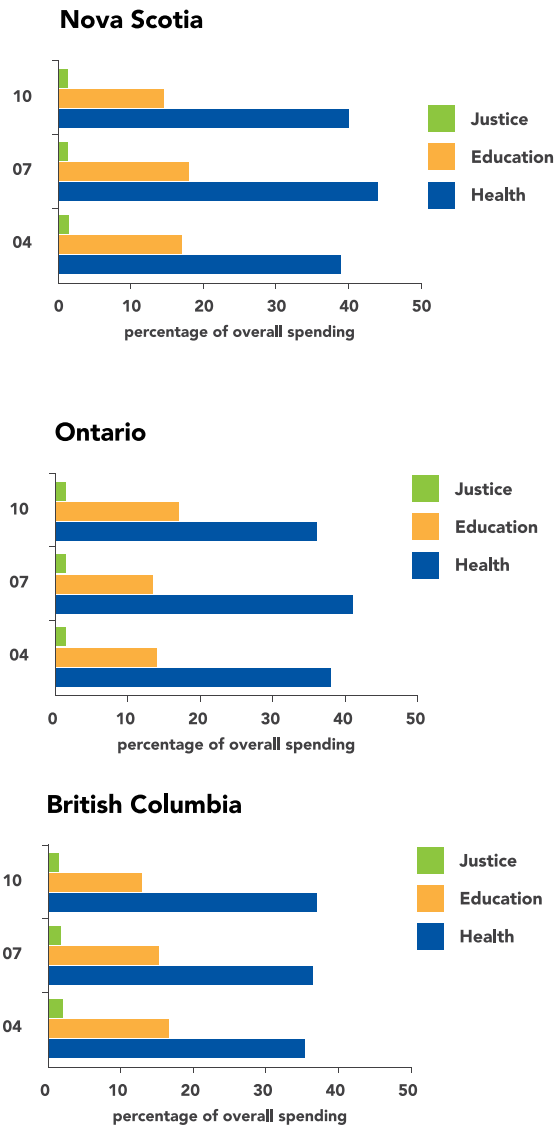
## Low Relative Spending on the Justice System

Spending on the justice system (excluding policing and corrections but including prosecutions, courts, victim and other justice services, and legal aid) is roughly 1% of government budgets. This 1% includes prosecution, court services and justice services such as legal aid and law reform.

**Ratio of spending on health to justice: 40:1**

Government spending on justice compared to overall government spending shows a trend: health and education funding is generally stable or gradually increases, while spending on justice is flat or declines from year to year.[79] This is illustrated in the following charts, showing numbers from three sample provincial budgets (Nova Scotia, Ontario and British Columbia) for justice, education and health over the same period.

**Chart 10: Comparative government spending in 3 sample regions 2004-2010**




At about the same time, federal government spending on prisons and policing has increased significantly, while Canada's crime rate continued to decline. At the federal level, police services use more than half the justice budget (57.2%), followed by corrections (32.2%), courts (4.5%), prosecutions (3.5%) and legal aid (2.5%).[80] The next chart sets out the percentage of public spending on justice in the same provinces (Nova Scotia, Ontario, British

[79] Data taken from the *Annual Budget Estimates* from those sample provinces over the past decade.

Nova Scotia

www.novascotia.ca/finance/site-finance/media/finance/budget2010/EstimatesAndSupDetail2010-11.pdf

www.novascotia.ca/finance/site-finance/media/finance/2007_estimates.pdf

www.novascotia.ca/finance/site-finance/media/finance/2004-2005_Estimates_Book.pdf

Ontario

www.fin.gov.on.ca/en/budget/estimates/2010-11/volume1/

www.fin.gov.on.ca/en/budget/estimates/2007%2D08/volume1/

www.fin.gov.on.ca/en/budget/estimates/2004-05/volume1/index.html

British Columbia

www.bcbudget.gov.bc.ca/2010/estimates/2010_Estimates.pdf

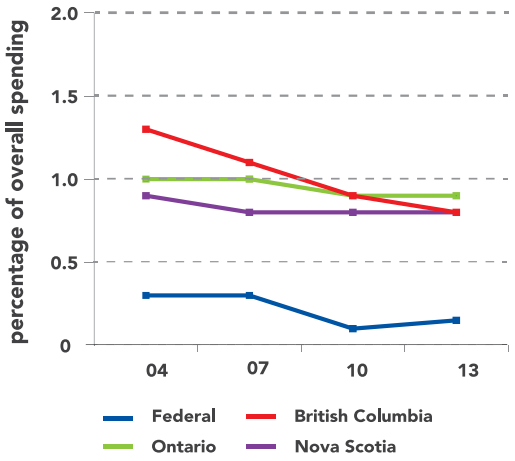
www.bcbudget.gov.bc.ca/2007/pdf/2007_Estimates.pdf

www.bcbudget.gov.bc.ca/2004/est/pdf/default.htm

[80] Ting Zhang, *Costs of Crime in Canada, 2008* (Ottawa: Justice Canada, 2008) at 5.

Columbia) as well as the federal government. Again, keep in mind that for every dollar spent on the justice system, our governments spend about $40 on health.

**Chart 11: Justice spending in Canada**[81]




## So Much to Learn

This brief overview of what we know and don't know about access to justice shows there are still many gaps in our knowledge and these gaps impact our capacity for reform.

Over the past two decades the justice system has become more adept at collecting baseline data, but the empirical basis for decision making is still extremely limited compared to what is known about health and education. The justice system has a long way to go in terms of what information is collected, how it is collected and how open it is. Overall we have become better at counting inputs and outputs, although not all of this data is open or transparent and there is no coordination across agencies to collect information in a manner that permits comparison. The Canadian Association of Provincial Court Judges and the Association of Legal Aid Plans are both in the early stages of developing a protocol for standardized data collection. These commitments mark a welcome step in the right direction.

In 1996, the CBA identified the lack of court management information data as an obstacle. This information is essential for planning and evaluating access to justice initiatives and understanding the role of legal and justice services vis-à-vis other support services.[82] But that is just the tip of the iceberg. We know little about the relative effectiveness and efficiency of various service delivery models, legal information, assistance and representation, or dispute resolution mechanisms across different types of legal matters, and how to match processes and legal services to the nature and intensity of the legal dispute.[83] At this time, we do know that we fall far behind the health and education systems in our commitment to and capacity for evidence-based decision making. It contributes to our justice innovation deficit.

This lack of knowledge cannot be an excuse for inaction. Nor can we focus only on what is currently measured or easy to measure and ignore what cannot be measured or what we have chosen not to measure. It is detrimental and wrong-headed to suggest a lack of evidence justifies inaction, where it is obvious that action should be taken. Action is needed on many fronts, including developing and maintaining a stronger knowledge base.

## The Case for Fundamental Change

What has gone wrong? The simple answer is that justice has been devalued. We see justice as a luxury that we can no longer afford, not as an integral part of our democracy charged with realizing opportunity and ensuring rights. The justice system has been starved of resources and all but paralyzed by lack of coordinated leadership and a tendency to focus on how justice institutions other than our own are contributing to the problem. As one person put it: "access to justice is even more undervalued in an already undervalued area." Meaningful access to justice is a scarce resource and the mechanisms used to ration this scarce resource are largely hidden. The implications of this rationing are often also invisible.

In this section, the Committee considers arguments in support of a fundamental reexamination of the value we put on our justice system, and ways

[81] *Ibid.*

[82] CBA Systems of Civil Justice Task Force, *supra* note 76.

[83] The CBA Legal Futures Initiative is canvassing the legal profession, the public, and other stakeholders for their opinions about these concepts.

to create conditions that promote justice system change.

> JUSTICE = GROWTH.
> JUSTICE IS A VALUE IN ITSELF.
> IT IS A VERY GOOD INVESTMENT.
>
> ***Hague Institute for the Internationalisation of Law (HiiL), Innovating Justice (2013)***

## Everyone Experiences Legal Problems

We live in a society regulated by law. Everyone's lives are shaped by the law and everyone is likely to experience a legal problem at some point. This is not to say that everyone will engage with the formal justice system: many problems can and should be resolved in more informal ways. Still, we should know for certain that we – and those we care about – will have meaningful access to justice if and when we need it. **Everyone is entitled to justice. This point needs to be a common thread of public discourse and individual understanding.** Needing recourse to the justice system does not suggest a personal failure, any more than a health problem requiring access to the medical system does. It is a simple fact of 21st century life in a developed political economy: law "knits together the fabric of our society".[84]

## Direct Relationship between the Courts and Democracy

The courts are one branch of government (in addition to the executive and the legislature) and an essential component of Canadian democracy. Courts are essential to a society committed to the rule of law, ensuring the peaceful resolution of disputes in a system where no individual or institution is above the law. The rule of law is two-dimensional: it shapes and protects the relationship between the individual and the court and between courts and other branches of government. In this way, access to justice is a democratic imperative. Basing arguments for justice innovation on democratic principles and the rule of law may seem abstract, as the straight line between those concepts to the services that may help an individual to resolve a legal problem is not immediately obvious. Yet this line is very real.

> Can therefore a country be said to be governed by the rule of law if some of its populace is excluded from accessing the law or is faced with significant challenges in doing so, cannot benefit from using the legal process or is disadvantaged in proceedings brought against them by the state?
>
> ***Dr. Patricia Hughes***

## Growth in Poverty and Social Exclusion

The reality today is that not everyone has meaningful access to justice regardless of income. When social exclusion becomes more entrenched because a person cannot get the legal help needed to redress a wrong or enforce a right, the justice system aggregates, rather than mitigates, inequality. We know that poverty is deepening across Canada and it is changing the structure of society.[85]

The growth in income disparity and social exclusion is a leading public policy concern and has specific ramifications for justice policy. In a section discussing the lack of access to legal services in Canada, the World Justice Project report notes that these issues "require attention from both policy makers and civil society to ensure that all people are able to benefit from the civil justice system." A recent US study by the RAND Institute of Civil Justice similarly concluded, "[t]he policy ramifications of diminished legal aid, in terms of what the civil justice system actually accomplishes and whom it serves, present a troubling set of questions for society".[86]

Providing suitable legal advice and assistance can play a crucial role in helping people move out of some of the worst experiences of social exclusion.

[84] Eberts, *supra* note 52.

[85] See: www.cwp-csp.ca/poverty/just-the-facts/.

[86] Michael Greenberg, Geoffrey McGovern, *An Early Assessment of the Civil Justice System after the Financial Crisis* (Santa Monica, CA: Rand Institute, 2012) at 62.

> I just wanted to say when I first started working in community people were poor. We were just poor. Today there are different types of poverty, not just that people are poor. I have young people that I work with. Young couples with children, where 20 years ago they would have been working middle class, and they're not anymore. They're homeless. They make enough money between the two of them to keep their kids fed and to be able to buy clothing for them and send them to school. But they don't have money to pay rent. There's no way that they can pull that kind of money. One of them gets minimum wage and the other one is making a bit more but there's still not enough to cover. So there's a whole new kind of poverty that's becoming even more prevalent in the community.
>
> ***Maria Campbell, Metis Elder, Envisioning Equal Justice Summit, April 2013***

Timely intervention in a life crisis triggered by a problem with a legal component, like debt or homelessness, can make all the difference, preventing the situation from becoming more extreme. For these reasons, the UK National Action Plan on Social Inclusion (2003) gave access to justice similar priority to health-care and education, recognizing access to justice as a basic right and a vital element in policies that address social exclusion. Currie's Canadian research highlights the relationship between legal problems and health problems, demonstrating a strong policy rationale for connecting access to justice policy with other public policy concerns. His findings also illustrate the ways that lack of access to justice reinforces social exclusion faced by certain groups in Canada, particularly people with disabilities.

Canadians have a strong commitment to equality, exemplified in domestic and international human rights commitments, and Canadian governments have an important role in offsetting income inequality. For example, the Canadian Institute for Health Information recently found that public health care alone reduces the income gap by 16%, as wealthier Canadians pay more in taxes than they reap in benefits. As stated by Hughes: "While responding to the needs of members of less advantaged communities matters if there is to be equal access to justice, a failure to achieve 'equal justice' also has implications for other aspects of people's lives and inevitably therefore for society at large."[87]

## Poor Public Policy

There are strong practical reasons for ensuring meaningful access to justice. Adequate representation leads to a smoother and more effective functioning of the system. When people receive appropriate assistance in reading and preparing documents and making arguments, it saves public money in the long run and results in better outcomes.

Justice degrades with delay: while the outcome may look the same when a resolution is finally reached or a decision rendered, the justice the person receives is not the same. The parties' position or personal safety may be compromised and the damage may be irreparable. People whose legal issues are not resolved face ongoing difficulties. Problems spread to other areas of their lives, at significant individual and social cost. For example, a mother and children unable to get timely, effective assistance or an expedited court hearing to determine their right to support may eventually get the requested order and judgment, but that won't cure the deprivations or repercussions suffered in the meantime. Further, since we know that people whose legal issues are unresolved face ongoing and escalating problems in different areas of their lives, at significant individual and social cost, society as a whole benefits from providing timely access to justice.

Empirical research shows a false dichotomy between focusing on "efficiency and effectiveness rather than equality and ideals." Equal justice

[87] Hughes, *supra* note 27 at 5.

makes sense for both "the wallet and the heart."[88]

## Costs of Inaccessible Justice

Studies are now demonstrating how unresolved legal problems and inadequate access to justice can be costly for both the individual and to society at large. For example, Macfarlane's national SRL study notes some costs of inaccessibility in terms of stress and health effects, loss of income and loss of employment. Children can be secondarily affected if parents are not afforded the fair outcomes that they need. This may be obvious in child support or parenting cases, but is equally true when families with dependent children are at risk because of other unmet legal needs, such as those impacting housing or income issues. The costs and benefits of equal justice are also documented in reports prepared by the Canadian Forum on Civil Justice[89] and others.[90] However, we have as yet been unable to quantify the impact of these costs in Canada.

Other jurisdictions are further ahead. For example, one British study calculated that each legal problem reported to cause physical illness ultimately costs Britain's National Health Service between £113-£528, depending on which service provider was used, or more if multiple providers were involved. Stress-related effects cost between £195-£2224 per patient, again depending of which service provider was used.[91] Similarly, an Australian study found that providing legal aid at the committal stage of a criminal procedure would save the equivalent of three or four district court judges per year.[92]

The Canadian Forum on Civil Justice is collaborating with a range of individuals and institutions on a five-year study to define the economic and social costs of justice. The study will develop methods to measure what our civil justice system costs, who it serves, whether it is meeting the needs of its users and the price of failing to do so. The project has two prongs: the costs of providing an accessible system and the costs of not providing an accessible system. The costs of justice system inaccessibility will be measured at four levels:

- individual (health, well-being, power, security, economics, education)
- private sector (business, lawyers, paralegals)
- government (justice system, health care system, other social services (housing, social welfare, policing, for example)), and
- civil society (rule of law, democracy, sustainability).

The results of these research projects are eagerly awaited. They will offer an in-depth understanding of the value of an accessible justice system and a convincing case for institutions and citizens to invest in access to justice.

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[88] Pascoe Pleasence and Richard Moorhead, *Access to Justice after Universalism* (2003) 30:1 Journal of Law and Society at 1.

[89] Mary Stratton and Travis Anderson, *Social, Economic and Health Problems Associated with a Lack of Access to the Courts* (Toronto: CFCJ, 2008).

[90] Pascoe Pleasence, Nigel J. Balmer, Alexy Buck, Marisol Smith, Ash Patal, "Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems" in Pascoe Pleasence, Alexy Buck, Nigel J. Balmer, eds, *Transforming Lives: Law and Social Process*, (Belfast: 2006) at 61-63 [Papers from the Legal Services Research Centre's International Research Conference, *Transforming Lives*].

[91] *Ibid* at 83-84.

[92] Mulherin, *supra* note 73.

### Learn More: about the landscape of civil justice problems experienced by Canadians

Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007): www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf

**Access to justice and social exclusion:** Pascoe Pleasence, Alexy Buck and Nigel J. Balmer (eds.), *Transforming Lives: Law and Social Process*, note 90.

A. O'Grady, Pascoe Pleasence, Nigel J. Balmer, Alexy Buck and Hazel Genn, "Disability, Social Exclusion and the Consequential Experience of Justiciable Problems" (2004) 19:3 Disability & Society 259.

Patricia Hughes, Inclusivity as a Measure of Access to Justice, note 27.

**Costs of Inaccessible Justice:** Pascoe Pleasence and Richard Moorhead, *Access to Justice after Universalism*, note 88.

Final Report of the Justice Sector Constellation of the Calgary Poverty Reduction Initiative, "Intervening at the Intersection of Poverty and the Justice System" (March 2013): www.enoughforall.ca/wp-content/uploads/2013/03/Justice-Sector-Constellation-Final-Report.pdf

## Return on Investment for Legal Aid Spending

In recent years, we have repeatedly heard that legal aid is not sustainable. But legal aid is our most important access to justice program. In addition to being a significant down payment on the promise of equal justice, funding for civil legal aid represents a good social and economic investment.

Synthesizing several studies on the economic benefits of civil legal aid, Dr. Laura Abel notes that it can actually save public money by reducing domestic violence, helping children leave foster care more quickly, reducing evictions and alleviating homelessness, protecting patient health and helping low-income people participate in federal safety-net programs.[93]

A growing number of studies are contributing to a business case for adequately funding legal aid by actually quantifying the return on investment for legal aid dollars spent:

- A 2012 Australian study, *Cost Benefit Analysis of Community Legal Centres* (CLCs), finds that, on average, CLCs have a cost benefit ratio of 1:18. For every dollar spent by government they return a benefit to society that is 18 times the cost. To express this in dollar terms, if the average held constant for CLCs in Australia, the $47 million spent on the program nationally in 2009/10 would yield around $846 million of benefit to Australia.[94]
- A PricewaterhouseCoopers study, also in Australia, found that every dollar spent on family law legal aid provided a $1.60 to $2.25 benefit to the overall justice system. "Legal aid demonstrably benefits those receiving legal aid support, those people and businesses they have contact with, the community more broadly and the efficiency of the legal system as a whole. Therefore there is a strong economic case for appropriately and adequately funded legal aid services, based on the magnitude of the quantitative and qualitative benefits that this funding can return to individuals, society and the government."[95]
- A 2009 Texas study found that "investment in legal aid services led to economic growth in the community by increasing jobs, reducing work

[93] Laura K Abel, *Economic Benefits of Civil Legal Aid* (National Centre for Access to Justice, Cardoza Law School, 4 September 2012) http://ncforaj.files.wordpress.com/2012/09/final-economic-benefits-of-legal-aid-9-5-2012.pdf.

[94] Judith Stubb and Associates, *Economic Cost Benefit Analysis of Community Legal Centres* (Sydney: National Association of Community Legal Centres, 2012) http://www.communitylawaustralia.org.au/wp-content/uploads/2012/08/Cost_Benefit_Analysis_Report.pdf.

[95] PricewaterhouseCoopers, *Economic Value of Legal Aid: Analysis in relation to Commonwealth Funded Matters with a Focus on Family Law* (National Legal Aid, 2009) at ix-x www.legalaidact.org.au/pdf/economic_value_of_legalaid.pdf

days missed due to legal problems, creating more stable housing, resolving debt issues and stimulating business activity." In fact, "for every direct dollar expended in the state for indigent civil legal aid services, the overall annual gains to the economy are found to be $7.42 in total spending, $3.52 in output (gross product), and $2.20 in personal income.[96] Reductions in legal aid spending, therefore, have a negative impact on spending and create an economic burden on the community."

- A 2011 UK Citizens' Advice Bureau Report, *Towards a business case for Legal Aid*, found that for every pound of legal aid expenditures on housing advice, debt advice, employment benefits and income benefits advice, the state potentially saves between €2.34 and €8.80.[97]

One British study approached this issue from the opposite perspective: how cuts to legal aid increase costs in other areas of public spending. In a 2011 report for the Law Society of England and Wales, Dr. Graham Cookson of the School of Social Science and Public Policy of King's College London was asked to consider any "knock on" costs (unintended costs) because of significant cuts to legal aid, and the overall impact of those cuts on government budgets. His advice was that the cuts would involve such significant "knock on" costs that the promise of any cost savings should be reevaluated. He also noted significant areas where additional longer-term costs were likely, but were difficult to precisely evaluate.

Similarly, a British study on the effectiveness of legal aid in the asylum (refugee) context found that restrictions on the quality of legal aid as a cost savings measure resulted in higher costs overall: "poor quality work costs much more in the longer term to the public purse and in human terms to individual asylum seeker applicants."

**These studies from Australia, the UK and the US conclude that the average demonstrated social return on investment is that for every $1 of legal aid spending about $6 of public funds are saved elsewhere (a range from 1:2 to 1:18.)**

**Average Social Return on Investment from Legal Aid Spending**
**$1 = $6**

US civil legal aid providers increasingly report the economic impact of their programs in concrete terms. Program impacts are quantified in millions of dollars, on an annual basis. The impacts measured include: income benefits and cost savings received by low income families, cost savings to tax payers, economic impact of federal dollars flowing into local economies as an outcome of legal aid cases, increased tax revenue, and systemic changes resulting in savings for state residents. These reports also note additional economic impacts that while difficult to quantify are no less real, including for health care providers, court efficiencies, and for costs and losses to the state from homelessness and domestic violence.[98]

Unfortunately no Canadian studies to date have quantified the economic impact of legal aid in this way. Several legal aid plans have reported in general terms the ways legal aid can save public funds.[99] In 2012, the Law Foundation of British Columbia commissioned Yvon Dandurand and Michael Maschek to conduct a feasibility study on the economic impact of legal aid. They identified a number of promising areas for future research, proposing four studies on the impact of legal aid.[100]

[96] The Perryman Group, *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential* (Waco: Perryman Group, February 2009) at 3.

[97] Citizens Advice Bureau, *Towards a Business Case for Legal Aid* (London: International Research Conference, July 2010).

[98] See sources in "Learn More", *infra* at 55.

[99] For example, see Legal Aid Ontario, Business Plan, 2006-07: www.legalaid.on.ca/en/publications/PDF/Public Business Plan April 2006.pdf; for other Canadian discussions of the cost benefit of funding legal aid, see Doust, *supra* note 11; Sharon Matthews, *Making the Case for the Economic Value of Legal Aid* (Vancouver: CBA-BC, 2012); Kamloops Chamber of Commerce: www.kamloopschamber.ca/files/documents/Go%20Long%20on%20Legal%20Aid%20Funding%20FINAL.pdf; Alberta Government, *New Ways for Families: Social Return on Investment Case study: Medicine Hat Family Services* www.newways4families.com/images/pdfs/Medicine%20Hat%20Family%20Services_Executive%20Summary.pdf

[100] Yvon Dandurand and Michael Maschek, *Assessing the Economic Impact of Legal Aid - Promising Areas for Future Research* (Vancouver: Law Foundation of British Columbia, 2012).

## Learn More: about Bang for the Legal Aid Buck! [#1]

PricewaterhouseCoopers for National Legal Aid (Australia), "Economic Value of Legal Aid" (Sydney: PricewaterhouseCoopers, 2009): www.legalaidact.org.au/pdf/economic_value_of_legalaid.pdf

The Perryman Group, "The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential" (2009): www.nlada.org/DMS/Documents/1236008203.14/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf

Citizens Advice Bureau, "Towards a Business Case for Legal Aid" (London: CAB, July 2010): www.google.ca/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CDUQFjAA&url=http%3A%2F%2Fwww.citizensadvice.org.uk%2Ftowards_a_business_case_for_legal_aid.pdf&ei=ADJpUsubHMufkQeYk4GIAg&usg=AFQjCNF3BPvWbn7ktg10pDD2mTutlBCn2A&bvm=bv.55123115,d.eW0

Kenneth A. Smith et. al., "Economic Impacts of Civil Legal Aid Organizations in Virginia: Civil Justice for Low-Income People Produces Ripple Effects That Benefit Every Segment of the Community" (Legal Services Corporation of Virginia, 2011): www.vplc.org/wp-content/uploads/2012/10/VA-Report-on-Economic-Impacts.pdf

Access to Justice Commission, "Economic Impact of Civil Legal Aid Services in Maryland" (Access to Justice Commission, 2013): www.mdcourts.gov/mdatjc/pdfs/conomicimpactofcivillegalservicesinmd201301.pdf

## Learn More: about Bang for the Legal Aid Buck! [#2]

Laura K. Abel and Susan Vignola, "Economic and Other Benefits Associated with the Provision of Civil Legal Aid" (2011) 9 Seattle J. for Soc. Justice 139: www.law.seattleu.edu/Documents/sjsj/2010fall/Abel.pdf

Laura K. Abel, Economic Benefits of Civil Legal Aid, National Centre for Access to Justice at Cardoza Law School (2012): www.ncforaj.files.wordpress.com/2012/09/final-economic-benefits-of-legal-aid-9-5-2012.pdf

The National Legal Aid Defenders Association, *Economic Benefit of Meeting Civil Legal Needs*: www.nlada.org/DMS/Index/000000/000050/document_browse#topics

James A. Richardson, *Legal Services Programs in Louisiana: Their Economic Impact on the State of Louisiana* (2011): www.lsba.org/2007Documents/NewsDocuments/NewsDocument-647.pdf at page 5.

Rod Feelhaver and Jerome A. Deichert, *The Economic Impact of Legal Aid in Nebraska: National Legal Aid & Defender Association*, (2008): www.nlada.org/DMS/Documents/1236007550.3/NE impact 2007.doc

Florida Tax Watch, The Economic Impact of Legal Aid Services in the State of Florida (2010): www.nlada.org/DMS/Documents/1309704171.89/florida%20legal%20aid%20economic%20impact%20study%202010.pdf

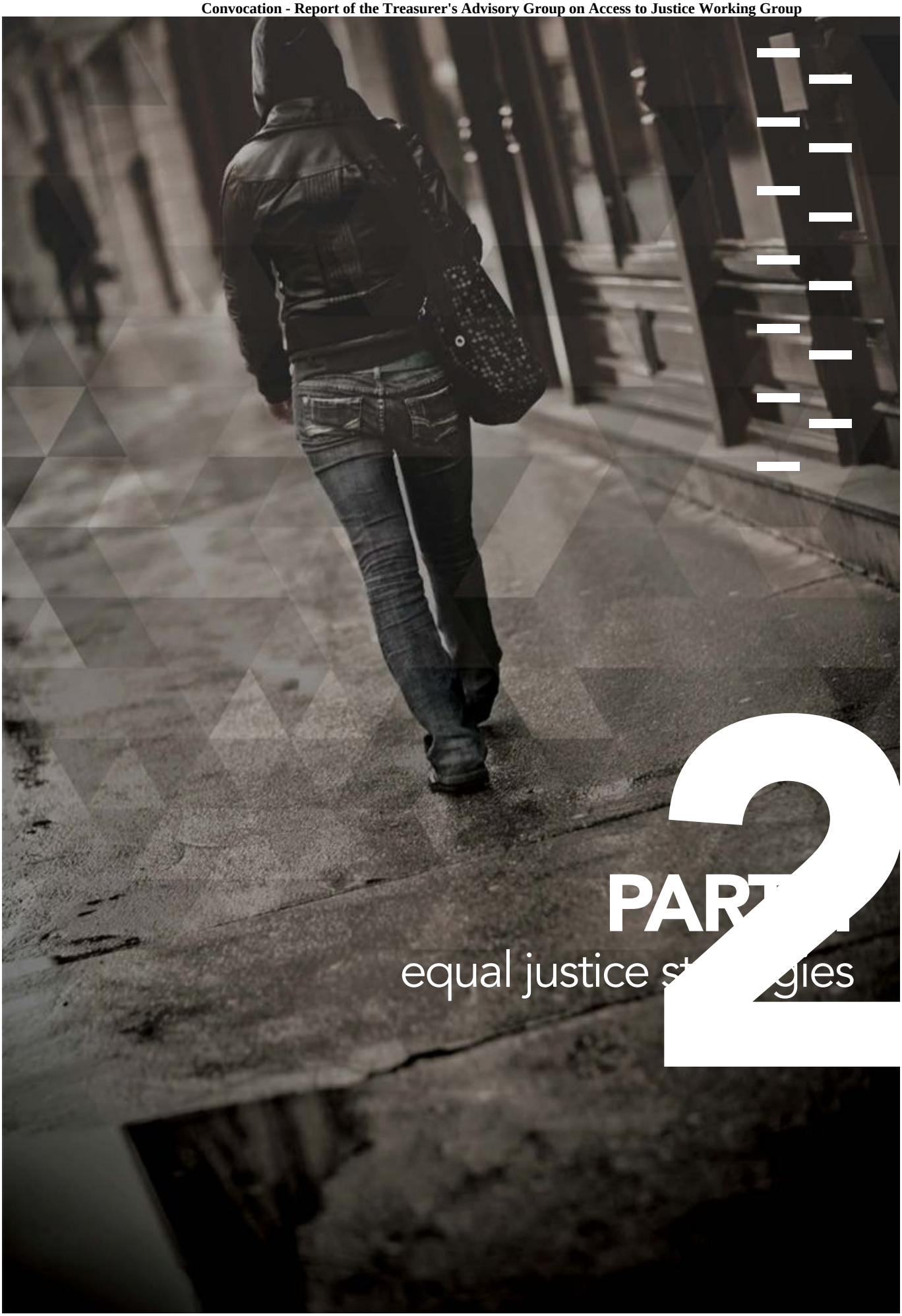
Task Force to Expand Access to Civil Legal Services in New York, *Report To The Chief Judge Of The State Of New York* (2010): www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf

## Why Tinkering is Insufficient

The civil justice system is too badly broken for a quick fix. People fall between the cracks at an unacceptable cost. Injustice is too deeply woven into the system's very structure for piecemeal reforms to make much of a dent. It is unclear whether the myriad of ad hoc access to justice interventions currently proliferating outside an overarching strategic framework are actually helping. Individual interventions may work at cross-purposes and risk hindering progress by fostering complacency and diminishing support for more substantive reform. An excess willingness to compromise makes achieving the equal justice vision impossible.

> Believing that we are doing something effective can reduce our perceptions of injustice, whether or not our beliefs are factually justified.
>
> ***Gary Blasi, How Much Access? How Much Justice? (2004)***

We need to abandon a "culture of martyrdom"; we need to stop trying to simply make do. It is time to reach for equal justice, not some limited vision based on a short term view of current constraints. The enormity of the challenge may seem paralyzing, but access to justice problems are not intractable, and committing to achievable reforms can be empowering. Change will not happen quickly, but every step along the right path, with a common vision and commitment to measure how effective each innovation has been in achieving that vision, can help. Missteps can be corrected when evidence shows a better way, but we should not waiver about the need to start walking, or the ultimate destination.



# PART II
## equal justice strategies

# Equal justice strategies

## Envisioning Equal Justice

### Finding the 'Soul' of Reform

At the Summit, Sam Muller of the Hague Institute for the Internationalisation of Law (HiiL) urged participants to consider the 'soul' of reform, that is to work toward a consensus on the animating purpose of our access to justice efforts. Agreeing on the 'soul' of reform would give us a shared focus and a measuring stick for progress, while allowing flexibility on how the animating principles are actually achieved in particular circumstances. It would also recognize that diverse approaches are needed and should be encouraged.

Improving access to justice is an ongoing project, and contemporary efforts date back to the 1960s. The focus of these efforts has changed over time, with succeeding waves of the access to justice movement. Early on, access to justice was seen as one prong of an agenda to build a more equitable society, joined with a focus on human rights and increased accountability of government institutions. This gave rise to the spectacular growth of administrative tribunals and legal aid, including community-based clinics. In the 1980s, the focus shifted away from institutional change to processes and procedures, with a renewed interest in alternative dispute resolution in both court and community settings. In the 1990s, the focus was more on court reform, with an emphasis on reducing costs, delays and complexity. And, the new millennium has ushered in an emphasis on cost efficiency and meeting budgetary targets, seemingly based on the general belief that as a society, we can no longer afford justice.

The emphasis on rationing civil justice has been linked to the steady rise in the cost of legal aid and the dramatic increase in spending on criminal justice. Some reforms of the 21st century have been more about eradicating barriers to the courts[101], though couched in the overall language of rationing access to justice. More recently, empirical research into unmet legal needs and their impact on people's lives and society as a whole has begun to shift the discourse back to a focus on client needs, but the trend now is more towards problem-solving than based on the idea of a right to equal justice.

The earlier generations' access to justice agendas were never finished, and they continue to motivate individual and institutional positions and reform priorities. This gives rise to distinct and sometimes conflicting goals for reform. The lack of clarity and agreement about the purpose (or 'soul') of reform is a key barrier to change and impedes progress. It also adds a layer of unintended, negative consequences to the process of reform.

Reaching agreement on the 'soul' of reform involves delineating the goal: a vision that is ambitious but possible. The Committee proposes a tangible vision of equal justice to guide reform:

*An inclusive justice system requires that it be equally accessible to all, regardless of means, capacity or social situation. It requires six concrete commitments:*

1. *People – The system focuses on people's needs, not those of justice system professionals and institutions.*
2. *Participation – The system empowers people. It builds people's capacity to participate, by managing their own matters and having a voice*

[101] When the Committee refers to "courts" in the general or conceptual sense in this Part, it views this term as potentially encompassing court-like tribunals that adjudicate disputes for individuals.

**TIMELINE of Unfinished Access to Justice Agendas**

| 1960s & 1970s | 1980s | 1990s | 2000s | 2010s |
|---|---|---|---|---|
| Commitment to"A Just Society" - rights-based entitlements, ending poverty | ADR - the iconic "Fitting the Forum to the Fuss" | Court reform - costs, delays, complexity - case management | The Cost-Efficiency Mantra | Renewed Focus on Client Need - "Putting the Client at the Centre" - helping people to solve their legal problems |

*in the system as a whole.*

3. *Prevention – The system focuses attention and resources on preventing legal problems, not just on resolving them after they arise.*
4. *Paths to justice – A coherent system involves several options and a continuum of services to arrive at a just result. People get the help they need at the earliest opportunity, and find the most direct route to justice.*
5. *Personalized – Access to justice is tailored to the individual and the situation, responding holistically to both legal and related non-legal dimensions, so that access is meaningful and effective.*
6. *Practices are evidence-based – The system encourages equal justice by ensuring justice institutions are 'learning organizations', committed to evidence-based best practices and ongoing innovation.*

## Equal and Inclusive Justice

It is hard to object to the goal of building a Canadian justice system that is equally accessible to all regardless of means, capacity or social situation. Equality, after all, is what the rule of law is all about. Despite this, there is a long way to go to ensure equality and inclusivity in practice.

At the Summit, Hughes reminded us that acknowledging diversity is not about including the 'other' but rather it is about all of us. The challenge is to approach the task of building an inclusive justice system not from a list of categories, like gender or Aboriginality, but based on people's relationship to the justice system and their need for assistance in different situations. Maria Campbell also spoke about the importance of working across differences in a manner that builds trust and empowers, rather than erects or reinforces boundaries.

> You're lawyers, you know that words have power. Words like marginalization, all of these things; we separate ourselves from people, from each other when we use that kind of language. It's like establishing boundaries if I'm coming to you for help and I'm seeing that kind of language on brochures or I'm hearing that kind of language used then that barrier is there between us before I even get started. Which would make me powerless even more.
>
> ***Maria Campbell, Metis Elder, Envisioning Equal Justice Summit, April 2013***

**What's the fix?** Focus on users' needs and how they need it. No one-size-fits-all solution for poor, middle class and distinct communities.

In this report, we highlight differences between the needs of the middle class and the needs of lower-income, poor and people living in marginalized conditions, as they are often not the same. While this approach oversimplifies the realities, it is a shorthand way of reminding us that individuals are socially-situated and that social situation relates to both the characteristics of the individuals and the complexity and extent of their legal needs. As such, many of the solutions to the crisis in access to justice for the middle class and the poor are distinct.

We need to continually question: who needs what kind of help in accessing justice? And what can be done to ensure that they can find it regardless of their particular characteristics and situation?

Dr. Ab Currie, the leading Canadian legal needs researcher, has shown that experiencing more than one form of disadvantage, say disability and remoteness, has an "additive effect". Multiple disadvantage results in multiple problems in different areas of life, like health and employment, and legal issues themselves compound at an ever-increasing rate. These realities result in further entrenching social exclusion.

At the Summit, Geoff Mulherin, Executive Director of the Law and Justice Foundation of New South Wales, provided a practical example of how paying attention to inclusivity will affect reform initiatives. He warned us to be careful about focusing too much on 'early intervention' – a current trend in Australia and Canada. The

research by his foundation demonstrates that "many disadvantaged people will turn up late in the process, not early." Focusing on early intervention is a positive direction for reform, but not when it has the perverse result of reinforcing barriers for people who need assistance the most. '*Timely* intervention' is a more inclusive, more effective policy.

The Committee employs broad categories to distinguish between the legal needs of different segments within Canadian society, recognizing that these categories are imperfect and there are no hard and fast rules that separate the legal needs of various groups of people. They do however reflect differing means, capacities and social situations in a general way, and assist us to keep in mind significant differences in legal needs, the impact of unresolved legal problems, and problem-solving and dispute resolution behavior, so we can assess who is most likely to benefit from proposed innovations.

While "100% access is the only defensible ultimate goal",[102] the Committee recognizes that this will be challenging. To the extent that rationing justice must be done, and undoubtedly is done on a daily basis, how can it be done to mitigate rather than reinforce patterns of inequality? Getting to equal justice demands that we first focus on the people who are most disadvantaged by their social and economic situation.

## Designing a People-Centered Justice System

Over time, our justice system has developed to reflect the needs, approaches and imperatives of courts, court administration, tribunals and the legal profession. Justice institutions are not alone in this tendency. It is common to the way many organizations and professions work, and is difficult to overcome. But the civil legal needs research has demonstrated how far removed this approach is from what people actually want, need and expect from their courts and justice system. The way legal services are delivered by the legal profession, the nature of court and tribunal proceedings, including procedural requirements and the language used, the complexities and the costs, all act as barriers limiting people's opportunity to obtain justice.

A people-centred justice system will be easier to use, transparent and fair. It will ensure just outcomes so that people can go on with their lives and have confidence in the justice system. It will operate on the basis of reciprocity, actively transcending the standard 'us-them' divide between service provider and the user of services.

Participants in the Committee's community consultations were clear that justice and equality are primary goals underpinning the law. When asked what they meant by 'justice', comments included:

> "Fairness, equality and being held accountable." ***Person with Disability, Toronto***
>
> "Due consideration of all the facts and circumstances." ***Man with mental disability, Toronto***
>
> "Being heard. Being taken seriously." ***Single mother, Kentville***
>
> "It makes it possible to fix the damage." ***Youth, Montréal***

The Committee summarizes the broad vision of the justice system gained from the consultations it held with people living in marginalized conditions this way:

> *Justice is inviolable. It ensures fairness and equality for all, and respect for all who come before it. Being accorded respect from a justice system means being heard and provided with an effective, meaningful outcome.*

A justice system designed for the people using it will have strong linkages to other services. Legal issues are often experienced as part of a constellation of issues or problems, many that are not legal in nature.

[102] Richard Zorza, "The Access to Justice "Sorting Hat": Towards a System of Triage and Intake that Maximizes Access and Outcomes" (2012) 89:4 Denver University Law Review 859 at 861 http://www.zorza.net/Sorting-Hat.pdf.

> "People don't have federal problems or state problems. They have problems. They're multiple, complex, legal and non-legal. We have this real problem in Australia where things are driven by stovepipes [silos], by area of law, by is it a commonwealth matter, is it a state matter.
>
> People don't have problems that way as you all know. So we need to break down the stovepipes."
>
> ***Geoff Mulherin, Executive Director, Law and Justice Foundation of New South Wales***

When lawyers and judges talk about access to justice, we usually talk about law, justice systems and sometimes about how legal services and information are provided. Our vision is often limited by our own frame of reference. One of the most palpable and crucial findings of the Committee's consultations, consistent with other broad based surveys, is that the public has a more holistic view of justice.

The community consultations made it clear that people's legal issues are intimately interwoven with other social and personal issues in their lives. This can flow in two directions. In one sense, what is happening in the justice system has a ripple effect on their lives, like the single mother experiencing excessive delay in family court who fears she may lose her home as a result. In another sense, what is happening in people's lives and households can create legal problems and promote involvement in the legal system, for example, when a youth flees a troubled home life to become easy prey for gangs on the street. These realities illustrate the link between prevention and integration.

## A Participatory Justice System

The only way to ensure a people-centred justice system is to ensure that members of the public are engaged in its oversight. Many also want to be active participants in preventing and resolving legal problems. The goal is to move away from traditional approaches that set lawyers and courts apart, denigrating any non-professional knowledge. Enhanced public accountability and participation depends upon informed and capable citizens and disputants or litigants. Strong commitments and resources must be devoted to building people's individual legal capabilities.

## A Standard for Meaningful Access to Justice

A meaningful access to justice standard should guide our reform agenda, in particular, our evaluation of services designed to increase and ensure access. **Assessing whether the system, process, service or resource provides meaningful access to justice depends on the nature of the right, interest or legal problem at issue, the capacity of the individual, the complexity of the legal process or proceeding, and the seriousness and impact of potential outcomes.** These factors are supported by a growing body of jurisprudence[103] and empirical research.[104]

Developing a meaningful access to justice standard will involve a commitment to transcending the SRL phenomenon. SRLs appear to be an increasingly accepted fixture of our justice system, yet the current situation is unacceptable.[105] A tripartite approach to reform is required, including:

[103] See, *G (J) v New Brunswick*, [1999] 3 SCC 46 and *British Columbia (Attorney General) v Christie,* [2007] 1 SCC 873. In the criminal law context, some examples include *R v Sechon* (1995), 104 CCC (3d) 554 at 560 (Que CA); *Deutsch v Law Society of Upper Canada Legal Aid Fund* (1985), 48 CR (3d) 166 (Ont Div Ct); *R v Cormier* (1988), 90 NBR (2d) 265 (QB); *R v McKibbon* (1988), 45 CCC (3d) 334 (Ont CA); *R v James* (1990), 107 AR 241 (QB); *Spellacy v Newfoundland* (1991), 91 Nfld & PEIR 74 (Nfld SC); *Mireau v Canada (Attorney General)* (1991), 96 Sask R 197 (Q.B.); *R v Rothbotham, 1988* CanLII 147 (ON CA); *R v Fisher,* [1997] S.J. No. 530. (QB); *R v Brydges,* [1990] 1 SCC 190; *R v Bartle,* [1994] 3 SCC 173; *R v Prosper,* [1994] 3 SCC 236; *R v Matheson,* [1994] 3 SCC 328. See also, *Universal Declaration of Human Rights*, GA Res 217 A (III), UN Doc. A/810 (1948), cited by the New Brunswick Court of Appeal in G(J) above.

[104] For example, see the work of Russell Engler, including "Towards a Context-Based Civil Gideon Through Access to Justice Initiatives" (2006) Clearinghouse Review 196; "Shaping a Context-Based Civil Gideon from the Dynamics of Social Change" (2006) Temple Political & Civil Rights Law Review; "Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?" (2010) 9:1 Seattle Journal for Social Justice 97; "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed" (2010) 37:37 Fordham Urban LJ.

[105] See comments from SRLs and findings from Macfarlane and Birnbaum studies, *supra* note 6.

- reducing the need for representation through enhanced legal information and assistance services;
- where feasible, developing paths to justice (including forms of adjudication) that do not require representation; and
- re-engineering the delivery of private and public legal services to make representation available in a greater range of situations.[106]

Full legal representation is not required in every case: meaningful access can be assured through a range of legal services and forms of assistance, depending on the circumstances. A growing body of research can assist in translating this general standard into best practices to guide the delivery of legal services and decision making processes (both court and non-court-based). The key is to offer a seamless continuum of legal and non-legal services, and ensure that representation is available when needed to have meaningful access to justice. While a lawyer is not required in every case, people must have access to a lawyer when their situation requires it, regardless of their financial capacity.

## A Dual Focus on Prevention and Resolution

Our long range goal is to shift justice system resources away from finding effective ways to deal with legal problems, conflicts and disputes, toward preventing them in the first place. At the Summit, many discussions circled back to the need to invest in building the fence at the top of the cliff,[107] rather than spending all of our resources for the ambulance at the bottom. This does not mean abandoning those who require the ambulance, but it does mean finding ways to reduce the need for responsive interventions by increasing capacity for prevention and resilience. To use another analogy, we need to find ways to provide legal help "further upstream". This analogy is used frequently in health prevention literature and derives from the parable of the fisher, tired of continually saving people being swept downstream, who decided to go upstream to find out why so many people were ending up in the water.

It is useful to think of this as a dual-track approach that provides a better balance of justice system services aimed at both preventing and resolving legal problems. A proposed statement of civil justice system objectives developed by the Australian Attorney-General's Department distinguishes between a system in which "people can solve their problems before they become disputes" *and* "people can resolve disputes expeditiously and at the earliest opportunity." Importantly, it recognizes the need for both approaches.

Reform must not be approached in a monolithic fashion or based on an idealized view of how people should approach their legal problems. Relying on concepts of "ideal" citizens, those sensible people who know their rights and responsibilities, resolve their disputes by discussion, act quickly and are always prepared, and know how to navigate the system, is not useful. While we shift the emphasis towards prevention, we must also keep in mind that there is no way to prevent all problems and disputes.

## One System, Many Paths

Another central component of this proposed vision is building a more coherent civil justice system. There is rarely only one solution or resolution to a legal problem. There are many paths to justice, some leading toward and others away from formal court and tribunal processes. Those paths must be integrated to a much greater degree than at present and we need additional paths to meet everyone's needs. The keys to greater coherence are effective navigation assistance and enhanced collaboration amongst stakeholders and participants.

Access to justice means more than simply access to the courts, but there are diverging views on what this insight means for the courts. For some, recognizing multiple paths to justice results in a 'de-centering' of courts, setting up an alternate system that is opposed to formal justice. However, in the Committee's vision, access to the courts remains a central component within a broader access to justice system. It is the threat of coercion

[106] Engler, *supra* note 25.

[107] See, Richard Susskind, *The End of Lawyers?* (Oxford: Oxford University Press, 2008). Susskind also acts as a Special Advisor to the CBA's Legal Futures Initiative.

from the formal justice system that brings many defendants to the negotiating table, and the courts that ultimately decide what is just under the law. The Committee, like Hazel Genn, does not want to abandon "the language of justice".[108] It is not a question of de-centring courts, but re-centring them in an integrated, well-ordered justice system. Re-centred courts are required to ensure that the resolution of disputes is consistent with legal norms. Re-centred courts will also keep our laws and legal system alive through ongoing judicial interpretation.

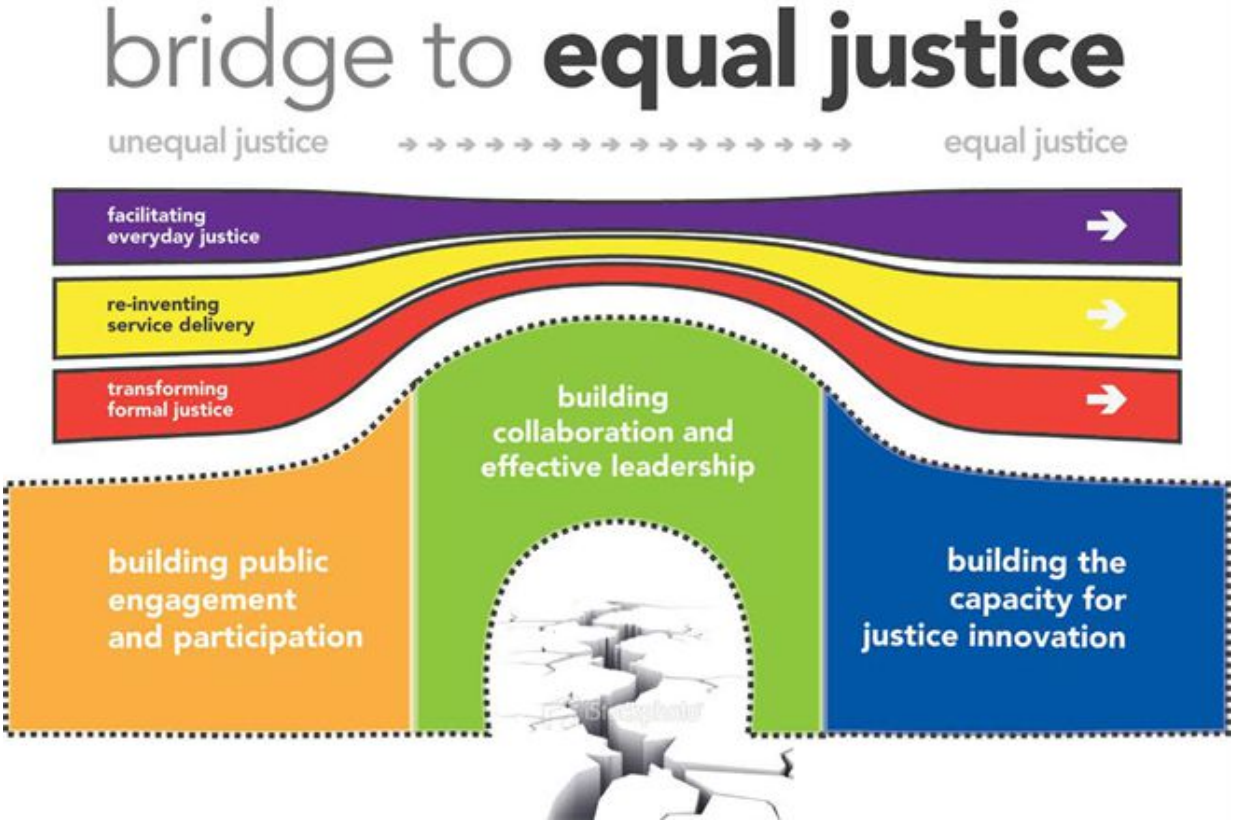
### Learning Institutions, Organizations and Systems

If we have learned anything from decades of access to justice reform, it is that these issues are complex and cannot be addressed through one-off initiatives. Equal, inclusive justice is a shared aspiration, one that can only be achieved through an ongoing commitment to learning, continuously developing evidence-based best practices and supporting innovation. Learning is required at many levels, ranging from adapting procedures based on public feedback and evaluation, to testing and refining mechanisms for the improved delivery of legal services to better meet the public's needs, to integrating knowledge about common legal problems into systemic solutions.

## Building a Bridge to Equal Justice

Reaching equal justice requires us to bridge the distance from the current state of inequality to the vision articulated above. The Committee imagines this 'bridge' as having three lanes, each representing different strategies for moving to equal justice. One lane is facilitating everyday justice, the second is transforming formal justice

[108] Hazel Genn, "What is Civil Justice For? Reform, ADR, and Access to Justice" (2012) 24:1 Yale Journal of Law and the Humanities" 415.



and the third is reinventing the delivery of legal services. Those three lanes are the topic of this part of the report.

The conceptual bridge rests on three structural supports: increased public participation and engagement; improved collaboration and effective leadership; and enhanced capacity for justice innovation. Those structural supports will be discussed in part III.

The Committee has proposed targets, milestones and actions for each lane and structural support. The targets are framed as measurable, concrete goals to be achieved at the latest by 2030. While different organizations and individuals may debate the specifics, the targets are designed to reflect a consensus of what is required. Achieving these targets will require individual, coordinated and collaborative efforts – none is in the purview of a sole justice system player.

Examples of immediate and interim actions and strategies are offered to illustrate the way forward, recognizing that much more detail is required and can be developed over time. Wherever possible, examples of emerging good practices and insights from research and evaluations, as well as links to further information are included in the discussion. The goal is to enlarge and change the conversation about access to justice in a manner that invites participation and inspires action. The Committee solicits feedback to these proposals and looks forward to an active and engaged dialogue.

## Facilitating Everyday Justice

A new paradigm for access to justice is gradually evolving out of civil legal needs research that has taken place over the past several years. Currie has been a strong proponent of this shift, centred on the concept of "everyday justice". The idea of everyday justice is that few problems, in reality, are dealt with in the formal justice system. Knowing this, we need to take a much broader view of access to justice. Facilitating everyday justice requires three main changes. We need to:

- Recognize that there are many paths to justice.
- Find ways to deal with a larger number of legal problems through a larger range of mechanisms.
- Shift our attention "far upstream from the courts" by investing in timely intervention and preventative services.

Facilitating everyday justice means improving legal capability, taking legal health seriously, enhancing triage and referral systems to navigate paths to justice and taking active steps to ensure that technology is well used to facilitate equal, inclusive justice.

### Law as a Life Skill

Law should be seen as a life skill, with opportunities for all to develop and improve legal capabilities at various stages in their lives, ideally well before a legal problem arises. Law is a fact of life in the 21st century. Almost everyone will experience a legal problem at some point in their lives, but until that happens, most people don't know what to expect from the justice system, the benefits of different paths and legal services and so on. Those involved in the justice system and in legal service delivery have a shared responsibility to increase the legal capabilities of everyone in Canada.

Building legal capability involves knowledge, skills and attitudes. Teaching law as a life skill also helps to cultivate trust and confidence in the justice system. All justice system participants can find ways to help build capability in their daily contact with members of the public.

**Poor people and potential**

"All people, including the poor, have enormous capacity to help themselves. Despite appearances, deep inside of every human being lies a precious treasure of initiative and creativity waiting to be discovered, to be unleashed, to change life for the better."

***Muhammad Yunus, Founder Grameen Bank, Lawyers Can Help Us to Win the War Against Poverty (2013)***

Legal capability training is a new approach that builds on a rich foundation of public legal education and information (PLEI) resources and curriculum.

PLEI is key for people to develop their capacity to understand the law. Information is a basic element of access to justice. The focus of this section is on PLEI approaches to building law as a life skill, but PLEI is also an important aspect of the continuum of legal services, discussed later in the report, assisting people when they confront a specific legal problem or problems.

At present, most people seek out legal information when they are in a legal bind, during a time of crisis. The goal is to change this so that everyone develops basic legal capabilities as part of public education curriculum and has a continuing opportunity to build on this base of knowledge and understanding throughout their lives.

As Sarah McCoubrey, Executive Director of the Ontario Justice Education Network, explained in her Summit presentation, building legal capability involves three components: knowledge; skills and attitudes. Teaching law as a life skill helps to cultivate trust and confidence in the justice system.

Seeing law as a life skill is also consistent with what the Committee learned in the community consultations. Many individuals said they experience the justice system as withholding critical information. In their view, information about law and its processes *empowers*; it enables community members to know their rights and how to enforce them. Being informed helps to ensure equal participation in the justice system.

McCoubrey offered her framework for the elements of legal capabilities and highlighted the value of legal professionals sharing our advocacy skills.

## Framework for Building Legal Capabilities

**Knowledge**

- Know where to find out more
- Understand the issues
- Know the routes to a solution (or processes)
- Know where to get help.

**Skills of Legal Capability**

- Listening
- Communication
  Distinguishing between interests
- Imagining alternative solutions
- Ability to collect and record details
- Identifying between facts and emotions
- Empathizing with others in a dispute
- Identifying bias or self-interest

**Attitudes of Legal Capability**

- Trusting the professionals working in the system
- Believing that the system is impartial
- Believing that one deserves a fair resolution
- Having confidence that decision makers are unbiased (bribes, connections etc.)
- Believing that system evolves or can change
- Seeing that the system responds to injustices

**Sharing our Advocacy Skills**

- Consider All Perspectives
- Listen
- Find Evidence
- Talk to Experts
- Look for Bias
- Evaluate Sources
- Empathize with Others
- Be Curious
- Take Responsibility
- Give Reasons

The Summit workshop on PLEI centred on new challenges, emphasizing the need to empower the public and engage the legal profession to a greater extent. Legal practitioners need to do better at integrating public legal education and information resources into their delivery of legal services. Providing reliable legal information can help to build trust between a lawyer and client. Lawyers can also assist in developing PLEI materials, using plain language and providing specialized legal content to technology specialists, while also making their clients aware of and promoting easy access to those materials.

## Learn more: about Emerging practices – some examples:

**Use of Wiki books, wiki resources, and crowdsourcing:**

Clicklaw Wikibooks (eg. See, JP Boyd on family law)
www.wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law

Partnering with public libraries and others to increase access Legal aid at the library:
www.lasclev.org/legal-aid-at-the-library/

Public libraries - Access to Justice project:
www.lawhelpmn.org/resource/public-libraries-access-to-justice-project

Finding Legal Help – San Francisco Public Libraries Project:
www.sfpl.org/index.php%3Fpg%3D2000024801

Code, Laws and Legal Help/Oakland Public Library:
www.oaklandlibrary.org/online-resources/government-resources/code-laws-and-legal-help

**Connecting resources:**

www.clicklaw.bc.ca/
www.povnet.org/

Clicklaw BC Help Map: www.clicklaw.bc.ca/helpmap

Platforms to compile resources:
www.yourlegalrights.on.ca/\videoshttp://vimeo.com/channels/yourlegalrights

Mobile phone: www.mobile.dudamobile.com/site/yourlegalrights

FLIP – Family Law Advice: www.legalaid.on.ca/en/getting/flip.asp

Use of video/audio:
Video tutorials from BC Courthouse library: www.courthouselibrary.ca/training/videos.aspx

**Self Help materials:**

What young mothers should know about Children's Aid Societies: www.vimeo.com/75326555

Going to the tribunal work book: www.bccpd.bc.ca/docs/cppworkbook_web.pdf

PEI:
www.cliapei.ca/content/page/publications_court/
www.cliapei.ca/content/page/publications_family

Keeping PLEI resources "open":
Declaration of an explicit grant of permission for attributed, non-commercial use:
Courthouse Libraries BC and Clicklaw offer.

Some PLEI providers have expressed concern that lawyers may discount research that clients have done because they perceive it as threatening the lawyer's role. It is difficult to gauge whether this concern is widespread or founded. Many lawyers, including John Paul Boyd, a leading proponent of integrating PLEI with delivery of legal services in the family law context, have suggested that an informed client is "not a threat, it is a blessing".

PLEI providers agree there is room for more coordination and opportunities to learn from each other, as well as a need for more creativity, collaboration, neutrality and rigour. Open licensing can be used to encourage borrowing and reduce duplication. There is an ongoing debate about the best ways to aggregate information, whether by linking web resources through portals or by other means. PLEI should not be framed as a complete answer to the public need for legal education, advice and representation, but it is a valuable starting point to assist people to connect to other resources.

**Target: *By 2030, 5 million Canadians have received legal capability training.***

**Milestones:**

- *Law as a life skill courses are integrated into public education curricula*
- *Legal capabilities training modules are available to specific groups during life transitions (e.g. newcomers to Canada, older adults at retirement, young adults entering the workforce)*
- *Legal capabilities training is embedded into workplaces and other environments where training can be sustained*
- *Lawyers integrate legal capabilities approaches and work with public legal education and information providers (PLEI) in their delivery of legal services*

**Actions:**

- *The CBA and PLEI organizations work with the Council of Ministers of Education, departments of education, school boards and other interested organizations to advocate for the integration of law as a life skill courses into schools across Canada*
- *The CBA encourages lawyers to integrate PLEI materials and a legal capabilities approach in the delivery of legal services (where appropriate) and to assist PLEI organizations to develop and update materials*
- *PLEI organizations develop stronger partnerships with public and private sector organizations to integrate legal capabilities training into their existing programs, including those organizations serving members of the public experiencing life transitions (e.g. newcomers and seniors organizations)*
- *PLEI organizations develop, pilot and test national model legal capabilities training modules and protocols*
- *Justice system stakeholders work with PLEI organizations to develop and train rosters of law students, and current and retired lawyers and judges to deliver legal capabilities training in a variety of settings*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

## Legal Health Checks

The access to justice literature has long recognized that preventing legal disputes is a key facet of an effective justice system. Prevention can be enhanced by better access to legal information and by public policy initiatives, such as no-fault insurance, proactive regulation or consumer protection, which remove the need for legal assistance to resolve problems by shifting the burden of demanding compliance to public bodies. Systemic advocacy to reform laws, regulations and institutions is often the only effective way to eliminate recurring problems because they can get at the root causes of repeated and often routine legal issues.

## WHAT IS LEGAL HEALTH?

Everyone knows that by eating the right foods, having enough sleep and exercise and avoiding stress you can stay healthy, strong and be better able to ward off illness.

Just like your body, your "legal health" needs attention. By following some simple steps your legal health can also be strong and you can avoid or minimize problems that could otherwise be expensive, time consuming and stressful.

There are certain events that most people face in life, such as entering or exiting a relationship, buying, selling or renting a house, the death of a loved one and possibly being questioned or arrested by the police. By being informed and by following some simple steps you can be prepared for these life events, even the unexpected ones.

***Women's Legal Services, Tasmania***

Lawyers have traditionally played a pivotal role in preventing legal disputes, by providing strategic advice and planning services. This role is diminished now when many people have limited access to lawyers, so we must consider new means to make preventative measures more available. For example, providing post-dispute resolution support can assist in preventing legal issues from recurring or resolving related problems before they also develop into legal disputes. This approach is often referred to as building resilience to future legal problems.

Initiatives that focus on legal health advance our capacity to prevent legal problems and build resilience to future or recurring legal problems. Just as the health system aims to both prevent and treat disease, so too the justice system should aim to prevent legal problems in addition to providing assistance when they arise.

The legal health checklist model ties together the ideas of prevention, resilience and building legal capability. A number of legal practice websites encourage people to have an "annual legal health checkup" or offer checklists of situations in which legal needs or issues often arise. While to some extent these checklists are marketing tools, they could be a significant preventive measure if properly developed and employed. For example, Australian legal providers are developing legal health checklists that can be self-administered to create awareness of common legal problems and how to address them, or used by service providers to ascertain whether an individual who is seeking one form of assistance, say in a homeless shelter, has other types of problems that could be addressed through an appropriate referral. These checklists can also offer general advice on "how to stay legally healthy".

Women's Legal Services Tasmania has published an excellent booklet called *Legal Health Checkup – What shape is your legal health in?* It opens with an engaging introduction and definition of legal health. The booklet aims "to encourage people to take basic steps in their day-to-day life, which will help ward off legal nasties and other situations, which could otherwise be avoided." It points out that both physical and legal health are important: "Taking basic steps like the ones outlined in this booklet and knowing your rights or where to go to get the right advice can be the difference between legal health and a legal disaster."[109]

According to the booklet, there are three essential items at the foundation of legal health: a will; a reliable post address; and a safe place for important documents. The booklet also provides checklists about legal issues that arise in ordinary day to day life, and in other more specific situations. These situations include: relationships (moving in together, getting married, having a baby, separation, divorce); putting a roof over your head (moving house, being a tenant, being a landlord, buying a house, selling a house); money money money (watching out for the credit crunch, mortgages, personal loans and other forms of finance, email offers and overseas lottery wins, rent to buy, financial abuse, bankruptcy); when someone dies

[109] Women's Legal Services, *Legal Health Check Up: What Shape is Your Legal Health In?* (Tasmania, Australia, August 2013) http://www.womenslegaltas.org.au/uploads/booklets/Legal_Health_Checkup.pdf.

(registering the death, find the will, funeral plans); and the police.

Legal service providers, including legal aid plans and community-based clinics, have a particularly key role to play in contributing to legal health, both at the individual and systemic levels. In addition to administering or making available personal legal health checklists, with appropriate resources these organizations could also carry out broader heath checks — providing valuable feedback about the incidence of legal problems in a community and potential systemic solutions. These organizations could offer an early warning system about general increases in certain types of legal problems with a view to timely intervention and prevention. In some communities, this work would need to be carried out in conjunction with trusted intermediaries. However best established for a particular community, the idea would be to enhance opportunities for contact between members of the public and service providers, creating more everyday opportunities for ameliorating social exclusion and disadvantage and creating equality.

At the Summit, Allan Seckel, CEO of the British Columbia Medical Association and former Deputy Attorney General for British Columbia, introduced the idea of "capitation" in the sense of assigning responsibility for the legal health of a community to a particular individual or organization. This idea takes the concept of legal health checks one step further. Both systemic legal health checks and the idea of assigning responsibility for the legal health of a community share the advantage of moving from an opt-in to an opt-out system. A valuable lesson from health care delivery is that services provided on an opt-out basis, such as vaccinations, have a much higher take up rate than those provided an opt-in basis – particularly in reaching people living in marginalized conditions.[110]

We have a long way to go to integrate these insights, and develop measures of legal health and mechanisms to contribute more proactively to prevention. A commitment to rebalancing the emphasis on prevention and resolution requires us to broaden our thinking about how the justice system functions now. The concept of legal health encourages the kind of 'outside the box' thinking required to make this profound shift.

### Learn More: What is a legal health checklist?

**From Canada**

LAWPRO's practicePRO initiative Annual Legal Health Check-Up: www.practicepro.ca/practice/pdf/Annual-Legal-Check.pdf

**From Around the World**

State Bar of California, "How Is Your Legal Health? Legal Health Checklist": www.calbar.ca.gov/LinkClick.aspx?fileticket=REVCXS6ShNQ%3D&tabid=1322

The Women's Legal Service Tasmania, "Legal Health Check Up: What Shape Is Your Legal Health In?": www.womenslegaltas.org.au/uploads/booklets/Legal_Health_Checkup.pdf

Legal Aid Act, Australia, "Legal Health Checklist": www.legalaidact.org.au/pdf/publications_legalhealthchecklist.pdf

YOUTUBE VIDEO! Queensland Public Interest Law Clearing House, "Legal Health Check Training Videos": www.qpilch.org.au/cms/details.asp?ID=692

ChristieLaw, Australia, "A Legal Health Check – for Personal Needs" and "A Legal Health Check – for Small Businesses": www.christielaw.com.au/a-legal-health-check-for-personal-needs/

Contact Law, United Kingdom, "Small business legal health check": www.contactlaw.co.uk/small-business-health-check.html

[110] Mulherin at CBA Summit, *supra* note 73.

**Target:** ***By 2020, individual and systemic legal health checks are a routine feature of the justice system.***

**Milestones:**

- *Legal aid/assistance providers have a strong capacity to undertake follow up with clients on a routine basis, including, for example, through post-resolution follow up*
- *Legal aid/assistance providers have a strong capacity to carry out systemic health checks and routinely provide input to law and justice reform processes to enhance capacity to prevent/ minimize frequent legal problems*

**Actions:**

- *The CBA partners with PLEI organizations to establish a universal Canadian legal health checklist and make it broadly available to individuals, to students as part of high school and other training curriculum, or by service providers to review with people using their services*
- *The CBA promotes the use of legal health checklists at Law Day and other forums and encourages other justice stakeholders to do the same*
- *Legal aid/assistance providers collaborate with each other and community groups to adapt the legal health checklist to their communities/ specific contexts. The adapted checklist includes a tool kit with information on where to go for help and best practices guide for integrating checklists into service delivery*
- *The CBA collaborates with interested organizations to prepare an options paper on the broader concept of legal health and the prevention of legal disputes, including the use of legal health system checklists*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

## Effective Triage and Referral to Navigate the Paths to Justice

There are many paths to justice and more are required to ensure that people are quickly and properly directed to services and assistance so they can effectively address their legal problems. The way people enter the system and the way they are treated on day one is the essence of a people-centred justice system.

People currently report finding it difficult to navigate the justice system. The need for improvement was highlighted in the Committee's community consultations and on the street interviews:

> "There should be a place that everyone should know about. If you have a legal issue, you can go explain your situation and they would tell you where to go, YWCA, website, etc. A sort of triage service to get you on the right track. Right now it's all disjointed and hit or miss. It's difficult to get good information." ***Single mother, Moncton***

> "Have a central place with information and a "triage" service to point everyone in the right direction, e.g. both victims and offenders. Develop a checklist or questionnaire to identify people's needs. Make sure it is flexible to respond to our realities, such as being available evenings and weekends, via telephone and the internet." ***Single mother, Moncton***

> If I was a person who needed a legal service, I would have trouble knowing where to start. Most people just have no idea.... what programs are new, who do I call?
>
> ***Woman in Victoria, Envisioning Equal Justice on the street interviews***

The hurdles people typically encounter in navigating current paths to justice and locating the services they need is underscored by mapping projects, such as the Canadian Forum on Civil Justice's Alberta Legal Services Mapping Project

and the American Bar Foundation's Access Across America Civil Justice Infrastructure Mapping Project. So often programs and services have been developed ad hoc, adding an agency here and a program there as unmet legal needs become apparent or funding and other resources are identified. There has been no overarching vision or plan, and correspondingly, a lack of integration among various services. A step back is required to reorder what is available, as the current paths to justice are too complex, sometimes even for service providers themselves to effectively navigate.

Services must be designed to meet individuals' needs at the particular stage they are at with their problems, rather than waiting for them to develop to the point that the formal justice system is involved. At the Summit, Mulherin noted that people do not always approach their legal problems or behave in the way that legal service providers expect or want them to. Australian research demonstrates though that people can learn about more effective pathways and "one of the indicators of what people will do with a problem this time is what they did last time." Reform efforts must also account for changes that reduce accessibility by "breaking pathways". For example, existing services may be de-funded, a service may be renamed, or a location or contact person may change.

Accessible services that help people resolve their issues without recourse to the formal justice system are critical. Often, providing specific appropriate services at the right time can avoid or ameliorate the problem without it getting worse and becoming a legal issue potentially implicating the formal justice system. Any triage system needs to recognize the role in preventing legal problems from developing initially, and intervening in a timely way to address those that do arise.

At present, points for people to access the civil justice system are highly decentralized. The advantage is that entry points tend to reflect the way people most often approach problems, for example through trusted intermediaries such as health care providers or social workers. The disadvantages are that it is uncertain where people will actually seek help, and their success relies too often relies on their degree of resilience and willingness to keep knocking on different doors, repeating their stories, until they finally resolve the matter. With each additional step, more people become discouraged and many give up, often at significant personal cost.

Even in the current model, the paths to justice can be made easier to navigate through standardized or generic entry forms that simplify transitions. Another option is providing 'warm' referrals, where the organization approached takes responsibility for ensuring that a referral leads to follow up and action, rather than leaving that with the individual. Equal justice does not depend on an individual's resilience or 'stick-to-it-ive-ness' to effectively navigate the system and achieve a just outcome.

Perhaps the greatest single innovation required right now is an effective triage system in each jurisdiction. This is not a new idea. Community-based legal clinics or offices were initially designed to play this function, efficiently linking community resources and the justice system. Where clinics exist and resources permit, many continue this function. Significant steps have been made recently in some locations, including Family Law Information Centres in Alberta and Ontario, Justice Access Centres in British Columbia, and Centres de justice de proximité in Québec. Triage also takes place in some courthouses and many tribunals, but too often this is attributable to the skills and dedication of an individual staff person, like Louise, a well-known court case management coordinator in one Committee member's community.

Still, we are far from having "integrated well-designed, transparent and intellectually defensible" triage and referral systems.[111] The goal is to build an efficient and transparent sorting system to replace what Richard Zorza, a leading American access to justice scholar, of the Self-Represented Litigants Network, has described as "the multiple, inconsistent and non-transparent processes used by various separate programs and institutions". He has argued that this is an essential feature of reform and that the current US system is the "complete antithesis" of what is needed.[112] The situation is no better in Canada.

[111] *Ibid.*

[112] Zorza, *supra* note 102 at 866.

Zorza suggests that one reason for the lack of progress in access to justice has been a fear of "identifying individual cases in which services are required but cannot be provided for resource reasons."[113] Tackling this concern would require building a system that could be modified to match service need and availability, while setting priorities based on principles (e.g. protecting those with lower capacity or those facing the highest stakes and most difficult issues). This makes sense, but the lack of existing services cannot be used as a rationale for inaction. In fact, one of the benefits of an effective triage system is that it would make the 'mismatch' or gaps between people's needs and capacities and the services available to them much more visible. It would build learning into the system.

Awareness of this problem is growing, but there is no consensus about how best to address it. Three main approaches are currently part of the conversation:

- enhanced single points of entry such as justice access centres;
- building well-networked referral systems based on the "no wrong number, no wrong door" philosophy; and
- putting services in the path of clients who are unlikely because of their geographic or social situation to come into contact with established entry points, including by working with trusted intermediaries.

More consideration should also be given to previous community-based options, including well-resourced community legal offices that serve as a clearinghouse for both legal and non-legal services, or an information and referral service to direct clients to the best sources of assistance for all aspects of their problems. Ontario's community clinics provide a Canadian model.

> Clinics provide services in areas of law that most affect low income individuals and disadvantaged communities, and particularly focus on issues around which a low-income "community of interests" can coalesce. Often clinics assist people with meeting their most basic needs, such as a source of income, a roof over their heads, human rights, rights to education and health care, etc... Clinics provide these services through a variety of methods, including traditional casework, summary advice, self help, public legal education, community development and law reform initiatives. Clinic work often involves trying to effect systemic change on behalf of the broader community.[114]

These approaches should be seen as complementary, as long as they are a part of an effective overall triage and referral system.

The NAC Working Group on Prevention, Triage and Referral envisions triage and referral taking place

[113] Zorza, www.accesstojustice.net/2013/01/30/sorting-hat-triage-article-now-posted/

[114] See, www.aclco.org/about_Clinics_overview.html. See also Andrea Long and Anne Beveridge, *Delivering Poverty Law Services: Lessons from BC and Abroad* (Vancouver: Social Planning and Research Council, 2004) [SPARC report], which surveyed legal service providers about the impact of the loss of community-based services following 2002 cuts to legal aid in British Columbia. See also findings summarized in Melina Buckley, *Renewed CBA Legal Aid Policy* (Ottawa: CBA, 2010) (unpublished 2009 background paper for *Moving Forward on Legal Aid,* on file at CBA National Office), including:

- cuts increased demand for advocate services, with several respondents indicating a doubling or tripling of their client caseload.
- opportunities for one-on-one client services substantially declined – a format many respondents identify as the most valuable type of assistance.
- impact is particularly strong for clients who experience other barriers to access such as language and literacy barriers.
- additional pressure on poverty law organizations, resulting in longer wait times for clients, increased stress for advocates, and a need to 'triage' clients to focus on crisis management rather than prevention.
- more clients simply giving up hope because there is nowhere to turn for assistance.
- lack of legal services is obliging women to return to, or remain within, unhealthy relationships.
- increase in the number of clients trying to represent themselves.
- outcomes for self-represented litigants tend not to be as good, and increase delays in the legal system when claimants lack adequate preparation.
- declining service quality and organizational support for providers.
- concerns about the place of appeals and judicial review, as legal representation is essential for these more complex and technical proceedings.
- limited availability of legal representation means that people's rights are simply not being respected, and access to justice is accordingly compromised.

at three stages: the early resolution stage before a dispute crystallizes; on entry to the larger justice and advocacy system; and after entry into the formal system.[115] Others have focused on a single court-based system, an option discussed later in the section on transforming formal justice.

In the Committee's view, it is critical to move to a well-designed, sufficiently resourced and effective triage system, staffed by highly-trained and capable staff. Different approaches are likely needed to meet the needs of different communities within an overarching province- or territory-wide system. As with all major innovations proposed, it is critical that we evaluate and compare different triage and referral services to understand what works, and to integrate this knowledge on an ongoing basis.

**Target: *By 2020, each provincial and territorial government has established effective triage systems guiding people along the appropriate paths to justice.***

**Milestones:**

- *Triage and referral demonstration projects, including an evaluation component, are in place in each province and territory, building on existing initiatives and experience*
- *A national mechanism is in place to integrate evolving knowledge on the effectiveness of triage and referral services, policies and protocols, including the evaluation of demonstration projects*
- *A best practices guide is available presenting Canadian research and knowledge*

**Actions:**

- *Provincial and territorial governments work with PLEI organizations, legal aid providers and other service providers to prepare and maintain a comprehensive list of early resolution, legal and related services in each jurisdiction or region*
- *Provincial and territorial governments work with PLEI organizations, legal aid providers and other service providers to develop an agreed upon set of core principles to guide the design of triage and referral processes, including a common intake form. Some of this work could take place on a national basis or through the development and testing of prototypes in one jurisdiction to avoid duplication of effort.*
- *Provincial and territorial governments work with PLEI organizations, legal aid providers and other service providers, to develop and implement training in support of triage and referral policies and protocols*

## What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

### Learn More: about some effective Triage and Referral initiatives

National Action Committee on Access to Justice in Civil and Family Matters, *Report of the Working Group on Prevention, Triage and Referral*: http://www.cfcj-fcjc.org/sites/default/files/docs/Report%20of%20the%20Prevention%2C%20Triage%20and%20Referral%20WG%20.pdf

Family Law Information Centres: Alberta: http://www.albertacourts.ab.ca/fjs/flic.php

Family Law Information Centres: Ontario: http://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.asp

Family Mediation Services: Ontario: http://www.attorneygeneral.jus.gov.on.ca/english/family/family_justice_services.asp

Justice Access Centres in British Columbia: http://www.ag.gov.bc.ca/justice-access-centre/

Centres de justice de proximité in Québec: http://justicedeproximite.qc.ca/

[115] National Action Committee on Access to Justice in Civil and Family Matters, Prevention, Triage and Referral Working Group, *Final Report: Responding Early, Responding Well* (February 2013) at 15 http://www.cfcj-fcjc.org/sites/default/files/docs/Report%20of%20the%20Prevention%2C%20Triage%20and%20Referral%20WG%20.pdf.

## Inclusive Technology Solutions

Canada's justice system lags behind other sectors for integrating technology. Technology (including information technology) can be harnessed to improve access to justice and is an integral part of all three major strategies for change discussed in this report: facilitating everyday justice; transforming formal justice; and reinventing the delivery of legal services.

Technology can:

- automate current processes and make them more efficient and accessible to individuals
- create new pathways to justice
- provide direct access to justice services (e.g. online dispute resolution).

While technology can support justice innovation generally, it is particularly useful for facilitating everyday justice. At the same time, careful planning is needed to prevent technological innovations from creating or reinforcing existing barriers to equal justice.

### *Trends in Harnessing Technology to Improve Access*

Technology is increasingly used as a tool to both deliver information and expeditiously link people to the services that best contribute to equal access to justice. A recent Australian report on harnessing the benefits of technology in this context provides a helpful framework[116]:

[116] Australian Government, *Harnessing the benefits of technology to improve access to justice –Analysis paper* (Sydney: Commonwealth of Australia, 2012) [Australian Report].

## Access to justice benefit

| | Providing access to information | Supporting the delivery of services | Providing seamless & integrated services |
|---|---|---|---|
| **How does technology support this?** | • assisting people to access and understand the law and information about how to resolve problems early and cost-effectively | • improving access to other third party support and assistance such as ADR, court services and tribunals<br>• improving the efficiency and scope of service delivery to the public on a cost effective basis | • providing a 'no wrong door approach' for entry into the civil justice system<br>• integrating delivery of services across agencies/ organisations |
| **Examples of technology initiatives** | • legal information and referral websites<br>• apps<br>• social media | • videoconferencing<br>• online dispute resolution<br>• e-court services such as e-filing and e-lodgement<br>• online transaction services | • whole of government web portals<br>• integrated information systems that share information e.g. between government agencies |

Today, the Canadian focus is primarily on applying existing technology initiatives, such as the internet and software applications, telephone and audio-visual technology, to improve access to justice. However, internationally, some sectors of the civil justice system are also applying emerging technologies, such as online dispute resolution, social media, cloud computing, smart phones, mobile software applications and mobile computing. In some jurisdictions, civil justice sector agencies and organizations are using websites for more than just providing information. There is increasing use of websites and Web 2.0 initiatives (such as blogs and social media) to both engage the public and gather information, for example, through polls, surveys and online consultations. Five main trends are identified in the Australian report:

- interactive web initiatives
- integrated legal assistance services
- online dispute resolution and telephone-based ADR services
- increased use of technology in courts and tribunals, and
- 'one-stop shops' for government services.

In this section, the Committee includes examples from Canada and abroad to demonstrate how technology is currently being harnessed to facilitate everyday justice. The use of technology by courts and tribunals is discussed in the next section.

### Learn More: about Online Dispute Resolution and Telephone-based ADR services

HiiL online divorce program:
www.hiil.org/project/divorce-online

Online family mediation in the Netherlands:
www.adrresources.com/adr-news/802/online-family-mediation-netherlands-tilburg-university-tisco

**Other examples:**

www.equibbly.com/
www.odr.info/
www.mediate.com/odr/
www.europa.eu/rapid/press-release_MEMO-13-192_en.htm

Smartsettle is aimed at conflict resolution and dispute prevention for different decision making and negotiation situations, ranging from complex negotiations to simpler single issue disputes—eg family and small claims disputes. It is based in Vancouver, Canada but the software can be used for eNegotiations worldwide. It can provide parties with more control to decide, with a facilitator, on a combination of online and face-to-face meetings for their particular situation:
www.smartsettle.com/

Consumer Protection BC has a self-help online tool for consumers to settle disputes with businesses. This is a relatively simple form of ODR that is delivered by email:
www.consumerprotectionbc.ca/odr

Remote mediation by teleconference is another obvious choice, but these services tend to be available in fewer areas, and often only for those who can afford to pay and are represented by legal counsel on both sides to coordinate it: www.odr2013.org/

Technology can increase the channels of communications and access between legal assistance providers and community service providers to assist people living in marginalized conditions or in rural and remote areas far from most services. Properly employed, technology can improve access for Aboriginal persons, and for people with disabilities, from culturally or linguistically diverse backgrounds and in low socio-economic situations. A key consideration is to ensure that people receive the support they require at the first point of contact to avoid 'referral fatigue'. Integrated web and telephone assistance services, telephone and audio-visual technology, social media and mobile software applications can all be recruited toward this end.

**Best Practices – Example:**

MIDLAS community legal centre in Western Australia has implemented a highly effective social media campaign to share relevant and up-to-date information and advocacy options with clients, while raising awareness about the plight of the disadvantaged, offering information and building stronger connections within networks. MIDLAS currently has six dedicated and integrated social media platforms: www.midlas.org.au/media/socialmedia/

Australian Report, note 116

The Australian report concluded:

> …while technology can offer great benefits in simplifying processes, reducing costs, improving communication and promoting access to justice as a whole, implementing technology solutions without a clear strategic purpose and policies underpinning their implementation may diminish the effectiveness of the solution. There is the risk of resources being wasted if the procurement and implementation of these initiatives is carried out without well thought out strategies.[117]

The report also noted that the civil justice sector's slow progress in developing policies and strategies around the use of emerging technology has delayed the uptake of these initiatives. This delay can be partly explained by the interconnection between technology initiatives and technical and information management issues relating to confidentiality, privacy, identity security, record keeping and storage of information.[118]

US reports reach similar conclusions about trends in harnessing technology to facilitate access to justice. A growing number of technology tools are used by legal aid providers, courts tribunals and others, and new tools appear frequently. Adoption of the best tools is sporadic, and their use is far from widespread.[119] Two US experts, Linda Rexer and Phil Malone, have identified barriers to adopting effective technology strategies for improving access to justice:

a) Lack of uniformity, standardization and simplification;

b) Perception that using technology is not full justice;

c) Resistance to change and planning for usability and quality;

d) Lack of top leadership support and impediments in large programs;

e) Lack of adequate and appropriately targeted funding;

f) Lack of guidelines for making technology decisions;

g) Lack of adequate policy framework and unauthorized practice of law; and

h) Fragmentation of the delivery system and lack of national support mechanisms.[120]

Many of these barriers overlap or interrelate. For example, being able to make good technology

[117] *Ibid.*

[118] *Ibid.*

[119] Linda Rexer and Phil Malone, "Overcoming Barriers to Adoption of Effective Technology Strategies for Improving Access to Justice" in James E. Cabral, Abhijeet Chavan, Thomas M. Clarke, John Greacen, Bonnie Rose Hough, Linda Rexer, Jane Ribadeneyra & Richard Zorza, "Using Technology to Enhance Access to Justice" (2012) 26:1 Harvard Journal of Law & Technology 243 at 305.

[120] *Ibid.*

decisions may be negatively affected, not only by a lack of guidelines but also by resistance to change, inadequate executive-level support for using technology or a fragmented delivery system with too few common systems to maximize resources.

Rexer and Malone propose ways to overcome these barriers:

- Incentives
- Money for evaluation
- Bring leaders together to provide them with info about IT
- Accurate info about costs of projects (upfront, support and maintenance)
- Cost savings can be achieved by consolidating hardware and software for multiple organizations into shared, virtual servers.
- Technology funding should be seen as iterative, rather than one-time, and funders should be mindful of the need for ongoing support and maintenance.[121]

Q Wonder about an app that would show wait times for different processes.

Or, one to empower people to provide feedback about the system and gather important information

A Yay – great idea !!

***From discussion at Summit workshop on Administrative Tribunals***

An intriguing way to foster innovation and engage public and private sectors is to sponsor "app development" competitions. This is an innovative and cost effective way to encourage new ideas, as the value of the apps created generally far exceeds the prize money offered to the winning entrants.[122]

There is significant scope for further growth in this area and public expectations for accessibility are likely to increase. For example, people will increasingly expect to access up to date information through mobile media devices.

The CBA Legal Futures Initiative is also taking a close look at how new technology platforms can impact the delivery of legal services. Its June 2013 report summarizing preliminary research, "The Future of Legal Services: Trends and Issues,"[123] concludes that none of the critical change factors currently in play is more important than the rapid growth in innovation and adoption of new technology. It notes an uneven adoption of technology by law firms and lawyers; there have been few incentives and because of partnership structures and tax laws, very few firms re-invest profits in basic research and development, new processes, services and technology. Some key technology trends affecting the practice of law are online dispute resolution, an electronic marketplace (including virtual law firms), computer intelligence systems with capacity to manage and access data, solve problems, and draw conclusions and social networking.



[121] *Ibid.* See also discussion in Australian Report, *supra* note 116.

[122] *Ibid* at 12.

[123] www.cbafutures.org/trends

## Learn More: about Using Technology

Youtube videos for unrepresented clients going to court (Pro Bono Law Alberta and the CBA-Alberta Branch): www.pbla.ca/news/http://www.pbla.ca/news/

Australian national A2J website: www.nationalprobono.org.au/page.asp?from=5&id=287
www.accesstojustice.gov.au/Pages/default.aspx

20 Territory Growth Towns – Talking posters: www.adc.nt.gov.au/media/2012/ADC_talking_posters.pdf

South Korea downloadable mobile applications from their websites provide information on various everyday justice initiatives run by their government: http://english.mw.go.kr/front_eng/al/sal0401ls.jsp?PAR_MENU_ID=1002&MENU_ID=100205

Illinois Legal Aid Online: www.illinoislegalaidonline.org/

Immigration Advocates Network : www.immigrationadvocates.org/nonprofit/

Pine Tree Legal Assistance: www.ptla.org/

SelfHelpSupport.org: www.selfhelpsupport.org/

LawHelp.org:www.lawhelp.org/

The Self-Help Assistance Regional Project ("SHARP") uses videoconferencing equipment to link four court-operated self-help centers in California. This means one supervising attorney and minimal support staff can offer assistance through workshops and individual support to more than 1200 people monthly: www.lawhelpca.org/organization/self-help-assistance-and-referral-program-sha?ref=85a6G

Techno.la Blog – Julia Gordon, Project for the Future of Equal Justice, Equal Justice and the Digital Revolution: using Technology to meet legal needs of low income people: www.clasp.org/admin/site/publications_archive/files/0110.pdf

LSNTAP - Legal Services National Technology Initiative Project: www.lsntap.org/

LSNTAP provides technology leadership to the poverty law community through on-site assistance, tutorials & training, online information & services, and promoting successful technology tools that improve efficiency or client services. NTAP receives funding from the Legal Services Corporation Technology Initiative Grants, and is supported by over 50 legal aid progra ms across the country. LSNTAP's wiki site for information on training and legal aid technology tools being used across the country: http://lsntap.org/

Nonprofit Technology Network: http://www.nten.org/

Self-Represented Litigants Network: http://www.representing-yourself.com/bibliography

Contra Costa, California Self Help:
http://cc-courthelp.org/index.cfm?fuseaction=Page.ViewPage&pageId=5818

Center for Access to Justice & Technology (Chicago-Kent College of Law):
http://www.kentlaw.iit.edu/institutes-centers/center-for-access-to-justice-and-technology/self-help-web-center

### *Concerns about IT Solutions*

Integrating technology solutions into justice system reform while ensuring that those solutions advance equal justice and inclusivity requires us to identify existing barriers and avoid creating new ones. Bonnie Hough, a US legal aid lawyer, has said about the adoption of new technology: "let's not make it worse".

Hough is concerned about the "specter of a digital divide that institutionalizes a two-tiered system incapable of delivering appropriate justice to low-income persons."[124] She says:

> Technology offers many options for the largely underserved rural population. It can assist those who do have web access by providing legal information online and allowing litigants to access court files, pay fines and fees, and file documents remotely. Legal aid programs have also succeeded in using videoconferencing to reach rural residents. Videoconferencing and telephonic appearance procedures are also making it possible for rural residents to participate in some court proceedings without incurring the cost of traveling to the courthouse… However, [these developments are] not possible in all areas because of significant technological challenges. Indeed, many rural service providers do not have access to high-speed Internet connections, some lack cell phone reception, and others have little nearby access to fax machines. In addition, rural areas have high levels of illiteracy, which limits the value of text-based information. For these reasons, courts and legal aid providers must maintain traditional services even as they expand into new technological frontiers.[125]

She also points out that while technology can be particularly helpful in providing meaningful access to information and the courtroom for people with disabilities, other disabilities get in the way of accessing the internet and gateways commonly used to offer information and help. Thoughtful web design can overcome many challenges, but it cannot change the fact that fewer adults living with a disability use the Internet, compared to adults without a disability.[126] Even 'smart' programs with built-in ratings/assessments/feedback features cannot reach or help people who for whatever reason will not use it to begin with, or try it once or twice but then give up.

For service or information providers, one of the greatest challenges to using technological solutions to increase access to justice is the lack of personal contact with an individual, contact that allows the provider to better gear what is offered to the needs of that particular individual. That personal contact can be the key for successfully navigating either informal or formal justice sectors, pursuing a process through to a satisfactory conclusion and achieving a just outcome. Integrating technology and access to justice must not replace personal assistance where it is needed to ensure equal justice.

### *Fostering Inclusive IT Innovation and Planning*

The Committee proposes that by 2020, all justice sector organizations will have plans to harness technology to increase access to justice, ensuring inclusivity by eliminating barriers to underserved populations and avoiding new barriers. Developing and implementing these plans will be done in a way that ensures technology is integrated in a systematic, efficient and inclusive manner.

To accomplish this ambitious goal, Canada's justice community could consider principles developed in other jurisdictions. The California Judicial Council commissioned an independent agency to survey California legal service providers and self-help centre staff to identify potential benefits and barriers from increased use of technology for low-income persons. The Council eventually adopted guiding principles that articulate fundamental core values for future use of technology in the courts, and offer guidance to courts and court partners on how to avoid barriers to access to justice.

The principles suggest considerations for court technology decision makers, rather than mandating

[124] Bonnie Rose Hough, "Let's Not Make it Worse: Issues to Consider in Adopting New Technology" in Cabral et al, "Using Technology to Enhance Access to Justice", *supra* note 119 at 256.

[125] *Ibid* at 261-262.

[126] *Ibid.*

any particular step.[127] They recognize the need for those implementing court technology to not only ensure that innovations improve access to justice, but also that the innovations lead to appropriate and neutral substantive outcomes. They say that the first and most fundamental principle is to "Ensure Access and Fairness", recognizing that the unique needs of certain groups of litigants must be at the forefront in technology planning.

Other main principles address real concerns about technologically assisted access by underserved populations, as several groups face particular challenges with using technologies:

- Preserve traditional access for those persons challenged by technology — encourage but do not mandate technological solutions
- Provide education and support to potential users of these services on an ongoing basis
- Secure private information including by informing individuals of risks associated with use of public computer terminals and ways to mitigate those risks.[128]

Courts and legal aid providers should also consider hybrid legal service systems that integrate human and automated assistance. The question of inclusive design can be addressed in the early phases of planning and development, rather than left to the implementation stage. For example, software developers and web designers must recognize that features making an application 'friendly' for unsophisticated users may make it 'unfriendly' for those who use the application more frequently: "unsophisticated users are best served by an application that leads them step-by-step, whereas more frequent users are best served by an application that allows the fastest and most efficient data entry possible".[129] In some cases, two or more versions of an application may best meet the reasonable needs of both types of users.

> A tremendous body of knowledge has developed around the strengths and weaknesses of particular technologies, strategies for choosing appropriate technologies, the challenges of effectively implementing and maintaining valuable technologies, and the effectiveness and return on investment of particular tools. To be most effective, courts and organizations deploying access to justice technologies need to be able to build on and leverage these experiences and best practices to design and implement their projects as state-of-the-art and integrated solutions, rather than reinventing the wheel and making avoidable mistakes. Beginning new projects from the strongest possible knowledge base prevents organizations from going down technology paths that end up conflicting with or excluding other valuable options and avoids wasteful mid-course corrections.
>
> ***Linda Rexer and Phil Malone, "Overcoming Barriers to Adoption of Effective Technological Strategies for Improving Access to Justice", note 119.***

Inclusive integration of technology should be supported on a national basis. Taking stock regularly will build a better understanding of how the current use of technology initiatives is doing to promote access to justice in the civil justice sector. Gaps, emerging trends and opportunities can be identified and inform a strategic approach for implementing technology initiatives that promote access to justice.

In the US, there are a number of national sources of information: National Technology Assistance Project, National Center for State Courts Information and Resources, Future Trends in State Courts reports, the Self-Represented Litigation Network and its www.selfhelpsupport.org collection

[127] See, Court Technology Advisory Committee, Judicial Council of California, *Advancing Access to Justice through Technology, Guiding Principles for California Judicial Branch Initiatives* (2012) www.courts.ca.gov/documents/SP12-05_State_Bar_of_CA_COAF.pdf, cited in Hough, *ibid* at 257.

[128] *Ibid.*

[129] *Ibid.*

of materials, and the LSC TIG grant program.[130]

Several annual conferences present sessions on access to justice technology topics, including the LSC TIG conference, NCSC Court Technology Conferences and e-Courts conferences, and portions of the ABA Equal Justice Conference. Many states share specific examples of best practices and lessons learned with one another. The Kleps Award process in California's courts involves a committee of judges and court staff who review and select innovations to improve court proceedings, with mechanisms for evaluation to assess effectiveness.

In Canada, the important national information sharing and evaluation role has being filled to some extent by the Canadian Forum on Civil Justice and the Canadian Centre for Court Technology, but more is needed. A comprehensive source for lessons learned, best practices and opportunities for more in-depth exchange about what works well could avoid repetitive research and duplicative efforts in developing new technology. Shared learning and joint evaluations would also promote technology that is holistic, strategic, efficient, and inclusive. A national strategy to ensure equal justice should include this critical component.

**Target: *By 2020, all justice sector organizations have plans to harness technology to increase access to justice, ensuring inclusivity by eliminating barriers to underserved populations and avoiding the creation of new barriers***

**Milestones:**

- *Evaluation and feedback mechanisms for internet-based and other technology-assisted solutions assess user experience as well as the reasons people do not use the technology or try to use it and give up*
- *Grants and other incentives foster the development of inclusive access to justice technologies*

**Actions:**

- *Technological innovations preserve traditional access for people challenged by technology, including access to a service provider, and the use of technological solutions is not mandatory*
- *Justice system stakeholders survey legal services and community services providers, court staff and others to identify potential benefits and barriers posed by increased use of technology for low-income persons*
- *Justice system service providers offer ongoing education and support to people using technology to accessing their services*
- *Justice system service providers provide active warnings to people about the need to secure private information and protect confidentiality; users receive messages about the limitations of the technology-based service and value of review by a legal service provider*
- *The National Action Committee, its successor, or another national organization:*
  1) *develops guiding principles for justice system stakeholders on how to avoid barriers to access to justice when using technology;*
  2) *provides centralized support for making good technology decisions, including by developing an evaluation tool for investments in new technology, and*
  3) *offers knowledge, experience and data about using technology to advance the planning and delivery of justice services for the most disadvantaged and vulnerable populations. The Federation of Law Societies, law societies or the CBA Ethics Committee, provides guidance on ethical and professional obligations when using technology to deliver legal services*

[130]See: National Technology Assistance Project, www.lsntap.org/; National Center for State Courts Information and Resources, www.ncsc.org/Information-and-Resources.aspx; Future Trends in State Courts report, www.ncsc.org/~/media/Microsites/Files/Future%20Trends%202012/PDFs/TRENDS%202012%20BOOK.ashx; Self-Represented Litigation Network and its selfhelpsupport.org collection of materials, www.srln.org/ & www.selfhelpsupport.org/; LSC TIG grant program, www.tig.lsc.gov/.

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

## Transforming Formal Justice

Courts around the world are engaged in a process of transformation. At the Summit, Zorza described this as a "thousand year change." His point is that the last time courts changed this dramatically was when they became people's courts. He describes a metamorphosis from courts as we have known them to "access to justice institutions". There are two major dimensions to this process: external changes to the relationship of courts to other aspects of the civil justice system and internal changes to the functioning of the courts.[131]

Many of these developments are a response to challenges and pressures on court systems, including changes in demands, limited resources and enhanced knowledge about the multifaceted nature of people's legal problems. The goal of reform of the formal justice system is to complement informal everyday justice innovations, and eliminate gaps between formal and informal justice to create one seamless civil justice system. Here too, the central theme is forging more effective paths to justice and a greater variety of processes to ensure fair procedures and just outcomes, while at the same time building greater coherence. HiiL, an advisory and research institute for the justice sector, frames this as the need to focus on both specific justiciable problems as well as "justice supply chains."

Transformation is a strong word, suggesting thorough, dramatic change. The Committee's view is that it is the appropriate term for the challenges facing courts today, in Canada and elsewhere. Justice remains a cherished public good, and courts and an independent judiciary are essential to our public justice system and democracy itself. Court innovation need not threaten these bedrock constitutional principles. Indeed, transforming formal justice has the potential to ensure the continued vitality of courts by halting a growing disaffection on the part of the public attributable to costs and delay, and inspiring increased public confidence in judicial conflict resolution.

## Global Trends and Strategies

Many court systems around the world are undergoing transformative processes but the purpose and direction of the changes are not always clear. Based on its international scan, HiiL sets out three possible scenarios for the future role of civil courts: courts as the forum of last resort; courts as the solver of legal issues; and courts as *the* central service responsible for adjudicating people's problems.[132] HiiL makes the following points about these three scenarios.

### Courts as a last resort

- A place to go when all else fails.
- Legitimizing the view that people should avoid courts and solve their own problems instead.
- Courts should deal with only the most complicated cases.
- All routine issues dealt with elsewhere.
- Procedural issues, not the substance of the conflict, are more likely to dominate the litigation process.
- Maybe only role is checking whether other decision-makers did an acceptable job.
- Means courts cannot ensure application of the law to everyone.
- Courts may lose some of their legitimacy because they are further from contact with people.

[131] Richard Zorza, "Access to justice: The emerging consensus and some questions and implications" (2011) 94 Judicature 156 at 157.

[132] HiiL, "Three Implied Strategies and Their Implications" (Hague: 17 June 2013) www.futureofcourts.org/strategies/.

### Courts as solvers of legal issues

- Courts are there to provide answers to legal questions.
- The court "will not go into the conflict itself, but is the help desk for the legal problem or for qualification of facts under the law".
- This model matches the tradition of legal education and refers users to other professions for other types of help.
- Mismatches between legal, psychological and technical expertise, perhaps leading to procedural issues and extended litigation. Risk of being too bureaucratic or legalistic: "A lawyer's paradise, but not necessarily a paradise of justice."

### Courts as adjudicators of problems between people

- Courts are THE service that adjudicates problems: crimes and disputes as they are experienced by people in their personal lives, in in business or in dealing with their government.
- Deal with large volumes of cases in a standardized way quickly.
- Problem solving courts will use many techniques to stimulate settlement and make decisions when settlement efforts fail.
- Great added value to society as they can be counted on to solve any serious issue in a fair way.
- Courts will need to adapt to new demands and some judges may find it difficult to adopt these new skills.
- Funding may be a serious issue and the system would depend on cooperative lawyers.

This framework provides a useful starting point to discuss the implications of court reform. The first two scenarios would result in a de-centring of courts in the civil justice system, and a corresponding decrease in their accessibility and role in people's lives. The last scenario is favoured by the Committee, involving re-centring of the courts to be the main path to dispute resolution processes and referral to other services for non-legal aspects of people's problems.

This re-centring of courts would involve transformation and overarching innovations. Global trends offer insight into which tools and approaches are most effective for court-based reform. These include a systems approach that integrates the wider context, using new information technology, distinguishing the minority of complicated cases from standard cases, distinguishing high and low value users, involving the private sector and empowering communities, users and staff.[133] Some specific reforms have proven to be particularly effective, such as court specialization.[134] Good results have also been obtained from making early hearings focused on providing advice about possible settlement options and early neutral evaluation the normal starting point. These early hearings would be followed by a second hearing a few weeks later.

### Transcending the SRL Phenomenon

One of the greatest pressures on civil courts in Canada and the US today is the exponential growth of unrepresented or self-represented litigants. From one perspective, this is and should be the driving force of reform: courts should change to be more directly accessible to litigants without representation. While recognizing the immediate need to accommodate people without representation, the Committee questions this as a principled foundation for reform. There is mounting evidence that unrepresented litigants are at a high risk of not receiving meaningful access to justice. It is also unfair to all involved for judges and court staff to be responsible for finding solutions to a critical systemic problem resulting from failures of the justice system as a whole, notably including governments and the legal profession.

[133] Sandford Borins, "Public Management Innovation: Toward a Global Perspective" (2001) 31 American Review of Public Administration 5.

[134] Sam Muller, Maurice Barendrecht, Robert Porter, Wilfried de Wever, Eva Pouwelse and team, *Innovating Justice: Developing new ways to bring fairness between people* (The Hague: HiiL, 2013) at 55-58 http://www.hiil.org/data/sitemanagement/media/Sneakpreview%20Innovating%20Justice.pdf.

Certainly, short-term strategies must include accommodating unrepresented litigants and ensuring fair treatment (including by opposing counsel), as outlined in the Macfarlane study, but the ultimate goal should be to transcend the unrepresented litigant phenomenon by providing more seamless delivery of legal services to everyone, including representation when required. This perspective does not mean that there will be no unrepresented people by the Committee's suggested target date of 2030, but it does mean that unrepresented litigants will no longer be considered a "problem". Some people will self-represent, not because there is no viable alternative, but because they are able to do so competently given the nature of their problem or dispute, the process and their capacity to participate fully and effectively with available supports.

## Court-based Triage and Referral

Effective triage and referral to appropriate services and processes is key to transcending the unrepresented litigant phenomenon and transforming courts to be fully centred in the broader civil justice system. Re-centred courts will develop capacity for triage and referral that complements and works in coordination with the jurisdiction-wide and community based networks that facilitate everyday justice, as proposed in the previous section.

Zorza has developed two models for court-based triage, one based on an individual decision-maker and the other on a computerized algorithm.[135] The aims and general approach of the two models are fundamentally the same. Either model would unify the two sorting processes required; to determine how a court will handle a case and how litigants will obtain the services they need to interact with the court and other players. (This would include situations in which going to court would not be involved.)

Zorza and other US civil justice researchers, including Russell Engler, have written extensively about the importance of understanding the relationship between court processes and providing services for litigants. These are "moving targets" and the goal is to "figure out how the two processes can work together to provide both optimum case handling from the court's point of view and access from the litigants' point of view."[136] An embedded centralized triage system would take into account innovations on both fronts, again serving as a focal point for learning and integrating new insights.

Zorza's models are well-developed and offer an excellent starting point for an initiative of this type in Canada. He recommends that the system be based not on categories of cases, but on the tasks required of the litigant and the court or other decision-maker. He identifies the following potential "court tracks":

- Non litigation situations (which would jump to the next step, with the process possibly then managed by a services program rather than by the court)
- Uncontested cases requiring no court involvement beyond approval
- Uncontested cases requiring non-judicial court involvement to optimize agreement and decisions for fairness and finality
- Contested cases amenable to alternative dispute resolution
- Contested cases requiring single final resolution between parties
- Contested cases requiring extensive supervision of the pre-trial process
- Contested cases likely to require ongoing decision making and compliance activity.[137]

Breaking down litigant tasks and sub-tasks (such as preparing pleadings, presenting evidence, preparing analysis and judgments) so litigant capacity can be assessed is a complex task. However, a growing body of research in this area centred on the experience of unrepresented litigants to date can be

[135] Zorza, *supra* note 102.

[136] *Ibid.*

[137] *Ibid.*

harnessed to develop principled criteria.[138]

## Court Specialization

Specialized courts, both by problem type and target group, have been demonstrated to contribute to access to justice and quality of decision making. Indeed, the administrative law revolution was based on this premise. Despite the knowledge that specialized courts generally enhance efficiency, there is substantial resistance to this trend in the legal community. At the Summit, Muller spoke about the dichotomy between generalization and specialization, and the tension between the two. He emphasized that most innovation comes from specialization and so allowing for specialization is a positive goal.

Court specialization goes hand in hand with community-based justice models and integrated support systems able to assist people in a more holistic and collaborative way. Often these models and systems focus on criminal law matters and the intersection between people facing particular challenges, such as drug addiction or mental illness, and minor crime. In the civil context, specialization and holistic approaches have mainly been developed in the family law area and there is much scope for expansion on this front. Some specialized courts, including domestic violence courts, deal with overlapping criminal and civil matters. Others focus on a particular group of people, rather than an area of law. For example, there is a strong movement in Canada to approach issues faced by people with Fetal Alcohol Spectrum Disorder as an access to justice issue and to develop specialized approaches to the multiple legal problems experienced by members of this vulnerable group (child welfare, family, criminal, guardianship and trustee), including fully integrated preventative measures.[139] This approach acknowledges that access to justice involves systemic issues and is not simply about how individuals can handle legal problems.

### Learn More: about Good Practices in Court Specialization

Ontario - Domestic Violence Court (DVC) Program:
www.attorneygeneral.jus.gov.on.ca/english/about/vw/dvc.asp

New Brunswick – Mental Health Court:
www.mentalhealthcourt-sj.com/home.html

British Columbia - First Nations Court:
www.lss.bc.ca/aboriginal/firstNationsCourt.php

Alberta - New Ways for Families initiative:
www.newways4families.com/HCI-Articles/current-program-locations.html

UK - Specialist Domestic Violence Courts 2013:
www.cps.gov.uk/publications/equality/vaw/sdvc.html

US - San Diego Superior Court Launches Behavioral Health Court:
www.internationalbipolarfoundation.org/san-diego-superior-court-launches-behavioral-health-court

Australia - Mental health court diversion and support program:
www.mentalhealth.wa.gov.au/mentalhealth_changes/Mental_Health_Court_Diversion.aspx

New Zealand - Family Court of New Zealand:
www.justice.govt.nz/courts/family-court/what-family-court-does/mental-health

and, about Unified Family Courts -
www.attorneygeneral.jus.gov.on.ca/english/family/famcourts.asp

www.court.nl.ca/supreme/family/index.html

www.gov.mb.ca/justice/family/law/englishbooklet/chapter2.html

[138] Some examples include the work of Engler, *supra* note 25 or Sandefur, *supra* note 25 and 32. Also, see report on online family mediation by Tilburg University's Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems in the Netherlands: www.adrresources.com/adr-news/802/online-family-mediation-netherlands-tilburg-university-tisco.

[139] Consensus Development Conference on Legal Issues of FASD held in Edmonton Alberta, September 2013 www.fasdedmonton2013.ca/FASD-Legal/Default.aspx. See also, Canadian Bar Association Resolutions 10-02-A and 13-12-A.

## Courts as Learning Organizations

Re-centred courts would have increased capacity and resources to engage in sustained innovation and more assertively become learning organizations. A learning organization is one that can continually transform itself by integrating evidence-based practices and facilitating individual and shared learning and systemic thinking.[140] This model would assist in meeting the challenges of change by replacing structures and individual thinking, which tends to grow rigid and be best suited for short term or single loop learning, with an evolving understanding and problem-solving capacity. Learning organizations develop responsive cultures that maintain knowledge about new processes, understand the outside environment and produce creative solutions using the combined knowledge and skills in the organization.[141] This requires cooperation between individuals and groups, strong communication and a culture of trust.[142]

In the context of courts, learning involves soliciting feedback from the people accessing court services and effectively using that feedback to inform innovations and reforms. Learning also involves developing and testing prototypes for procedures and evaluating them to ensure that reform is evidence-based to the greatest extent possible. Much can be gained by sharing best practices between courts and tribunals and by coordinating reforms across different courts to minimize duplication of efforts. The Canadian Institute for the Administration of Justice already facilitates an important dialogue between courts and administrative tribunals, but these opportunities for exchange should be increased.

Global developments and initiatives can also contribute to innovation in Canada. The International Centre for Court Excellence is developing a framework for court excellence that includes draft global measures for court performance to help courts improve their operations. The global measures consist of eleven "focused, clear, actionable, core court performance measures" consistent with "universally accepted judicial values and areas of court excellence".

These measures deconstruct the key question, "How are we doing?" The measures are court user satisfaction, access fees, case clearance rate, on-time case processing, pre-trial custody, court file integrity, case backlog, trial date certainty, employee engagement, compliance with court orders, and cost per case. The measures and particularly public reporting on them contributes to both transparency and accountability. At the same time, while responsibility for performance is mainly assumed by the courts, it must be shared by all actors and organizations engaged in justice. It is ambitious but possible to imagine that by 2030, courts around the world, including Canadian courts, will report in a common framework of this type on their websites.[143]

To achieve equal justice, judges, and particularly those in positions of judicial leadership, must advocate for reform within and beyond the court, and be concerned about the functioning of the civil justice system as a whole. Canada is fortunate to already have powerful role models in this regard. This critical role would be supported by the robust internal structure of the court as a learning organization. These issues are discussed more fully in Part III, including the US experience with access to justice commissions, where judicial leadership is often cited as the main prerequisite for success.

[140] See, for example: M. Pedler, J. Burgogyne, and T. Boydell, *The Learning Company: A strategy for sustainable development,* 2nd ed (London: McGraw-Hill, 1997); T. O'Keefe, "Organizational Learning: a new perspective" (2002) 26:2 Journal of European Industrial Training 130; C.L. Wang and P.K. Ahmed, "Organizational learning: a critical review" (2003) 10: 1 The Learning Organization 8; D. McHugh, D. Groves and A. Alker, "Managing learning: what do we learn from a learning organization?" 5:5 *The Learning Organization* 209; David R. Schwandt and Michael J Marquardt, *Organizational Learning* (Boca Raton: St. Lucie Press, 2000); Peter M. Senge, *The Fifth Discipline: The art and practice of the learning organization* (New York: Doubleday, 1990); Peter Senge, Art Kleiner, Richard Ross, George Roth and Bryan Smith, *The Dance of Change* (New York: Currency Doubleday, 1999); P.M. Senge, "The art and practice of the learning organization" in *The new paradigm in business: Emerging strategies for leadership and organizational change* (1990) at 126-138 www.giee.ntnu.edu.tw/files/archive/380_9e53918d.pdf.

[141] C. Argyris, *On Organizational Learning* (2nd ed) (Oxford: Blackwell Publishing, 1999).

[142] *Ibid.*

[143] See the work of HiiL at www.hiil.org/.

## Expanding Judicial Functions

As members of the justice community, many of us share a traditional and limited conception of the role of judges, presiding over trials, hearing and evaluating evidence, finding facts, applying the appropriate legal standards, making judgments and dispensing justice. Particularly during the pre-trial phase of civil cases, judges have traditionally assumed a fairly passive role, allowing lawyers to control the progress and pace of the litigation. In the words of Lord Denning, he or she "must wear the mantle of a judge and not assume the robe of an advocate". Judges must be free of bias and perceived as neutral and impartial at all times, and a more active role can suggest that the adjudicator has taken sides and prejudged the facts, evidence or credibility.

At the same time, judges have an overarching responsibility to ensure fairness of the proceedings and the efficiency and effectiveness of court procedures. At the Summit, Ottawa-based mediator and arbitrator Ian Mackenzie discussed contemporary challenges to the traditional role of judges, noting that it assumes:

- parties are well represented,
- truth will emerge from a contest of positions,
- parties will ensure that the public interest is reflected in evidence and arguments, and
- lawyers will be officers of the court (not relevant for unrepresented litigants).

According to Mackenzie, these traditional assumptions will be challenged by the "excessive adversarialism" that can result when parties are not represented. Unrepresented parties often lack knowledge about substantive law, procedures and rules, do not understand why processes need to be followed, lack objectivity or advocacy skills, and possibly have misplaced confidence in their abilities.

A more expansive view of the judicial function has developed in response to current challenges. This expansion is centred on more active case management, increased judicial dispute resolution and more active adjudication. Administrative tribunals have led the way in these developments, due in part to their greater institutional flexibility.

Many courts around the world have already embraced an expanded view of judicial roles and responsibilities in individual cases. In Canada, acceptance and comfort with this expansion varies widely in the judiciary and the bar, with enough discomfort to slow, and in many cases halt, reform. The Committee proposes that by 2025, these processes will have become mainstream in all courts and courts will be performing new functions in line with their re-centred status in the civil justice system. In some cases, effective implementation of novel functions will require courts to have a broader range of quasi-judicial officers with specialized functions, such as alternative dispute resolution.

Courts and judges must be provided with the knowledge and resources to make these changes effectively. There are also implications for the judicial appointment process, such as the need to allow consideration of candidates' openness to and suitability for broader judicial functions.

### *Active Case Management*

Case management was adopted by Canadian courts from the 1990s onward to address costs and delays in the justice system. Parties traditionally controlled the timing of case events within the overarching structure of court rules. Case management systems proscribe the timing of events to a greater degree. 'Active' case management means the judge takes responsibility for improving efficiency in the court, displacing the role of lawyers in this regard. This judicial function is essential both in the pre-hearing and hearing phases.

Summit participants cautioned that it is uncomfortable for many in the justice system to challenge or suggest changes to traditional approaches to the respective responsibilities of judges and lawyers. Some judges are more willing to take on the responsibility of preventing unnecessary delays. Also, active judicial case management can lead to other problems such as increased complaints of judicial bias and lawyers relying too heavily on case managers. Changes in this area must be fully supported by effective rule making and measures to promote cultural change through education. An iterative implementation process with enhanced opportunities for feedback and evaluation about how more active case

management is in fact being implemented is necessary.

### *Judicial Dispute Resolution*

The Committee proposes that by 2025, re-centred courts will offer more tailored dispute resolution processes, with a greater range of approaches to timely settlement. In some cases, this could mean referring parties outside of the court to more suitable processes, but it could also involve a greater capacity for judicial dispute resolution, particularly for the range of mediation processes.

Some Canadian courts and judges have embraced judicial dispute resolution, while others maintain the view that judges are appointed to decide. Similarly, the legal profession is not uniformly supportive of these developments. However, at least one provincial court has a new regulation for the judicial selection committee, allowing that committee to explore applicants' capability and willingness to engage in new dispute resolution methods. The Ontario Bar Association is also engaged in a two-year study on judicial dispute resolution aimed at fostering similar developments. "The courts in Alberta administer a judicial dispute resolution program that provides litigants with an opportunity to schedule a confidential dispute resolution session with a Superior Court or Court of Appeal judge. Research undertaken in respect of the efficacy of this program suggests that approximately 90% of the cases subject to judicial dispute resolution… settle in whole or part."[144] Still, there are remaining concerns about the availability of dates for this process, and the cost and complexity for the preparation of materials, which limits how accessible these options actually prove to be.

### *Active Adjudication*

Judges engage in active adjudication by taking on a greater role in ensuring that the court has the evidence it requires to make a just decision. At its most basic, this approach suggests a judge simply looks at the decision required and determines what is needed to make that decision. This is a direct response to the growing number of unrepresented litigants and recognition that the adversarial process does not serve them well. Mackenzie describes active adjudication as "bending" the adversarial process to make it more amenable to unrepresented people without actually 'breaking' it and becoming an inquisitorial system. The major concern is that judges may 'cross a line' of involvement and appear to be biased – this is particularly valid when one party is represented and the other is not.

Zorza describes active adjudication as judges being engaged while remaining neutral. At the Summit, he described a research project that videotaped hearings with unrepresented litigants in courtrooms in four states. The videotapes were then shown to the litigants and judges separately, and each had the opportunity to explain what they were trying to say and what they saw happening. Litigants also offered their views on characteristics of 'good judges', as those who:

- are good at framing their cases – explain what happened in last court hearing, what is expected to be discussed that day, remind that all decisions are in best interests of the children (if family), explain that the judge will be asking questions
- are good at probing – trying to identify the issues and resolving them; questioning and framing the questions and reminding that the judge is asking questions because they need to get to the facts
- explain decisions very clearly
- use reassuring language – affirming without judging, saying things like, "I'm not judging you

[144] National Action Committee, Court Simplification report, *supra* note 68 at 14. At footnote 33, the Working Group notes that, "[a] review of all of the provincial rules of court indicates that settlement conferences are generally in use across the country. For example, British Columbia's Court of Appeal offers judicial settlement conferences (see British Columbia Court of Appeal Practice Directive, "Judicial Settlement Conferences"); the Queen's Bench Rules in Saskatchewan contemplate judges assisting with settlement (see rR 1-3(1)-(4), 4-7(1)(e)); judges hearing a case management conference in the Northwest Territories can facilitate settlement and as a means of doing so, assist with settlement discussions or even hold a mini-trial in which he or she can provide a "non-binding advisory opinion" (see Rules of the Supreme Court of the Northwest Territories, R-010-96, pt. 19, r 292); a judge-assisted settlement conference process, which was recently expanded, has been in place in Quebec for a number of years now (see *Code of Civil Procedure*, R.S.Q., c. C-25); Nova Scotia, Newfoundland and Labrador and New Brunswick also have judicial settlement conference regimes (see respectively Civil Procedure Rules of Nova Scotia, pt. 4, r 10.11-10.16; Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sched. D, as amended at r 39; and Rules of Court, N.B. Reg. 82-73, r 50.07-50.15)."

as people" or "I really appreciate you both love your children"

- discuss when the next court hearing will be or what will happen next
- have effective body language, for example "using hands to convey equality"
- use simple clear respectful caring words.[145]

Mackenzie described a model of active adjudication currently employed for some cases by the Ontario Human Rights Tribunal (in others the hearing is run like a traditional trial). Tribunal rules say the:

> Tribunal can define or narrow issues, limit evidence or submissions, require witness statements, and require narrative at beginning of the hearing. An adjudicator can conduct examination in chief and cross-examination, can prescribe stage at which preliminary procedural or interlocutory matters are dealt with, and require party to adduce evidence or call witnesses "reasonably within their control".[146]

Mackenzie describes his "active adjudication toolkit" as including the following skills:

- Defining or narrowing the issues to be decided
- Limiting evidence or submissions on any issue
- Requiring witness statements
- Permitting a party to give a narrative before questioning
- Determining the order of evidence and issues
- Conducting examination-in-chief and cross-examination
- Prescribing the stage at which preliminary, procedural or interlocutory matters will be dealt with
- Requiring a party to adduce evidence or call witnesses "reasonably within their control".

Other assistance provided to unrepresented litigants by judges and adjudicators includes less active forms of intervention, such as directing litigants to resources available on the internet that may apply to their case, advising of other available resources including public mediation services, and at the trial management conference, offering litigants a summary of what will be expected of them at their forthcoming trial.

## Supporting Court Innovation: Technology and Rules

The task of transforming formal justice should begin by considering broad strategies for reform, the implications of those strategies for the structures and processes used by courts, and the courts' relationship to external service providers and the civil justice system as a whole. Closely connected are questions related to the judicial functions needed to meet these new roles and responsibilities, and how to support those functions by integrating technology to re-engineer processes and communication with users of court services and to support management functions. Court rules and administration can also play a key role in either supporting or deterring innovation.

The Australian report on enhancing access to justice through technology provides an overview of how courts and tribunals are increasingly using technology. Initiatives include a move to virtual courtrooms that allow documents to be filed electronically (e-filing) and, in some instances, for formal submissions, directions and other orders in pre-trial matters to be conducted by electronic means. There is also some progress toward integrated court management systems to give all courts and tribunals a single, integrated technology platform and set of applications, rather than having them work across different systems.[147]

In Canada, similar initiatives are underway. British Columbia's Court Services Online provides electronic searches of court files, online access to daily court lists and e-filing capacity. E-filing initiatives are in place in several courts, including the Alberta Court of Appeal, the Superior Court in Newfoundland and Labrador (in estate matters) and the Federal Court of Canada. An Alberta Court of Appeal practice direction supports

[145] www.accesstojustice.net/2013/08/04/tools-for-srl-courtroom-observation-project/.

[146] www.hrto.ca/hrto/index.php?q=en/node/28.

[147] Australian Report, *supra* note 116.

e-appeals if both parties consent or the court orders them.[148] Other initiatives include internal web-based tracking of court files, online access to court record information, electronic storage and retrieval of court documents, interactive court forms, e-hearings so proceedings can be held entirely electronically, and online information to assist self-represented litigants.[149] Examples of online information include the Montréal Bar's "best practices guide" to assist individuals with different aspects of litigation, Newfoundland and Labrador and the Public Legal Information Association's booklets on a range of legal topics at the courts, Clicklaw in British Columbia, the Ontario Attorney General's self-help guides about family court rules and procedures and LawHelp Ontario's information booklets and how-to manuals for unrepresented litigants to assist in preparing court documents and participating in certain court processes. Québec has also recently implemented a Justice Access Plan with increased and new uses for technology to enhance access to justice, such as by obtaining testimony through videoconferencing.

A concrete example of the potential of technology highlighted at the Summit was in the area of family law. Segments of the Canadian population move around the country for employment. This results in multi-jurisdictional family law issues, which can be difficult to navigate without legal help. Use of information technology for court processes across jurisdictions could transform these issues. One participant noted that: "interjurisdictional child and spousal support orders take months, or sometimes years, to flow through the system in two jurisdictions. Making efficient technology available to allow for the transmission of documents and attendance at hearings electronically could substantially impact how mobile families (and other litigants) access the justice system."

Simplifying court processes and rules to support the transformation of formal justice is another important path to equal justice. As Muller highlighted at the Summit, rules should not lead the innovation process, as rulemaking is too rigid a process compared to problem-solving methods.

Further, our rapidly changing environment and the need to tailor processes to particular types of disputes suggest that flexible guidelines may often be more useful than rules. Rules that are permissive, as those discussed above in the Ontario Human Right Tribunal context, may be most effective. Some Summit participants spoke about the ways that rule changes can have a mixed impact on access to justice. For example, they can contribute to judicial efficiency but also add costs for litigants (particularly those requiring documents submitted in writing before court appearances). Zorza has proposed guidelines for choosing measures for court simplification:

1. Work for all stakeholders
2. Help ensure focus on law rather than technicalities
3. Help ensure parties are fully heard by decision maker
4. Increase transparency
5. Underlying substance of law should be able to be applied in simplified process
6. Result in less time, less cost
7. Prevent reintroduction of complexity.[150]

The focus on learning through feedback from users of court services and rigorous evaluation is essential for ensuring that changes are doing what they were intended to do. Evidence from other jurisdictions is mounting on what rule changes work best to enhance access to justice, with fixed trial dates within two years of commencement at the top of the list (unless the dispute is not ripe for settlement, e.g. a personal injury case when it is too early to assess damages).

[148] National Action Committee, Court Simplification report, *supra* note 68.

[149] *Ibid* at 5.

[150] Richard Zorza, "Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation" (2013) 61 Drake Law Review 845.

### Learn More: about Court Reform and Rule changes

National Action Committee, Court Simplification Working Group Report: www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Court%20Processes%20Simplification%20Working%20Group.pdf

Hague Institute for the Internationalisation of Law (HiiL): www.hiil.org/

Rechtwijzer 2.0: www.rechtwijzer.nl/ www.hiil.org/project/rechtwijzer

Roger Smith, "Can digital replace personal in the delivery of legal aid?" A discussion paper for the conference of the International Legal Aid Group, 2013: www.ilagnet.org/jscripts/tiny_mce/plugins/filemanager/files/The_Hague_2013/Session_Papers/5.1_-_Roger_Smith.pdf

Canadian Centre for Court Technology: www.ccct-cctj.ca/

E. Rowden, A. Wallace, D. Tait, M. Hanson & D. Jones, "Gateways to Justice: design and operational guidelines for remote participation in court proceedings" (Sydney: University of Western Sydney: 2013), accessed from: www.uws.edu.au/justice/justice/publications

Association of Canadian Court Administrators: www.acca-aajc.ca/

Laboratoire de cyberjustice laboratory, University of Montreal and Towards Cyberjustice project: www.site.cyberjustice.ca/en/Home/Home

International Centre for Court Excellence: www.courtexcellence.com/

Global Measures of Court Performance: www.courtexcellence.com/~/media/Microsites/Files/ICCE/Global%20Measures_V3_11_2012.ashx

BC Property Assessment Appeal: www.assessmentappeal.bc.ca/

BC Civil Resolution Tribunal: www.ag.gov.bc.ca/public/WhitePaperTwo.pdf

Centre for State Courts: www.ncsc.org/Topics/Technology/Technology-in-the-Courts/Resource-Guide.aspx)

## Re-centring Courts

Re-centred courts will offer tailored public dispute resolution services with effective internal and external triage and referral processes, and will employ a wide range of quasi-judicial officers to assist litigants to achieve just and timely outcomes. Re-centred courts will be dedicated to innovation, learning and integration of evidence-based best practices. They will be open to feedback from users of court services and to developing transparent performance evaluation measures. As a result, judges will need to be ready to integrate new functions and approaches, potentially including active case management, judicial dispute resolution, specialization, court simplification and active adjudication models. Many Canadian courts have already taken steps in these directions and should be supported in these reform efforts. Reaffirming the role of courts at the centre of the civil justice system also involves building a new type of relationship between courts and other justice organizations. Issues for relationship building, structures for collaboration and leadership functions are discussed further in Part III.

**Target:** ***By 2025, courts are re-centred within the civil justice system and resourced to provide tailored public dispute resolution services with effective internal and external triage and referral processes.***

**Milestones:**

- *All courts have effective triage and referral systems*
- *All courts have the capacity to provide a range of dispute resolution processes and provide tailored, simplified processes*
- *Courts employ a wide range of quasi-judicial officers to assist litigants to achieve just and timely outcomes*
- *Courts have the resources to carry out this range of functions*

**Actions:**

- *Courts develop and employ a range of mechanisms to solicit feedback from people*

*accessing court services and use these perspectives to inform innovations and reforms*

- *Courts develop and test prototypes of specialized procedures for priority categories of cases. Piloting different prototypes in each jurisdiction within an overarching strategy could maximize use of resources, avoid duplication of effort and enhance evidence-based reform*
- *The National Action Committee, its successor or another national organization develops an evidence-based best practices guide to assist courts in their access to justice innovations*
- *Judicial appointment processes take into consideration candidates' openness to and suitability for broader judicial functions, including active case management and judicial dispute resolution methods*
- *The CBA champions this re-centred role for the courts within a coherent civil justice system: a central role not based on traditional, status quo role of the courts but on this people-centred vision*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

## Re-inventing the Delivery of Legal Services

The third lane of the bridge to equal justice is reinventing the delivery of legal services. Both everyday justice and formal justice depend on having a spectrum and continuum of legal services available to meet the range of legal needs. The goal is seamless legal services delivery: to ensure meaningful access to justice in every case without the 'legal assistance deserts' in the current inequitable landscape of services.

The Committee believes that the first step is to define the concept of essential legal needs and then to find ways to meet those needs. **Essential legal needs are those that arise from legal problems or situations that put into jeopardy a person's or a person's family's security – including liberty, personal safety and security, health, employment, housing or ability to meet the basic necessities of life.** A main objective of equal justice efforts must be to provide the necessary legal services to meet all essential legal needs.

The Committee's *Proposed Responsibility for Legal Needs* connects the spectrum of legal service providers and the continuum of legal services with categories of essential legal needs. A range of approaches is needed to reach this goal, along with a commitment to finding new and creative ways to address existing gaps in legal services.
Some essential legal needs can be fully met by the private market, while others can only be adequately met through publicly funded legal services. Over the past two decades, the centre area of the spectrum between these two sources of legal services has grown in response to failures of both private and public providers to meet the most pressing and/or essential legal needs. Organized pro bono efforts and other specialized services, many based on public-private partnerships, have developed and expanded greatly during this period to fill gaps in legal service provision.

Reinventing legal services for equal justice involves meeting three challenges:

- ensuring the most effective delivery of both private and public legal services;
- achieving a consensus on where responsibility for meeting legal needs falls on this spectrum, from private to public service deliverers; and
- reaching a better understanding of the structure and role of service providers in the middle area between private and public services.

As shown in the diagram below, the Committee proposes that the main targets of reform should be to improve capacity at both ends of the publicly funded/private spectrum, to provide meaningful access to justice for people experiencing legal problems related to essential legal needs. Pro bono organizations and programs and public-private partnerships are best positioned to deliver legal services for important but non-essential and specialized needs that people cannot meet within the private market. This section also discusses the significant contribution of law schools and law societies to reaching equal justice. [151]

Two competing pressures on legal representation services cut across the spectrum of service providers: the increasing unaffordability of legal services has given rise to a demand for piecemeal or partial services delivered by a broader range of providers, while the growing understanding that legal problems are often intertwined with non-legal problems has led to a demand for more holistic approaches that meld legal and non-legal services. Health care and dental care services are increasingly delivered in teams, for cost-effectiveness and quality of service, and legal services providers are at an early stage of incorporating this service delivery model.

[151] The extent to which law firms and practitioners can innovate to better address the range of legal needs is also being examined by the CBA Legal Futures Initiative in the areas of business structures and innovation, legal education and training, and ethics and regulation of the profession.

## Limited Scope Retainers

The greatest potential for achieving meaningful access to justice and fair and lasting outcomes comes from a comprehensive, holistic approach. Yet, a current trend to make legal services more affordable to clients or reduce cost to the providing organization is moving *away* from the holistic approach, and to limited scope retainers or unbundled legal services. This issue cuts across the service delivery spectrum, affecting lawyers in private practice, legal aid and those working pro bono, as well as those providing other forms of legal assistance, also increasingly in a limited, piecemeal fashion.

Limited scope services often rely on clients to sort out what services they need and when. Delivering these services also pressures lawyers to help clients find their way to other services.

Lawyers and legal regulators have been somewhat wary about this development. Professional obligations require a cautious approach to isolating elements of legal services for limited representation. This does not mean that it cannot be done, only that it must be done in a manner that ensures protection of individual clients and the overall public interest. Five law societies have provided detailed guidance to their members on how to meet their professional obligations when providing unbundled services.

Empirical research to date has found that limited scope services are of questionable benefit to many people participating in adversarial proceedings. An unbundled service is not the same as having legal representation. The Australia Law Reform Commission concluded that "unbundling can really only work for educated, articulate litigants in routine matters".[152] A US study found that SRLs have to carry out an average of 193 tasks to prepare for and participate in a formal hearing.[153] Further, individuals need to "pull it all together" which many SRLs, including the majority of participants in the Macfarlane study, find very difficult.[154] Other specific concerns are lawyers' ability to offer sound advice without the full picture of their clients' situation and how to ensure that an individual understands and is able to follow through on the instructions provided by the lawyer.

> It is at least possible that the unbundled model, despite serving many more low-income people, might actually be making inefficient use of resources. To use a simplified analogy: If there exists a finite supply of AIDS drugs to distribute in sub-Saharan Africa, should it be divided equally among those who want it, even if this requires lowering the dose to an untested level that has not been proven to improve survival rates? Or should a full dose of medication, proven to boost survival, be provided to a smaller number of AIDS patients, with the remainder of the population required to wait for the next shipment of drugs? Unless and until it is proven that limited intervention on behalf of low-income clients is successful in producing better outcomes than litigants can attain on their own, a return to the traditional model of full representation for fewer clients--a proven model of success--should at least be considered, and resource and policy decisions should be made to facilitate increased access to full representation.
>
> ***Jessica Steinberg (see note 62)***

From an equal justice perspective, the question is whether limited scope services in a particular context are consistent with the **meaningful access to justice** standard?[155] To answer this question we need to consider who may benefit from what types of limited legal services and in which situations. Meaningful access is advanced when

[152] LAW report, *supra* note 23.

[153] Ronald W Staudt and Paula L Hannaford, "Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers" (2002) 52 Syracuse L Rev 1017 at 1021.

[154] Macfarlane study, *supra* note 6.

[155] See *infra* at 61.

these services are provided to capable litigants through an effective relationship between lawyer and client. For example, coaching, particularly during a hearing, can mean the difference between ineffective or effective assistance. However, limited scope services are not the solution for everyone.

The Committee proposes an overarching goal should be to ensure that limited scope services are only offered where the "meaningful access" standard is met. Overall this requires a range of private market and publicly funded solutions aimed at making representation more accessible. It also requires a new model of lawyering based on a reciprocal partnership between the provider of legal services and the client and where the service provider knows about alternate sources of information useful to their clients and collaborative networks with other service providers. This point underscores the importance of lawyers and other legal service providers collaborating with PLEI providers.

Target: ***By 2020, limited scope legal services are (only) offered in situations where they meet the meaningful access to justice standard.***

**Milestones:**

- *Best practice guidelines, based on empirical studies of emerging limited scope service models and their impact on meaningful access to justice are in place.*

**Actions:**

- *All law societies provide detailed guidelines to lawyers providing limited scope services, including advice and precedents for limited scope retainers*
- *Bar associations, law societies and legal aid organizations develop resources to assist lawyers to provide limited scope services in an integrated, seamless way by equipping lawyers to inform clients about other service providers and sources of information*
- *The CBA provides professional development on coaching and other skills that support the delivery of effective limited scope services*
- *The CBA, law societies, other bar associations and legal aid organizations work with PLEI organizations to inform the public about limited scope services*
- *The CBA and the Federation of Law Societies ensure the integration of existing research and evaluations of limited scope service models to formulate evidence-based best practices and identify further research needs*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

## Team Delivery of Legal Services

Recognizing the value of a continuum of legal services approach means recognizing the importance of increased diversity and specialization among legal service providers and enhanced capacity to provide comprehensive, cost-efficient services through teams of lawyers, other legal service providers (like paralegals) and providers of related services (like social workers). Teams can deliver more comprehensive and holistic services tailored to people's needs.

Advances have been made in the team delivery of legal services in both law centres and community-based and specialized courts. Inter-professional collaboration in one agency has many advantages: allowing clients to "one-stop-shop" and avoid referral fatigue, making legal services more time and cost effective by relieving legal staff from lengthy counseling sessions they may be ill equipped to handle and providing in-house education for legal staff through regular meetings and ad hoc consultations with other staff professionals.[156] The presence of other professionals can also give legal staff a different and useful perspective about client circumstances.

[156] SPARC report, *supra* note 114.

## Learn More: about Integrated Legal Assistance Services

**See, Australian report (note 23), specifically Ch 10:**
A Holistic Approach to Justice:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

Multifaceted Justice for Diverse Needs:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

Tailoring Services for Specific Demographic Groups:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

Accessible Legal Services:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

More Integrated Services:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

Tailoring Services for Specific Legal Problems:
www.lawfoundation.net.au/ljf/site/templates/LAW_SA/$file/LAW_Survey_SA.pdf

**Canadian examples:**

Youth Criminal Defence Office – Alberta:
In addition to providing counsel, YCDO has youth workers authorized to assist clients with broad spectrum support - ranging from bus tickets to advocacy for suitable residential placements - to address the issues they face from a holistic perspective:
www.legalaid.ab.ca

Legal Aid Alberta, Calgary Legal Guidance and Edmonton Community Legal Centre are working to develop a common intake form that will assist with cross referrals to provide more efficient services to clients.

Legal Aid Nova Scotia:
For Newcomers to Canada: www.legalinfo.org/i-have-a-legal-question/newcomers-to-canada/
Mi' Kmaw Legal support network: www.cmmns.com/Legal.php

Legal Services Society (British Columbia)
Aboriginal services: www.lss.bc.ca/aboriginal/index.php

Legal Aid Ontario:
Interactive Voice Response (IVR) so clients receive automated services from the help line 24 hours a day

Automated call back systems that permit prioritization of calls (eg people with domestic violence complaints spend less time in the queue)

Instant messaging and social media software for call centre reps to engage with staff and management

Online mapping tools to allow reps to locate specific community resources and provide accurate directions to clients

Fixed telephone lines and voice over internet protocol (VOIP) softphones with computer screen interfaces.

While there has been some resistance to these developments in the legal profession, there is a growing consensus that it is a "win/win" situation, providing services to clients at a more affordable rate and lawyers with adequate income.

The Committee proposes that as a profession and legal community we increase the diversity and range of services available to clients through the integrated team delivery of legal and related services, so that by 2030 the vast majority, in the range of 80%, of personal people law legal services are provided through a team approach. To smooth the way for team delivery of legal and related non-legal services, licensing, insurance and professional and ethical issues such as confidentiality and solicitor-client privilege, have to be resolved. Some Canadian law societies have examined alternative delivery of legal services, focusing on paralegals. Diversification in the legal profession also contributes to a team approach to service delivery. Other countries recognize a broader range of legal service providers with regulations and protections in place. For example, the UK has eight categories of legal practitioners and the State of Washington recently began providing limited licenses to legal technicians.[157]

**Target: *By 2030, 80% of lawyers in people law practices work with an integrated team of service providers; in many cases these teams will operate in a shared practice that includes non-legal services and services provided by team members who are not lawyers.***

**Milestones:**

- *Evidence-based best practice guidelines for team delivery of legal and non-legal services in people law practices are available*

**Actions:**

- *The CBA prepares a discussion paper and models for team legal service delivery and coordination of legal and non-legal services for both private market and publically-funded legal services*
- *The CBA offers professional development materials and online discussion groups*
- *Law societies develop comprehensive regulatory frameworks for alternate delivery of legal services*
- *Law offices partner with other service providers facilitating team delivery of services*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

## Reorienting The Practice of Law

This section looks at three proposals for changing the practice of law to enhance equal justice: establish sustainable people law practices; learning from the European experience about the potential of legal expense insurance; and enhanced regulatory approaches.

### *Sustainable People Law Practices*

Our models for providing personal services law, or people law practices, have often not kept pace with the changing demands of our clients and pressures in the justice system. Changes are needed to:

- provide a greater range of legal services to respond to client needs
- provide a more predictable idea of costs to clients, and
- deliver services through a more engaged/ participatory relationship between the client and lawyer.

Making people law practices more attractive to lawyers is also a key component of reinventing the delivery of legal services. Lack of affordability is perceived to be the main barrier to legal services but research in Canada, the US and the UK

[157] Although outside its mandate of examining changes to the legal profession, the CBA's Legal Futures Initiative may ultimately determine these innovations to be in the public interest as they deliver increased access to legal services.

shows that deciding whether to hire a lawyer is influenced by a range of factors.[158] These issues are canvassed in the Committee's discussion paper on *Underexplored Alternatives for the Middle Class*.[159]

Here the Committee highlights strategies to build and maintain sustainable people law practices through different organizational models from the current model of legal partnerships. In the US, the UK, and Australia in particular, there are already many examples. Law firms operate virtually and use alternative business practices to enhance flexibility and reduce overhead, for example, allowing them to reduce the cost of legal services to clients.

Alternative organizational models for providing legal services that focus on meeting the legal needs of people with low and moderate income are emerging and should be supported in a manner that contributes to reaching equal justice. This approach garnered much support in the Committee's consultations and at the Summit. The Summit discussion was energized in particular by the work of Andrew Pilliar, a lawyer and doctoral candidate at the University of British Columbia Faculty of Law, who advocates for a reinvigorated sense of entrepreneurship for young lawyers keen to build viable social justice/access to justice practices and broader definitions of professional success. His master's thesis investigates the experience of Pivot LLP, a law firm established as a social enterprise and funding source for the public interest work carried out by Pivot Legal Services. Pivot LLP also pursued associated goals, including providing affordable legal services.

Pilliar offers a "toolbox for legal entrepreneurs" based on his case study of the Pivot experience and related research.[160] These tools set out 11 challenges for law firm models attempting to provide accessible legal services to a greater range of people: focus; recruiting; income stream; support staff; mentorship; keeping overhead low; using existing work forms; location; branding; decision making models and sources of business. The legal profession can help to build and expand these tools, and so assist in what they can offer in reaching equal justice.

In the UK and Australia, regulations have been modified to allow law firms to seek outside investment or operate under external ownership. As a result, alternative business models are becoming common. For example in England and Wales, co-ops now offer legal services[161] and in Australia, Melbourne, Slater & Gordon became the world's first publicly traded law firm.[162] In the US, innovation has found its way into law firms in other ways. The alternative legal practice making the largest impact is Axiom,[163] which describes itself as "a place where lawyers are passionate about practicing law, not billing hours". Axiom has found innovative ways to offer quality legal services cheaper and more efficiently. As a result, it has grown exponentially to a 1000-person firm operating in 11 offices and four delivery centres across three continents. Other US examples include Gateway Legal Services and Chalmers Consulting, both building 'self-supporting legal services programs' through sliding scale fees, contingency fee awards and payments from third party beneficiaries.

In Canada, alternative models are starting to emerge as well. An innovative firm in Vancouver, Miller Titerle[164] has developed around the principle of "helping people do good things". The firm is structured as an open office space and operates "in the cloud" at all times. They reduce overhead by outsourcing legal research and other work to contract lawyers and paralegals who prefer to work from home. They offer flexible work arrangements for lawyers and support staff, and flexible fee structures for clients, including fixed fee arrangements. Recently, the firm has started offering a value guarantee, which allows clients to discount their bills by 25% if they believe the value guaranteed was not met. The firm is developing innovative programs to allow clients to access their

[158] Andrew Pilliar, "Exploring a Law Firm Business Model to Improve Access to Justice and Decrease Lawyer Dissatisfaction" www.cba.org/CBA/cle/PDF/JUST13_Paper_Pilliar.pdf.

[159] CBA Access to Justice Committee, *Underexplored Alternative for the Middle Class* (Ottawa: CBA, 2013) www.cba.org/cba/equaljustice/PDF/MidClassEng.pdf.

[160] *Supra* note 158. Note that Pivot LLP no long exists, but Pivot Legal Services continues its work.

[161] www.co-operative.coop/legalservices/.

[162] www.slatergordon.com.au/investors/.

[163] www.axiomlaw.com/.

[164] www.millertiterle.com/.

corporate records and start new businesses online, including incorporation, corporate structuring, organization, and basic corporate/commercial transactions, at a low fixed cost.[165]

Some other particularly innovative law firms in Canada include Cognition LLP, Conduit Law, Sky Law, Wise Law, AnticIPate Law, Heritage Law, and Valkyrie Law Group.[166] These law firms are re-designing the legal service delivery model based on entirely new propositions about what clients identify as the value they receive from their lawyers, and eradicating paradigms like the billable hour while doing so.[167]

Bar associations and law societies have an important role in fostering and supporting the development of alternative organizational models for viable and sustainable people law practices. Support from the legal profession as a whole is needed to facilitate the transition to these new models to ensure that by 2025, a wide range of alternative organization models for delivering legal services exists to meet the legal needs of low and moderate income Canadians, including those living outside major urban centres.

The legal profession can foster initiatives through 'incubator programs' that help recent law graduates transition into sustainable practice situations to serve individuals and small businesses, as well as through virtual practice arrangements.

In the US, 'law school incubator' programs successfully help graduates transition into sustainable practice. Incubators accelerate the development of start-up companies by providing entrepreneurs with instruction in financial management, marketing, networking and sound business practices. The idea started at City University of New York in 2007 and spread quickly throughout the US. In some cases, law firms and other service providers donate office space and money.

In some law schools this takes the form of 'legal residency programs' where recent graduates offer low-cost legal assistance while attending seminars on obtaining and billing clients, malpractice insurance and setting up a law office. Another approach is through 'solo and small firm institutes' or facilities, where recent graduates receive substantial training or have access to a facility for hands on training, including in some cases office space, office assistance, access to lawyer mentors and law practice guidance. All of this is geared to assisting young lawyers to launch their own practices. 'Entrepreneurial lawyering' classes help students develop business plans provided participants are committed to establishing a solo or small firm practice and helping underserved populations after completion of their incubator training. They are generally encouraged to provide pro bono and low-bono services to increase access to civil legal services for those in need.

New initiatives are especially significant outside urban centres, where barriers to accessing legal services are even more acute. Various legal organizations have worked collaboratively, particularly in Manitoba, Alberta and British Columbia, to encourage the practice of law outside major centres. Virtual legal practices should be fostered including through expanded forums for learning, sharing and networking about these innovations.

[165] See their recent newsletter: www.millertiterle.com/2013WinterUpdate.pdf.

[166] www.cognitionllp.com/, www.conduitlaw.com, www.skylaw.ca/,www.wiselaw.net/, www.anticipatelaw.com/, www.British Columbia, heritagelaw.com/, www.valkyrielaw.com/

[167] The CBA Legal Futures Initiative highlighted international examples of innovative service delivery models in its background paper, "Innovations in Legal Services: 14 Eye-Opening Cases," and expects to highlight more examples of innovations through the recommendations of its Business Structures and Innovations Team.

## Learn More: about Service Delivery Options

Andrew Pilliar - Master's thesis:
www.circle.ubc.ca/handle/2429/43478
CUNY's solo-focused Community Legal Resource Network

Law Society of Alberta, Alternate Delivery of Legal Services Committee, "Alternate Delivery of Legal Services: Final Report" February 2012:
www.lawsociety.ab.ca/files/adls/ADLS_Final_Report.pdf

Manitoba's Forgivable Loans program - The Law Society offers a forgivable loan to selected students from under-serviced Manitoba communities, if they are accepted into the University of Manitoba Faculty of Law. 20% of the loan if forgiven for each year after call to the bar that the recipient practices in the home community:
www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/january_2010/access_justice.cfm

Lawyers in Vancouver and Red Deer provide legal advice to remote communities in British Columbia and Alberta through Skype and other Internet services.

Legal residency:
www.colorado.edu/law/careers/information-employers/legal-residency-colorado-law

Bala, Nicholas, "Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (note 32):
http://www.jstor.org/stable/10.3138/j.ctt2tv2dr

Beg, Samreen & Lorne Sossin. "Should Legal Services Be Unbundled?" **in** *Middle Income Access to Justice* **(**note 32):
http://www.jstor.org/stable/10.3138/j.ctt2tv2dr

Fedorak, Jeanette, "Unbundling Legal Services: Is the Time Now" (2009) 12 *News & Views on Civil Justice Reform* 14.

Kent Roach and Lorne Sossin, "Access to Justice and Beyond" (2010) 60:2 *University of Toronto Law Journal* 373.

Report of the British Columbia Unbundling Legal Services task force:
http://www.lawsociety.bc.ca/docs/publications/reports/LimitedRetainers_2008.pdf
http://www.lawsociety.bc.ca/docs/publications/reports/legalservices-tf_2010.pdf
https://consult.justice.gov.uk/digital-communications/transforming-legal-aid

**Target: *By 2025 a wide range of alternative organizational models for the provision of legal services exist to meet the legal needs of low and moderate income Canadians, including those living outside of major urban centres.***

**Milestones:**

- *An evaluation of the effectiveness of sustainable people law practices at filling legal services gaps and providing meaningful access to justice is carried out, and the results are broadly shared to encourage learning, further innovation and best practices*
- *All jurisdictions have legal practice incubator programs.*

**Actions:**

- *The CBA provides professional development materials, and hosts a PD webinar and online discussion groups to foster conversation and learning about alternative organizational models for providing people law services*
- *The CBA develops a "startup package" for alternative organizational models for sustainable people law practices comprising for example, a handbook, contracts, other documents and training materials*
- *A consortium of bar association, law society, law schools, law firms and business enterprises support the development of one or more accessible legal practice incubators in at least three jurisdictions*
- *The CBA supports the establishment and maintenance of networking among these incubator programs to facilitate information exchange, development of best practices and continuous improvement*
- *The CBA and law societies provide ongoing opportunities for mentoring and peer-to-peer sharing of best practices for sustainable people law practices, and consider how the recommendations of the CBA's Legal Futures Initiative can be used to support lawyers in the creation of alternative service delivery models*
- *The CBA coordinates a roster of experienced justice system participants, including law practice management consultants, to carry out awareness campaigns for law students, young lawyers and members of the profession (not just law firms) about alternative organizational models for delivering legal services*

## What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

### *Legal Expense Insurance*

The holder of legal expense insurance (LEI) has a commitment from an insurer to pay some or all of the legal costs arising from certain legal situations. Insurers support legal services by both lawyers and paralegals and customers may include individuals, families and small to mid-size businesses.

LEI is popular in Europe and provides basic access to legal assistance for people who can afford to buy the insurance, often in conjunction with home insurance or tenant insurance policies. Approximately 40% of all Europeans have LEI, and in the UK 59% of families have some coverage under home insurance policies. In Sweden coverage has been mandatory since 1997 and its development ran parallel to decreases in the availability of legal aid.

LEI has not caught on in Canada to the same extent. In contrast to Europe, Canadians purchase only about $11-12 million of coverage per year. LEI has mainly taken hold in Québec, attributable in large part to efforts by the Barreau du Québec, which spent $2 million on a campaign to encourage Québecers to take advantage of LEI. Their ads are explicitly aimed at people who make too much for legal aid, but too little to comfortably afford counsel should a legal event occur. While the campaign saw the number of subscribers double, only about 10% of Québecers have coverage and only about 12 insurance companies provide the

product. In his 2008 report on legal aid in Ontario, Professor Michael Trebilcock concluded that the law society and Legal Aid Ontario should "accord a high priority to promoting the role of legal insurance."[168]

At the Summit, Barbara Haynes, the CEO of DAS Canada, summarized the current market for LEI in Canada outside Québec. DAS is a global leader of LEI operating in 18 countries including in Canada since 2010, marketing itself as providing affordable justice for the middle class. Haynes explained that LEI is not yet understood or accepted in Canada. Research is needed to understand why it is not currently purchased. This may be attributable to restrictions on the coverage provided by LEI. For example, family law matters are not included by most insurers at present. There is a perception that the premiums are high, but in fact the average annual stand alone premium for a family is $150-200 and a group purchase through a homeowner's policy is about $50. Some concerns have also been raised about the ability to retain choice of legal counsel and to clarify who instructs the lawyer in a given matter, the insurer or the individual client.

The CBA has endorsed LEI that is adapted for the Canadian market by including family law services as one mechanism to increase access to justice. LEI is not a panacea, but the evidence from jurisdictions where it is commonly used shows that it could help many people get much of the legal help they need. The Committee proposes that by 2030 the vast majority of Canadians should have legal insurance as one part of a seamless provision of legal services. Reaching this goal requires working to overcome current limitations on understanding and availability of LEI.

The low uptake of LEI in Canada outside Québec appears largely because many people are unaware of its value. Unlike health, people often don't expect to incur legal costs. They probably don't know anybody who has LEI. If they thought about it, they might believe LEI to be expensive. People with limited discretionary income tend not to buy insurance and policy limits can mean that coverage does not extend to the types of cases that arise most often. Lawyers also seem to lack awareness of LEI or question its value, and this disinterest or distrust may be compounded by apprehensions that LEI will be bad for business. On the other hand, le Barreau du Québec was primarily responsible for the success in spreading LEI in Québec.

> I would like to share my knowledge of the usefulness of what seems to be an almost universally covered legal insurance system in parts of Europe – in particular, Denmark. When my son, who lives there, was wrongfully dismissed, he was able to access enough legal insurance to obtain the services of a lawyer who negotiated a settlement on his behalf. He could not have done this on his own considering he was up against a large multinational corporation. Legal insurance is included in his house insurance and apparently is included in tenants' insurance. Since everyone contributes, the cost is small. Obviously there are ceilings on the amount covered but it helps both working poor and middle class access services that are not covered by legal aid because of issue and eligibility cut offs. Also, this is operated by the private sector (unusual for Scandinavia) rather than government. Administrative costs are likely low as they are piggy backed on to a larger insurance scheme.
>
> ***Anne Beveridge, comment during Committee consultations in British Columbia***

In August 2012, the CBA Council adopted a resolution directing the CBA:

- to collaborate with legal insurance providers to communicate to CBA members, government leaders and the public the potential for legal expense insurance to improve access to justice to the middle class in Canada and
- to ask insurance providers to adopt measures to safeguard and inform consumers, and adapt

[168] He noted that the Law Society of Upper Canada had considered and endorsed LEI as far back as 1993, but that it had not yet made its way into the mainstream.

policies to address the legal needs of the Canadian market, requiring family law services to be included at reasonable cost.

Following this resolution, the Committee has attempted to start a discussion about these issues with the insurance industry. The Committee is committed to encouraging the expansion of LEI both in terms of uptake and the scope of coverage provided, particularly for family law matters. At the same time, a growing acceptance of LEI is also a matter of public policy and there is a role for government on these issues. This is discussed further below in relation to universal legal aid coverage.

**Target: *By 2030, 75% of middle income Canadians have legal insurance.***

**Milestones:**

- *Insurance providers offer a range of LEI policies that assist in advancing meaningful access to justice to middle income Canadians, including on family law matters*
- *Options for mandatory legal expense insurance are being fully considered*

**Actions:**

- *The CBA communicates that making LEI more available contributes to access to justice and is compatible with the profession's interests*
- *The CBA develops a strategy, building on the Barreau du Québec initiative, to increase public awareness of the benefits and relatively low cost of LEI, through speeches, articles and testimonials*
- *The CBA continues to collaborate with insurance providers to encourage them to develop more LEI policies for Canadians, including for family law matters*
- *The CBA works with governments to explore the feasibility of mandatory legal insurance based on existing European models*

## What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

### *Regulation and Access to Justice*

The regulation of legal services has an impact on the availability and cost of legal services. This is a key point of intersection between CBA's Equal Justice and Legal Futures initiatives.

These issues were canvassed at the Summit in a workshop developed by the Canadian Association for Legal Ethics. Speakers emphasized how regulation is increasing the price of offering legal services and reducing innovation in the legal service marketplace, exacerbating access to justice problems. Noel Semple, from the University of Toronto Faculty of Law, described three primary legal regulation tools:

- Barriers to entry: to offer legal services, a series of hurdles must first be overcome (undergrad, LSAT, law school, articles, licensing exam, etc.)
- Market conduct regulations: what must be done on an ongoing basis to offer legal services (pay dues to law society, attend professional development classes, etc.)
- Business structure regulations: that forbids certain business structures from offering legal services to the public.

The main purpose of professional regulation is to protect the public by ensuring the quality of legal services, but regulation can also limit access by restricting options for the delivery of legal services. Conversely, scaling back on regulation is likely to increase access but the trade-off may be less public protection.

During the Summit workshop, Professor Richard Devlin of the Schulich School of Law advocated for a more active role for law societies and provided his list of things that law societies must do to support access to justice:

- Enhance paralegal services (so far Ontario, British Columbia and Alberta have taken steps to do so)
- Permit alterative business structures ABS (described more below)
- Become brokers of legal services (there is a pilot project in Manitoba where law society matches clients with family law lawyers, and lawyers accept a reduced fee. However, the law society guarantees payment.)
- Make pro bono mandatory
- Make ethical infrastructures mandatory
- Promote financial transparency through the publication of lawyer remuneration.

Devlin also noted that countries like the UK and Australia have liberalized their legal services regulation, and asked the question: What price have they paid?

Professor David Wiseman of the University of Ottawa Faculty of Law provided an overview of the issues in the move to permit alternative business structures (ABS). ABS are businesses that provide legal services not owned or managed under the control or direction of lawyers. The main advantages of ABS are that they supply more capital and business expertise (organizational management, product development, branding, market research etc.) compared to current law firm structures. ABS may assist in addressing unmet legal needs by investing time and resources to reach out to more people who lack legal services. ABS may also increase access through marketing to clients that need services and may be more user friendly, accessible and inviting.

Hesitancy over ABS arises from a concern that allowing corporate legal practice will create ethical dilemmas and conflicts. Wiseman called this concern "overblown" given the existing tension lawyers face now, between their duty to the court and the client, and their need to also make a living. Regulators can address these issues directly. For example, in Australia, the profession outlined a hierarchy of obligations for ABS – court, client, and then owners. A serious concern is the potential to exploit vulnerable persons through marketing.

From the Committee's perspective the central question is whether ABS will increase meaningful access to justice by those currently underserved by lawyers in private practice. Who will benefit from ABS? What 'pain' is addressed through this development? Wiseman stated that the supposed gains in equal justice are speculative at this point. There is an active and growing debate on ABS in Canada, and it is now under consideration by several law societies and the CBA Legal Futures Initiative, which acknowledges in its early research that ABS may migrate to Canada as markets become more closely connected. The initiative is examining ABSs from the perspective of increased access to legal services. Last year, ABA rejected a resolution permitting ABS in the US. More research and evaluation is needed on the access gains by ABS before it can be considered a priority for reaching equal justice.

## Regenerating Public Legal Services

Public-funded legal services, generally referred to as legal aid programs, are an indispensable component of a fair, efficient, healthy and equal justice system. At present, Canada's legal aid system is inadequate and underfunded, and there are vast disparities between provinces and territories on who is eligible for legal aid, what types of matters are covered and the extent of the legal services provided. Legal aid alone will not cure all barriers to access and it is important not to conflate legal aid with access. At the same time, our justice system cannot operate fairly and efficiently without a healthy legal aid system.

> I found, first of all, that there is a huge consensus that the current system isn't working, that the disparities and gaps in legal aid are truly deeply troubling, challenging to our core shared values, democracy, our shared citizenship, our understanding of justice and fairness. There's a huge consensus that what we have isn't good, that the disparities are unsupportable.
>
> ***Alex Himelfarb***

At the Summit, Karen Hudson, Executive Director of Nova Scotia Legal Aid, proposed the REACH framework for regenerating legal aid: Research, Eligibility, Advocacy, Coverage and Holistic services. These vital elements are woven into the discussion in this section.

Three main components are needed to regenerate legal aid:

- national legal aid benchmarks with a commitment to their progressive implementation, monitored through an open, transparent process;
- reasonable eligibility policies that give priority to people of low and modest means but provide graduated access to all residents of Canada who are unable to retain private counsel (including through contributory schemes); and
- effective legal service delivery approaches and mechanisms designed to meet community needs and the meaningful access to justice standard.

## *National Benchmarks*

At its inception over 40 years ago, the federal government envisioned "the establishment of a coast-to-coast federally funded legal aid system that would cover both civil and criminal cases", modeled on the Canadian medicare system. This vision was never met[169] and Canada is further away from this goal in 2013 than when the program was created. National benchmarks for legal aid are completely non-existent and there is an unacceptable disparity in service provision between jurisdictions.

The Committee proposes the development of national benchmarks as the basis for a principled framework for this key social program, to counterbalance the sole focus on reducing expenditure as the key driver of legal aid reforms. National benchmarks should be focused and concrete, but leave scope for local priority setting and innovation. Benchmarks should be aspirational rather than setting a minimum threshold and include targets for progressive implementation.

National benchmarks should be established on the basis of evidence about legal needs and legal assistance required to ensure meaningful access to justice. This is a rapidly growing body of knowledge that provides a platform for developing generic and more refined standards. Where evidence is lacking, steps must be taken to fill the knowledge gaps.

The central feature of national benchmarks would be agreement on a definition of essential public legal services, based on a shared understanding of the legal issues or problems that involve fundamental interests. Responses to the Committee's discussion paper on National Legal Aid Standards suggest that it would not be difficult to achieve a broad consensus. Essential public legal services include situations where basic human needs are at stake. These include: criminal law; child protection; family law; domestic violence; landlord tenant matters where an individual faces eviction; employment law where an individual is not represented by a union; refugee and immigration; and social benefit cases. Within this overall category of essential public legal services, cross-cutting issues would have to be addressed by national benchmarks, including the complexity and consequences of the issues; priority characteristics of individuals; the type of legal assistance from the continuum of available services required by the various factors at play; and assistance in addressing non-legal factors with a significant impact on the legal matter.

Several US initiatives have been established to empirically demonstrate where a right to publicly funded counsel is in fact essential. The Boston Bar Association's Civil Gideon Project and the California legislature's Access to Justice Statute, known as the Shriver Pilot[170], are models that could be considered as we work together to frame national legal aid benchmarks in Canada.

[169] National Health and Welfare did indeed propose a combined criminal and civil program at that time, but the Department of Justice opposed it and the criminal cost sharing program emerged. Health and Welfare developed civil legal aid funding under the Canada Assistance Plan as a default. See Dieter Hoehne, Legal Aid in Canada (Lewiston, NY: Edwin Mellen Press, 1989); Ab Currie, "Down the Wrong Road" (2006) 13:1 International Journal of the Legal Profession 99.

[170] See: www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf; www.courts.ca.gov/documents/20110429itemp-revt.pdf

In addition to defining legal aid coverage based on essential public legal services, national benchmarks should also address eligibility and quality of legal aid services by employing services according to the continuum of legal services described above, in a manner consistent with the meaningful access to justice standard.[171] Eligibility and delivery of legal services are discussed in the next two sections.

Rather than a minimum threshold, national benchmarks should be aspirational and include targets for progressive implementation. Benchmarks will supply a principled basis for legal aid funding decisions, be focused and concrete, while still leaving scope for local priority setting and innovation.

**Target: *By 2020, national benchmarks for legal aid coverage, eligibility and quality of legal services are in place with a commitment and plan for their progressive realization across Canada.***

**Milestones:**

- *Federal, provincial and territorial governments establish a national working group with representation from all stakeholders including recipients of legal aid, to develop national benchmarks*

**Actions:**

- *The CBA works with all interested justice sector, service providers and community-based organizations to increase public awareness about the importance of legal aid and the costly personal and social consequences of inadequate legal aid*
- *The CBA works with all interested justice sector, service providers and community-based organizations to develop a broad alliance of individuals and groups to support and champion the regeneration of legal aid and the development of national benchmarks*
- *The CBA and the Association of Legal Aid Plans, in consultation with other justice system stakeholders, prepare draft national benchmarks as a means of engaging stakeholders and fostering dialogue and action*
- *The Association of Legal Aid Plans consults with the Federal-Provincial-Territorial Permanent Working Group on Legal Aid on an action plan to initiate work on national legal aid benchmarks*
- *The CBA and the Association of Legal Aid Plans, in consultation with other justice system stakeholders, carry out research to develop and refine the empirical basis* for understanding 'essential legal needs' and 'meaningful and effective access to justice'

## What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

### *Eligibility*

The process described above for developing national legal aid benchmarks should also consider eligibility for publicly funded legal services. At present, some legal aid services such as public legal information are available to all, but most forms of legal assistance and representation from legal aid are available on the basis of a means test. Generally, an individual or family must receive social assistance or earn just above this threshold to qualify for legal aid. In many regions, people working full time for minimum wage do not qualify. In Alberta, even recipients of Assured Income for the Severely Handicapped are ineligible. The Barreau du Québec has implemented an advocacy campaign to raise eligibility to include those earning minimum wage. Québec has very recently announced a significant change to its eligibility standards so that more people will qualify for help[172].

[171] The continuum is discussed *infra* at 93 and the standard *infra* at 61.

[172] www.justice.gouv.qc.ca/english/ministere/dossiers/aide/aide-a.htm.

At the Summit, Nye Thomas from Legal Aid Ontario (LAO) noted that LAO offers a range of legal aid programs and covers a range of essential legal issues, but has a lower eligibility threshold than all legal aid standards in Canada and the US. In a recent study, LAO analyzed its financial eligibility guidelines against Statistic Canada's Low income Measure (LIM) – a commonly used measure of poverty. The LIM is an income threshold below which a family is likely to spend a larger share of household income on the necessities of food, shelter and clothing than the average family.

As discussed in Part 1, LAO has itself noted a growing gap between its financial eligibility criteria and the LIM in Ontario. Since 1996, all demographic groups have lost ground. Without corrective action, things will get worse, meaning more hardship, less access to justice, more court delays, more court ordered counsel, and more unrepresented litigants.

Thomas emphasized that expanding financial eligibility does not have a linear or automatic correlation to legal aid costs: "There are a lot of ways to improve accessibility which doesn't mean you need to double costs. The money discussion is more nuanced than it is often portrayed."[173] This highlights the critical relationship between coverage, eligibility and the type and extent of legal services provided by legal aid, and the strategic policy choices required to ensure meaningful access to justice.

There is a clear consensus that legal aid should be available to a wider range of people than at present. The stumbling block is not that this is a bad idea, but that it is impractical and unaffordable. A more difficult question is, if eligibility should be extended, how far should it go: To everyone living below the LIM? To those earning a minimum wage? To people of modest means? To all Canadians?

At the Summit, the Committee invited Alex Himelfarb, former Clerk of the Privy Council, and Sharon Matthews, a lawyer at Camp Fiorante Matthews Mogerman in Vancouver, to debate the question: should there be a national justice care program in Canada? This was an opportunity to explore whether legal aid should be a universal or targeted social program, a question raised frequently during the Summit.

Both speakers based their positions on an understanding that a national justice care system, similar to the universal healthcare system, is a noble idea and reflects good public policy. Himelfarb argued in favour of adopting a vision of a national justice care system and building it in increments. Research has demonstrated that "if you target your social program to those in need, sooner or later that program gets starved"[174], because the political commitment wavers when many people aren't benefiting from it. People need to see what their tax dollars are buying for them. The current dismal state of legal aid targeted only at the neediest of the needy reinforces his position. The more people have a stake in the quality of the system, the better it will be. Targeted social programs also tend to be ineffective in that they can unjustifiably exclude

> In short, the legal aid system, despite the important normative rationales that underpin it, is not a system in which most middle class citizens of Ontario feel they have a material stake. As a percentage of the population, fewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system (as witnessed most dramatically in the family law area, but also in various areas of civil litigation).
>
> This leads me to suggest that both LAO and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides).
>
> ***Trebilcock 2008 (note 47)***

[173] Thomas, panel presentation at Summit, *supra* note 38.

[174] Alex Himelfarb, former Clerk of the Privy Council, Presentation at CBA *Envisioning Equal Justice* Summit (Vancouver: April 2013).

people who require services. Professor Michael Trebilcock of the University of Toronto Faculty of Law has made this same argument.[175]

For purposes of this debate, Matthews, a long time advocate for legal aid, argued that while a national justice care system should be the ultimate goal, Canadians are not ready for it. The CBA-BC Branch, as part of its legal aid advocacy campaign, highlighted how little most people know about legal aid and so, do not really understand its importance. Given the low public traction of legal aid, Matthews argued that it is better to focus limited resources on improving legal aid for those most in need, rather than providing justice care for people who can afford to pay. In her words, "without a foundation of public support we can't make real changes and we don't have the foundation of popular support." She suggested that it is best to meet the needs of the most vulnerable and build from that base in an incremental and affordable way.

Following the 'ambitious but possible' theme used to set its targets, the Committee proposes that eligibility for legal aid be increased gradually over time, so that by 2020 all Canadians living at and below poverty level are eligible for full legal aid coverage for essential legal services and by 2025 those services are available to low-income Canadians, defined as those with incomes less than two times poverty levels.

The Committee also proposes that we fully canvass, develop and encourage an informed public dialogue about options for a national justice care system.

Funding options include client contribution schemes (based on ability to pay) and public insurance schemes (whether mandatory or opt-out). Eligibility can be approached flexibly: it does not have to be uniform for different types of services.

Professors Sujit Choudry and Michael Trebilcock and James Wilson have developed a proposal for a non-profit legal expense insurance scheme for Ontario that would operate through the province's legal aid plan. The proposal would address shortfalls in access to justice, while remaining grounded in the public interest, in contrast to for-profit private market legal expense insurance plans discussed in an earlier section. Under their proposal, everyone would be assumed to subscribe to the insurance scheme, with allowance for people to opt out.[176]

Another option is offered by popular reforms enacted in Finland in 2002, which raised the proportion of households eligible for assistance with their legal costs to 75%, with cost sharing on a sliding scale. (The figure is below 30% in most English-speaking common-law countries.)[177] Coverage encompasses criminal and civil matters, ranging from simple estate inventories to complex litigation. The main criteria are the seriousness of the matter and how well the applicant can handle it alone, rather than the area of law.

**Targets:**

***By 2030, options for a viable national justice care system have been fully developed and considered.***

***By 2025, all Canadians whose income is two times or less than the poverty line (Statistics Canada's Low Income Measure) are eligible for full coverage of essential public legal services.***

***By 2020, all Canadians living at and below the poverty line (Statistics Canada's Low Income Measure ) are eligible for full coverage of essential public legal services.***

**Milestones:**

- *The working group on national benchmarks (see Milestone for 'Regenerating Publicly funded Legal Services') develops a proposal for a gradual expansion of eligibility for legal aid*
- *A vigorous public policy dialogue about the value and feasibility of a national justice care system is underway*

[175] Trebilcock, *supra* note 47.

[176] S Choudry, M Trebilcock and J Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance" in *Middle Income Access to Justice*, *supra* note 32.

[177] www.lawyersweekly.ca/index.php?section=article&articleid=787.

- *Federal, provincial and territorial governments commit to continue increasing funding for legal aid to ensure progressive implementation of the national benchmarks (see Targets under 'Reinvigorated Federal Government Role')*

**Actions:**

- *The CBA works with the Association of Legal Aid Plans and other interested stakeholders to prepare draft national benchmarks on eligibility as a means of engaging stakeholders and fostering dialogue and action*
- *The CBA works with interested public policy institutes and think tanks to develop an options paper for a national justice care system building on existing research and considering universal legal aid models in Canada and abroad*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

## *Legal Aid Services Delivery*

Today legal aid plans offer an array of legal services that vary widely from jurisdiction to jurisdiction. In some places, services include the full continuum from legal information to representation, while in others legal aid provides a narrower range of services, such as duty counsel and representation. In addition to direct service, the continuum of services can include strategic advocacy and test case litigation on issues affecting low income people, so that problems can be addressed on a systemic basis instead of dealing repeatedly with individual cases. Strategic advocacy contributes to efficiency in courts and tribunals and the proper functioning of our legal system. Services are provided by a mix of employees, often operating through legal centres or clinics and by lawyers in private practice working for rates generally far below market rates.

Legal aid plans in Canada have spent many years making do with less, and have become adept at doing so. Although many provincial and territorial governments have increased legal aid funding in the past 5 to 10 years, demand continues to far exceed the capacity of most legal aid plans. This approach is unsustainable. Changes to legal aid services should be driven by the legal needs of the communities served, not by a drive to decrease expenditures in every way possible.

There is a gap between the information available to legal aid providers and the perspectives of the broader community as to how well current services address the public's legal needs. While legal aid program evaluations including client satisfaction components are generally strong, the Committee's community consultations and other recent public forums have provided less positive feedback. Complaints are heard about the inadequacy of and lack in flexibility in legal aid, but also the quality of service offered (for example, delays in getting service, service providers not caring, not doing thorough work, not fighting hard enough for clients, or not listening to or respecting clients). Many felt the underlying cause of these problems is that legal aid lawyers are overworked and underpaid. Related to this observation, many of those consulted believed that people with low incomes are given second-class service relative to private legal services.

> "Unless you have lots of money, you cannot access justice." ***Single mother, Moncton***
>
> "Once you finally get there and you get an order, there is nobody there to enforce it. This is what I needed. Now that I have an Order, it's not being respected and there is no one to do anything." ***Single mother, Moncton***
>
> "To me, legal rights are an unfulfilled promise." ***Person with Disability, Toronto.***
>
> "If you don't know what your rights are, how can you have them protected?" ***Single mother, Kentville***
>
> "Their (legal aid lawyers) case load is so big that they cannot go through every detail of the case. It's hard when you are trying to prove your innocence and they are not willing to fight for you." ***Aboriginal person, Saskatoon***

> "Legal aid lawyers burn out, so justice isn't served. They need to open it up more; the lawyers lose passion when they are overworked and underpaid, which is unfair to lower class society." ***Aboriginal person, Saskatoon***

The Committee also surveyed legal aid lawyers, paralegals and community legal workers across Canada and received over 700 responses. Respondents expressed a widespread belief that legal aid services are not meeting the ever-increasing demand for services and basic needs of the community:

> "Many clients are left with the prospect of no legal assistance with their divorce or spousal support claims and with their criminal charge, and so on."
>
> "Why do we even talk about "clients" if they aren't getting services? And these are in the two chief areas where legal aid actually does provide service, family and criminal. Confused."
>
> "Current Legal Aid Services are inadequate to meet the needs of today's clients and communities, let alone those of the future."
>
> "Even though Legal Aid is supposed to fund family and criminal law matters, very limited matters in each are actually covered."
>
> "Those not able to get spousal or child support or a fair divorce settlement can end up in poverty."

Service deliverers also expressed serious concerns about their ability to meet their professional obligations given the demands and constraints they face in their work:

> "Duty counsel are overworked and fewer private counsel are accepting certificates."
>
> "The danger is that the quality of legal services provided do not live up to professional standards expected of lawyers."

Quite a few lawyers expressed a lack of trust between legal aid management and providers of legal aid:

> "Proper planning for the future must recognize increasing demand for services but also that services must respond to wider community needs and a more comprehensive view of the costs of inadequate legal aid."

None of this should be taken as a critique of legal aid plans or of the lawyers doing legal aid work: both are doing their best in difficult circumstances. In some cases, positive innovations have resulted from efforts of plans to keep within budgetary targets. Many Canadian legal aid plans have developed and implemented innovative and cost-effective service delivery models, working closely with communities, pro bono organizations, and other justice service providers.

Overall, legal aid innovation is characterized by a greater mix of legal services designed to reduce the divide between full legal representation and no representation, in a situation of scarce resources. The predominant trend is to provide information and limited assistance, putting the onus on the litigant (or accused) to "self-help" with various levels of support.

## Learn More: about Emerging Best Practices for Holistic, Coordinated, Comprehensive Delivery

- Involve multiple service providers on the same team
- Get all service providers on the "same page"
- Encourage dialogue between service providers, e.g. through case conferences
- Ensure everyone understand each other's roles

See various examples in Committee discussion paper on Future Directions for Legal Aid Delivery: http://www.cba.org/CBA/Access/PDF/FutureDirectionsforLegalAidDelivery .pdf

**See also, specific Canadian examples:**

Nova Scotia focus on holistic, coordinated service delivery: www.nslegalaid.ca/resources.php

Connecting Ottawa: a social worker and lawyer offer consulting services to frontline workers: http://connectingottawa.com/about

Pro Bono Law Alberta, with Calgary Legal Guidance and Legal Aid Alberta collaborate to provide legal services in a northeastern community of Calgary. The partners provide intake, assessment, advice, referral and follow up in a community centre to a population that would otherwise be underserved.

BC's integrates legal services with community partnerships: www.lss.bc.ca/assets/legalAid/CPOManualSept2013.pdf

Nova Scotia, Alberta, Saskatchewan and Manitoba now have expanded duty counsel models for criminal matters, and most plans offer duty counsel for family matters. In Nova Scotia, legal aid funds family duty counsel in two locations full time, and part time in other locations, without means testing.

Alberta's Legal Services Centres and Family Settlement Services focus on front end dispute resolution: www.informalberta.ca/public/service/serviceProfileStyled.do?serviceQueryId=1228

In 2012, LAO announced a new mental health strategy to provide criminal lawyers whose clients have mental health needs with funding to support their clients' specialized needs: www.legalaid.ab.ca/AnnualReport2013/Strategy/Pages/FamilySettlementServices.aspx

Multi disciplinary approach in Alberta (family resource faciliators) and Nova Scotia (family support assistants).

Alberta's Family Settlement Services (FSS) offers financially eligible clients in Edmonton, Calgary and Lethbridge up to five hours of dispute resolution services for family law issues except child protection matters. Participants are screened to ensure they are capable of effective participation.

Yukon: www.yukoncourts.ca/courts/territorial/cwc.html

LAO: www.legalaid.on.ca/en/getting/type_civil-mentalhealth.asp

At the Summit, Nova Scotia Legal Aid Executive Director Karen Hudson listed examples of recent innovations by legal aid plans in the child welfare area:

- in British Columbia, Aboriginal community legal workers are targeted specifically for child welfare matters
- in Ontario and Newfoundland and Labrador, enhanced duty counsel determines legal aid eligibility prior to or at the first appearance, and provides post docket negotiation, social worker assistance, representation at pre-trial conferences and even at hearings
- in Newfoundland and Labrador, legal aid teams are comprised of lawyers, paralegals and social workers
- Nova Scotia offers specialized professional development
- Ontario has partnered with law schools to develop a clinical course in child welfare
- the Territories are using ADR approaches to get the parties together with counsel early on (even before a protection application is brought), coupled with ongoing and timely disclosure

Another important trend is to become more inclusive by incorporating services that meet the unique needs of particular disadvantaged communities. For example, legal aid plans are using court support workers familiar to local communities to respond to clients with mental health needs. LAO recently launched a mental health strategy that includes improved access to advocacy, enhanced training, increased capacity of service providers, and developing a research agenda. The strategy also provides criminal lawyers whose clients have mental health needs with funding to support those special needs.

Alberta has launched a Cultural Liaison Specialist project, to provide language and other services to newcomers to Canada.

British Columbia's Legal Services Society has launched an Aboriginal section on its website[178], with information about different available options specifically intended to address the needs of Aboriginal people, including Gladue reports, Gladue courts, aboriginal community legal workers, aboriginal child protection, mediation and circuit courts, and expanded duty counsel.

As noted earlier in this report, the community legal clinic movement, which has operated both separate from and in some cases in conjunction with legal aid, involved a more holistic approach at its inception. Evidence is clear that holistic services are what people want and what is best able to supply just, lasting outcomes. Our central objective must be to move away from piecemeal self-serve models and toward comprehensive holistic approaches which value the client as an engaged participant. When we think of justice access centres or multi-disciplinary, multi-function centres, and outreach, we should be thinking about them in the context of legal aid.

National benchmarks should set out criteria determining the type, quantity and quality of services. To the greatest extent possible, criteria should be based on evidence-based practices. Criteria should take into account whether the individual can take some initial steps, perhaps with some advice, and whether or when the individual would require in person service. Where appropriate because of the complexity of the case, or the challenges facing the individual, full representation should be provided. The standards should assist in identifying the point at which the individual requires on-going assistance, including from the outset. Assistance with mediation or other settlement processes should be included, when appropriate for the case.

National benchmarks should encourage innovative and collaborative legal aid services. Consideration should be given to mandating specific legal services, like duty counsel, to provide summary advice at an early stage in proceedings and to facilitate dispute resolution.
What can be done to support legal aid innovation to improve meaningful and inclusive access to justice?

1. Enhance outcome-based evaluation of programs and monitoring of developments and sharing of knowledge gained
2. Dedicate resources to establish and maintain mechanisms to share best practices between legal aid plans
3. Increase opportunities for legal aid providers to come together to share and learn – perhaps through an annual or biennial conference.
4. Online learning opportunities – webinars.

The Association of Legal Aid Plans (ALAP) plays an important role in fostering innovation but is not resourced to fully meet this need. Many legal aid lawyers participated in the Summit and voiced a strong need for a regular forum.

**Target: *By 2025, all legal aid programs provide meaningful access to justice for essential legal needs through inclusive and holistic services that respond to individual and community needs and integrate evidence-based best practices.***

**Milestones:**

- *Legal aid providers develop an increased capacity for outcome-based evaluation and research, as well as monitoring and sharing information about developments to facilitate*

[178] www.lss.bc.ca/aboriginal/index.php

*evidence-based best practices*

- *Prototypes of innovative holistic legal aid service delivery models have been developed and tested. Results are integrated into practice and broadly shared to encourage learning, further innovation and best practices.*

**Actions:**

- *Legal aid providers build and strengthen relationships with other social service organizations to develop more holistic service delivery*
- *The Association of Legal Aid Plans is resourced to play a national leadership role in support of strong, innovative legal aid service delivery including through research, monitoring and sharing developments*
- *The Association of Legal Aid Plans develops measures of inclusivity to integrate into evaluation frameworks*
- *The Association of Legal Aid Plans completes its work on a common framework for data collection for all legal aid providers*
- *The Association of Legal Aid Plans increases opportunities for legal aid providers to come together to share and learn (e.g. regular webinars, an annual or biennial conference)*

**What do you think?**

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

## Bridging the Public-Private Divide

As innovations in private service delivery and an increased commitment to publicly funded legal services build up the ends of the spectrum of meeting legal needs, gaps in service that remain can be addressed through public-private collaborations. Pro bono efforts have been an important aspect of these collaborations, and the profession has demonstrated its commitment to offering those services as an aspect of professional responsibility. At the same time, there is a growing need to clarify the relationship between legal aid and pro bono, to ensure that they work well together into the future. According to Access Pro Bono Executive Director, Jamie Maclaren, "we view it as high time that legal aid and pro bono be genuinely treated as mutually supportive systems."[179]

In addition, law schools are enhancing practical opportunities for law students, through clinical education, experiential learning and more, not only better equipping students with applied skills once they graduate but also developing awareness of social justice and the public's unmet legal needs and instilling a pro bono 'culture' in young lawyers.

### *The Place for Pro Bono*

The combination of private market and public legal services currently available in Canada cannot meet the demand for access. One of the main mechanisms to bridge the divide between public and private legal services is organized pro bono services. The Committee defines pro bono work as providing legal services without fee to people or organizations that can't otherwise afford them and which have a direct connection to filling unmet legal needs.

There has traditionally been some debate in the profession about the extent to which expanding pro bono services is likely to undercut public commitment to legal aid. The Committee's consultations revealed a strong division in views about the profession's responsibility to provide pro bono and the extent to which a tension between pro bono and legal aid exists.[180] Some individuals and organizations objected to the suggestion that there is a tension at all, but most of the feedback supported the idea that while there does not *need to be* tension, it does indeed exist. Further,

[179] Legal Services Society, *Submission to Public Commission on Legal Aid* (Vancouver: 1 September 2010) http://www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionToPublicCommissionLegalAid2010.pdf.

[180] For more discussion, see the Access to Justice Committee's discussion paper, *"Tension at the Border": Pro Bono and Legal Aid* (Ottawa: CBA, 2012) www.cba.org/CBA/groups/PDF/ProBonoPaper_Eng.pdf.

it is exacerbated by the serious underfunding of public legal services and competition for those scarce funds. Law firms may prefer to focus on pro bono contributions rather than taking on legal aid files or advocating for better legal aid services. At the same time, there is a remarkable degree of effective collaboration between legal aid and pro bono services, and this collaboration should be encouraged and supported.

Perhaps more fundamentally, there is a strong division in views on whether it is acceptable that the volunteer efforts of lawyers be considered a formal part of the justice system. This also raises questions about the sustainability of a system increasingly dependent on volunteer efforts. At one end of the debate are those that believe pro bono contributions, either in cash or kind, should be mandatory. At the other end are those who believe an increased emphasis on pro bono is problematic, in that it accepts that a fundamental aspect of citizenship and democracy is not an entitlement to justice but that access to justice may depend on the charitable impulses of others. Concerns are also expressed about how organized pro bono, no matter how well-motivated, simply reproduces power imbalances and injustice experienced by vulnerable clients, and unfairly distributes responsibility for filling the void created by an underfunded justice system to the least powerful or most 'socially committed' members of the profession.

> In creating these pro bono organizations, the well-off in the profession, whether judges with generous salaries and pensions, tenured law professors, or secure practitioners who have the wherewithal to serve as governors of the profession, are essentially organizing and deploying the labour of the legal proletariat: students, those struggling to become established in practice, and so on. These volunteers join the ranks of the low-paid legal aid lawyers, and the practitioners who eke out a living serving the disadvantaged, in delivering needed services.
>
> ***Mary Eberts, "Lawyers feed the Hungry" (note 52)***

The predominant view is a pragmatic one: lawyers do pro bono because they see a great, unmet need and they are able to help. Lawyers who normally practice outside the personal legal services field may enjoy volunteering as a complement to their regular, business-oriented practices. In addition, some see the profession's pro bono contributions as a kind of bargaining chip to deflect criticism when it calls for increased legal aid funding.

Others emphasize the importance of pro bono in maintaining a legal profession committed to public service. Indeed, the CBA has long promoted the legal profession's engagement in pro bono services. Twenty years ago, the CBA Wilson *Task Force on Gender Equality in the Legal Profession* recommended that students be required to engage in some pro bono work before they are granted their law degrees to "send a very clear message to students about the importance of such work and … help connect students to the community" and "reverse the trend toward commercialization of the practice of law and restore the professionalism and virtues of public service." In 1997, the CBA *Systems of Civil Justice Task Force* recommended that the CBA develop a program to "monitor, promote and publicize pro bono work carried out by lawyers and notaries." Emphasis was placed on the value of law firms setting targets and creating incentives for lawyers to provide pro bono services and for the profession as a whole to recognize the importance of these efforts.

## Learn more: about Pro Bono Developments

Jamie Hartman and Jane Park, Making Pro Bono Work: 8 proven models for community and business impact (with case studies) (San Francisco: Taproot Foundation): http://www.taprootfoundation.org/docs/8_Models_Whitepaper.pdf

The Judges' Toolkit on Pro Bono Legal Assistance (Missouri): http://www.courts.mo.gov/page.jsp?id=3933

US - ABA Rural Pro Bono Project: http://www.americanbar.org/groups/probono_public_service/projects_awards/rural_pro_bono_project.html

Australia, National Pro Bono Resource Centre, "Pro Bono Partnerships and Models: A Practical Guide to WHAT WORKS" (2013): https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/Pro%20Bono%20Partnerships%20and%20Models%20-%20A%20Practical%20Guide%20to%20WHAT%20WORKS.pdf

Australia: The State of Pro Bono Service Delivery in Australia (Speech delivered by John Corker, Director, National Pro Bono Resource Centre): https://wic041u.serversecure.com/vs155205_secure/CMS/files_cms/Pro%20Bono%20Partnerships%20-20The%20State%20of%20Pro%20Bono%20Service%20Delivery%20in%20Australia%20-%20Brisbane%20May%202013.pdf

Australia - National Law Firm Pro Bono Survey - Australian Firms with More than Fifty Lawyers: https://wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%20Final%20Report%20Dec%202010.pdf

Pro Bono Institute: http://www.probonoinst.org/projects/global-pro-bono/

Pro Bono Net: a national nonprofit organization based in New York City and San Francisco working in partnership with nonprofit legal organizations across the US and Canada to increase access to justice for poor people who face legal problems every year without help from a lawyer.

Pro Bono Net offers 4 technology products:

- Advocate website tool (probono.net)
- Public legal help tool (lawhelp.org)
- Document assembly national server (npado.org)
- Law firm pro bono management tool (probono.net/pbm)

PBLO (Pro Bono Law Ontario) and PBLA (Pro Bono Law Alberta) have built web sites on the Pro Bono Net platform. PBLO also participates in the document assembly project that builds online forms using HotDocs and A2J.

Pro bono clinics in both Alberta and BC are using Skype, video conferencing and other Internet services to provide legal advice to remote communities.

Access Pro Bono, Pro Bono Law Alberta and Pro Bono Law Ontario worked with the federal Department of Justice to develop three pilot projects in their respective provinces which engaged public sector lawyers in the provision of pro Bono legal services.

Access Pro Bono, Pro Bono Law Alberta and Pro Bono Law Ontario are working with the federal Department of Justice on pilot projects in the respective provinces to engage public sector lawyers in providing pro bono services.

Pro bono organizations in several provinces and the national Pro Bono Students Canada have made great strides in increasing access to justice. Biennial conferences have contributed to information sharing and development of best practices among pro bono lawyers. Pro bono organizations are an important part of the justice system in the communities and provinces where they exist. Pro bono organizations have developed innovative programs to better serve client needs. For example:

- as of May 2013, Access Pro Bono in British Columbia is actively seeking lawyers to staff 2 hour clinics once or twice a month, by speaking to pre-screened clients by phone or Skype for half hour interviews. This allows the client to be matched to a lawyer experienced in the required area of law, and lawyers to contribute pro bono help from their offices. It also addresses the lack of legal help available in many rural and remote locations.
- In 2009, Pro Bono Law Alberta announced a partnership with a law firm and an Edmonton Health Centre's Housing program, with the goal of ending homelessness.
- Pro Bono Law Ontario has established a medical/legal partnership providing legal services to families of critically or chronically ill children being treated at Sick Kids in Toronto or the Children's Hospital in London.

Pro bono programs can also assist young lawyers in their professional development through specialized training and mentorship, and opportunities to enhance practice skills through experience.

Despite these advances, pro bono services vary greatly from one jurisdiction to another, and even within provinces and territories. An international scan shows that pro bono developments also vary dramatically from one country to another. In the US, pro bono services are fully accepted as the main mechanism to promote access to justice.[181]

However, in Australia pro bono plays a limited role in meeting peoples' legal needs. A recent survey revealed that over 60% of the pro bono work undertaken there by large law firms is for organisations rather than individuals.[182]

The Committee's long term vision of equal justice is one in which all essential legal needs are met by public and private legal service providers (supported by legal expense insurance as appropriate). A justice system permanently based on volunteer efforts is too ad hoc and unsustainable to provide effective and durable access. Regardless of how extensive the legal profession's efforts, pro bono cannot possibly fill the current gap created by public-private legal service providers. According to Maclaren, "although we have the highest level of pro bono engagement in the country, we simply cannot meet the overwhelming demand for legal representation in this province."[183]

The late Alan Parker, QC, a recognized pro bono leader in British Columbia, said it this way:

> Wherever I have been associated with new service delivery initiatives, the latent demand surfaces. This is true every time Access Pro Bono opens a new clinic around the province. A recent example was our yearly Advice-a-Thon public clinics that we hold in open area-settings in Vancouver, Victoria and Kelowna. When we put up legal advice tents in Victory Square one day last month, we were, literally, swamped by walk-in clients. In short, if you build it, they come in.[184]

Where does this leave pro bono and public-private partnerships? As these service providers are neither designed nor equipped to provide a predictable and secure response to essential legal needs, their energies are more appropriately streamed toward

[181] This is clear from the extent of coverage of pro bono related topics at the American Bar Association's Equal Justice Conference, its emphasis in the Presidential initiative on Access to Justice, many access to justice commission mandates, and more. See www.americanbar.org/content/dam/aba/events/probono_public_service/2013/05/equal_justice_conference/equal_just_conf2013_programbookWEB.authcheckdam.pdf.

[182] National Pro Bono Resource Centre, *National Law Firm Pro Bono Survey: Australian Firms with Fifty of More Lawyer: Final Report* (January 2013) at 29 www.wic041u.server-secure.com/vs155205_secure/CMS/files_cms/National%20Law%20Firm%20Pro%20Bono%20Survey%202012%20-%20Final%20Report.pdf.

[183] Legal Services Society, *Submission to Public Commission on Legal Aid* (Vancouver: 1 September 2010) www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionToPublicCommissionLegalAid2010.pdf.

[184] *Ibid*.

important but non-essential legal needs, such as resolving disputes that have a significant impact on the individuals involved but may not put their security or ability to meet basic needs at risk. Consumer protection issues could fall within this category, for example. Test case and public interest litigation are essential aspects of publicly funded legal services. In addition to the litigation carried out or funded by legal aid plans and other public interest advocacy clinics, this is also a good area for pro bono contributions and a great opportunity for partnerships between legal aid and pro bono.

Lawyers acting pro bono and pro bono organizations should continue to work in collaboration with legal aid organizations to provide seamless delivery, but with greater clarity on the line between their responsibilities. Pro bono programs are nimble, flexible and can marshal resources quickly, and so are also arguably well suited to emergent and emergency situations as a stop-gap measure.

Lawyers should continue to consider pro bono as a professional obligation and pro bono organizations should continue to play an important role in encouraging and facilitating these volunteer efforts. The focus should be on encouraging pro bono contributions by lawyers who do not regularly provide people law services, such as lawyers in large law firms, corporate counsel and government lawyers. Until the targets proposed by this report are met, it can be expected that the level of unmet legal needs in Canada will continue to be a serious concern, one that pro bono efforts by the profession contributes in significant ways to alleviate. It is important to view the many targets in this Report as a whole, in terms of how they fit together. The Committee is not suggesting that there will be no place for pro bono in its vision of equal justice – but rather a refocused place that better dovetails with what legal aid and the private market provide.

This transition in pro bono priorities and participation should be tracked through a survey of the legal profession. In Australia, the National Pro Bono Resource Centre conducts an annual survey of national law firms that could serve as a model.

Targets: ***By 2025, the justice system does not rely on volunteer legal services to meet people's essential legal needs.***

***By 2020, all lawyers volunteer legal services at some point in their career.***

**Milestones:**

- *Pro bono programs work with legal aid and other service providers to phase out dependence on volunteer legal services to meet people's essential legal needs and reprioritize their work to meet other gaps in the availability of legal assistance*

**Actions:**

- *All law societies and legal employers remove barriers to participation in pro bono programs*
- *The CBA Pro Bono Committee collaborates with pro bono organizations to develop and carry out a national survey of pro bono contributions in Canada*

## What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?

(write to: equaljustice@cba.org)

## Law Schools, Legal Education and Law Students

Law schools support both private and public delivery of legal services and have a direct role in providing legal services through legal clinics. An important avenue for advancing access to justice is by engaging the legal academy to a greater extent than at present. One promising development is that the Council of Canadian Law Deans has established an access to justice committee to review the role of law schools in this area.

> Students need opportunities to learn about, reflect on, and practice the all encompassing responsibilities of legal professionals. The other professions employ well-elaborated case studies of professional work while law schools, which pioneered the use of case teaching, only occasionally do so. Lack of attention to practice and the weakness of concern with professional responsibility are the unintended consequences on a single, heavily academic pedagogy to provide the crucial initiation into legal education.
>
> ***Doug Ferguson, 2010, speaking about Educating Lawyers: Preparation for the Practice of Law (Sanford: Carnegie Foundation, 2007)***

### *Overview of Law School Involvement*

***The Big Picture***

In preparation for their review, the Council of Canadian Law Deans prepared a summary of current law school access to justice initiatives. Many schools have initiatives to encourage and support students from communities that are under-represented within the legal profession.

The Federation of Law Societies' list of 'competency' requirements[185] does not include an access to justice component, or a requirement for experiential legal education. Some law schools have attempted to address access to justice by weaving relevant issues into mandatory basic courses, optional seminars and clinic courses.

### *Examples from Law School Courses*

The University of Windsor Law School offers a mandatory full year course in access to justice for first year law students. The signature aspect of this course is collaborative projects for justice (P4J). Students must research a real life barrier to justice, prepare a background paper, and propose a solution. Some creative innovations have been proposed, including a public awareness campaign, a business plan, a software application, a policy paper, a public service announcement, a series of brochures and a guided interview 'app' for a particular legal document.

Osgoode Hall Law School requires its graduates to take part in an experiential legal education course, and provide 40 hours of community service.

### *Student Legal Clinics*

All but three of Canada's law schools operate some form of legal clinic. Western University clinic director Doug Ferguson[186] has categorized these legal clinics into five types: representational; informational; placement; advocacy and simulations. Representational clinics are the most common and fill a gap in providing legal services. Hundreds of law students assist thousands of low income persons who don't qualify for legal aid and have no place to turn. Representational clinics are in every Canadian law school except those in Québec (where students are not allowed to appear in court) and New Brunswick.

All clinics provide some form of experiential learning for law students and assist individuals and non-governmental organizations in various ways. However, some argue that despite some progress, Canadian law schools are still not doing enough to integrate practice and ethics into legal studies. The Association for Canadian Clinical Legal Education (ACCLE) is a group of individuals and clinics who

[185] See: www.flsc.ca/en/a-profession-with-high-admission-standards/.

[186] Also a member of the CBA Access to Justice Committee since August 2013, and member of the CBA Legal Futures Initiative's Education and Training Team.

came together to improve experiential education and to facilitate connection and collaboration between clinics across Canada. More recently a parallel student organization (ACCLES) with similar objectives was established.

### *Pro Bono Students Canada*

Pro Bono Students Canada has chapters in 21 law schools, providing additional practical training and opportunities to increase access to justice. Executive Director Nikki Gershbain, reports that 90% of volunteers plan to offer pro bono services once they graduate from law school, and 55% said their participation in pro bono had an impact on that decision. No longitudinal studies have been carried out to demonstrate this impact.

### *US Developments*

Some US law schools require students to take experiential learning courses as a graduation requirement. For example, Washington and Lee University has transformed their third year into experiential learning. As noted earlier, many law schools sponsor 'incubator programs' to assist recent graduates in developing accessible legal practices. Some law schools have similar programs that involve law students, such the Justice Bridge program at Northeastern University.

#### Learn more: about Law School Initiatives

Pro Bono students Canada: http://www.probonostudents.ca

Canadian summary of law school experiential learning initiatives: www.cba.org/pdf/Experiential-Learning-Programs.pdf

Association for Canadian Clinical Legal Education: http://accle.ca/

Initiatives by Canadian law school clinics: http://accle.ca/links/

US summary of law schools access to justice initiatives: http://www.justice.gov/atj/atj-campus.html

Street Law – "a nonprofit organization that creates classroom and community programs that teach people about law, democracy, and human rights worldwide":www.streetlaw.org

Link for P4J at UWindsor: http://www1.uwindsor.ca/law/p4j/registrar/

Legal Help Centre of Winnipeg - "a not-for-profit organization that was set up by community volunteers working together with faculty and students from both the University of Winnipeg and University of Manitoba. Our vision is to assist disadvantaged members of our community to access and exercise their legal and social rights":http://www.legalhelpcentre.ca/

Law Practice Program in Ontario:http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848

Alternative clinical legal education programs, such as Street Law in Washington, DC engages students to work with community members to develop self-help tools and capabilities, as well as systemic and preventive solutions to recurring justice issues.

The Family Law Education Reform Report[187] from the Association of Family and Conciliation Court Services, William Mitchell College of Law and Hoffstra University Faculty of Law emphasizes the

[187] www.flerproject.org/?q=node/1.

need for students to learn about their place as a lawyer in the range of service providers. This approach could be generalized to other subject areas that particularly impact low and moderate income people.

The ABA *Recodification of Accreditation Standards* requires that: "A law school shall offer substantial opportunities for student participation in pro bono activities." Schools are also `encouraged to address "the obligations of faculty to the public, including participation in pro bono activities."

### *Access to Justice Research*

Research on access to justice is not a priority in all Canadian law faculties. Civil justice research often lags behind research on criminal justice issues, where departments such as criminology and sociology have made great strides. There are reasons to be optimistic that civil justice research is on the rise, including through collaborative research alliances. This issue is discussed further in Part III.

### *Future Directions*

The Summit included a rich discussion on the role of law schools, law students and legal education in fostering greater access to justice. Some ideas discussed include:

- Law students can do more to address unmet need if given the opportunity and support by law schools.
- Law schools have a critical role in shaping professional identity to highlight public service as a component of ethical lawyering.
- Rewarding research on access to justice.
- Law societies and law regulators should consider changing the monolithic entry structure for the legal profession (the UK or England and Wales) has 8 different legal licensed occupations).
- Criteria for promotion, tenure, and renewal could be adjusted to give appropriate weight to experiential learning in courses, service to the profession, service to the community, and encouraging pro bono activities.

Professor Bruce Elman advocates for law schools to take a leadership role in modeling the lawyer of the future by formulating an aspirational statement for every law student. That statement includes a community service component and integrates this approach in all aspects of law school life. Elman has developed detailed proposals to this end and sees this as making a substantial contribution to equal justice.

Law students are a vigorous force for change and many law faculties are also keen to increase experiential learning opportunities and make stronger contributions to access to justice. At the same time, education and training goals do not always coincide with access goals. Students can make an important contribution, but cannot be expected to address the vast range of unmet needs.

At the Summit, there were discussions about how law schools could become more engaged in contributing to equal access to justice. The CBA, law societies, and members of the legal profession have an important role to play in advocating for and supporting these changes. The new Law Practice Program in Ontario will also support more experiential learning to enhance access to justice.

To the extent they are not already doing so, law schools should take a dual focus to integrating access to justice into education, by establishing requirements for all students and supporting opportunities for those particularly interested in access to justice. All graduating law students must have a basic understanding of issues relating to access to justice and know that fostering access to justice is an integral part of their professional responsibility (i.e. think systemically, act locally). Steps could be taken to encourage students who want to contribute more in this area, such as special internships, supporting innovations and research paper prizes.

Targets: ***By 2030, three Canadian law schools will establish centres of excellence for access to justice research.***

***By 2030 substantial experiential learning experience is a requirement for all law students.***

***By 2020, all graduating law students:***

- ***have a basic understanding of the issues relating to access to justice in Canada***
- ***know that fostering access to justice is an integral part of their professional responsibility.***
- ***have taken at least one course or volunteer activity that involves experiential learning providing access to justice.***

***By 2020, all law schools in Canada have at least one student legal clinic that provides representation to low income persons.***

**Milestones:**

- *Law school curricula examined and adjusted as needed to meet the targets*

**Actions:**

- *The CBA adopts a statement on the 'Model Lawyer of Tomorrow' to encourage and foster dialogue on the role of lawyers in promoting access to justice*
- *The CBA adopts a resolution encouraging law schools to offer substantial opportunities for experiential learning in the access to justice context. This ties into the Legal Futures Initiative, which is considering legal education and training of the next generation of lawyers*
- *The Federation of Law Societies includes an access to justice component in its competency requirements*
- *Law schools expand the access to justice content of their curricula*
- *Law schools expand the availability of experiential learning to their law students*
- *The Council of Canadian Law Deans supports development of access to justice curricula*
- *Each law school appoints a staff member to serve as champion/leader for engaging discussion between the school and justice system stakeholders, including the public, about the role of law schools in supporting equal access to justice*
- *Law students have opportunities to become involved in CBA access to justice initiatives, including discussions of this report*

## What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

# PART 3

## making the equal justice vision real

# *Making the equal justice vision real*

Shared responsibility.
Change the conversation.
Bring the cheque book.

This report is an invitation to act, or as one person attending the Summit put it, to "just(ice) do it". A fundamental step to reaching equal justice is laying the foundation for ambitious but possible targets for an equal, inclusive justice system by 2030. At the same time, the Committee recognizes the barriers to even modest improvements to access to justice, let alone the type of change the Committee advocates.[188]

The Equal Justice initiative was designed to consider four systemic barriers that have hindered substantive progress on access to justice reform and to propose means to overcome them. The barriers are:

- Lack of public profile of access to justice
- Inadequate strategy and coordination between those seeking improvements
- No effective mechanisms for measuring change
- Gaps in our knowledge about what works and how to achieve substantive change.

In this part, the Committee examines these barriers more closely to consider how best to overcome them, so we can move from the current situation of unequal justice to the vision of equal justice. Here the focus shifts to the three structural supports in our conceptual bridge to equal justice:

- increased public engagement, participation and ownership of the justice system;
- improved collaboration with effective leadership; and
- enhanced capacity for justice innovation.

Two perspectives frame this discussion. First, access to justice is a 'wicked problem', meaning it is a complex policy problem that defies quick fixes and simple solutions. A second and related point is that given the scale of change required, we need to go beyond conventional approaches. One could say a 'superhero' is required, but certainly, effective leadership is fundamental.

## Access to Justice is a 'Wicked Problem'

Decision making theory refers to very complex problems as 'wicked' problems, not in the sense that they are actually 'evil', but because they are highly resistant to resolution. In its 2007 report, *Tackling Wicked Problems: A Public Policy Perspective*, the Australian Public Service Commission outlines characteristics of these problems:

- They are difficult to clearly define: the nature and extent of the problem depends on who is asked as different stakeholders have different views of what the problem is.
- They are often interdependent or co-exist with other problems and there are multiple causal factors.
- They go beyond the capacity of any one organization to understand and respond to.
- There is often disagreement about the causes of the problems and the best way to tackle them.
- Usually, part of the solution to wicked problems involves changing the behaviour of groups of people or all members of society.[189]

All these characteristics apply to the access to justice problem in Canada today. Further, like many

[188] As in Part 2, when the Committee refers to "courts" in the general or conceptual sense in this Part, it views this term as potentially encompassing court-like tribunals that adjudicate disputes for individuals.

[189] Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (Commonwealth of Australia, 2008) at 3-5 http://www.apsc.gov.au/__data/assets/pdf_file/0005/6386/wickedproblems.pdf.

wicked problems, attempts to solve the access to justice problem have generally been unsuccessful or have met with partial but disappointing levels of success, and even to unforeseen negative consequences. These chronic policy failures give access to justice problems an appearance of being intractable and diminish support for change. It is easy to see equal, inclusive justice as simply too hard a goal to achieve and to give up or set our sights on minimal reform objectives. Rather than depressing action, however understanding the nature of the challenge can empower us to bolder solutions.

Tackling wicked problems requires a bold approach founded on a shared recognition and understanding that there are no quick fixes and simple solutions. The Australian Public Service Commission report discusses key ingredients in solving or at least managing wicked problems:

- Holistic rather than partial or linear thinking – need to grasp the big picture including the interrelationships between the range of causal factors and policy objectives;
- Innovative and flexible approaches;
- Successfully working across both internal and external organizational boundaries;
- Engaging citizens and stakeholders in policy making and implementation;
- A principle-based rather than a rule-based approach;
- Iterative processes involving continuous learning, adaptation and improvement; and
- Developing innovative, comprehensive strategies or solutions that can be modified in the light of experience and on-the-ground feedback.[190]

The Australian report concludes that wicked problems require governmental and non-governmental agencies to work together in new ways and through novel processes. This shift must be facilitated through:

- supportive structures and processes;
- a supportive culture and skills base;
- facilitative information management and infrastructure;
- appropriate budget and accountability frameworks; and
- ongoing forums of exchange.[191]

The Committee has integrated the Australian framework and suggested approaches into the targets, milestones and actions for the structural supports to our bridge. Together, they suggest that collaboration and coordination will be required to reach equal justice.

## Is a 'Superhero' Required?

The Committee has concluded that partial solutions are incapable of addressing the current access to justice gap and effectively contributing to equal justice. This conclusion is supported by the wicked problems literature[192], which emphasizes the importance of holistic thinking and the need to confront the big picture and deal with the interrelationships between a range of causal factors and policy objectives. This report rejects the status quo and calls for action on a more fundamental scale as required by the depth, breadth and urgency of the problem.

At the Summit, there was a consensus that we need access to justice champions. The role of those champions is discussed in the sections that follow. Justice innovation literature[193] suggests that access champions come forward organically, often from a grassroots perspective, armed with a keen understanding of a specific access problem, a creative solution and an unwillingness to take 'no' for an answer.

The question remains though whether champions will be enough, as those people do emerge from time to time. It seems that instead something truly extraordinary may be required to achieve our ambitious shared objectives. The Committee found

[190] *Ibid* at 9-12.

[191] *Ibid* at 21.

[192] See, for example, Richard H Beinecke, "Leadership for Wicked Problems" (2009) 14:1 The Public Sector Innovation Journal www.innovation.cc/scholarly-style/beinecke1.pdf.

[193] See, for example, the work at HiiL, *supra* notes 132, 134 and 143.

itself asking: is a superhero required? This image is hard to avoid, as a special champion would need extraordinary powers and be fervently dedicated to protecting the public. Rather than a comic book hero, however, the Committee is suggesting someone more like a Tommy Douglas and his heroic efforts to build a universal healthcare system in Canada. He is the iconic social policy superhero.

In posing the question this way, the Committee does not mean to trivialize the efforts required. The Committee believes it is important to encourage the latent champion in each of us and reiterate the invocation that we all need to think systemically and act locally. At the same time, the notion of superpowers is appropriate to describe the effort required to reach equal justice. In particular, the Committee is concerned that change efforts will continue to flounder as no one individual or entity is responsible for ensuring access to justice in Canada. And so, our targets include a typically Canadian proposal for an additional function in the justice system: an access to justice commissioner in each jurisdiction with modest but novel 'super' powers.

## Building Public Engagement and Participation

Civil justice is a low priority for the Canadian public, and so has low political priority. Polling shows broad public support in principle for legal aid, but still there is no public outrage at the current deficiencies, or any broad movement urging change. Criminal justice issues tend to dominate the media and have more public profile. The lack of awareness of the importance of a functioning justice system for non-criminal matters means civil justice issues receive little attention. Overall, justice concerns have lower priority than other parts of our social safety net, notably education and healthcare.

> On average, healthcare takes over 40 cents of every dollar of public spending. The whole civil justice system is less than one cent of the same dollar. How can we possibly be doing that? The answer is because the public demands healthcare and so far, they are not demanding access to justice.

Those who most need publicly funded legal services often have no voice in determining priorities, because poor people have little political capital, as do other vulnerable groups affected by inadequate access, including, for example, children.

In addition, many people believe that legal problems happen to other people, not them. Another common misperception is that most people's justice needs are already met. There is a widespread disconnect between Canadians and their justice system: there is no sense of ownership. The public feels disenfranchised and helpless to change the system. Our elected representatives broadly reflect the population, and are unlikely to act on issues that they know are unimportant to their constituents.

As the statistics in Part I vividly illustrate, justice has lost ground relative to other important social programs. Political attention to equal justice is unlikely given the current lack of public recognition or support. So, increased public engagement is a necessary condition for reaching equal justice. This engagement could be fostered by governments regularly using community roundtables, town hall meetings, or other public gatherings to engage in dialogue with the public about justice. Governments should be able to demonstrate that the public perspective has informed the foundations of the justice system.

### Changing the Conversation

The long-term strategy for increasing public engagement with the justice system and building a public commitment to equal justice is linked to improving individual legal capability, beginning with early education to build law as a life skill. The objective is for Canadians to have a greater sense that they own the justice system, that it's a system intended to serve them, rather than a system for lawyers and judges to exert power over them. In the shorter term, a comprehensive public engagement campaign is required. We need a convincing answer when people ask: "why should I care about equal justice?" While each justice stakeholder group has a role, the legal profession and the CBA have a leadership role in developing this campaign.

Lack of public interest in justice system reform is further harmed by conflicting messages about access to justice. When justice leaders speak out they are often accused of acting out of self-interest. Messages that emphasize or reinforce a negative or jaundiced view of legal and court processes, the legal profession and the judiciary have great currency. Genn has noted with dismay this "damaging justice rhetoric" that "presents court proceedings as an unnecessary drain on public resources, and public funding for civil and family disputes through legal aid as an incitement to litigate rather than a means of facilitating access to justice."[194] Justice system stakeholders can contribute to this negativity and confusion in a dialogue marked by finger-pointing and attributing fault to others.

The Envisioning Equal Justice initiative focused on changing the conversation among justice system stakeholders to move beyond damaging rhetoric arising from competition over scarce resources and protecting turf. The next stage is to change the conversation further by expanding it to include more members of the public in more meaningful ways.

> The point is not to challenge and resist in order to preserve the status quo, but to engage in the debate, to argue for the benefits of public justice while recognizing where and how the public justice system and legal practice needs to change and to offer a realistic program for improvement in order to meet the needs of disputing parties seeking justice through the legal system.
>
> ***Dame Hazel Genn***

Increased public engagement is a necessary condition for reaching equal justice, but politicians are unlikely to embrace the issue given the lack of public recognition or support. The importance of strategies that bring the public into conversations about equal justice featured prominently in the Summit discussions about obstacles to change and how to overcome them.

Summit participants also emphasized the need to stop "singing to the choir" and develop mechanisms to engage the public more directly and open the discussion up significantly. People need to know that:

- They are not immune from legal problems: "it" can happen to "you"
- Everyone will likely be touched by the justice system at some point
- The value of legal help when people have serious legal problems
- The benefits to society as a whole when we provide equal justice
- That justice needs can be as important as health care needs
- The economic and social cost of doing nothing.

Another key message is the strong interconnection between health, education and justice; understanding that spending on justice will save money elsewhere (in addition to avoiding suffering). Also, equal justice is interrelated to other more accepted social goals, such as alleviating child poverty, improving the GDP and dealing properly with mental health issues.

Summit participants were also clear that the goal must be community ownership of the justice system, and that can only be achieved through active engagement. The public is very much a part of the justice community. Justice system stakeholders are not instigating dialogue with the public but rather tapping into a justice dialogue that is already going on. The problem is that the two conversations – the justice system dialogue and the community justice dialogue – are disconnected. We need to replace the weak links between the two conversations with a strong connection.

As noted above, wicked problems must be widely discussed by all relevant stakeholders to get to a full understanding of their complexity. The Australian Public Service Commission Report confirms that changes cannot be imposed on people: "Behaviours are more conducive to change if issues are widely understood, discussed and owned by the people whose behaviour is being

[194] Genn, *supra* note 22.

targeted for change."[195] At a Summit workshop, Mary Ellen Hodgins, an entrepreneur and a public representative involved in several access to justice initiatives, emphasized practical reasons for engaging the public *as partners* in justice dialogue. Public engagement builds trust, reduces the potential for unintended consequences, builds capacity and contributes to innovation because the public offers valuable contributions. In addition, it is the right thing to do because people are part of the justice community.

## Increasing Public Participation

Initiatives to build general public understanding of, support for, and ownership in the justice system is one key strategy. A second is to develop effective means for public engagement and participation as active justice system stakeholders.

HiiL's *Innovating Justice* handbook emphasizes the importance of involving users early on and throughout the process. While acknowledging that this takes time, it is essential because it is only by listening to the people involved in a judicial process that we will be able to understand the problems from the perspective of users. People using justice system services "are not always able to clearly articulate their deepest needs".[196] The main mechanism employed today is user satisfaction surveys but these only scratch the surface. Actual conversations may be required to explore past and present experiences, attitudes and emotions surrounding these topics. The justice system has much to learn from market research and other more sophisticated tools and approaches.

> Pain is a mere signal. It is crucial to diagnose exactly what hurts most and what the needs are. So involving users from the outset, and throughout the process, is not just 'a good idea' or something 'to be aimed for', it is essential to the development of an efficient effective, innovation.
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> ***HiiL, Innovating Justice, note 134***

[195] Australian Public Service Commission, *supra* note 189.

[196] *Innovating Justice*, *supra* note 134.

The broader question is how to fully engage the public in a way that will build the sense of ownership required for fundamental change. This challenge seems particularly daunting given the paucity of policy dialogue in Canada. Those working for improvements are not an organized national movement, but advocates who are already often overworked and underpaid.

In *A Voice for All: Engaging Canadians for Change,* the Institute on Governance has developed a framework to facilitate active participation and citizen engagement.[197] Principles include shared agenda-setting by all participants, a relaxed timeframe for deliberation, an emphasis on value-sharing rather than debate, and consultative practices based on inclusiveness, courtesy and respect. In her remarks at the Summit, Maria Campbell advocated for steps to recognize and transcend the power differentials between institutional and professional voices and community voices. Conversations based on reciprocity, where the contribution of all perspectives and forms of knowledge is equally recognized and valued is key. Steps must be taken to ensure the dialogue is culturally appropriate and addresses barriers to communication. As Campbell pointed out: "Our language is different. Because I speak English doesn't mean that I understand or comprehend what you're talking about."

For its community consultations, the Committee developed a consultative framework integrating the principles outlined in this section. The framework is appended to this report.

In facing the difficult challenge of beginning to build greater public engagement and ownership of the justice system, successful existing models can serve as the foundation for concerted, widespread efforts. We can also learn from successful campaigns to change public policy and public behaviour in other fields, such as changing the cultural acceptability of drinking and driving, and smoking in public places.

Smaller scale successes have been made in justice

[197] Institute on Governance, *A Voice for All: Engaging Canadians for Change Conference on Citizen Engagement October 27-28, 1998* (Ottawa: 1998) http://iog.ca/wp-content/uploads/2012/12/1998_October_cereport.pdf.

> Reciprocity has to be the essence of the work… that we do. If you're always giving and I'm always taking there's no way that empowers me and there's no respect that's gained between the two of us. We can teach each other all sorts of things… We can do that if we can have even one or two classes a month in the community where we can bring in different kinds of community people and we share. You're able to give us the kinds of information instead of in a handbook but also they can teach you and that becomes a reciprocal thing. It empowers both of us and it's the empowering and the process that makes the change.
>
> ***Maria Campbell, Metis Elder, Envisioning Equal Justice Summit, April 2013***

system public engagement strategies. In her post-Summit reflections, Anne Beveridge, a long time legal aid lawyer in British Columbia, attributed the decline in public support for legal aid to the removal of local community law offices, which had carried out regular extensive consultations with local community members. As a result, the community felt they "owned" the province's legal aid plan and successfully went to bat for it when the government sought to cut services in 1997. Community law offices are essential to community engagement.

More recently, the CBA British Columbia Branch successfully raised the profile of legal aid and other access to justice issues through a concerted public engagement campaign. At the Summit, Matthews said that an important and promising insight gained through the campaign is that the highest support for legal aid comes from those with the most knowledge. After a 25-minute phone conversation, with the interviewer mainly asking questions, the interviewees' favourability rating, their personal commitment to having tax dollars support legal aid, went way up. This was true across all demographics.

As members of the justice community, we need to change the way we talk and how we act. Our goal is an equal, inclusive justice system that everyone can take part in. To start, we need to listen to the public perspective and create inclusive forums for dialogue and accountability structures. True public ownership of the justice system will require more than enhanced consultation and dialogue though. We must also transform accountability structures to include public representatives. **Right now, Canadians think of the justice system as belonging to judges, lawyers and the government – this has to change. Canadians must perceive the justice system, including the courts, as belonging to them.**

Targets: ***By 2025, all provincial and territorial governments engage in dialogues with the public (e.g. community roundtables, town hall meetings) on a regular basis and demonstrate how the public perspective informs justice system policies and processes, innovations and reforms.***

***By 2020, Canadians have a greater sense of public ownership of the justice system.***

**Milestones:**

- *All governments hold dialogue sessions with the public (e.g. community roundtables, town hall meetings), in partnership with community groups, at least three to five times per year*
- *A principled framework for community dialogue (e.g. inclusion, respect, reciprocity) integrating evidence-based best practices is in place*
- *Justice reform captures the public perspective which informs policy and process development, innovation and reform to the justice system*
- *A suggestion from a member of the public is championed by an appropriate justice system participant and is successfully implemented*

**Actions:**

- *The CBA works with other justice system stakeholders to develop a public engagement strategy, including an interactive "My Justice System" campaign to learn more about public expectations of the justice system and to seek out concrete proposals for access to justice reforms*

- *Provincial and territorial governments build on the consultative practices of legal aid providers and legal clinics to identify justice system user groups who should be included in consultation processes*
- *All justice system governing boards and advisory committees include more than one public representative and operate according to inclusive guidelines for communication and consultation*
- *Justice system stakeholders collaborate to increase the number and types of mechanisms to receive feedback from people accessing the justice system, including online discussion forums and surveys of people denied services; feedback is taken into account in reform strategies*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?

(write to: equaljustice@cba.org)

## Building a Coherent Civil Justice System: Collaboration and Effective Leadership

There is effectively no coherent civil justice system in Canada. Fragmentation is to some degree a necessary consequence of institutional and individual independence of the parts of our justice system – the courts and judges, the legal profession and lawyers and the legislative and executive branches of government. Independence of the judiciary and of the bar and the separation of powers between branches of government are foundational principles of Canadian democracy that must be steadfastly preserved. At the same time, a rigid application of these principles can act as a shield against justice innovation and prevent necessary collaboration and coordination.

This overall lack of coherence is replicated on a practical level. The diffuse and complex nature of delivery of civil justice services is exacerbated by the lack of effective mechanisms for coordination and collaboration. These conditions also exist in the criminal justice system, but it has achieved a higher degree of coherence through focused collaboration.

During the Summit closing plenary session, Colleen Cattell Q.C., a Vancouver mediator, asked participants to consider the unseen or unspoken interests that inhibit collaboration in the justice system. She used the image of an iceberg, with the tip above the water representing expressed positions, and the bulk hidden under the surface to suggest possibly unarticulated interests or fears at stake. A number of common themes emerged from these small group discussions at the closing plenary, shown in the "Iceberg of Hidden Hurdles to Justice Innovation" diagram below.

Acknowledging these barriers is an important first step in working together to overcome them.

> This need for collaboration and cooperation is pervasive. None of us can meet these challenges alone. Many conversations begin with issues about authority and independence. I say let's start with the problems and the solutions. Of course we have to be careful about roles and responsibilities and about the independence of the bar, the bench and the administration. But let us not start the conversation there. Let's identify the problems together and try to solve them together, respecting our roles and responsibilities but never forgetting our shared responsibility to the administration of justice.
>
> ***Justice Thomas Cromwell, Keynote Speech at Envisioning Equal Justice Summit, April 2013***

### Hidden Hurdles to Justice Innovation

*What's below the surface?*

- Fear of innovation
- No reward for taking risks
- Unwillingness to expose failures and inefficiencies
- No one has/takes responsibility (or joint responsibility), so everyone expects someone else will "do something"
- Finger pointing, blaming
- Fear of losing turf - institutional self-interest
- Overwhelmed by complexity and extent of the problem
- Self-preservation, fear of loss of control, status and work (e.g. fear of becoming a discount store lawyer)
- Sense of entitlement – we know more/better than people asking for change
- Belief that some issues are untouchable/ shouldn't be questioned (eg. judicial independence, role of law schools, self-regulation of profession, necessity of lawyers being sole providers of legal representation)

In addition to justice stakeholders' fears and interests, the current situation is exacerbated by our underdeveloped capacity for collaboration despite the clear human, social and economic costs of unequal justice. Summit participants noted that justice system players too often act in 'silos' and the lack of clear common goals or visions act as inhibitors to effective collaboration. We must acknowledge that we in the legal profession are better at competing than collaborating or recognizing our interdependencies. This competition reinforces inefficiencies and leaves out the broader community. Inertia and lethargy are natural responses to these conditions and active steps are required to overcome these tendencies and complexities to facilitate collaboration.

However, collaboration alone will not create a coherent civil justice system. Effective leadership is also essential. At the Summit, participants considered the question, 'how can we go *forward* when we don't know where we're going' because;

- The justice system is a body without a brain.[198]
- We lack management capacity: there is no CEO of the justice system making coherent decisions.
- We need leaders, champions for change.
- There is plenty of diagnosis, but little attention to how to translate it into change/action.

If the justice system is a body without a brain or an organization without a CEO, then genuine leadership in the access to justice field must be developed to fill this void.

The Committee proposes that we build our capacity for collaboration and effective leadership in the civil justice system through two main avenues:

- establishing permanent and ongoing national, provincial, territorial and local collaborative structures; and
- the appointment of access to justice commissioners.

The expectation is that by 2020 these collaborative structures and commissioners would be functioning at a high level. A committee or commission can be set up quickly, but time is needed to develop the skills and processes necessary to work together effectively, cultivate membership, refine mandates, and gather resources and so on. The following discussions bring together the Committee's insights on what is required to meet this target of effective collaboration and leadership.

Equal justice will also be advanced through networking, sharing information and communication between collaborative forums. This is addressed in the next section on building the capacity for justice innovation. Here, the focus is on the skills, processes and structures needed to facilitate collaboration in the justice system.

[198] Rebecca Sandefur and Aaron Smith, "Access Across America: First Report of the Civil Justice Infrastructure Mapping Project" (American Bar Foundation, 2011).

## Collaborative Skills, Processes and Structures

The National Action Committee is an important forum for bringing together justice system stakeholders, including a member of the public. Other collaborative forums are needed at the provincial, territorial and local levels. During the Summit, this requirement was expressed as the need for "a neutral umbrella leadership body to oversee justice system reform and bring together stakeholders". Some jurisdictions have had access to justice committees for a specified period or for specific initiatives. These include two Alberta initiatives; the Justice Policy Advisory Committee and the Safe Communities Initiative. Lessons can be learned from the successes and the failures of these types of initiatives. At the Summit, Kurt Sandstorm, Q.C., Assistant Deputy Minister, Alberta Justice and Solicitor General, highlighted three specific lessons: establish separate forums for civil and criminal justice issues, keep collaborative structures small and develop a focused mandate and action plan.

Collaboration requires more than setting up committees. Certainly to reach equal justice we must develop collaborative skills, processes and structures. But, we also need to fundamentally change the way we work and carry out the business of justice. We need to build equal justice communities from the ground up, breaking down siloes and replacing them with effective means of communication, coordination and cooperation within and across sectors of the justice system.

> We desperately need a more cooperative and collaborative approach - within sectors (eg among PLE providers, pro bono groups, etc); across sectors (judges, lawyers, court administrators, legal aid, etc); and across jurisdictions (eg. why develop essentially the same materials for self represented litigants 13 times?)
>
> ***Justice Thomas Cromwell***
> ***Keynote Speech at Envisioning Equal***
> ***Justice Summit, April 2013***

The first step to facilitate working across organizational boundaries includes inter-organization mapping on a given issue, strategic reviews and creating a shared understanding of problems across organizations.

The Australian Report on tackling wicked problems states the social complexity that accompanies nearly all such problems means "a lack of understanding of the problem can result in different stakeholders being certain that their version of the problem is correct". Achieving a shared understanding of the dimensions of the problem and different perspectives among external stakeholders who can contribute to a full understanding and comprehensive response to the issue is crucial. The report goes on to say that, "... the Holy Grail of effective collaboration—is in creating shared understanding about the problem, and shared commitment to the possible solutions." From this perspective, solving a wicked problem is fundamentally a social process: "Having a few brilliant people or the latest project management technology is no longer sufficient."[199]

## Lessons from the US Access to Justice Commission Experience

In the US, Chief Justices are considered the 'stewards' of the entire justice system. Many Chief Justices have established access to justice commissions (ATJC) to enable them to work with other stakeholders to advance equal justice. In 2010, the US Conference of Chief Justices adopted a resolution supporting the "aspirational goal that every state and United States territory have an active access to justice commission or comparable body." The resolution was in large measure a response to the remarks of Professor Laurence H. Tribe, Senior Counselor for Access to Justice, US Department of Justice. Tribe championed access to justice commissions as having achieved remarkable results and referred to them "as one of the most important justice-related developments in the past decade."

In January 2011, the US Conference of Chief Justices adopted a resolution entitled "Leadership to Promote Equal Justice". The resolution

[199] Australian Public Service Commission, *supra* note 189 at 28.

acknowledges that under the US constitutional structure, the judicial branch "shoulders primary leadership responsibility to preserve and protect equal justice and take action necessary to ensure access to the justice system for those who face impediments they are unable to surmount on their own." Given the importance of judicial leadership and commitment, the resolution urges Chief Justices to establish partnerships with state and local bar organizations, legal service providers and others to:

1. Remove impediments to access to the justice system, including physical, economic, psychological and language barriers;
2. Develop viable and effective plans to establish or increase public funding and support for civil legal services for individuals and families who have no meaningful access to the justice system; and
3. Expand the types of assistance available to self-represented litigants, including exploring the role of non-attorneys.

At the Summit, Steven Grumm, Director of the ABA Resource Centre for Access to Justice Initiatives provided an overview and analysis of the US experience with ATJCs to date. The ABA defines ATJCs as:

- A blue ribbon commission or similar formal entity comprised of leaders representing, at minimum, the state courts, the organized bar and legal aid providers. Its membership may also include representatives of law schools, legal aid funders, the legislature, the executive branch, and federal and tribal courts, as well as stakeholders from outside the legal and government communities.
- Its core charge is to expand access to civil justice at all levels for low-income and disadvantaged people in the state (or equivalent jurisdiction) by assessing their civil legal needs, developing strategies to meet them, and evaluating progress. Its charge may also include expanding access for moderate-income people.
- Its charge is from or recognized by the highest court of the state or equivalent jurisdiction; the highest court and the highest levels of the organized bar are engaged with the ATJC's efforts and the ATJC reports regularly to them.
- Its primary activities relate to planning, education, resource development, coordination, delivery system enhancement, and oversight. It is not primarily a funder or direct provider of legal assistance.
- It meets on a regular basis and has ongoing responsibility for carrying out its charge.[200]

In some cases, ATJCs have been established by statute; more frequently they are created by state Supreme Court rule or order in response to a petition or request by the state bar, sometimes with formal support from other key stakeholder entities.

ATJCs have focused on a range of activities:

- Increasing public awareness of the civil legal needs of low-income people and the importance of civil legal assistance—through legal needs studies and other reports, hearings, evaluation reports and public awareness campaigns;
- Expanding efforts to educate federal legislators about the need for increased LSC funding and state policymakers about the need to augment state-level funding— through state appropriations, filing-fee surcharges, voluntary or mandatory bar-dues contributions, improvements in IOLTA (Interest on Lawyers Trust Accounts), and other means;
- Increasing pro bono participation among private attorneys—through pro bono initiatives such as mandatory reporting, rule changes, pro bono attorney—recruitment campaigns, websites, conferences, and state-wide data collection;
- Creating and expanding loan-repayment assistance programs for young attorneys with substantial student-loan debt, which serves as a barrier to taking lower-paid jobs in civil legal aid organizations;
- Assisting efforts to bring together the bar, courts, legal aid providers, and others to make

[200] www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf

the courts more accessible and user friendly and to address the challenges posed by the self-represented—through comprehensive plans, reports and evaluations, training and education, simplification of rules and forms, courthouse support, web- and technology-based tools, and other activities; and

- Developing new programs and state-wide collaborations to ensure effective coordination among providers, implement innovative technology-based systems and ensure systemic advocacy and services to special populations, such as immigrants and prisoners.

In Grumm's opinion, the main function and virtue of ATJCs "has to do with the fact that they sit at altitude and can break down some of the silos that other actors in legal system might be living in and not realizing that they're not communicating as well with their counterparts." The effectiveness of ATJCs comes down to a question of leadership, the personality and dedication of the Chief Justice. Another key to ATCJ's success is increased accountability. In almost all cases, ATCJs have to report annually, whether to legislature, the Supreme Court, and/or the bar association. This reporting feature pressures ATJCs to show concrete results. The greatest successes of ATJCs have been in advocating for additional funds for access to justice initiatives and services, particularly legal aid.

Grumm also outlined pitfalls and challenges experienced by some ATJCs, which tended to reflect the flipside of the advantages. For example, because ATJCs are blue ribbon committees operating at 'altitude', they can be removed from day to day problems and may therefore be better at creating strategic plans than carrying them out. Similarly, ATJCs focus on breaking down silos but can themselves project an air of elitism and may be perceived as exclusionary. Further, direct service providers have expressed concerns that an ATJC is just another player consuming time and funds and taking finite resources away from meeting the public's legal needs. This concern has been overcome where ATJCs have been successful in generating additional resources.

The ABA provides support to ATJCs through its Resource Centre for Access to Justice Initiatives,[201] which serves as a hub for the exchange of information, and facilitates an annual meeting of heads of ATJCs in conjunction with the Equal Justice Conference. The Access to Justice Commission Expansion Project[202] has established a fund from monies from private foundations to strengthen the ATJC movement nationally, facilitating the development of new ATJCs and enabling existing ATJCs to develop and test innovative projects. The fund makes grants to commissions for this purpose.

As part of the Access to Justice Support Project, the ABA has developed a number of access to justice tools, including a checklist and best practice guide. The checklist sets out common strategies employed to increase equal justice on several fronts: funding for civil legal assistance; pro bono; education, research, awareness; student loan repayment assistance; court access and pro se (SRLs); state agency administrative fairness; and program delivery and collaboration. The best practices guide recognizes that while no two states are alike, and every state's access to justice efforts must be geared to local circumstances, some basic lessons can be discerned and shared. The guide's twelve lessons from successful state access to justice efforts are set out below.

Several state ATJCs have prepared detailed handbooks for building access to justice communities. For example, leaders of the Washington Access to Justice Board have published a "roadmap for building an equal justice community", providing step-by-step advice on building an access to justice structure at the state level.[203]

[201] www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html.

[202] http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_2013_innovation_grant.authcheckdam.pdf

[203] Washington Access to Justice Board, *Equal Justice... The Noblest Common Denominator: A Road Map for Building an Equal Justice Community* (Washington: Jim Bamberger, 2001) www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/~/media/Files/Legal%20Community/Committees_Boards_Panels/ATJ%20Board/roadmap%20Part%20I.ashx.

## 12 Lessons for Effective Collaboration

1. Successful Access to Justice efforts are founded upon a strong partnership among the bar, the judiciary, and legal aid providers. Law schools can also be key partners, while representatives from outside the legal community can bring new perspectives and help broaden support.
2. Formal structures that are accountable to more than one partner can be more secure than informal structures or structures accountable to only one partner.
3. Judicial leadership – especially at the state Supreme Court level – greatly increases the effectiveness of Access to Justice initiatives.
4. Individual leadership is critically important for a successful Access to Justice effort.
5. New and emerging Access to Justice leaders should be cultivated.
6. Institutional commitment is necessary on the part of each of the key partners.
7. Assessing and publicizing accomplishments is a key task.
8. Access to Justice leaders should chart a compelling vision but avoid creating unreasonable expectations.
9. An effective staff capacity is essential for a successful Access to Justice effort.
10. Access to Justice structures should carefully consider how best to obtain meaningful input from client communities.
11. Access to Justice structures should be open and inclusive and place a priority on developing trust among the partners.
12. Partners should place a priority on promoting cooperation and consensus within their own community and strive to speak with one voice in public.

ABA Access to Justice Support:
www.nlada.org/DMS/Documents/1018712627.59/12%20Lessons.pdf

## Access to Justice Commissioners

The US experience with ATJCs is not directly transferable to Canada, particularly given the differences in the role of the judiciary and the Chief Justices on either side of the border.

Blue ribbon committees may not be the best model to drive substantive access to justice reform in Canada. The willingness and ability to exert genuine leadership is built on passion and commitment, not on status and position. As the ABA has stated: "many of the most effective leaders have been volunteers with no formal responsibility in this area, who simply developed an Access to Justice vision and brought others along. An individual's institutional role is far less important than the willingness to make a commitment to do what is necessary to further Access to Justice goals."[204] As the ATJC experience shows, not all Chief Justices are cut out to be the champion for change. Further, most senior leaders of the bench and bar are very busy and unable to free up the time required by this endeavor.

Champions for change are likely to emerge at a local level in connection with specific reforms – that is why the Committee's target includes not only system-wide collaborative structures but also collaboration at the local level on specific initiatives. HiiL has created an awards program to recognize innovation leaders, saying that "[i]nnovators are motivated to improve and to implement their innovations across borders. Nominees and applicants for the Innovating Justice Awards will be able to share their setbacks, successes and best practices."[205] Access to justice commissions or committees can cultivate and celebrate equal justice champions, but it is rare for a collective body to actually carry out this role.

Given these realities, the Committee has concluded that while federal, provincial and territorial committees along the lines of the US ATJCs are necessary to reach equal justice, they are not a

[204] http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_definition_of_a_commission.authcheckdam.pdf

[205] *Innovating Justice*, *supra* note 134. See also, J.M.Howell and C.A. Higgens, "Champions of Technological Innovation" (1990) 35:2 Administrative Science Quarterly 317.

sufficient measure. They are required to improve communication and coordination of efforts but do not guarantee the leadership and champions required for consistent, substantive change. As Muller pointed out at the Summit, current leaders of justice system organizations should not take the lead as it will likely result in "more of the same and no true collaboration." Every member of an ATJC participates in her or his representative capacity bringing a unique and important perspective, but no one, including representatives of the public, represents the system as a whole.

> First, unlike Apple, there really isn't a CEO of the justice sector. There's not one owner. I mean, who owns justice? Who's the CEO, who directs the justice system? If there is a very clear CEO, I think it almost, by definition, would not be a justice system but a dictatorship.
>
> ***Sam Muller, HiiL, at CBA Envisioning Equal Justice Summit***

The Committee is also concerned that ATJC would not be adequately resourced to carry out this important reform work. It is time to stop trying to bring about equal justice from the corner of our desks. Something new and distinctive is required to ensure progress on equal justice: the Committee suggests access to justice commissioners at the federal, provincial and territorial levels. Access to justice commissioners would be an individual and office dedicated to justice sector reform to ensure equal justice as their sole focus. They would have the advantage of an independent perspective and a full-time, resourced position focused on this objective alone. This proposal is not for a CEO of the justice system – that model is incompatible with Canada's constitutional and legal order. No one person can dictate how independent branches of government and the profession carry out their responsibilities. In the Canadian tradition, commissioners, like auditor generals, would have other types of 'super powers' to use their individual reputation, office, persuasion and other skills to facilitate change. Important to the success of these positions is reporting to the public on progress on achieving reform goals, through regular communications and annual reports. It is not envisioned that access to justice commissioners would have a grievance or complaints function. Rather, the office would operate in a proactive fashion. Equal justice requires many champions and collaboration among equal justice communities, but also desperately needs concentrated, effective leadership that can only be offered through independent offices of access to justice commissioners in each jurisdiction.

### Learn more: about Resources for Building Equal Justice Communities

Access to Justice Commissions in the US: www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html

Washington Access to Justice Board, "EQUAL JUSTICE…The Noblest Common Denominator: A Road Map for Building an Equal Justice Community" (Washington: Jim Bamberger, 2001): www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Access-to-Justice-Board/~/media/Files/Legal%20Community/Committees_Boards_Panels/ATJ%20Board/roadmap%20Part%20I.ashx

**For a complete list, see:** www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html

**Some websites:**
(North Carolina): www.ncequalaccesstojustice.com/

(Massachusetts): http://www.massaccesstojustice.org/

(Illnois) : www.isba.org/probono/illinoissupremecourtaccesstojustice

Conference of Chief Justices. "Resolution 8: In Support of Access to Justice Commissions." 28 July 2010: www.ccj.ncsc.dni.us/AccesstoJusticeResolutions/resol8Access.html

Target: ***By 2020, effective, ongoing collaborative structures with effective leadership are well-established at the national, provincial, territorial and local levels, including through the appointment of access to justice commissioners.***

**Milestones:**

- *Access to justice commissioners are in place in every province and territory and at the federal level*
- *The performance of collaborative structures is reviewed every two years, with lessons and improvements integrated into their operations. Evidence about collaborative best practices is widely-shared.*

**Actions:**

- *The National Action Committee, its successor or another national organization is properly resourced as a national collaborative structure with a mandate to support and coordinate provincial and territorial efforts*
- *The National Action Committee, its successor or another national organization works with other justice system stakeholders, including provincial and territorial committees, to organize an annual or biennial national conference*
- *Provincial and territorial governments establish collaborative structures to bring together stakeholders and establish networks between local equal justice communities and task-based collaborative initiatives*
- *Access to justice leaders create local equal justice communities including pathways for communication and collaboration with other communities and initiatives*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?

(write to: equaljustice@cba.org)

## Building the Capacity for Justice Innovation

Our greatest challenge in reaching equal justice is addressing what the National Action Committee has identified as 'the implementation gap'. The justice system's capacity for innovation is underdeveloped and undernourished. For the most part we know what needs to happen, but we are not as clear on how to do it.

At the Summit, there was considerable discussion as to how we acknowledge that justice reform is hard, while facilitating dialogue about building capacity and creating an environment conducive to innovation. The centrepiece of this dialogue was a conversation between two international experts on justice innovation, Geoff Mulherin, Director of the Law and Justice Foundation of New South Wales (LFNSW) and Sam Muller, Director of the Hague Institute for the Internationalisation of Law (HiiL). This section builds on that conversation and the published contributions of these two leading access to justice organizations, notably *Innovating Justice* and *Legal Australia-Wide Survey*.[206]

### Keys to Justice Innovation

#### *Being Clear on Success Criteria*

Among the most essential lessons learned about justice innovation is the necessity of being clear on what will constitute success. Muller used the example of the Millennium Development Goals as a clear set of success criteria for a complex policy problem: eradicating poverty. Progress has been made because the clear goals and sub-goals have become the focus of many organizations' work. This initial stage is crucial: understanding the problem, understanding what you're trying to innovate, and developing terms of reference as to what your innovation must achieve.

Mulherin also highlighted the importance of this step by comparing it to the first principle of war: selection and maintenance of the aim. He cautioned

[206] Note that the many quotations and references in the following section of the Report are not individually footnoted, but refer back to these two sources and conversations at the Summit. *Innovating Justice*, *supra* note 134; LAW Study, *supra* note 23.

that it is rare to actually have a shared, agreed aim: "It's actually harder than you think. We think we have concepts that we share. We don't. People have conversations without ever agreeing exactly what the purpose of this is actually about."

> What is success when you're trying to put innovations into place in the justice system? What does it look like? How do we know we're going to get there and how do we have the vision of where we want to end up?

Our vision of what we're trying to achieve is often constrained by what we do: publishers publish, judges judge, advocates advocate, and so on. It is hard to move beyond these perspectives to really collaborate and agree on success criteria. Success criteria must be clear, unambiguous and measurable.

### *Connecting Macro and Micro Approaches*

Justice innovation requires a balance between macro (top-down) and micro (bottom-up) approaches: again, we need to think systemically, act locally. Mulherin reports that most innovations are generated by the people working on the front line. For example, this might be the people working at a community legal centre, seeing the same problems day in and day out. Increased access to justice can mainly be characterized as: "a tentative, iterative buildup of micro-level changes in a general direction, preferably engaged or led by a group at the lower level, the community level, but supported by sufficient people at the top end to sort of bring that change through."

Muller concurred with this description of the dynamic between micro and macro approaches to justice innovation. Change emanates from the bottom up: "The best innovations come from the people that face the same issue every single day and are so sick of it that they want to change it, so that's where the innovators are." At the same time, support is needed from the top to connect small scale innovations into broader change. Changes in one part of the justice system may be beneficial but incompatible with changes in other parts. We have to consider the inter-operability of technical systems. The challenge is to connect the macro and the micro: "the innovators need somehow to be clever to link to the top and … the top needs to be clever to empower those guys down below."

### *Creating a Nurturing Ecosystem*

HiiL's *Innovating Justice* succinctly offers the key to success: *Innovation requires an extensive ecosystem nurturing the process.* Justice innovation experts have identified components of this ecosystem, including:

- Adopt a 'Yes AND', not a 'Yes, BUT' mentality
- Forget about the rules
- Treat "failure" as an entrée to adaptation and eventual success
- Be clear on who benefits: an innovation is not just an idea
- Nurture a champion
- Ensure the time is ripe
- Engage a critical mass
- Provide incentives and resources
- Cultivate a diversity of skills and knowledge and partnerships.

Innovation begins with a mindset and belief that change is possible. For many, this glimmer of possibility has been eroded by past failures or the sense that change is realistically impossible. HiiL refers to this as a "Yes, BUT" attitude, and suggests a "Yes, AND" approach is needed to generate ideas, build on those ideas, and establish and maintain a safe and creative environment.

> The first lesson in innovation, whether you're designing iPods or new procedures, is forget about the rules to start with. Real innovators, when they start, they don't give a toss about the rules. They have something they want to achieve and the rules can be changed if you need that at one point. So don't start with the rules.
>
> ***Sam Muller, HiiL, at CBA Envisioning Equal Justice Summit***

Conditions that allow experimentation and create a safe environment are key. Innovation processes are not linear: sometimes a prototype will fail, but the reaction should be to adapt and make it a success, rather than give up. Rules have the opposite effect: they act as inhibitors of innovation. Rules are the centrepiece of the justice system, so it is a natural reflex for lawyers and judges to respond to change by saying 'that's against this rule or that principle'. But the HiiL work emphasizes that getting rid of rules is key: "Don't think about those rules when you're working on innovation and keep the end in mind. Always start with the end in mind – that should be our frame of reference."

Muller pointed out that "a successful innovation is not the same as a good idea." Innovations are always connected to "a very clear problem, a very clear need, or as we negatively say, huge pain somewhere. If there's no huge pain, then it generally remains a great idea." We need to be clear on who will benefit from the measure, what 'pain' it is going to assuage. Mulherin made the flipside of this point even more emphatically: it is imperative not to change only for the sake of change. Change is disruptive and disruption can have a disproportionate impact on members of society living in disadvantaged conditions. The bottom line here is 'first do no harm'.

In HiiL's analysis of successful justice innovations, a common factor was that each effort had what they call an 'innovation champion': "Somebody who does not stop against all odds. And it usually is a person or two or three people. A committee is never an innovator." The *Innovating Justice* handbook contains numerous examples of such champions. At the Summit, Muller highlighted a Kenyan example of innovation to tackle delays in the criminal courts. The courts and legal profession developed many complex delay-reduction strategies, but the successful innovator was a young woman who championed a prison paralegal program, where prisoners were taught to offer assistance to other prisoners. He described her story: "she fought and fought and fought and fought and went on and on and on and you could imagine the resistance she had. It's now being rolled out in more prisons. But it comes down to a person."

Mulherin emphasized that timeliness is a factor. The time has to be ripe for a given innovation, and a critical mass from the broader community has to be engaged. In his view, "mere sympathy is not enough", a specific innovation has to be moving in the same direction as a broader movement. This critical mass is needed to influence decision makers so that an environment at the top supports the innovation. The top does not have to be the champions, but the top does have to be supportive. The HiiL report points out that innovation comes in waves or patterns and describes the importance of "surfing the innovation wave."

In the private sector, innovation is fostered through incentives and resourced through a research and development budget, data about the subject area, knowledge about the market and users, good research capacity, a vision with lots of diverse perspectives and teams with a variety of skills and smart partnerships. Muller contrasted this with the justice sector, where innovation is starved. We have no time for innovation. Regular overload of work, constant pressure to deliver services and meet deadlines and heavy administrative burdens are all obstacles to innovation. Further, a valid concern expressed during the Summit closing plenary was that resources to facilitate change likely mean cuts elsewhere.

Our knowledge base is very thin. We don't know enough about what people want from the justice system and we have limited capacity to measure public satisfaction with service delivery in the justice sector. We know even less about how to effectively meet needs. In Mulherin's summary of what it takes

to innovate he said: "I'd like to say also, 'driven by research' but I'm afraid it's too often not the case for me to actually say that."

Both within and across justice institutions, our skills tend to be homogeneous, while creativity requires diversity. Muller pointed out the justice system also lacks partnerships, for example, with academia and research bodies. In contrast, he noted that innovation in the IT sector includes endless, very creative partnerships between public and private sectors. Mulherin reinforced this point noting that: "Law is an opinion-based discipline. You are inculcated with … opinions when in actual fact we should be talking much more social science." And it rarely happens that justice innovation is something one person can do alone.

## HiiL's Innovating Justice Model

HiiL offers advice on getting our "justice innovation act together" in *Innovating Justice*, a collection of best practices based on research, years of experience and interviews with leading justice innovators.[207] The handbook breaks the innovation process into six phases and provides advice and examples for each phase. An overview of the HiiL model is presented in the form of the central questions to be posed and answered in each phase. This handbook should be at the top of our collective reading list. [208]

'Incubation', bringing people with innovation expertise together in one environment, has proven an effective approach. HiiL has developed an incubator in the form of a 'justice innovation lab', with three main features. First, the lab provides a physical space where people can be away from their daily work to concentrate on developing an innovation. Second, it contains a 'neutral lab chief' responsible for facilitating the process, keeping the work focused and moving forward, and generally characterized by HiiL as a 'process pitbull'. The third ingredient is a variety of clever processes and techniques to ensure diversity of participants in the session, to understand the problem, to assist in setting the terms of reference (success criteria) and evaluation framework, and so on.

> Now, if I go to the average ministry of justice, you have rules, hierarchy, rigid budgets, you don't know the users, you have lots of compartments, changing visions or no visions, homogeneity in general, excessive workload--all things that are very, very bad for innovation. So… I really think there are a number of fundamental things that we could change and should change if we want innovation in courts, if we want innovation in ministries of justice.
>
> And you don't need to be Einstein to know what has to change. How many courts in the world have an innovation budget or an R&D budget? How many judges have 5% of their time to experiment? How many courts have a real safe environment in which we can just try something out? How many ministries allow that? I don't know very many and I think there's a lot you could change in that sense.
>
> ***Sam Muller, HiiL, at CBA Envisioning Equal Justice Summit***

At the Summit, Muller described one of these processes: moving quickly from discussions to creating a prototype using techniques from the IT sector called 'scrums'. Scrums involve blocking off a short period of time and creating a high pressure environment, with the goal of generating a prototype quickly.

Dedicated time in the lab is key. While the HiiL justice innovation lab is a physical lab, the same approach can be taken in a 'metaphorical justice lab'.

## Filling the Justice Innovation Gap

The Canadian justice system has dedicated few resources to, and has limited capacity for justice innovation. An efficient way to fill the remaining gap is to establish a dedicated centre for justice innovation with a mandate to foster and support initiatives across Canada. In addition, all justice

[207] *Innovating Justice, ibid.*

[208] *Ibid.*

## HiiL's *Innovating Justice* model: Six phases of the innovation process

### 1. FOCUS ON CITIZENS' NEEDS

- Who will benefit from your innovation?
- How many beneficiaries are there now and how many more can you scale up to?
- What are the pressing needs?
- What causes citizens most pain?
- Who can be the lead customer (group)?
- Who is willing to pay or take action for this innovation?

### 2. RELEASE THE MIND

- Which ways of thinking and which rules constrain the best solution?
- Is there sufficient time and space? Think about the physical and environmental settings.
- Which skills, knowledge, backgrounds, personalities and cultures are involved already?
- And how could you involve more?

### 3. SHAPE SOLUTIONS

- What are goals and terms of reference?
- What are the characteristics of the innovation that are most essential to success?
- Do you have a prototype or model? Does it work? How was it tested?
- What makes the solution new and unique?
- Why is it better than what is already out there?

### 4. REFRAME THE CONSTITUTION

- What are the essential partners in the justice supply chain to make this innovation work?
- What do they need to do and why will they do it?
- What is the vision behind your innovation?
- Who are the champions for that vision?
- Who stands to lose from the innovation? What reaction can be expected and how should you respond?

### 5. JUDGE THE BUSINESS

- What is the value proposition?
- Can you quantify the benefits?
  What is the early stage investment needed? In time, money and other resources?
- How are you going to make you innovation financially viable? How can you make it sustainable, even after you stop working on it?

### 6. GET IT DONE

- What are your metrics for success and how do you measure them?
- How is the innovation organized in order to stay focused and to manage by results?
- How do you ensure that there is continuous learning and adjustment?

> So for almost all the innovation processes that we're involved in, we spend a lot of time on terms of references and goals, and then it's locked down and sweat and pain to get to some kind of prototype fairly quickly, which you can then slowly improve and roll out.
>
> ***Sam Muller, HiiL, at CBA Envisioning Equal Justice Summit***

system stakeholders, including law firms, need to increase their research and development capacities to explore ongoing innovations for the practice of law. Some service providers are beginning to offer assistance to law firms and other justice sector institutions.[209] The CBA Legal Futures Initiative has initiated a conversation about prospects for innovation in legal practice, and is consulting widely to obtain a broad diversity of perspectives about better ways to serve the public. Two mechanisms that have been employed to facilitate innovation in other sectors and have begun to be employed in the justice community are dedicated funding for research and development, and through competitions such as the US Legal Services Corporation competitive challenge grants.[210]

[209] See, for example: www.reinventlaw.com/main.html.

[210] www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf.

Targets: ***By 2025, justice system stakeholders have substantially increased their innovation capacities by committing 10% of time and budgets to research and development.***

***By 2020, Canada has a Canadian Centre for Justice Innovation.***

**Milestones:**

- *Justice innovation leaders are recognized and share their best practices with others*
- *Regular environmental scans of justice innovations in Canada and abroad are carried out*
- *All justice system stakeholders, including law offices, develop innovation plans, with definite interim targets to increase their research and development functions in line with a 10 year goal of 10%*

**Actions:**

- *The CBA Legal Futures initiative use the results of its work to facilitate enhanced networking and exchanges of information on practice innovation*
- *The CBA works with other justice system stakeholders to develop a partnership with the Hague Institute for the Internationalisation of Law*
- *The CBA works with other justice system stakeholders to develop options for establishing a Canadian Centre for Justice Innovation to support local initiatives*
- *Law firms adopt models of compensation for lawyers that reward innovation*
- *Law schools establish innovation think tanks and involve a broad range of justice system stakeholders, including members of the public, consultants and experts on justice innovation*

## What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

## Access to Justice Metrics

Access to justice metrics are critical to support justice innovation. In Part I, the Committee underscored the limited ability to give definitive answers to even the most basic inquiries about barriers to access. We have only fragmentary data and no capacity to pull it together to get a complete picture of access to justice in Canada. The absence of an evidentiary base for action, and shared views on what to measure and how to measure it are serious obstacles to achieving equal justice.

We all know the maxim 'you can only manage what you can measure'. We are far from having access to justice metrics to measure justice system performance. The development of metrics is an important pillar supporting justice innovation. Metrics serve a range of purposes, from informing the public about the justice system and grounding the day to day decision making of justice system participants, to supporting policy making processes and change processes. Metrics enhance people's choices, enable comparison and learning, increase transparency and create incentives for improving access to justice.

As emphasized in the section on keys to justice innovation, we need success criteria, but we also need to be able to measure progress in attaining those criteria. In addition to citing the Millennium Development Goals, Muller also highlighted the sustainable living plan developed by Unilever as a potential model for justice innovation. Unilever is a multinational consumer goods company with a clear environmental sustainability plan. The company tracks progress towards their detailed goals on their website using red, yellow and green lights. Metrics of this kind are a powerful information tool that can contribute significantly to transparency and public confidence.

As noted earlier, in its 1996 report, the CBA Systems of Justice Task Force decried the lack of basic management information, concluding that the paucity of information was both indicative of and related to one of the five main identified barriers to access: inadequate management tools and resources. Some progress has been made in improving court-based data collection. Most notable are the 'Justice Dashboards' in British Columbia, which report basic criminal justice statistics.[211] Plans are underway to expand these dashboards to the civil justice realm.

Many organizations collect some data, but their approach and methods reflect their own business practices and the data is diffuse. There are ongoing initiatives to gather more sophisticated data, particularly in costing aspects of the justice system through the Canadian Forum on Civil Justice's Cost of Justice initiative.[212] Yet, we are far from a shared framework for gathering data, much less a sound knowledge base for justice system decision making. The Canadian Association of Provincial Court Judges and Association of Legal Aid Plans have committed to developing a common management information collection framework.

Canada is not alone with underdeveloped justice system data and evidence, but a concrete action plan to remedy this situation is past due. These issues are canvassed more thoroughly in the Committee's Discussion Paper on Access to Justice Metrics.[213] There is a growing consensus that we need to invest time and money to address the shortcomings on this front, although with some remaining uneasiness over how these goals can be met.

The Law and Justice Foundation of New South Wales has carried out pioneering work in this area in their "Data Digest" initiative, which collects, collates and analyzes data from the main public legal service providers (legal aid, community legal centres and so on). This initiative attracted the attention of the Australian government's Access to Justice Task Force in 2009 paving the way for a more comprehensive initiative.

The Australian Attorney-General's Department has embarked on a multi-year collaborative initiative to build a robust evidence base for the civil justice system, described as "a long-term project that aims to remedy the current lack of consistent and comparable data across the civil justice system." This promising approach could serve as a model for a Canadian initiative. The Australian Attorney-General's Department has stated that the project would need the commitment of all, or at least the key stakeholders in the civil justice system. The project will be a long-term one that will require stakeholders to engage and commit some resources, if only in terms of time. In May 2011, the Department hosted a symposium to discuss with stakeholders how to move forward with this initiative, and a further forum was held in May 2012. A working group of all civil justice system stakeholders and data experts is developing a framework to guide the collection of consistent data to create an evidence base for the civil justice system. A research team was commissioned to scan recent empirical research and develop draft objectives for the civil justice system. The working group has assessed the quality and coverage of existing data in the civil justice system, paving the way for further refinement of the data collection framework. At the Summit, Mulherin reported that while the project recognized the importance of state participation (since people's legal problems and pathways do not neatly align with the federal division of powers), state governments have yet to fully come onboard with this initiative.

The Committee proposes that the federal government take the lead but work closely with all justice system stakeholders, with the goal of publishing a first report on Canadian access to justice metrics by 2020 and a comprehensive report by 2030.

Substantial feedback was received on the Committee's *Access to Justice Metrics* discussion paper, both in writing and in a Summit workshop. These insights are summarized here and should be taken into account in structuring a Canadian initiative to develop performance measurements and an evidence base for the civil justice system:

[211] http://www.ag.gov.bc.ca/justice-data/index.htm

[212] http://www.cfcj-fcjc.org/cost-of-justice.

[213] CBA Access to Justice Committee, *Access to Justice Metrics: A Discussion Paper* (Ottawa: CBA, 2013) http://www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf.

- Community voices should be integrated into framing of access to justice metrics. The Committee integrated the perspectives of members of communities living in marginalized conditions into its vision of equal justice in Part II and throughout this report.
- Inclusivity should be a measure of access to justice. Hughes paper for the Summit provides details for a framework for measuring inclusivity in the civil justice system.[214]
- It is critical to "not to just go where the light is brightest", for example, by focusing on court data. Mulherin warned of the "temptation to count what we can. And the problem is that what you count becomes what's important." In particular, court data does not tell the whole access to justice story.
- The development of access to justice data and metrics is clearly a government responsibility, but the approach, framework and data collection methods have to be developed collaboratively with the commitment of key stakeholders, including the public. There is some tension between government and the judiciary about data collection that needs to be resolved.
- The framework should be developed on a national basis, with room for provincial and territorial adjustments as needed.
- The variety of metrics required includes needs measurements, efficiency metrics, outcome measurements, and inclusivity measures. Efforts must include a measure of low-income persons who *do not* proceed through the justice system. Client satisfaction measures are insufficient as measurements need to incorporate broader background and context.
- If we are going to measure access to justice, the *tools* must be good – poor measurement is worse than no measurement at all.
- Data collection can be time-consuming and we should avoid adding too much burden on individuals and small organizations that provide services.
- Data collection should be forward-looking. The development of protocols to commit to moving to common data collection over time, as systems are upgraded, is key.
- Privacy issues have to be taken into account; data sharing agreements must include agreements to conceal private data. The idea of "justice identifiers" like health insurance numbers that help to ensure privacy while satisfying the need for robust information base is under discussion.
- A phased approach is most practical, given concerns over the resources required and to overcome other barriers to moving forward.

[214] Hughes, *supra* note 27.

## Learn more: about Metrics

CBA Committee Access to Justice Metrics Building Block Paper: www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf

CBA Committee Access to Justice Community Voices Paper: www.cba.org/CBA/Access/PDF/Community_Voice_Paper.pdf

Patricia Hughes, "Inclusivity as a Measure of Access to Justice" (paper presented at the CBA Summit on Envisioning Equal Justice)

Link to LJFNSW website Data Digest: www.lawfoundation.net.au/ljf/site/articleIDs/3D3EE18A9E1E9970CA257060007D4F9E/$file/data_digest.pdf

Martin Gramatikov, Maurits Barendrecht, and Jin Ho Verdonschot. "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology" (2011) 3 Hague Journal on the Rule of Law 349: www.measuringaccesstojustice.com/

Australian Government, Attorney-General's Department, Symposium Paper: Building An Evidence Base for the Civil Justice System (May 2011): http://www.ag.gov.au/LegalSystem/Documents/Consultation%20paper%20for%20symposium%20May%202011.pdf

Dr. Robyn Sheen and Dr. Penny Gregory, *Building An Evidence Base for the Civil Justice System – Civil Justice System Framework and Literature Review Report* (Australia Attorney-General's Department, September 3, 2012): www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx

**Target:** ***By 2020, the first annual access to justice metrics report is released; by 2030, this report is comprehensive.***

**Milestones:**

- *The federal government establishes a working group to develop a framework and action plan for the development of access to justice metrics*

**Actions:**

- *The CBA works with other justice system stakeholders to develop a proposal for assessment of the quality and coverage of existing data*
- *Building on initiatives of the Canadian Association of Provincial Courts and the Association of Legal Aid Plans, justice system stakeholders develop a protocol for the collection of a common standard data set*
- *The CBA encourages the courts and other key agencies in the justice sector to see the value of access to justice metrics and to commit to work to attain these targets*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?

(write to: equaljustice@cba.org)

## Strategic Framework for Access to Justice Research

Canada is plagued by a paucity of access to justice research. This gap exists in tandem with the poor state of justice data collection and evidence. The lack of high quality, publicly available data detracts from scholarship and the lack of scholarship contributes to the poor state of data, since empirical research will help to determine which types of data should be collected. Other barriers

to research include: fragmentation of access to justice research across disciplines and under-development of interdisciplinary studies; lack of integration of recent methodological developments such as internet-based tools; and lack of connection between academics and practitioners.

At the Summit, Wayne Robertson, Executive Director of the Law Foundation of British Columbia, facilitated a roundtable discussion on a national access to justice research agenda. There, Mulherin summed up the current situation: past research, particularly the civil legal needs literature, has told us quite a bit about promising directions for reform. Now the focus should be on establishing evidence about *what works* and *what works at what cost*. The Law and Justice Foundation of New South Wales has a ten year research plan to provide answers to these central questions. Preliminary literature reviews of international research concluded there is very little quality evaluative research that can offer a sound basis for identifying effective reform to address specific needs.

A national research strategy is needed, not in the sense of a centralized master plan but rather to ensure coordination, avoid duplication and enable researchers to build on each other's efforts. Workshop participants affirmed the importance of quantitative, qualitative, empirical and anecdotal research, the latter being particularly powerful in motivating reform. The overarching priority is for research on what works to improve access to justice. More research should be carried out on a longitudinal and latitudinal basis.

Workshop participants also recognized that the research agenda engages numerous organizations and institutions: law schools and social science departments; law commissions and other agencies such as the Official Languages Commission, legal service providers, bar associations and so on. Attention is needed to build stronger bridges between academia and practitioners as the perception is that there is a "big gulf" between the two.

An ongoing American Bar Foundation initiative serves as a potential model for fostering access to justice research in Canada. In December 2012, the American Bar Foundation launched a multi-year initiative to "kick start a sustainable access to justice research capacity." The workshop had three components: a poster session, a town-hall meeting; and a small by-invitation working session. The poster session and town-hall meeting were designed to bring together researchers and field professionals to discuss research needs and research findings. The workshop focused on three topics:

- The most important research questions, research needs, and/or knowledge gaps that exist today in access to justice research, services delivery, administration, and policy;
- Concrete research projects, including data sources, sites, partnerships, methods and funding; and
- Possible models for building a sustainable access to justice research program.

Workshop outcomes include a discussion paper on an access to justice research program, including research priorities and the development of a web-based network amongst researchers to facilitate ongoing discussion.

The Committee proposes that efforts be taken to double access to justice research by 2020, with a view to building to a sustainable national access to justice research agenda by 2025. Integral to this proposal is establishing a central independent research organization that assumes responsibility for developing and coordinating the required data sources and research activities. These proposals work in conjunction with the targets for increased research in law schools and for government-led initiatives to build an evidence base on the civil justice system.

A national access to justice research framework to contribute to equal justice should encompass three main objectives:

- generate new high quality research activity;
- ensure the coordination of research efforts; and
- improve the communication of research results, including aggregating and synthesizing research findings and program evaluations to make this information more accessible to decision makers and in policy-making processes and forums for public dialogue.

Targets:

***By 2025, Canada has a sustainable access to justice research agenda with four minimum components:***

***a) available, high quality data that supports empirical study of effectiveness of measures to ensure access to justice***

***b) a central independent research organization that assumes responsibility for developing and coordinating the required data sources and research activities***

***c) effective mechanisms through which researchers and people in the field collaborate and coordinate research activities, and***

***d) ongoing commitment to and adoption of best practices in access to justice research.***

***By 2020, the amount of access to justice research conducted in Canada has doubled.***

**Milestones:**

- *A central research organization continues to conduct – or support and coordinate – initiatives that synthesize and coordinate existing, and generate new research activity, including research that can inform policy*
- *A central research organization establishes – or supports the establishment of – a mechanism and methods for amassing quality data to support empirical access to justice research*

**Actions:**

- *The CBA, law foundations and other justice system stakeholders hold a workshop that provides an inventory of current and planned access to justice research initiatives, facilitates a dialogue between researchers and practitioners and considers potential mechanisms to coordinate existing and generate new research activity*
- *The CBA, law foundations, law faculties and other justice system stakeholders identify or develop a central organization that is able and willing to coordinate efforts to develop a national research agenda on an initial basis*
- *The central research organization establishes international collaboration networks with access to justice research institutes including the Law and Justice Foundation of New South Wales and the American Bar Foundation*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help? (write to: equaljustice@cba.org)

## Reinvigorated National/Federal Government Role

This report sets targets and actions that depend on strong national leadership on access to justice reform. While provincial and territorial governments have primary responsibility for the day to day functioning of the justice system, the federal government also has a critical role. Like healthcare, justice is a shared governmental responsibility. A reinvigorated federal role is imperative if we are to reach equal justice.

This needed shift is clearly reflected in declining financial contributions to the legal aid system across Canada in real terms. The federal government has primary or major jurisdictional responsibilities in criminal law, family law, immigration law, and assisting in ensuring basic needs are met through social security programs such as employment benefits and the Canada Pension Plan. Yet over the past two decades, the federal government has taken an increasingly limited view of its responsibility for ensuring access to justice in these or any areas of law. The federal government has fostered some access to justice initiatives through time-limited investment in justice innovations through the legal aid renewal fund and the existing justice innovation fund. Limited project or 'pilot project' funding, while helpful, does not come close to mitigating the damage to the justice system by

federal withdrawal from access to justice. The last time the federal government was actually an equal 50/50 partner was 1990/1991.[215]

The CBA, provincial and territorial governments and other organizations have pressed the federal government to meet its responsibilities and to shoulder a significant share of the additional fiscal commitments required to ensure that the Canadian justice system is equally accessible to all. For example in June 2007, all provincial and territorial justice ministers united to call for increased federal funding for legal aid, calling on the federal government "to pay its fair share as a partner in the justice system."[216] At that time, several of the provinces and territories estimated that their contribution to legal aid was four times that of the federal government. Importantly, this position was adopted by provincial and territorial ministers representing governments led by all major political parties.

Additional support for a renewed federal government role is based on the constitutional commitment to essential public services of reasonable quality across Canada, a commitment that can only be ensured through a robust national access to justice policy. Further, as discussed throughout this report, we now have a strong and growing understanding of the detrimental impact of unresolved legal problems on people's well-being, an impact particularly profound on people living in marginalized conditions or who are otherwise vulnerable. Renewed funding for legal aid is critical, but federal leadership and support is required on other facets of justice innovation. Specifically, change can be achieved or supported through national initiatives such as the development of access to justice metrics and a centre for justice innovation.

National governments in other federal states have taken a stronger and more visible role in ensuring equal justice, despite sharing responsibility for these matters with state governments. Notably, the Australian and US national governments are much more active on the access to justice front compared to Canada. In March 2010, the US Department of Justice established the Access to Justice Initiative (ATJ) to address the access to justice crisis in the criminal and civil justice system. ATJ's mission is to help the justice system efficiently deliver outcomes that are fair and accessible to all, regardless of wealth and status. ATJ staff works in the Department of Justice, across federal agencies, and with state, local and tribal justice system stakeholders to increase access to lawyers and legal assistance, and to improve the justice delivery systems that serve people unable to afford lawyers. The initiative is led by Laurence Tribe, who reports to President Obama, underscoring the importance of these issues.

### Learn more: about other Federal Governments' efforts for Access to Justice

US Initiative:
www.justice.gov/atj/

Australia Attorney General's Department:
A guide for future action – 2009:
www.ag.gov.au/LegalSystem/Documents/A%20guide%20for%20future%20action.pdf
www.ag.gov.au/LegalSystem/Pages/Accesstojustice.aspx

Australian Government A2J website:
www.accesstojustice.gov.au/Pages/default.aspx

New Zealand Justice System Improvements:
www.justice.govt.nz/policy/justice-system-improvements

The Australian Attorney-General's Department has been even more proactive, working steadily to increase equal justice since a landmark 1996 report on access to justice. For example, the Department has adopted a strategic framework for access to justice and has embarked upon a number of major initiatives, including a national partnership agreement on legal aid and building an evidence-based civil justice system, described above.

[215] Currie, *supra* note 39.

[216] See: www.scics.gc.ca/english/conferences.asp?x=1&a=viewdocument&id=92.

The Committee suggests that this target is achievable by 2025, with an interim target of reinstating federal funding for legal aid to 1994 levels by 2020. Equal justice is about more than only the administration of justice in a province or territory: it is about the health, safety and security of all residents of Canada and ensuring good governance through a fair and effective legal system. These are national concerns, both as a matter of constitutional division of powers and good public policy. There is a growing consensus that re-engagement of the federal government in this field is imperative. The federal government can, should and must be a full partner in ensuring an equal inclusive justice system.

Targets:
***By 2025, the federal government is fully engaged in ensuring an equal, inclusive justice system.***

***By 2020, the federal government reinstates legal aid funding to 1994 levels and commits to increases in line with national legal aid benchmarks.***

**Milestones:**

- *The federal government commits to steady increases in contributions to legal aid funding including returning to 50% cost-sharing in criminal matters and establishing a dedicated civil legal aid contribution*
- *The federal government is a leader in supporting access to justice innovation*

**Actions:**

- *The federal government commits to supporting justice innovation by taking a leadership role in building the evidence base necessary to develop access to justice metrics, appointing an access to justice commissioner, supporting the creation of a centre for justice innovation and funding access to justice research*
- *The federal government makes funding for civil legal aid transparent and works with provincial and territorial governments and justice system stakeholders to regenerate legal aid*

### What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

## CBA as an Access to Justice Leader

The CBA has contributed to access to justice in Canada since its inception, and improving access to justice is a core to the Association's mandate. CBA contributions over the years have included task force reports leading to the adoption of policy statements on court reform, civil justice reform, administrative justice reform, equality in the legal profession and the administration of justice. Advocacy efforts have been based on these policies. In particular, the CBA has been active in lobbying for the establishment, protection and promotion of a national legal aid system for both criminal and civil matters. Efforts on this front have included numerous reports and resolutions, advocacy campaigns in collaboration with other organizations and test case litigation and various interventions. The consistent focus has always been on ensuring access to justice for low income people through effective legal aid services. For example, the CBA adopted a *Charter of Public Legal Services* in 1993 founded on the premise that for certain matters; legal aid is an essential public service akin to healthcare. More recently, the CBA has taken steps to foster pro bono work within the profession. CBA Branches are also active on these fronts.

The CBA established this Access to Justice Committee in 2011 with a view to consolidating and enlarging its work on these issues. The CBA fills an important role in national access to justice reform efforts but a stronger organizational commitment is required for the CBA to become an access to justice leader.

The Committee is committed to take action on six fronts, working in conjunction with other CBA entities, committed members and outside organizations:

- Encourage greater collaboration between

justice system stakeholders, including the public and coordinate of initiatives in a strategic framework;

- Develop and revise CBA policies to support improvements in the public and private delivery of legal services;
- Partner with the CBA Legal Futures Initiative on elements of its work that relate to education, practice and regulatory innovations that could have an impact on access to justice;
- Foster greater public ownership of access to justice issues;
- Develop tools for advocacy geared to improving publicly funded access to justice, including legal aid; and
- Support and encourage CBA members to enhance the legal profession's contributions to equal justice through the practice of law.

The priority given to access to justice issues has waxed and waned over the years – a natural cycle in the life of a professional association with a broad mandate, operating on member-driven initiatives. The Committee proposes that the CBA takes the necessary steps to ensure that it is in a position to be an access to justice leader, by increasing its capacity to support initiatives in this field.

**Targets:** ***By 2020, the CBA has increased its capacity to provide support to access to justice initiatives***

**Milestones:**

- *The CBA provides support to its members so they can participate actively in increasing equal access to justice*
- *The CBA takes a leadership role in encouraging public engagement with the justice system and changing the conversation in support of achieving equal justice*
- *The CBA continues and expands its collaboration with other justice system stakeholders, including members of the public, in support of inclusive access initiatives*
- *The CBA substantially increases resources provided to access to justice initiatives*

**Actions:**

- *The CBA Access to Justice Committee develops a multi-year workplan to implement the actions in this report*
- *The CBA Access to Justice Committee develops resolutions to update CBA policies consistent with this report for consideration by CBA Council at the 2014 Mid Winter Meeting*
- *The CBA Access to Justice Committee provides many avenues for interested members and others to participate in the development of its initiatives and to share their ideas and experiences*
- *The CBA Access to Justice Committee seeks out and cultivates access to justice champions in the legal profession*

## What do you think?

- Any feedback or suggestions?
- Who should be involved?
- Are you willing to help?
  (write to: equaljustice@cba.org)

# EPILOGUE: Imagining 2030

This report has set out the Committee's vision for reaching equal justice, framed as 31 concrete, measurable targets to be achieved between 2020 and 2030. This vision is ambitious, but possible. The road to achieving these targets may appear long and difficult to navigate, but it can be travelled one step at a time, each of us doing our part, thinking systemically and acting locally. The Committee has initiated a description of this journey through some examples of actions intended to get us started and by setting out a few milestones we can aim to achieve along the way. There is no question that action must be initiated right away to join ongoing efforts – if not, we are likely to face a situation in 2030 that is dramatically worse for access to justice.

Despite the Committee's best attempt to offer concrete vision of equal justice, it still remains difficult to fully picture the transformation required to move from the dire state of access to justice in Canada today to the envisioned world of 2030, where the justice system is equally accessible to all, regardless of means, capacity or social situation. What does 100% accessibility look like?

To take this envisioning process one step further, the Committee will return to the stories of the nine people denied equal access to justice in Part I, to illustrate the impact of transformed paths and outcomes following our successful efforts toward equal justice.

So, imagine the year is 2030, and the justice system takes into consideration different legal needs, providing timely, holistic and personalized assistance to achieve lasting and just outcomes. People are empowered to manage their own legal matters, with a strong emphasis on prevention where feasible and public participation in overseeing the justice system. As a result, people feel a strong connection to the justice system, and a strong sense of ownership. Practices are evidence-based and the justice system is a nurturing environment for innovation. It consists of learning organizations committed to continual improvement.

# Remember Winsome?

The 75 year old housecleaner who co-signed for her grandson's car loan? She didn't understand what she signed and when her grandson fell behind in his payments she could not access legal information or advice so she panicked and paid $2500 from her meagre savings to pay the debt.

Imagine instead that Winsome saw a notice for legal capability training at the local library. She signed up, for two hour classes on four Saturdays. When her grandson asks her to co-sign for a car loan, she wants to help, but remembers what she learned. She insists on taking the documents home to read them carefully before she signs. She stops at the library and uses the legal information website that she'd learned about in her training course, to find out what would be involved in signing the papers. When she gets frustrated because she isn't used to working on a computer, someone at the library is available to help. Then, she stops by the courthouse, and is referred to a consumer advocacy centre staffed by pro bono lawyers. She calls them, and they make a suggestion. Winsome and her grandson return to the local dealership and she agrees to sign if the dealership removes the clause that gives it a mortgage on her home and adds a clause agreeing to give her two weeks' notice of any problems before they begin their usual process. The salesperson knows Winsome and her grandson and agrees.

Later, when she receives notice that her grandson is behind by $2500 in his payments, she talks to him. Her grandson explains that he was waiting for his income tax return and he didn't think the car dealership would act so quickly. Winsome writes the cheque for $2500 and mails it to the company, but her grandson pays her back two weeks later. He promises it will not happen again.

# Remember Phuong?

She inadvertently left a drugstore without paying for prescriptions she had picked up. Then she pled guilty to a charge of shoplifting when she couldn't get legal aid. As a result she lost her job as a personal care worker.

Imagine instead that Phoung's call to legal aid goes differently. Rather than being told that they can't help her because her charge won't result in jail time, they consider Phoung's application by phone, looking at the whole situation. Legal aid has done recent outcomes-based research. The representative says that because of her immigration status and that English is not her first language, she should go to a community centre in Canora for help from a court support worker. The centre is welcoming, and the support worker listens to what happened. He sends a report to a duty counsel lawyer at the courthouse.

On the day Phoung goes to the courthouse, she meets with the duty counsel lawyer who again reviews what has happened. The lawyer speaks with the crown prosecutor and explains that Phoung had no intention of stealing, but was exhausted after dealing with a sick child all night and simply overlooked the prescriptions. She is employed and always pays her way. When the judge appears, the lawyers jointly recommend to the judge that the charges be withdrawn, and the judge agrees.

# Remember Monique?

The 66 year old accounting clerk who didn't return to the lawyer's office after the first consultation? She slipped into a depression and her debt mounted and bills went unpaid. The bank started foreclosure proceedings.

Imagine instead that Monique's first consultation with the lawyer went differently. Monique's lawyer had attended a CBA legal education course many years ago and had been inspired to offer legal health checkups to his clients. He was also an avid reader of the many access to justice research papers generated by governments and law schools. After hearing Monique's story, the lawyer realized that more was going on than simply legal issues. He suggested that Monique take advantage of the "legal health check" program offered by paralegals in his office, and talk to one of the social worker members of the team. As a result of the meeting with the social worker, Monique was referred for counseling. The paraleglal uncovered further details and did some research on Monique's legal health. She advised Monique and the lawyer that the title to the home was vulnerable, and that Monique needed credit counseling. With the support of the social worker, Monique spoke to a credit counselor who helped consolidate her debt, and she stopped using her credit cards. She retained the lawyer to draft a separation agreement and her legal affairs were in order in a few months. Monique's children paid the lawyer, and she repays them a bit each month. She also manages to put a bit of money away each month.

# Remember Anna?

Anna came from Mexico to Ottawa with her daughters seeking asylum as she was fleeing a violent husband. She lost her bid for asylum due to the late delivery of necessary documents from Mexico and lack of legal aid funding for an appeal.

Imagine instead that the Canadian Centre for Justice Innovation has recently completed a comprehensive review of policies and priorities, and through its evidence based research activities, has identified barriers for refugees seeking justice and the legal needs they generally experience as "essential". The lawyer refers Anna to a community centre that assists refugees in various ways, including with their legal proceedings.

The centre's staff writes to the local police force in Mexico explaining the urgency of the situation, and asking for help. They make several follow up requests by phone but are unable to secure the paperwork in time for the hearing. They then provide Anna bus fare to go to the hearing in Montreal.

After Anna's claim for refugee status is refused, she applies for more legal aid for the appeal. Due to increased federal government funding for legal aid for immigration matters, the plan has reinstated funding for lawyers to write an opinion about the merits of the case to legal aid. The lawyer's opinion letter is successful and Anna gets a lawyer for the judicial review and stay of proceedings. Anna's appeal is granted and she and her children are allowed to remain in Canada.

# Remember Jill?

She was refused legal aid and had to borrow a lot of money to have representation when the judge refused to allow her to represent herself. Her ex-husband was suing her for custody as their three daughters refused to see him. Jill had an unsatisfactory child support award as she could not prove her ex-husband's cash income.

Imagine instead that Jill qualifies financially for legal aid and does not have to borrow a lot of money. She then spends some of her own money on a private investigator who is able to confirm that Jill's ex-husband makes additional income that he has not reported on his tax return.

Jill's province has been recording their access to justice metrics and realizes that the wait for court appearances in Fredericton is much longer than in other parts of the province. Resources are provided to decrease the delays.

At the first court appearance, the Judge refers the custody issue to mediation. In mediation, Jill and her husband can discuss the issues surrounding the breakdown in the relationship between father and daughters. They are referred to an external agency for counseling and resolve the custody issue provided the counseling occurs.

The support issue went forward in court. Jill got an order for arrears of support and for increased child support going forward that reflected her ex's actual income. The judge told her ex that there were methods of enforcing child support orders that could be used in future if necessary. Jill never had to return to court.

Jill was pleased with the outcome for her children on the custody issue. She volunteered as a subject in the local law school's access to justice research centre. In doing so, she gave the researchers her perspective on the options available to working poor parents dealing with custody and support issues.

# Remember Glynnis?

She trafficked in marijuana to make ends meet for herself and her daughter. She pled guilty to possession of marijuana for purposes of trafficking and went to jail, and her daughter went into a group home hundreds of kilometres away from her.

Imagine instead that the NWT government is part of a collaborative FPT initiative considering how to provide better legal services for citizens in smaller towns underserviced by lawyers. The First Nations of NWT have engaged in community roundtables with the territorial government on options for aboriginal people charged with drug offences. Through both initiatives, research tools and funding have been provided to a local law office. Glynnis' lawyer was able to present detailed "Gladue" arguments at sentencing, stressing Glynnis' background and the obstacles she had overcome, and her success as a parent in spite of her own upbringing. Court services were sufficiently resourced to arrange a referral for treatment through her band, and helped Glynnis find suitable care for Destiny while she got treatment. The two were reunited a few months later, and Glynnis was able to find employment, while supported by ongoing narcotics counseling.

# Remember Eugene?

He is schizophrenic and waiting to be evicted from his apartment. No one can help him.

Imagine instead that BC has an access to justice commissioner who has been reviewing the Access to Justice metrics report released last year. He is concerned about the lack of access to legal services for citizens with mental health issues. The commissioner has engaged the health sector and the justice sector to create collaborative services. Now when Eugene calls his income assistance worker, she tells him about a new community help centre in his town, staffed by a social worker, nurse and paralegal. The paralegal helps Eugene negotiate an arrangement to repay the landlord what he owes over the next three months. The social worker helps him to manage his money better, and use the food bank regularly until he's out of trouble. The nurse helps with his medication, and together the nurse and social worker realize that Eugene isn't taking advantage of subsidies available for medication. With the additional support that he now receives, Eugene is more secure financially, and doesn't worry about money all the time.

# Remember Dave?

Dave couldn't afford legal services related to custody matters and a no-contact order placed on him by his spouse. As a result, he does not have dependable access to his young children and he is aware that his wife has a substance abuse problem.

Imagine instead that Dave called a number he saw at the bus shelter, for a clinic run by law students. The student said that with the help of his supervising lawyer, they would represent him on the no-contact order. They suggested that Dave contact the courthouse to enroll in a diversion program that included six hours of counseling for each parent in a custody dispute. There was a cost for this, related to your income, but Dave was willing to pay, as he was anxious to get counseling instead of going to court. After individual counseling, Dave and Mona were seen together. They agreed on a shared custody arrangement with each of them having the children a week at a time.

Dave agreed to pay child support after he accessed a free computer at the local law library where he could look up the Child Support Guidelines. He went back to the student law clinic to have his custody and support terms reviewed before he signed the final agreement.

# Remember Arthur?

He was the businessman who represented himself in family court proceedings. He had difficulty navigating the court forms and the clerk's office would not help him. Exhausted and overwhelmed, he settled with his wife's lawyer, but had no idea if the deal was fair.

Imagine instead that when Arthur started in business for himself, he took a basic legal information course from the local community college. He also signed up for legal expense insurance, which provided some capped services for family law.

When he was served with his wife's request for university expenses, he contacted the insurance company. The lawyer provided by the insurance plan said she would prepare all the paperwork for his defence, and after that, he could represent himself or he could retain a private lawyer on a limited scope retainer.

Arthur then researched the legal issues online. He had an elementary idea of the issues, but knew he needed more assistance. He called a family law firm and asked for help on a limited scope retainer. He met with a family law lawyer who simplified the legal concepts for him and advised him of the appropriate range of support that he should pay based on the facts. With this knowledge, Arthur went to court alone. His ex wife's lawyer arrived and spoke to him about a possible settlement. Arthur was able to negotiate a more equitable deal than was first proposed.

# PART IV

## project description, acknowledgements and conclusion

# *Project description, acknowledgements and reflections*

The CBA's Access to Justice Committee was created in September 2011. The Committee members were:

Melina Buckley, Ph.D., Chair

John Sims, QC, Vice-Chair

Sheila Cameron, QC

Amanda Dodge

Patricia Hebert

Sarah Lugtig

Gillian Marriott, QC

Gaylene Schellenberg, Project Director

Each member came to this work with different personal and professional backgrounds and perspectives. Rather than being a hurdle, these differences have enriched our discussions, and our efforts to tackle the wicked problem of reaching equal justice.

The Committee would like to acknowledge the help and encouragement it has received throughout the Equal Justice Initiative.[217] The Committee is deeply indebted to Gaylene Schellenberg for her hard work and dedication to this initiative. She had the difficult job of turning our ambitious goals into the reality and her invaluable assistance did in fact make this vision possible.

In launching the Equal Justice Initiative, the Committee took note of the significant efforts and resources currently devoted to improving access to justice, from so many different and influential factions of the legal profession and justice system.

[217] The CBA Equal Justice initiative has occurred in two phases. The first phase, called Envisioning Equal Justice, involved research and consultations to develop a common vision of equal justice, one that includes the perspective of people living in marginalized conditions. The second phase is called Reaching Equal Justice, where a strategic framework for action to lead to that vision was developed.

Given the scope of these efforts, more substantial progress on the issue nationally could be expected at this point, but instead they seem plagued by a lack of coordination, strategic framework or common vision. The willingness to embrace change without leadership or coordination of the various efforts has sometimes resulted in moving ahead on promising ideas, without always considering fully the ramifications and the underlying tough questions that they might suggest.

The Committee first identified four major barriers in the way of substantive progress:

- shortfalls in information;
- lack of political will and public awareness of the issues;
- insufficient coordination and collaboration; and
- absence of tools to measure progress or define what we mean by equal justice.

The Committee then developed three main strategies to address what we perceived as those main barriers to progress.

- First, we planned a consultation and research strategy, to create the knowledge foundation for our initiative.
- Second, we planned to use what we found in the first strategy to change the conversion about equal justice – to ask the hard questions and pull people out of acting in silos toward a more common goal.
- Finally, we would find ways to build ongoing collaboration and coordination, to enable those who are committed to equal justice to work together more effectively and productively.

The Committee began by informing the legal profession and justice system participants describing the initiative. Judges, government officials and politicians, law societies and law foundations, legal aid leaders and many more offered help and support. They provided ongoing feedback as work progressed. The Committee also consulted with justice system participants through conferences, and meetings of CBA Council. This engagement from all justice sectors bodes well for achieving an ambitious but possible innovation agenda.

Different forms of consultation were used for other specific purposes. To inform thinking about how to define 'access to justice', and what 'equal justice' means for the people who need justice services, community consultations took place in Nova Scotia, New Brunswick, Québec, Ontario, Saskatchewan and Alberta, with different communities living in marginalized conditions. Local lawyers and community partners were instrumental in helping to organize and facilitate these consultations, and linking the Committee to community members who attended and shared their often painful experiences.

The Committee is grateful for the many individuals and organizations who arranged and participated in these community consultations including:

Calgary

- Eileen Bell and Barbara Poole, Discovery House Family Violence Prevention Society
- Gillian Marriott and Cecilia Frohlick, Pro Bono Law Alberta

Maritimes

- Michelle Poirrier, Phoenix Youth Programs (Halifax)
- Rhonda Fraser and Betty Kalt, Chrysalis House (Kentville)
- Karen Hudson, Kai Glasgow, Megan Longley and Linda Rankin, Nova Scotia Legal Aid Commission
- Sheila Cameron, Actus Law Droit, Moncton
- Chantal Landry, YWCA Moncton

Montreal

- Garage a musique, Centre de pédiatrie sociale en communauté de Hochelaga-Maisonneuve
- Hélène (Sioui) Trudel, Alliance droit santé fondation du Dr Julien

Saskatoon

- Alison Robertson and Nicole Braun, Saskatoon Food Bank and Learning Centre
- Candice Kloeble and Brenda Warnke, SIAST
- Deidrie Lavallee, Saskatoon Tribal Council Justice Program
- Amanda Dodge, Community Legal Assistance Services for Saskatoon Inner City (CLASSIC)

Toronto

- Beverley Dooley, Canadian Hearing Society
- Lucy Costa, Empowerment Council
- Ayshia Musleh, Ethno-Racial People with Disabilities Coalition of Ontario
- Edgar-Andre Montigny, Ivana Petricone and Yedida Zalik, ARCH Disability Law Centre

In addition to the Community Consultations, Pro Bono Students' Canada identified a group of committed law students, and they conducted video interviews with people 'on the street' from across Canada. We combined this footage with more offered by the Canadian Forum on Civil Justice. Town hall consultations have been held in recent years in British Columbia, Manitoba and Ontario, and the results were also used by the Committee. Legal aid lawyers, community legal workers, and paralegals were surveyed for their views on current issues, and legal aid plans were very helpful in this effort, both in commenting on the survey and in ensuring its broad dissemination.

Five research and discussion papers were prepared and circulated broadly to justice system participants for comment. Each paper addresses a "building block" of reform, an area that the Committee identified as requiring further exploration and debate:

- access to justice metrics;
- national standards for legal aid;
- legal aid service delivery innovations;
- the tension between pro bono and legal aid and
- underexplored options for ensuring access to justice for the middle class.

(see: www.cba.org/cba/equaljustice/about/project.aspx)

Throughout the preparation of the discussion papers and the consultations, several law students, social science students and young lawyers helped by developing background reports or conducting interviews. The Committee acknowledges these contributions by Shahdin Farsai, Elena Haba, Stefanie Carsley, Mieka Buckley-Pearson and David Parry (research and writing) and Alexis Chernish, Christina

Kwok, Elina Nakhimova, Faiza Hassan, Irene Fatehi, Theresa Kennedy, Lindsey Cybulskie, Chris Clarke, Marie-Christine, Gariépy-Assal, Samantha Clarke, and Will Goldbloom (interviewers). We received useful feedback on the discussion papers both through written comments and at workshops at the National Pro Bono Conference in Montreal in November 2012 and the Summit.

These various strategies came together at the Envisioning Equal Justice Summit in Vancouver on April 25-27, 2013. The event brought together about 250 lawyers, community advocates, judges, paralegals, law foundation and law societies, and members of the public. As we hoped, it marked a turning point to start a different more productive and coordinated conversation about access to justice, where justice system participants work together to solve the challenge of equal justice.

The Summit asked participants to leave their "day jobs" at the door, and tackle the big challenges in a new, more collaborative and collegial way. At the closing plenary, all participants worked in small groups to offer their best advice for going forward. The Summit was the focal point of the Committee's strategy to change the conversation about access to justice.

The Summit would not have been possible without the generous contributions of more than 90 plenary and workshop speakers, including international guests from Australia, the Hague and the US, and the Summit sponsors: Law Foundation of British Columbia; Law Foundation of British Columbia/ Legal Services Society Research Fund; DAS Canada; CBA BC; Alberta Justice; Law Society of British Columbia; Law Society of Upper Canada; and Actus Law Droit. Special thanks are due to Heather Block and Hillary Gair, and a raft of volunteers for facilitating the opening night poverty simulation, and to the Board of the United Way of Winnipeg for supporting this initiative.

We would like to express our gratitude to all Summit participants who came together to have a different, renewed conversation about equal justice at this unorthodox event. From the simulation on the opening night, where those present were asked to "live" a simulated month in poverty (in an hour), requiring them to provide for their families and negotiate a maze of social services with limited resources, through to the closing plenary, people engaged. Here are some comments following the event:

> "I was blown away by the level of engagement and the 'buzz' of meaningful conversations in every corner of the meeting, eating and even washroom spaces! You attracted people from so many different jurisdictions, with such interesting perspectives and openness to hearing others. It was an injection of much-needed energy into the ongoing fight for equal access to justice, and I know it will have an ongoing impact for years to come. " ***Caroline***
>
> "Congratulations on bringing it all together. It has momentum, optimism, ideas for action, engagement - everything you need to carry on with renewed hope." ***Vicki***
>
> "Right from the opening simulation through the few days until the dinner last night I thought it was a wonderful event. It was very motivating to see such a proportion of the profession (and those associated with it) devoting so much time and effort to trying to achieve what you are trying to." ***Geoff***
>
> "I don't think I've ever been in a place and surrounded by so many people where I felt like everyone was thinking on the same page, open to ideas, and willing to work together." ***Danielle***

The final strategy is to consider how to encourage greater collaboration and coordination of efforts moving forward. In addition to integrating a collaborative approach throughout its work, the Committee has participated in three ongoing national projects: as a member of the National Action Committee on Access to Justice in Civil and Family Matters as well its Steering Committee and several working groups; the Canadian Forum on Civil Justice Costs of Justice Project; and Professor Julie Macfarlane's National Study of Self-Represented Litigants.

In preparing this report, the Committee again

reached out to the broader justice community for assistance. We asked ten external reviewers to read a draft of this report and again were immensely rewarded by the encouragement and support offered by these busy individuals. We thank Dr. Ab Currie, Justice Thomas Cromwell, Professor Doug Ferguson, Allan Fineblit Q.C., Karen Hudson Q.C., Sharon Matthews Q.C., Professor Mary Jane Mossman, Danielle Rondeau, Allan Seckel, Q.C. and Erin Shaw. Their comments were instrumental in assisting us to clarify and fully develop this strategic framework.

The Committee is also grateful for the editorial assistance provided by Tamra L. Thomson, and administrative and technical support, particularly from Lorraine Prezeau and Denise Poulin, all at the CBA National Office. Finally, the Committee wants to acknowledge, with appreciation, the financial support it has received throughout the Equal Justice Initiative from the CBA and the Law for the Future Fund.

Going forward, the Committee will continue with its main strategies of working with others to build the knowledge base as a foundation for effective change, changing the conversation by engaging more directly with the public about their justice system, and seeking ways to support collaborations at the national and local levels. This report calls for the CBA to be an access to justice leader and we are preparing an action plan to make this goal a reality.

The Committee has styled this report as an invitation to envision and act and it is therefore fitting to end it with personal reflections on how this initiative has changed our perspectives and commitment to "think systemically, act locally".

*Changing the conversation:* this emerged as our overarching theme at our very first Committee meeting. Our two-year journey of reflection, hard work and reaching out to the justice community has me more convinced than ever about the absolute need for novel and creative approaches to generating dialogue, enlarging conversations and finding ways to build bridges between conversations and connecting thoughtful communication to thoughtful action to achieve equal justice. What I treasure most about the Summit was the way that we, all of the participants, created an energized space where the commitment to equality and positive change reverberated in intimate conversations between participants, around the tables, and in the larger workshop and plenary groups, in formal sessions and in the nooks and crannies in between. I came away thinking – what steps can we take to facilitate this conversation on a larger, more inclusive scale? I am committed to thinking systemically about a national conversation on reaching equal justice and to facilitating local dialogue within it. I am hopeful that this report is a first step, but mindful of the reality that reports don't make change, people make change.

***Melina Buckley***

In 2013, the New Brunswick family court system had become increasingly mired in delays, leaving us with a system where a date for a first appearance for custody, child support and spousal support could take 7-8 months. As I watched the system fail to respond to the needs of its clients, my faith in the process diminished.

After the Summit, I returned to New Brunswick with a renewed hope for real change. The feeling from the 200+ people in the room at the closing of the summit was overwhelming; there was a palpable desire for a paradigm shift in the way we resolve legal problems in Canada. But I was still left with the 'what now?' question – how do I help my clients right now, while the bigger change issues get worked on for the next number of years.

I recalled the "think systemically, act locally" mantra from the summit. I then set in motion a series of meetings that ultimately resulted in a local pilot project for September 2013 so simplified motions for custody, child support and spousal support will be heard within 6-8 weeks of filing. The project has been announced to the local bar and we are waiting with anticipation for its commencement.

***Sheila Cameron***

Sometimes the amount of work to be done to effect change seems overwhelming. After the Summit, though, it felt as if we were all speaking with one voice and that much more seemed possible. The change, for me, was keeping my eyes open for every opportunity to improve access and seeing how every community member was a potential agent of change. At a recent meeting with Queens' Bench Justices on another issue, we discussed our court's triage project and found we could open discussions that could better coordinate these developments with other parties in the process. At a charity lunch, an executive of a large local business was telling me about an initiative they were doing to promote services for mental health. After a short discussion, we found that I could introduce them to partners so they could expand their project to assist in accessing justice for more members of the community with mental health issues. The opportunities are there, the partners are there and they are willing. It may take only a few moments and some knowledge (thinking systemically!) to create more champions in our local communities.

***Patricia Hebert***

I came away from the Summit - and from our work on this Report - thinking about partnerships. I am convinced we can work together to achieve equal access once we have a common vision of where we want to go and how we can get there. Just last week, our Law Society's CEO had a great suggestion for a public-private partnership to deal with the family law cases our student legal clinic must turn away due to conflict of interest. The clinic is now exploring this option. If we continue to think creatively about potential partnerships and opportunities for mutual support, within a common vision, there is so much we can do.

***Sarah Lugtig***

My, "take away" both from the committee's work and the Summit echoes Sarah's to a certain extent in that I agree that it is through partnerships and collaborative efforts that we will be able to move forward to addressing the access to justice issues that we face. However, as someone involved in the "local" action, I also was reminded that it is crucial that we look to the bigger picture and that we encourage and reinforce the necessity of the "system" changing to address the changing needs and requirements of our society. The Summit was a crucial piece to this as it brought together individuals who I don't believe had ever put it together that they "all" need to be at the table. The energy and enthusiasm of the Summit moved people in a way I don't think they expected and that was very exciting and encouraging. I came away from the Summit thinking that we could "actually" achieve our goals and that we could positively impact the access issues. It was inspiring and to see that it has already led others to look at opportunities demonstrates that we can move forward and effect change. Thank you to all of you for including me on this journey!

***Gillian Marriott***

The main thing that I will take with me from our committee's work and the dialogue at the Summit is the primacy of inclusivity. It's absurd, really, to think that we could develop and run an effective system without consulting the system's users. More than just enhancing our effectiveness, listening and responding to the voices of the people we are attempting to serve is about authentic relationship building. As our Elder taught us, maintaining power imbalances through one-way service provision is unsustainable; there must be recalibration to incorporate reciprocity. I think this is an important, redemptive message for all of us in the justice system; I hope our Committee's report stimulates thinking and action toward inclusivity.

In terms of "acting locally", CLASSIC has made a commitment to host community conversations each year, multiple times throughout the year if possible, to hear the community's voices: identifying their priorities for justice initiatives and their recommendations to improve our service delivery. In my Masters studies this fall, I will be focussing on authentic partnership with marginalized communities toward meeting their social justice goals.

***Amanda Dodge***

I feel I left the Summit with new eyes. The optimism and renewed energy of those at that conference helped me see that change actually is possible. We don't have to accept – we shouldn't accept – the barriers that for too long have denied effective justice to so many people. I am more confident than ever that, together, we can make real progress in improving access to justice.

***John Sims***

This Committee may have arrived at our first meeting expecting that this would be 'just another project', 'another report', but I think we soon shared a feeling that we had a special opportunity - to imagine how our civil justice system in Canada might work to be truly available to everyone. I've come to recognize the importance of taking the time to develop that vision, and a solid plan for achieving it, so people have a sense that their work is contributing in a coordinated way toward a common goal. The Summit was a major test – could we encourage others, many worn down from years of trying, to join us in this optimistic exercise? It worked, people came and joined in the spirit of the event – it was amazing and energizing. Whether our suggestions here are right or wrong, more likely partially right, partially not, I hope they will be received as a sincere attempt to offer our ideas on how we can move forward differently to see real progress toward equal justice.

***Gaylene Schellenberg***

## PLEASE LET US KNOW WHAT YOU WILL DO TO CONTRIBUTE TO EQUAL JUSTICE!

## Resources

All material developed as part of the Envisioning Equal Justice initiative is available on the CBA website. For ease of reference these documents are listed here:

**"Building Blocks"** – five research and consultation projects:

- *Access to Justice Metrics* (www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf) looks at the potential of measurement and evaluation tools, and more precise definitions, to improve access to justice.
- *National Standards for Publicly Funded Legal Services* (www.cba.org/CBA/Access/PDF/TowardNationalStandards.pdf) and *Future Directions for Legal Aid Delivery* (link) deal with different challenges to providing publicly funded legal services. National Standards looks at principles and a sound policy underpinning to ration those services.
- Future Directions for Legal Aid Delivery (www.cba.org/CBA/Access/PDF/FutureDirectionsforLegalAidDelivery.pdf) emphasizes the need to use existing knowledge about people living in poverty and their legal needs when innovating legal aid delivery.
- "Tension at the Border": Pro Bono and Legal Aid (www.cba.org/CBA/groups/PDF/ProBonoPaper_Eng.pdf) considers reasonable parameters for the profession's voluntary efforts, and proposes a continuum of responsibility between public funders, pro bono efforts and private market forces to ensure essential legal services are provided to everyone. A summary of feedback can be found at (www.cba.org/CBA/Access/PDF/Summary_Feedback.pdf).
- Underexplored Alternatives for the Middle Class (www.cba.org/CBA/Access/PDF/MidClassEng.pdf) proposes a broader range of legal services at different price points, giving the middle class a greater range of options for legal help.

## Envisioning Equal Justice Project Description

- **Introductory letter to Justice Community, with project description** http://www.cba.org/CBA/equaljustice/pdf/Access%20to%20Justice%20public%20letter%20Generic.pdf

**Background research reports**

- Shahdin Farsai, "Pro Bono Annotated Bibliography"
- Elena Haba, "Selected Inventory of Initiatives to Improve Access to Justice for the Middle Class"
- Stefanie Carsley, "Innovations in Legal Aid Delivery"
- Mieka Buckley Pearson "Annotated Bibliography"
- Amanda Dodge, Envisioning Equal Justice *Community Consultation* report (See also, Community Engagement Framework below)
- David Parry, Legal Aid Survey Results http://www.cba.org/cba/equaljustice/PDF/CBA_Survey_Results.pdf
- Summit agenda
- Summit summary

**Appendix A**

**Community Engagement Framework:** Practical guidance for initiating dialogue with community members about the justice system.

*This framework was developed by representatives of the Committee through a collaborative process in Saskatoon in 2012. It was pilot tested in several sites and then employed in 13 consultation sessions held in 2012 and early 2013.*

**Ethical Framework**

We recommend implementing the following ethical principles in community engagement:

- **Honour the values of inclusion and collaboration, affirming the diversity of the community**

  o Design and execute the community engagement by involving community members themselves. Ensure that the conversation is framed by them.

- **Honour the values of reciprocity and empowerment**

  - Recognize and compensate participants for their time and contributions in genuine and meaningful ways.

  - Look for ways to empower and equip the participants and their communities through this process.

- **Honour the value of humility**

  - Acknowledge that the participants have knowledge and a voice.

  - We are seeking to hear it because it has value.

- **Honour the value of equity**

  - Maintain an awareness of, and take steps to avoid as much as possible the imbalances of power between facilitators and participants.

- **Respect the dignity, rights and interests of the participants**

  - Ensure free, informed and ongoing consent of participants.

  - Be non-judgmental, accepting and respectful of the participants.

**Practical Steps**

A first step will involve partnering with community-based organizations, such as food banks or open door societies. Look for organizations that are trusted by, and provide a safe space for community members.

Generally, engagement will simply involve conversations with community members. One-on-one conversations are possible, but group discussions are likely more effective and efficient.

Community discussions should not be solely facilitated by a member of the established legal community (e.g. lawyer, judge, government representative), as that may inhibit or prevent candid responses from the participants. To elicit the most authentic feedback from community members, the discussions should be facilitated by, or at least co-facilitated by, a community representative. Ideally, the community representative will be someone whose identity and experience reflects that of the group being engaged. Alternatively, the community representative will be someone who works closely with the community and is known and trusted by the community members. This could be someone who works at the community-based organization being partnered with, and/or is a respected leader in the community.

To promote participation, it is best if the discussions are informal, round-table style, and the groups are relatively small (10-12 members maximum). Larger, town-hall meetings can also elicit authentic feedback, however with a large group many attendees will be too shy to participate.

Prior to the discussions, consult with community leaders about cultural norms and attitudes within the group, and any relevant protocol and spiritual practices followed by the group.

At the outset of the discussions, informed consent will need to be obtained, ideally in writing with a plain language form. The informed consent should include:

- A statement as to:
  - the purpose of the discussion
  - who is conducting the discussion
  - its expected duration
  - the nature of anticipated participation
  - how the participants' feedback will be used
- A comment as to any mutually beneficial goals, including and in particular:
  - how it may help participants and their communities
  - how it may enhance the capacity of the participants' communities
  - how it may address long-term community needs

- Assurance of anonymity:
- Assurance of participants' ability to withdraw from the consultation at any time without prejudice to their entitlements

It is best to read and explain the provisions of the informed consent form orally, so to address any literacy challenges. At the time consent is considered, the co-facilitators should speak to how these consultations may benefit the community members and how they can access data recorded from the discussion.

During the discussion, the facilitators should focus on listening, not talking. They should be mindful of the group's protocol and practices, and be alive to ongoing dynamics in the group. Feedback may be captured through note-taking or recording the session. Ensure that the participants are aware of, and consent to how their feedback is being captured, and whether their identity will be anonymous.

There are practical ways to incorporate the principle of reciprocity. It is important to provide refreshments for participants during the discussion, as well as providing honoraria of some kind (e.g. cash, gift card) to the participants, to reflect the value of the time and feedback they are providing.

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# The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants

## Final Report

## May 2013

**Dr Julie Macfarlane**

**Supported by grants from the Law Foundation of Ontario, the Law Foundation of Alberta, and the Law Foundation of British Columbia/ Legal Services Society of British Columbia**

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Special thanks are owed to the Project Advisory Board – Professor John Manwaring (Chair), Justice John Rooke, Mary Anne Docherty, Mary Butterfield, Melina Buckley, Dr Noel Semple and Sherry MacLennan – as well as John Greacen, Perry Dunmore, Gillian Dunmore and Bernie Mayer, for their thoughtful input to the draft report and recommendations.

I appreciated the time and expertise provided by the justice ministries in the three participating provinces who worked with me to identify the study field sites (Anne-Marie Predko and Maretta Miranda in Ontario, Edie Delanghe in Alberta, and Irene Robertson and Lisa Nakamura in British Columbia.)

To the more than one hundred court staff and service providers who sat down to be interviewed for this sudy, and the 259 self-represented litigants who participated in interviews and/or focus groups interviews – I sincerely hope that I have been able to accurately capture your perspectives here.

I am extremely grateful to my Project team – Raman Pandher, Lois Li, Kyla Fair and Cynthia Eagan – for all their hard work and dedication to this undertaking. Thuy Bin-Shiu dealt with many aspects of the Project finances, and fielded innumerable calls from people looking for “that Ontario professor doing the study.” Finally, Sue Rice, the Project Co-ordinator, has been absolutely pivotal in creating the conditions for this research and providing organizational and creative support throughout. This really was a team effort - thank you all.

Julie Macfarlane, Kingsville, April 2013

## EXECUTIVE SUMMARY

### Part 1: The study

### 1. Methodology

The goal of this qualitative study was to develop data on the experience of self-represented litigants in three Canadian provinces: Alberta, British Columbia and Ontario. Field sites in each province were used as primary data collection points, but SRL respondents also came via social media and from all over each province. In addition, service providers (court staff, duty counsel, pro bono lawyers, staff in community agencies working with SRL's) were included in the sample. Most respondents (almost 90% of SRL's and 100% of service providers) participated in an in-depth personal interview; the remaining 10% of SRL's participated in a focus group.

### 2. Data sample

259 SRL's from the three provinces participated in either an in-depth personal interview or a focus group. Including follow-up interviews, a total of 283 interviews were conducted with SRL's. In addition 107 interviews were conducted with service providers (defined above).

### 3. SRL demographics

The characteristics of the SRL sample are broadly representative of the general Canadian population. 50% were men and 50% were women. 50% had a university degree. 57% reported income of less than $50,000 a year and 40% (the largest single group) reported incomes of less than $30,000 a year.

60% of the SRL were family litigants and 31% were litigants in civil court (13% in small claims and 18% in general civil). 4% were appearing in tribunals (the remainder were unassigned). The majority of family SRL's were filed in the divorce court (Supreme Court, Queen's Bench or Superior Court) and a smaller number in provincial family court.

### Part 2: Decisions over self-representation

### 4. Motivations

By far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel.
In addition, some SRL respondents were dissatisfied with the legal services that they had received earlier in this case when they were represented by counsel. Their complaints (in their own words) included: counsel "doing nothing"; counsel not interested in settling the

case; difficulty finding counsel to take their case; counsel not listening or explaining; counsel made mistakes/ was not competent.

53% of the sample had been represented by counsel earlier in their action. Three quarters of these had retained a private lawyer, and the remainder had been legally aided, but this was now discontinued. These respondents had exhausted their available resources and were often resentful that despite significant expenditures on private legal services, they were still not at the end of their action. Past experience with legal counsel in an *earlier* case or legal transaction was not dispositive in their decision to self-represent.

Around one in five SRL respondents expressed a personal determination to take their matter forward themselves, as well as acknowledging financial reasons to self-represent. A small number – around than 10% of the sample - expressed confidence from the outset that they could handle their case themselves and saw retaining legal counsel as a poor use of resources when relatively little money was at stake.

### 5. The expectations / experience disconnect

Some SRL's began with a reasonable sense of confidence; others began with trepidation. However within a short time almost all the SRL respondents became disillusioned, frustrated, and in some cases overwhelmed by the complexity of their case and the amount of time it was consuming.

## Part 3: How SRL's engage with the justice system

### 6. SRL's and court forms

While on-line court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and SRL's often find they have made mistakes and omissions. The most common complaints include difficulty knowing which form(s) to use; apparently inconsistent information from court staff/ judges; difficulty with the language used on forms; and the consequences of mistakes including adjournments and more wasted time and stress. These widespread difficulties result in frustration for SRL's and additional burdens on court personnel, including registry staff and judges.

There has been some progress made towards developing user-friendly and simplified court forms, but it is far too little. A number of court staff commented that they (and some lawyers) also had difficulty completing complex and lengthy court forms and keeping up with constant changes. In her assignment to apply for a divorce in the three provinces (The Divorce Applications Project), Kyla Fair also found that even with legal training, the forms were confusing, contained terminology she did not understand, and required an enormous amount of work and concentration.

Court guides are an important step towards assisting SRL's complete forms and understand court procedure but these too are often written in a confusing and complex

manner. In her "audit" of three sample Court Guides, Cynthia Eagan found problems very similar to those highlighted above by SRL's regarding court forms (see (7) below).

## 7. On-line resources for SRL's

A large amount of the assistance presently made available to SRL's by the courts (and some service providers) is in the form of on-line information and related technologies (on-line forms, informational websites, and some video material). New initiatives in programming and support for SRL's in both Canada and the United States are largely based on the premise that access to the Internet can promote access to justice for SRL's. While many of these initiatives are in relatively early stages of development, this study suggests there are significant limitations and deficiencies to this material. On-line resources often require some level of understanding and knowledge in order to be able to make best use of them.

SRL's who anticipated that the proliferation of on-line resources would enable them to represent themselves successfully became disillusioned and disappointed once they began to try to work with what is presently available on-line. In particular, they identified the following weaknesses: an emphasis on substantive legal information and an absence of information on practical tasks like filing or serving, advice on negotiation or a strategy for talking to the other side, presentation techniques, or even legal procedure; often directed them to other sites (sometimes with broken links) with inconsistent information; and multiplicity of sites with no means of differentiating which is the most "legitimate". Cynthia Eagan found many of the same problems when she audited a selection of on-line Court Guides (The Court Guides Assessment project). Cynthia also highlighted the reading levels of some of this material (as high as 13.5), and the heavy use of jargon and unexplained legal terms.

The study data also shows that no matter how complete, comprehensive and user-friendly (standards we are still far from meeting), on-line resources are insufficient to meet SRL needs for face-to-face orientation, education and other support. Enhanced on-line technologies can be an important component of SRL programming – for example the development of sites developed specifically for SRL's making use of interactive technology - but cannot provide a complete service.

## 8. Legal information for SRL's

It is clear that many SRL's are eager to access further and better sources of legal information. SRL's in the study frequently described themselves as seeking "guidance" rather than "direction". This suggests that the expansion of legal information services (along with the clarification of the legal information/ legal advice distinction, below) has the potential to relieve pressure on more costly public legal services such as duty counsel.

The most common source of legal information for SRL's are court staff, primarily those working at the registry counters but also staff working in court programs such as Pro Bono Ontario, FLIC & LinC in Alberta, and the Justice Access Centres in British Columbia. These excellent services are not always clearly "signposted" in the courthouse or on the

courthouse website; as a consequence some SRL's appeared to have missed the opportunity to use these programs (this was also a problem for mediation services; see below at (9)). SRL's consistently described staff working in these locations as the "most helpful" person they encountered during their SRL experience. However they also complained about the restrictions on the time and scope of information that these staff can offer, because of the limitation on their providing "legal advice" (which results in substantial personal discretion, which some SRL's are better at exploiting than others) or because of the sheer volume of people they are dealing with.

The distinction between legal information/ legal advice which lies at the heart of the job descriptions of staff working on the court counters and in information services is consistently complained about by both SRL's and staff, as at best unclear and at worst practically unworkable. The present situation places an unfair burden on court staff who are required to make constant determinations of how much information they can provide to frustrated SRL's. This leads to inconsistent applications and creates a barrier between SRL's and certain basic information that may be construed as "legal advice".

Court and agency staff providing legal information to SRL's described an almost identical set of frustrations and challenges to SRL respondents. They also accurately identified the primary frustrations and challenges of the SRL's. Court and agency staff are working under enormous pressure in dealing with the growing SRL population and constantly changing court forms and procedures. These are very stressful jobs, for which they are often poorly trained and remunerated.

## 9. Other support & resources for SRL's

Service providers universally recognized the frustrations of SRL's as a source of pressure on the justice system in general, and on court staff and judicial officers in particular. Improving the experience for SRL's by developing low cost support services for them has the potential to both improve the efficiency and enhance the morale of the entire justice system. SRL's talked about a variety of "non-legal" services that they needed but either were not currently available to them, or did not meet their needs.

SRL's particularly identified the need for orientation and education (aside from legal training) to enable them to better anticipate and plan for what is involved in self-representation. While this study did not evaluate the effectiveness of existing mandatory education programs (eg Parenting After Separation, MIPS), it is clear that many SRL's are looking for different forms of educational workshops to prepare them for the SRL experience. In particular, they are asking for practical tools and skills that they can apply in practice.

SRL's also described a need for one-on-one assistance in the form of "coaching" (eg document review, answering questions) which support them in handling their own case but also provide checks, as well as moral support. For many SRL's who wish to remain in control of their own case, coaching would be an important resource.

A significant number of SRL's say that they were never offered mediation, and/or do not know what it is. This is a clear gap that needs to be urgently addressed (for example in educational workshops and better publicity). Some SRL's were nervous about participating in mediation, and especially where there was a lawyer representing the other side. Some SRL's who were eager to resolve their case expressed frustration that the Bench did not exercise greater pressure on a recalcitrant opposing side to come to mediation.

At present many SRL's bring friends and/or family members with them to the courthouse for moral support, especially on appearance days. There is a great deal of confusion and inconsistency surrounding the role of friends or supporters of SRL's, as well as the potential for an unrepresented person to being a McKenzie friend into the courtroom. This lack of clarity and the wide exercise of discretion by some judges is creating resentment and confusion

Finally, many SRL's do not have access to the types of office facilities that they require in order to represent themselves, including printing services, photocopying facilities and even computers. Some services are presently provided by counter staff (informally) or overburdened court-based programming.

## Part 4: SRL's, Lawyers and Judges

### 10. Delivering legal services to SRL's

This study shows clearly (and consistent with other recent studies) that the primary reason for self-representation is financial. Many SRL's find that the legal services that they can realistically afford to pay for, and/ or prioritize as an area in which they want assistance, are simply not available to them other than in a traditional legal services model. Financial retainers and services billed at a rate of $350-400 an hour are beyond the means of many Canadians. 53% of the SRL sample who were willing to pay for counsel at first later ran out of funds and/or exhausted their willingness to continue to pay for legal services.

86% of the SRL sample sought legal counsel, either in the form of private legal services of legally aided/ *pro bono* assistance. SRL's are not saying that they do not want lawyers to help them – but that the way in which lawyers are currently offering their services does not fit within their budget. Some are also saying that they prefer to have more control over the progression of their case and resist the traditional assumption of professional control by their lawyer.

Other complaints made consistently by some SRL's who had previously been represented in this action included: counsel "doing nothing", and no progress being made; counsel being disinterested in settlement possibilities and processes (including mediation); counsel not listening to them or consulting them in decision-making; and a sense that their lawyer was insufficiently familiar in the relevant area of law to be effective as counsel. A further complaint was that lawyers were not truly accountable to the public, and that

efforts to question their competence were often not taken seriously by the courts or the regulators.

When asked in interviews what they would ask a lawyer to do for them now, assuming that they could be provided with an affordable and competent counsel, some SRL's said that they were no longer interested in working with a lawyer. This was usually the result of a negative experience with a legal representative earlier in this action, and their determination now to manage their case themselves. Many more SRL's responded that they would prefer to have legal counsel, if this was affordable, offered them tangible value-for-money as they understood this (ie expertise they lacked and the prospect of a better outcome), and would allow them to remain in control of major decisions about the direction and conclusion of their case.

While many SRL's appreciated the assistance they received from duty counsel or other *pro bono* legal services, the study also found dissatisfaction with the most common model of delivery ie the summary legal advice model. While this model works well for some SRL's, others find a time limited opportunity to speak with legal counsel leaves them more confused, and even panicked, than before. At the same time, court duty counsel models are in serious overload. For both reasons, there is a need for reassessment of how to offer the maximum value to the maximum number of SRL's via the summary advice model.

Respondents frequently questioned the limitations placed on the provision of assistance by para-legals, especially in relation to family matters.

Finally, many SRL's sought some type of "unbundled" legal services from legal counsel; for example, assistance with document review, writing a letter, or appearing in court. Relatively few were successful in accessing legal services on this basis despite a sustained effort. This was perplexing to many respondents, who could not afford to pay a traditional retainer and envisaged that they could undertake some parts of the necessary work themselves, with assistance.

## 11. Court appearances and interactions with judges

The influx of SRL's into the family and civil courts has dramatically altered the judicial role. Judges, especially in family court, now find themselves dealing with SRL's as often as with lawyers representing clients. This is a huge sea change that some members of the judiciary are clearly adjusting to better than others. The study data is replete with SRL descriptions of negative experiences with judges, some of which suggest basic incivility and rudeness. There are also some examples of judicial interventions such as providing advice regarding court procedure, coaching on presentation, and progress towards settlement, which attract positive comments from SRL's. Other studies show that judges are concerned about showing "favour" towards SRL's and find themselves in a difficult position when one side is represented by counsel, and the other is not.

Most SRL's saw numerous judges during the progress of their case, and many complained that this created inconsistencies and required them to re-establish their credibility at each

appearance. Very few SRL's experienced single judge case management but those who did were far more satisfied with their overall experience.

There was a very widespread sentiment amoung SRL's that judges are not truly accountable and that the current mechanism for bringing forward a complaint against a judge is highly protective of the judiciary.

## 12. Social impact and consequences

The study data illustrates a range of negative consequences experienced by SRL's as a result of representing themselves. These include depletion of personal funds and savings for other purposes; instability or loss of employment caused by the amount of time required to manage their legal case; social and emotional isolation from friends and family as the case becomes increasingly complex and overwhelming; and a myriad of health issues both physical and emotionally.

The scale and frequency of these individually experienced consequences represent a social problem on a scale that requires our recognition and attention. The costs are as yet unknown.

Preliminary Recommendations based on these findings are included at the end of this Report.

## Part One: The Study and the Sample

### 1. Study Methodology

#### a. Background

There have been dramatic increases in the numbers of people representing (self-represented litigants or SRL's) themselves in family and civil court over the past decade, across North America. In some family courts this number now reaches to 80% and is consistently 60-65% at the time of filing.[1]

The impetus for this study came from these startling statistics. It also came from two other realizations following review of the existing literature and research on SRL's in North America and elsewhere. The first was that the majority of this literature documented the perspectives and views of judges and lawyers (ie system insiders and experts). Judges and lawyers were not included in this study not because their perspectives are not important and valuable, but because they have already been the subject of several other major studies[2]. In contrast, the perspective of SRL's themselves and their actual experiences is mostly absent from other studies. Those studies that have gathered information about SRL's are either closed-question surveys (often focusing on demographics) and/or small samples[3]. As a result, the SRL experience to date has been largely a subject of speculation rather than empirical data.

A second realization was that policy is being made on the basis of very little empirical information from SRL's about their needs and challenges in navigating court processes. An initial review of SRL programming revealed that the focus of most new initiatives being developed across North America is to offer SRL's more on-line resources – forms that can be completed on-line, on-line websites and information. While these initiatives are an important part of responding to the phenomenonal growth in the number of SRL's, it seemed questionable that such a heavy and singular emphasis should be placed on these types of resources, particularly in the absence of SRL input on what services and resources they actually needed and wanted. It seemed to be time to focus our attention on SRL's themselves, and their own accounts of their experiences, on the basis that "(P)ublic views…are one factor that needs to be considered when thinking about policy change." [4]

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[1] For further details, see (3)(a)&(b) below

[2] For example, Bertrand, L. Paetsch, J. Bala, N. & Birbaum, R. "Self-Represented Litigants in Family Disputes; Views of Alberta Lawyers" Canadian Research Institute for Law and the Family, Calgary, Alberta. http://people.ucalgary.ca/~crilf/publications/Self-reps_Report_Final_Dec2012.pdf; Birnbaum, R. & Bala, N.. "Views of Ontario Lawyers on Family Litigants without Representation" 65, University of New Brunswick Law Journal (2013) 99. Bala and Birbaum also surveyed 54 Canadian judges.,

[3] For example, Self-Represented Litigants in Nova Scotia: Needs Assessment Study March 2004, Paton A. & Withrop Y.; The Alberta Legal Services Mapping Project,: An Overview of Findings from the Eleven Judicial Districts Mary Strachan for the Canadian Civil Justice Forum, 2011; Birnbaum R. & Bala N. "Experiences of Ontario Family Litigants with Self-Representation") available at www.probonostudents.ca (the latter contains the most diverse data previously gathered about Canadian SRL's using a survey methodology).

[4] Tyler, T. with Zimerman N. "Between Access to Justice and Access to Counsel: A Psychological Perspective" 37 Fordham Urban Law Journal (2010) 473 at 474

### a. A note on terminology

The use of the term "self-represented litigant" or SRL is used throughout this Report and is preferred to "unrepresented" or the more traditional "litigant in person". The term "unrepresented" suggests a level of intention and choice to appear without a lawyer that mischaracterizes the motives of the vast majority of the respondents in this study[5]. The decision to adopt the term "self-represented" as a generic term throughout this Report reflects the conclusions of the Lord Chancellor's Civil Justice Council Working Group in the United Kingdom which rejected the use of the term "unrepresented", saying that it assumes that the norm is representation by lawyers[6]. This assumption can no longer be made.

### c. Study objectives

The purpose of this study was to enter the world of the SRL's, and understand the experience of self-representation through their eyes. This meant collecting extremely detailed narratives directly from SRL's about all aspects of their experience from beginning to end (or, to date).

The study aimed to collect data to answer the following questions from individuals representing themselves in either family or civil[7] court[8]:

i. Why are they representing themselves?
ii. What were their initial expectations and how far are these realized by their experience?
iii. Have they explored alternatives to court?
iv. What resources (on-line, paper, people, other) do they use and how helpful are they?
v. What is their experience of their reception and treatment by judges, lawyers, and court staff?
vi. What course does their progress through the legal process take? (eg filing, service, settlement conferences, mediation, hearings, trial)
vii. What is the (financial, emotional, practical) impact on them of self-representing?
viii. What, in their view, needs to change about the system in order to improve their experience as a SRL?

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[5] See further detail below at (4)
[6] Lord Chancellor's Civil Justice Council Working Group, Access to Justice for Litigants in Person, 2011 at chapter 3 paras 23-25
[7] Including but not limited to small claims court, where the upper limit is now $25,000 in all three participating provinces
[8] While there are growing numbers of SRL's in criminal court (see for example "Court Side Study of Adult Unrepresented Accused in the Provincial Criminal Courts" Robert G. Hann, R. Meredith, C. Nuffield J. and Svoboda M. available at http://www.justice.gc.ca/eng/pi/rs/rep-rap/2003/rr03_la2-rr03_aj2/p1.html) , the very different narrative of a criminal defendant from a family or civil litigant suggested the importance of excluding this group from the sample. A few criminal SRL's contacted the Project, but we declined to interview them.

While this study was not designed as a program evaluation of services available to family and civil SRL's in either the courts or the community, a related objective was to develop a picture of the types of services and support that SRL's found valuable. To meet this objective, interviews were also conducted with those offering assistance in a variety of capacities and from various skill sets to SRL's (for example, registry staff, mediators, staff providing legal information, duty counsel, lawyers providing legal advice via community clinics and other programs, para-legals). The study sought out individuals working on the "front lines" of the SRL explosion, such as the staff of services like the Justice Access Centres in British Columbia, the LinC centres in Alberta and the Pro Bono centres in Ontario. These individuals are often not legally trained and qualified and work in fairly low status and poorly remunerated positions.

In this Report these individuals are called "service providers". While these interviews were a secondary focus (more than two thirds of interviews were conducted with SRL's) they offer important insights into working "in the trenches" with SRL's and are integrated into the study findings below.

259 SRL's from the three provinces participated in the study. This includes individuals who participated in a focus group, as well as those who were interviewed in person and by telephone. 230 SRL's provided complete demographic data (below).

Most respondents (almost 90% of SRL's and 100% of service providers) participated in an in-depth personal interview, and the remaining 10% of SRL's participated in a focus group.

When follow-up interviews are included, a total of 283 interviews were conducted with SRL's. A further 107 interviews were conducted with service providers (see **Appendix A**)

### d. Research design

#### *i. Selection of the field sites*

The first step in research design was the identification of courthouse sites in the three participating provinces. Three sites were selected in each province[9] to reflect a range of prospective respondent demographics, to include at least one rural and one urban site and to capture some racial and ethnic diversity. Justice ministry staff in each province played an active role in identifying potential sites and facilitating introductions to the courthouse managers. The final list of all sites in all provinces is included at **Appendix B**.

Unfortunately we encountered some difficulties with accessing the selected courthouse sites in Ontario. One of the sites initially selected in consultation with the

[9] In Alberta we were asked by the Law Foundation of Alberta to add Lethbridge as an additional field site. In British Columbia, Vancouver effectively functioned as a fourth field site, with the Project material was displayed at the Robson Street courthouse Justice Access Centre.

Ontario MAG was apparently unable to facilitate our access following an initial field site visit and so no SRL focus groups were conducted there (although some court staff interviews were conducted on the first visit). Three other courthouses approached by the ministry were reluctant to display the project information on their counters. Finally we were able to work very successfully with two of the busiest courthouses in Toronto, and held focus groups there in the Fall of 2012.

The courthouse sites were intended to serve as the primary means of developing the sample group (of both SRL's and service providers) in each province. It was also anticipated that over time, respondents in other locations would hear about the Project and contact us. This is exactly what happened. The Project received considerable media attention in each province and as a result, SRL respondents came forward from towns and cities all over each province.

*ii. Establishing the field sites*

Once each field site was identified and initial contact established between the Principal Investigator[10] and the courthouse manager, Project materials (flyers and posters explaining the Project and giving the Project website and toll-free line for contact) were mailed to the courthouse for display at the registry counters. The managers at each field site were extremely supportive in ensuring that the Project material was prominently displayed, and asking their staff to facilitate access to these materials. A French and a Punjabi version of the Project poster was also printed for display at some field sites on their request.

At each site, contact was also established with local programs and services for SRL's – from specialized programs such as the local LinC or Family Mediation program, to other social programming that would likely see SRL's such as the local library, food bank, services for new immigrants, women's groups and men's groups. These contacts lead to both increased publicity for the Project (when the agency displayed our material in their facilities) and also introduced us to other service providers.

Following this initial contact, two visits were paid to each field site (with the exception of the later added Ontario sites and the later added Alberta site, where the work described below was compacted into one longer visit).

*1. First site visit*

On the first visit to each field site, the Principal Investigator (and in some cases the Project Co-ordinator[11]) met with the courthouse manager(s) in order to introduce ourselves in person. We described and answered questions about the Project. The managers were then interviewed using the interview template for service providers (**Appendix C**). This is a semi-structured interview template that focuses on a few key

[10] Dr Julie Macfarlane
[11] Sue Rice

questions for this group including the pace and impact of change within the SRL population, the impact on their services, and their frustrations and challenges in working with SRL's.

Following these meetings and interviews with managers, we then (by prior arrangement with the managers) interviewed registry staff, as well as (where possible) service providers located in the courthouse (for example staff at Family Law Information Centres in Alberta, Justice Access Centres in British Columbia, or Pro Bono Ontario in Ontario, as well as with court duty counsel). Where possible on this first visit, we also met with and interviewed service providers outside the courthouse who deal regularly with SRL's (for example staff at Family Justice Centres in British Columbia, citizens advocacy and advice services, Native Friendship Centres, domestic violence support services etc).

*2. Second site visit*

Prior to the second visit to each site, we used local media and publicity in the courthouses to advertise SRL focus groups. The focus groups aimed to generate an initial conversation about participants' experiences as family or civil SRL's, and to encourage them to participate further in the study via a personal interview.

Up to four focus groups were held on the second field site visit. Focus group discussions were structured around five key questions (**Appendix D**). Contemporaneous notes were taken. Participants were asked to complete a short sheet of demographics[12] and the focus group transcript could then link a speaker to these details for inclusion in the Project database.

All focus group participants were offered the opportunity to complete a more detailed SRL personal interview. Many of the focus groups were small enough for us to conduct these more detailed personal interviews on-the-spot using the full SRL interview template (**Appendix E**), either one-on-one, or in very small groups where participants were comfortable speaking about their experiences in more detail in front of others.

Further service provider interviews (especially off-site in the local community) were conducted during the second site visit.

*iii. Building the sample*

We were fortunate to receive a great deal of local media attention in almost every field site and following both the first and second visits, the Project heard from many more SRL's (as well as some service providers) wishing to participate in the study. Many of these participants came via the Project website, with the remainder via the Project toll-free line (see data collection strategies, below at (e)). The level of interest in participating in the study was very high – some weeks it felt almost overwhelming. We undertook to respond to everyone who contacted us via either the website and the toll-free line and scheduled up

[12] The same information captured in interviews from SRL's – see Appendix E. This captured potentially significant respondent variables including gender, income levels, education, prior experience of legal representation

to four telephone interviews (almost all conducted by the Principal Investigator) a day during the busiest periods.

Interviews lasted between 45 minutes and one hour but sometimes ran as long as 90 minutes. 90% of the personal one-on-one interviews were conducted by the Principal Investigator, Dr Macfarlane. The remaining 10% were conducted by Sue Rice, the Project Co-ordinator and Kyla Fair, the Project Research Assistant while Dr Macfarlane was on vacation for three weeks. Both were first trained and supervised by Dr Macfarlane to ensure consistency. Dr Macfarlane (with the assistance of Sue Rice) also conducted almost all the focus groups[13].

Some respondents whose cases were ongoing were re-contacted six to eight weeks after their initial interview and offered the chance to update their file by email communication or to take part in another personal interview. Both follow-up interviews and email communications were added to their file in the Project database.

*iv. Other sampling questions*

A decision was made at an early stage not to develop a control group as part of the sample design. In a qualitative study of this kind it is extremely difficult to establish a truly comparative sample (for example holding constant variables such as dispute type, money at stake, individual parties etc).

It is extremely challenging to ensure a "pure" randomized sample, given the reliance on voluntary participation. Instead the research sample was developed via a range of communication strategies including social media. In a qualitative study of this kind, which demands a considerable investment of time by respondents, voluntary opt-in is the only feasible design.

Given this constraint, the way in which the sample was collected supports the assertion that the study sample was effectively randomized as a result of the myriad points of entry. Whereas five years ago we might have used a targeted mail out (eg to named individuals who filed as SRL's) to ensure a more traditionally solicited sample, the pervasiveness of Internet access in Canada[14] plus the use of widely displayed print materials and the Project toll-free line allowed very widespread access to the study. This was evidenced in the enormous number of enquiries that we received throughout the data collection phase and continue to receive on a daily basis and to date.

[13] One additional focus group was conducted by Bernie Mayer and Michael Dwyer in Victoria on September 19th, 2012

[14] In 2010 Statistics Canada estimated that 79% of Canadian households had Internet access. These figures are somewhat higher in urban centres than more rural and isolated communities, borne out by our experience in the course of this research. It is also notable that this figure drops to 54% for households with an annual income of less than $30,000 (40% of the SRL sample see below at). See http://www.statcan.gc.ca/daily-quotidien/110525/dq110525b-eng.htm. Further, almost 90% of the SRL sample reported in interviews that they were comfortable using the Internet to conduct research for their case.

### e. Further data collection strategies

Flyers and posters describing the Project to SRL's in family and civil court and soliciting their participation were created and printed (in a different color and listing the field sites for each province). This material made it clear that a SRL in family or civil court from anywhere in the province might also participate. The Project website and toll-free line were provided on the flyers and posters.

A Webmaster (Lois Li) was hired to build and maintain the Project website (www.representing-yourself.org) which was to become a critical element in outreach to SRL's. 43% of SRL respondents came through the Project website. The site email linked directly to the personal email of the Principal Investigator and the Project Co-ordinator and enabled the Project Co-ordinator to then schedule) interviews.

The website also carried details of the field sites in each province and included a listing of local resources for SRL's. In this way we could offer some practical assistance to the SRL's who visited the website as well as solicit their participation in the study. The website has also enabled us to post links to media coverage of the Project.

Initial discussions with court staff in some of the more remote field sites resulted in a realization that the Project also needed to provide a toll-free line for those without Internet access. A toll-free line was set up in March 2012 with a message asking people to leave their details so that we could respond to them. The toll-free line was in place until January 4, 2013, and checked daily for new messages, which were then returned and an interview scheduled. 27% of SRL respondents came via the toll –free line.

In May 2012 we launched a Facebook page (Representing-Yourself-in-a-Legal-Process) in order to build an on-line community for SRL's and enable us to communicate with and reach out to SRL's. It was made clear that comments and debate would be captured (and anonymized) for the Project database. The Facebook page now has more than 160 members, and has become very significant in the development of the Project. Every couple of weeks we have posted a "Question of the Week" for discussion - for example, a link to an article about self-representation, or a question about people's experiences both positive and negative, or a question about future reforms. This has produced a lively dialogue.

Finally, a project blog (www.wordpress/drjuliemacfarlane) was luanched in August 2012. This is linked to Twitter and has attracted a number of followers and many comments

### f. The Project database

All interviews and focus groups were contemporaneously noted, with an emphasis on collecting as many complete verbatim quotes as possible. These Word files were then

entered into the NVivo program for coding and analysis. NVivo (produced by QSR International) is coding software used widely by qualitative researchers which has become an "industry standard" over rhe past decade.

A file was created for each SRL and each service provider whom we interviewed or spoke to in a focus group. These files initially comprised the (contemporaneously noted) transcript of that discussion. SRL files were frequently electronically updated with subsequent email communications and in some cases, a full follow-up interview. Where a previously interviewed SRL contributed to a Facebook page discussion, this was also added into their file. Comments made by a SRL who had not been interviewed via Facebook, were held in a separate section of the database. Interviews were then anonymized and are identified in this Report by either these numeric/alphabetic codes or by a specially created pseudonym (in this Report).

The resulting database is very large. The SRL interviews and focus group transcripts, Facebook commentary, and service provider interviews were separated into different source sections in the database allowing us to manipulate the data across and within these sections. This work was managed by Raman Pandher, under the supervision of the Principal Investigator.

An initial set of codes (described in the NVivo program as "nodes") were created by the Principal Investigator for the SRL interviews and another set of codes for the service provider interviews. Raman began the detailed process of adding these codes to selected text in the files, line-by-line. After the first 20 files had been coded in each section, we reviewed the codes and added some new ones while merging others. The same process was repeated after Raman had coded another 20 files. This brought us to a settled set of codes for each section – SRL's and service providers. The complete list of final codes is provided at **Appendix F** (SRL Interview Codes) and **Appendix G** (Service Provider Interview Codes). Raman then went back to the beginning and coded all files in each section using these codes.

In addition NVivo allows each file to have a number of variables attached, allowing for sorting and correlations among these, and among variables and codes. This is where the demographics collected for the SRL's were entered and enable the demographic analysis of the SRL sample presented at (2) below.

### g. Methodological and sampling strengths and limitations

Qualitative research has much to recommend it when exploring a topic that implicates personal, subjective experiences (here the experience of self representation), including being able to remain open-minded about what one will discover without *a priori* assumptions. The depth and complexity of data collected in interviews and focus groups has many advantages over information collected via quantitative methods such as closed question surveys. In-depth interviewing with subjects about their experiences can quickly produce patterns and consistent themes. Many important and influential qualitative

studies rely on sample sizes of a few dozen. This study has a very large sample (a total of almost 400 interviews) for a qualitative study.

Moreover, the consistency with which the themes emerge from coding both the SRL and the service provider data is extremely high. In addition and interestingly, service provider data (for example, how service providers describe the expectations and frustration of SRL's) mirrors SRL responses to these same questions in interviews, providing important triangulation.

The demographic data collected from SRL's is described in detail at (2) below. The results are consistent among the three provinces with no significant differences. The study reached a wide range of individuals in both urban and more rural communities who are representing themselves in court. The sample broke down almost exactly 50/50 male/female, and contains a reasonable range of socio-economic and educational variables (subject to the caveat that research studies tend to attract a more educated demographic, see below). The breakdown between family and civil litigants also reflects the general trend.

The sample did not record race or ethnicity. It is not possible therefore to estimate how much or little representation the SRL sample includes of people of color and First Nations people. In several sites extensive efforts were made to connect to the First Nations community, by talking with Native Court Workers, displaying information at Native Friendship Centres and other First Nations agencies. In one case, a field site court worker took Project materials on to local reservations where she spoke about the Project. Nonetheless, we believe the representation of First Nations people is very small in the sample. This is regrettable since many First Nations people find themselves self-representing – in fact the best way we found to connect to these individuals was always by meeting them in the courthouses. Judging by the compoisiton of the focus groups, racial diversity may also be limited.

Qualitative research of this kind does not aim to produce statistically significant findings (the purview of a high volume quantitative study). This means that the findings that are presented below are only occasionally presented in terms of raw numbers or proportions. Many of the themes that the interviews reveal are multi-layered and interwoven, and attaching numbers or percentages to the study findings would be misleading. Instead, in common with practice for the presentation of qualitative research, the term "many" denotes a finding that emerges from more than half the interviews, "most" denotes a finding that emerges from more than three quarters of the interviews, and "some" denotes a finding that, although a common theme, emerges from less than half but more than one quarter of the interviews. Where the Report refers only to "a few" this references a group smaller than one quarter of the sample, but may contain an important and strongly expressed perspective.

Given the context of this research in exploring (in the case of more than 50% of the SRL sample) professional relationships between lawyers and clients, and in almost all cases the interaction of SRL's with members of the judiciary, another important

qualification is appropriate. Clearly, the descriptions that SRL's provide in interviews of their experiences with both legal counsel and judges reflect their subjective perceptions and understanding of what occurred in that relationship or interaction. It is not presented here as "fact" or "reality".

How individuals make sense of their experience is at the heart of the qualitative endeavor. It is important not to dismiss qualitative findings as "only" the subjective "misperceptions and misunderstandings" of lay litigants. That would miss the point. What is more important here is the volume of the study data, the rigor of the data analysis and the consistency of the findings that emerges from this study of the complex and changing relationship between the users of the Canadian justice system and the system insiders (lawyers, judges, court staff).

### 2. SRL Sample Analysis

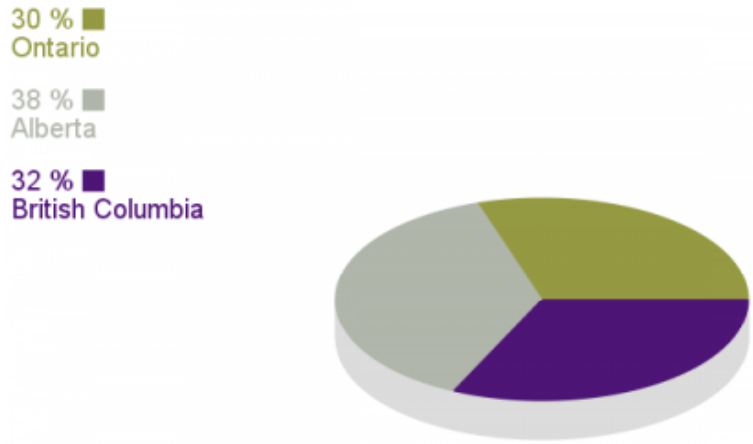
259 SRL's from the three provinces participated in the study. This includes individuals who participated in a focus group, as well as those who were interviewed in person or by telephone. 230 SRL's provided complete demographic data (below). A total of 283 interviews were conducted with SRL's. This number includes follow up and secondary interviews (including follow up interviews with focus group participants), but does not include other forms of informal subsequent communication (eg email). The total interview numbers are provided at **Appendix A.**

27% of the SRL respondents came through the toll free line, and 43% via the project email/ website. The remaining 30% of the sample either attended focus groups at the courthouses, joined the Facebook group and then participated in an interview, or contacted us directly following local publicity.

#### a. SRL's by province

The number of SRL respondents in British Columbia and Alberta was slightly higher than in Ontario, probably a result of the difficulty accessing courthouse sites in Ontario and the shorter data collection period. Nonetheless, Ontario respondents still constitute almost a third of the total SRL data collected (Fig 1 below). In addition, a slightly higher number of service providers were interviewed in Ontario than in the other two provinces (below).

*Fig 1: SRL's by province*




By the end of the study, the field sites in British Columbia and Alberta had provided the majority of SRL's respondents in each of these provinces, with a smaller but significant group from "other" provincial locations. These were SRL's who had heard an item on the radio about the Project, or read about it in the newspaper, or who had happened upon the Project website.

In Ontario, SRL respondents from courthouses "other" than the primary three were close in number to those from the field sites. This was probably the result of the time spent trying to secure a third site in Ontario (above) while publicity and media interest reached people in other parts of the province[15]. A complete breakdown of SRL respondents by field site and province is included at Appendix A.

### b. SRL's by court

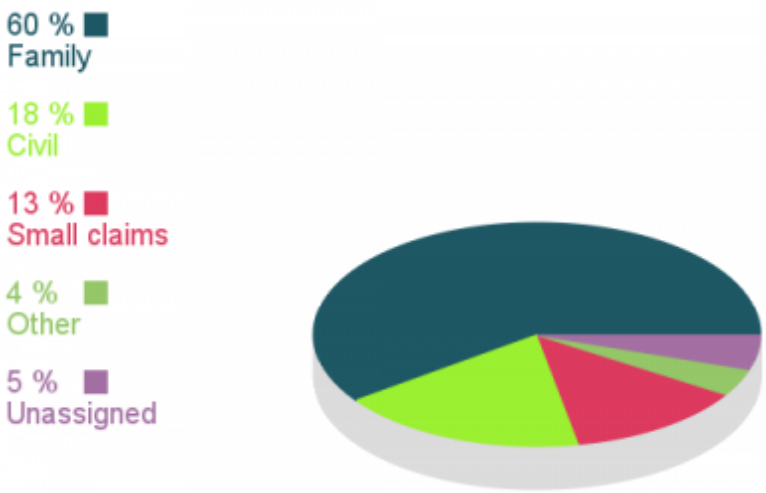
60% of the sample were in family court, either provincial or divorce court. Of this group, a clear majority in each province were filed in the divorce court (65% of BC family SRL's in Supreme, 85% of Alberta family SRL's in Queen's Bench, and 77% of Ontario family SRL's in Superior Court) and a smaller group in provincial family court. The proportions of family / civil/ small claims litigants in each provincial sample group was consistent to within one or two percentage points.

[15] For a complete breakdown of respondents by province and field site, see Appendix A.

The fact that 60% of our sample was appearing in family courts is most likely a reflection of the higher numbers of SRL's in family court compared to other civil courts (above small claims) throughout Canada. For example, in British Columbia 57% of litigants appearing in provincial court under the Family Relations Act (2011 figures) were self-represented, compared with 35% of family litigants in Supreme Court and 21% of general civil litigants in Supreme Court[16]. In Calgary Alberta, 39% of litigants in divorce hearings and 46% of litigants in family proceedings were representing themselves on the day of the hearing, compared with 18% of general civil litigants (also 2011 figures)[17].

18% of the SRL sample was appearing in the first instance civil court in their jurisdiction (Supreme, Superior, Queens Bench). 13% were appearing in small claims courts (up to $25,000) where historically there have been higher numbers of SRL's. A further 9% reported acting as SRL's in tribunals (for example, before provincial Labor Relations Board, provincial Residential Tenancies Tribunals, provincial Human Rights Commissions).

*Fig 2: SRL's by court*




[16] Figures made available to the author by the Ministry of Justice, British Columbia in October 2012
[17] Figures made available to the author by Alberta Justice in October 2012

### c. SRL's by gender

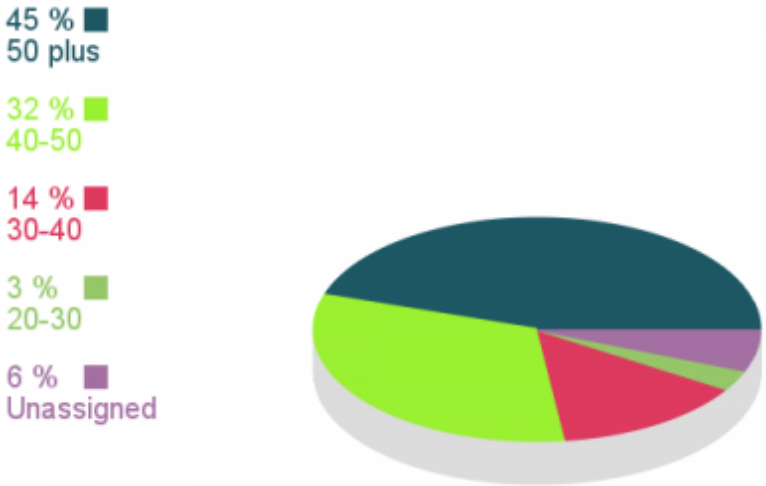
The SRL sample was almost exactly half men and half women (52% and 48% respectively). This was consistent across the three provinces. 63% were acting as plaintiffs or petitioners, and 37% as defendants or respondents. 25% of the cases were concluded at the time of interview, usually fairly recently although a few went back several years. The remaining cases were ongoing and many of these were updated via email, or a secondary interview.

In family court, more men than women were respondents (64% of the men versus 38% of the women) and more women were applicants than men (62% of the women versus 36% of the men). Gender differences also showed up among family court respondents in relation to income (and to a lesser extent in relation to age). 75% of women litigants reported an annual income of under $50,000 compared to 42% of men.

### d. SRL's by age

The largest single group of SRL's by age were the over 50's (45% of the sample). The next largest group was 40-50 (32%). Only 4% of the sample was under 30 year of age. This is consistent with other studies that suggest that SRL's are more often middle aged than young people[18]. The Ontario sample was slightly (but marginally) older than the other two provinces.

*Fig 3: SRL's by age*

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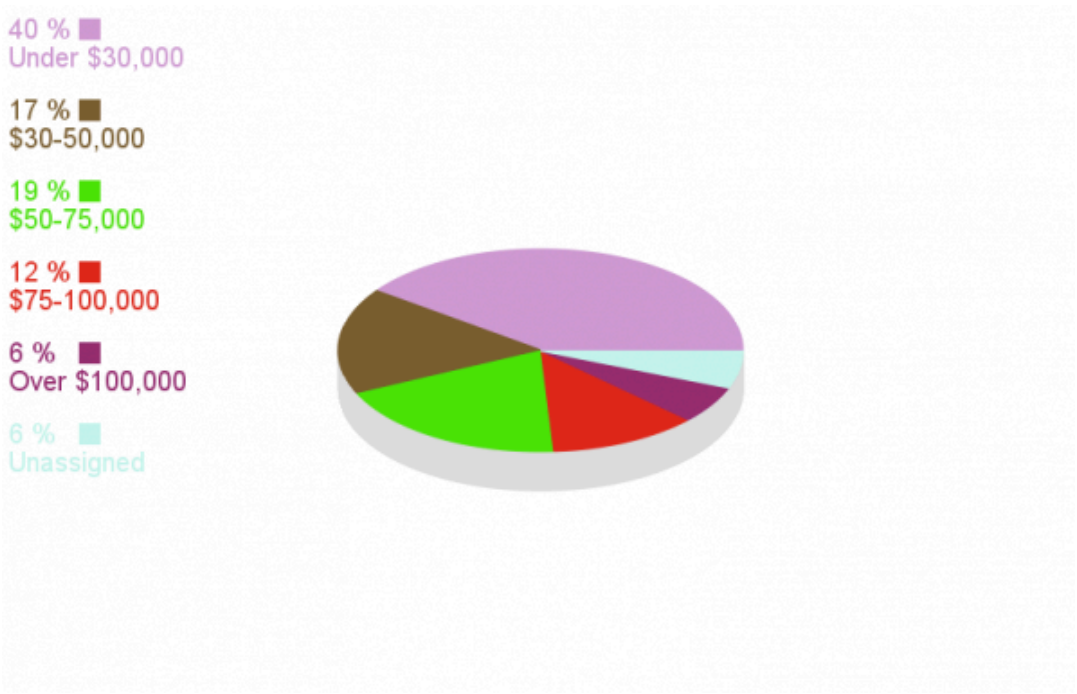
## e. SRL's by income

When it came to income, the most significant cluster (57%) in the SRL sample reported income of less than $50,000 a year and 40% (the largest single group) reported incomes of less than $30,000 a year.

*Fig 4: SRL's by income*




This breakdown of income level was highly consistent among the three provinces.

This data is consistent with other studies that have collected survey type data on SRL income. First, most studies concur that SRL's are more likely to be individuals with lower incomes (below $30-35,000). For example, the British Columbia Supreme Court Self-Help Information Centre Final Evaluation Report (henceforth BC evaluation) reported that 60% of their SRL users had incomes of $2000 a month and under[19]. In a 2004 Nova Scotia study conducted by the Court Services division of the Nova Scotia Department of Justice (henceforth Nova Scotia study), 60% of SRL's had incomes below $30,000[20]. The same study reported that 28% of SRL's that responded to a survey had incomes of between $30-60,000. An early and comprehensive survey of SRL's in the United States, conducted by Bruce Sales, Connie Beck and Richard Haan, for the American Bar Association in 1993 found that half the respondents had incomes under $30,000 and that SRL's in this income

[19] British Columbia Supreme Court Self-Help Information Centre Final Evaluation Report Malcolmson J. & Reid, G., 2006,
[20] Self-Represented Litigants in Nova Scotia: Needs Assessment Study (Department of Justice Court Services Nova Scotia, 2004) at pages 25 -26

range were significantly more likely to self-represent than those in higher income brackets.[21]

However it is also noteworthy that almost 20% of our SRL sample placed their income between $50-75,000 and 12% between $75-100,000. 6% reported that their annual income was more than $100,000. It is noteworthy that many of those in the higher income bands reported spending significant sums on legal fees before becoming self - represented (discussed further below at). The percentage of SRL's falling into a somewhat higher income bracket appears to be larger in this study than in many others (for example, a New York study in 2005 found just 4% of SRL's in family and housing court in New York City earned above $50,000 [22]; the Nova Scotia study found just 10% reporting an income above $60,000[23]), but this might be explained by adjustment for inflation/ regional differences in income. The inclusion of more higher income earners in this study may be a sign of the times, as the overall numbers of SRL's in the justice system grows each year[24].

The number of SRL's in a higher income bracket reported here reflects the growing gap between the means of middle income earners and the affordability of legal services, as well as the phenomenon of "expended resources" – 53% of the SRL sample in this study had previously retained a lawyer to represent them, but had run out of funds to continue to pay them.

### f. SRL's by highest educational level

50% of the SRL sample report having a university degree.

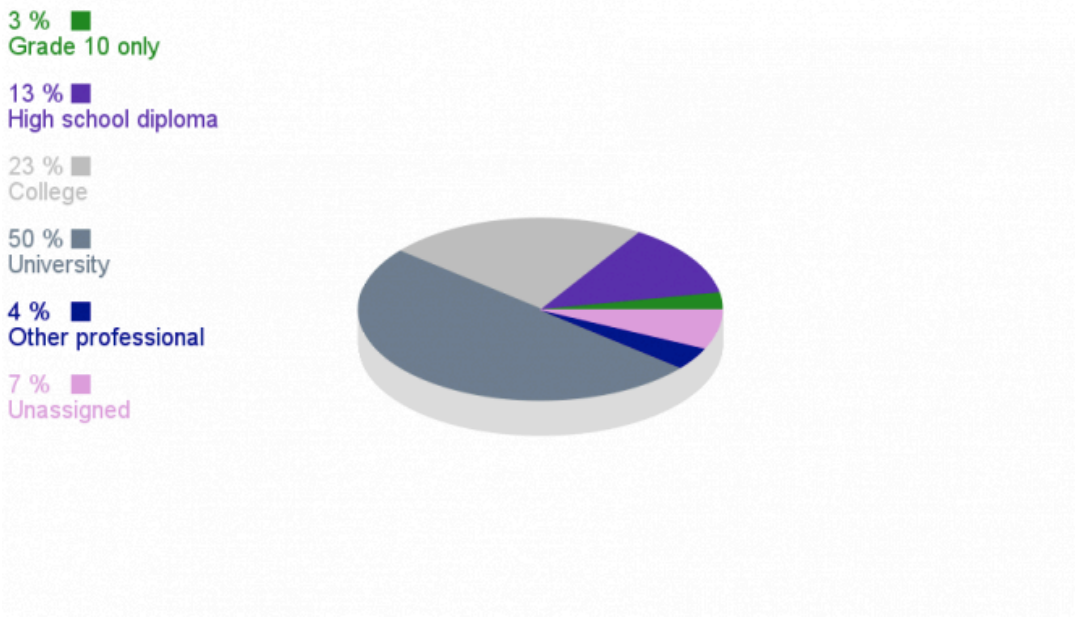
[21] Self-Representation in Divorce Cases: A Report for the ABA Standing Committee on the Delivery of Legal Services, Sales, B., Beck C. and Hann, R. American Bar Association (1993). Note that adjusted for inflation, $30,000 in 1993 would become $43,300 in 2013 (Bank of Canada inflation adjustor)

[22] Self-Represented Litigants: Characteristics Needs and Services – Self-Represented Litigants in the New York City Family Court and the New York City Housing Court, Office of the Deputy Chief Administrative Judge for Justice Initiatives December 2005 at page 4. However note that the New York City Family Court is equivalent to a provincial family jurisdiction ie this court does not grant divorces, so this comparison may be most direct in relation to the (minority) SRL respondents proceeding in provincial court.

[23] See note 20 above at page 26. However note that incomes are generally lower in Nova Scotia than everywhere in Canada aside from PEI (see for example The Chronicle Herald, "Nova Scotians losing the wage race" May 31, 2012)

[24] See further details at (3) below.

*Fig 5: SRL's by highest education level*




This level of respondent education was fairly consistent across the provinces, although the Ontario sample reported a slightly lower level of university education than the other two provinces – at 45% - whereas in Alberta 66% of SRL's reported having a university degree and in BC, 62%. If those with either a college or a university education are combined, 78% fell into this group in Ontario, 76% in Alberta and 83% in BC.

The high level of education reported by the SRL sample may be explained in part by the tendency of voluntary opt-in research studies such as this one to attract participants with a higher level of education and comfort with the idea of a research study[25]. In other Canadian studies, educational levels vary considerably depending on geography. The Nova Scotia study[26] found that 17% of SRL respondents had a university degree, 7% at the graduate level[27]. In the British Columbia study[28], 60% had some form of completed post-secondary education (sub-categories are not provided).

There is also evidence to suggest that the educational demographics of the SRL sample are roughly similar to the general Canadian population. Statistics Canada reported in 2008 that 58% of 25-34 year old across Canada had a tertiary education, and 40% of 55-

[25] Regardless of the study topic or method, participation has been shown to be generally higher among those with higher education than the general population. This is attributed in part to greater faith in research, no matter what the topic, and a greater level of volunteerism in general. See Galea S. & Tracy, M. "Participation Rates in Epidemiologic Studies" 17 Annuals of Epidemiology (9) (2007) 643 at 647

[26] Note 20 above

[27] However tertiary education levels in Nova Scotia are slightly lower than the general Canadian population. See Education Indicators in Canada: An International Perspective (2010) Statistics Canada at page 30.

[28] Note 19 above

64 year olds[29].

The tertiary level education of so many SRL's in the sample may be reflected in their widespread expectation *at the outset* that they would be able to navigate the justice system without legal representation, even though they might have preferred to have counsel. The reality for many however is that despite their prior education and knowledge they still find the system difficult to understand, and far more intellectually and practically challenging than they had initially expected.

Many SRL's commented that if it were so difficult for them, how much more so would it be for others without a similar level of education? Or for an individual for whom English or French is not their first language? 83% of the sample had English or French as a first language. 13 other first languages were represented amongst the sample.

### g. Previous legal representation in this action

At the time of their interview, all the SRL respondents were representing themselves. However more than half – 53% - had retained a lawyer at some point in their case. Three quarters of these had retained a private lawyer (the remainder had been legally aided, but this was now discontinued[30]). A few respondents had gone back and forth with representation, retaining them when they could afford to or were especially anxious about going forward without representation, but became self-represented once again when their funds ran out. This is a significant finding and its implications are discussed further below.

### h. Legal representation of the other party to the action

75% of the SRL's in the sample reported that the other party in their family or civil case was represented by counsel – in other words, that this was a matter in which one side was represented by counsel and the other was not. It was not always clear whether representation by counsel on the other side continued throughout the case – sometimes it seemed that the other side, like the respondent, had counsel make some appearances for them and in other instances they represented themselves. Of the remaining cases, 15% reported that both sides were self -represented (10% were unassigned). Like the other variables reported in this section, this variable is manipulated in the data analysis below to ascertain if it is a significant factor in shaping the particular experience of the SLR.

[29] Education Indicators in Canada: An International Perspective (2010) Statistics Canada at page 30. Note that tertiary education includes college education; 26% of Canadian adults had a college level tertiary education (reported 2006) and 34% of Canadian adults had a university level tertiary education (reported 2007) (at page 16).
[30] See further detail at (4)(a)(ii)

### i. Mental health issues

Researchers elsewehere have found a causal relationship between mental health issues and legal problems[31]. Without the necessary clinical and diagnostic expertise, any reflection on the extent to which mental health issues existed among the SRL sample is, of course, speculative only. That said, the widespread assumption that many SRL's are mentally ill makes it seem important to present a "lay" impression of how many of the respondents in the SRL sample may have been suffering from a mental illness.

A minimum of 45 minutes was spent with each person interviewed – sometimes by phone, sometimes in person – and some interviews lasted much longer (up to 90 minutes). In some cases, there were follow-up interviews and other contacts over email. From this time a sense of the individual's (e.g., stability, consistency, accuracy and emotional lability could be broadly gleaned). It is important to emphasize that this is *not* a diagnostic effort, but a reflection on the part of the interviewer on the stability of the interview subjects.

Of the 259 SRL respondents, just eight individuals stand out as demonstrating enough emotional instability to indicate that they possibly suffered from a mental illness of some kind. None of these respondents are quoted in this Report, although it is interesting to note that many of their insights were fully consistent with other accounts. This figure does not include individuals who were distressed (many were) or depressed (another smaller group) as a result of their experiences as a SRL, including the circumstances that brought them to the courts.

This unscientific assessment suggests that just over 3% of the sample may have been suffering from a mental illness. This is consistent with estimates of the prevalence of mental health problems in the general population that suggests, for example, that 1% of the population suffer from bi-polar disorder and a further 1% from schizopehrenia[32].

The SRL respondents in this study were sometimes distressed and angry about their experiences, but with very few exceptions they were not, insofar as it could be ascertained from limited contact with them, mentally ill. It does not appear, therefore, that the SRL sample in this study was characterized by a higher prevalence of mental illness than the population at large.

## 3. The SRL explosion: how many people are representing themselves in family and civil court?

The numbers are extraordinary.

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[31] See for example Pleasance P and Balmer NJ "Mental Health and the Experience of Social Problems Involving Rights" 16(1) Psychiatry, Psychology and Law (2009). The same article points out the causal connection between experiences of the courts and legal issues and deteriorating mental health. See the further discussion below at (12)(b)

[32] See for example http://www.cmha.ca/media/fast-facts-about-mental-illness

### a. Family court

Figures provided by the provincial ministries of justice show that the proportion of litigants appearing *pro se* in provincial family court is consistently at or above 40%, and in some cases far higher. In proceedings under the Divorce Act, the figures are lower but still significant.

For example,

- In Alberta in 2011, 40% of hearings in provincial court on family matters included one or more SRL's. In the Queen's Bench, the figure was 32%.[33]
- In British Columbia in 2011, 57% of hearings held under the British Columbia Family Relations Act included one or both SRL's. In the British Columbia Supreme Court, self-representation was running at 35%.[34]

In both Alberta and British Columbia the actual number of SRL's is probably yet higher, because this data only reflects whether or not an individual is represented at the time of a hearing – we know from interviews with SRL's and court staff that some SRL's will bring an agent to represent them in a hearing, but otherwise handle their case on their own behalf.

In Ontario, data on representation is recorded at the time of filing. Also unlike the other provinces, the Ontario data combines filings in the Ontario Court of Justice and the Superior Court (ie both family and divorce matters).

- Figures from Ontario show that throughout the whole province in 2011/12, 64% of individuals involved in applications under either the Family Law Act, the Childrens Law Reform Act or the Divorce Act were self-represented at the time of filing. In two of Toronto's busy downtown courthouses, Jarvis Avenue and Sheppard Avenue, the figures were 73% and 74% respectively. These numbers are likely to be an under-estimate since both the SRL sample and court staff attested to the significant number of individuals who begin the legal process with a lawyer, but then become self-represented after expending all their resources and/or becoming dissatisfied with their legal counsel[35].

Data recording strategies in relation to self-representation are just emerging, and the inconsistency among the provinces in the way in which this information is recorded requires immediate attention. This also makes it difficult to accurately pinpoint the timing of the rise in the percentage of SRL's, but many court staff stated in interviews that they believed that the steepest increases occurred up to ten years ago, reflecting the decline in provincial family Legal Aid budgets. What data does exist seems to be largely anecdotal and collected piecemeal by particular judges or lawyers who were concerned at what they were seeing in the courts. For example, Lynne Cohen writing in Canadian Lawyer in 2001

[33] Figures made available to the author by Alberta Justice in October 2012
[34] Figures made available to the author by the British Columbia Ministry of Justice in October 2012
[35] Figures pmade available to the author by the Ontario Ministry of the Attorney-General in October 2012

[36] claims that the number of SRL's in Ontario's Unified Family Court rose by 500 percent between 1995 and 1999. David Tavender, a leading Alberta practitioner, stated at a 2012 conference that the number of parties appearing in Alberta Family Law Chambers who are self-represented has increased 160% since 2006.[37] The precise basis for these claims is not clear but presumably draws on data provided by the courts to these researchers.

In order to get a more detailed picture of the increase in the numbers of SRL's, it is instructive to draw on figures from the California family court system (North America's highest volume jurisdiction) that go back to the 1970's. In 1971, self-represented litigants constituted 1% of all litigants in California family court. By 1992 this had risen to 46% and to 77% by 2000[38]. By 2004, 80% of all cases included at least one SRL by the time of judgment.[39]

### b. Civil court

The same trend is spreading to civil courts, with some lower level civil courts reporting more than 70% of litigants as self represented. This goes much further than small claims courts, which are designed to facilitate simple, speedy and inexpensive resolution and in which litigants have traditionally often represented themselves. However, the rise in the small claims court upper limit to $25,000 in all three participating provinces means that increasingly SRL's in small claims court are managing cases that have previously been handled by legal counsel or para-legals. In British Columbia in 2011, 80% of litigants in small claims court were self-represented at the time of their court appearance.[40]

Self-representation is also growing in the courts of first instance, that is, above the $25,000 boundary[41]. For example in the Ontario Superior Court, figures collected in 1999[42] found SRL's outnumbering represented litigants by 1.6 to 1. That gap will certainly be far larger 12 years on. In the British Columbia Supreme Court, 2011 figures report that 21% of general civil litigants are unrepresented in their appearance before the court, 19% in foreclosure hearings, and perhaps less surprising, 34% of bankruptcy petitions. This can be compared to figures produced by the British Columbia Justice Review Task Force covering two-week periods in 1999-2001 that showed that the number of self-represented

[36] Cohen, L. "Unrepresented Justice" Canadian Lawyer 25:8 (August 2001))
[37] E. David D. Tavender, Q.C. Fraser Milner Casgrain LLP at Pro Bono Law's Meeting with Managing Partners, Calgary, Alberta, March 29, 2012
[38] For a review of this data see Hough, B. "Self-Represented Litigants in Family Law: the Response of California's Courts" 1 California Law Review Circuit (2010). An exhaustive and extensive source of data on SRL levels in US courts is Graecen J. Self-Represented Litigants and Court and Legal Services Response to their Needs: What We Know Center for Children, Families and Court, California Administrative Office of the Courts available at http://www.docstoc.com/do/48509096/Self-Represented-Litigants-and-Court-and-Legal-Services-Responses cs
[39] Judicial Council of California, Statewide Action Plan for Serving Self-Represented Litigants 2 (2004), available at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/Full_Report_comment_chart.pdf.
[40] Figures made available to the author by the Ministry of Justice British Columbia in October 2012
[41] Note that the possibility of raising the small claims limit to $50,000 is under discussion in some provinces.
[42] Lynn Hartwell, "A Profile of the Self-Represented Litigant: Highlights of Some of the Relevant Research" (paper presented to the ACCA Symposium in Winnipeg, April 19 2001 [unpublished]

litigants in the Supreme Court varied from 5.5% to 14.2%[43]. In the Alberta Court of Queen's Bench, 19% of those appearing at civil hearings were representing themselves[44]. A similar trend is spreading to the civil appeal courts, highlighted recently by thr Chief Justice of the Federal Court of Canada[45].

### c. Predispositions towards lawyers and other sources of professional advice

Concern is sometimes expressed that the drop in the number of parties with legal representation reflects a general public malaise towards the legal profession – in short, that SRL's are predisposed to mistrust and even dislike lawyers. There is evidence of general public dissatisfaction and skepticism about the value of *all* professional advice (affected no doubt by the access to information provided by the Internet for which professionals have historically acted as gatekeepers[46]), as well as a general decline in deference towards professional advisors.

Alternatively or as well, the trend away from professional services and towards a "DIY" approach may be more closely related to the availability of information on the Internet, and the growing assumption that this allows for self-help in areas that have previously required professional advice and support, than any particular dislike or mistrust of lawyers. The trend towards "DIY" and cutting out professional advisors has been noted by sociologists (who have dubbed "disintermediation") as operating in a variety of arenas formerly dominated by professional advisors including financial planning[47], real estate and property transactions[48], and law. The result is fewer gatekeepers or "middle men", displaced by the availability of information on the World Wide Web. Some SRL respondents mentioned that they were initially encouraged to believe that they could handle representing themselves because so much information was available on-line; as one put it, "Google is my lawyer."[49] This reinforces the trend towards self-representation because it provides an increasingly normative argument to reject the use of legal counsel.

It seemed important, therefore, to establish what, if any, previous experience and pre-disposition SRL respondents had towards lawyers and legal services. We asked all SRL

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[43] Reported in Unrepresented Litigants Access to Justice Committee Final Report Ministry of Justice and Attorney-General Saskatchewan Final Report at page 26

[44] Figures made available to the author by Justice Alberta in October 2012

[45] Chief Justice Paul Cramopton was quoted describing …"thousands of self-represented litigants flooding his court." See "National Pro Se Network being Weighed" Lawyers Weekly March 01 2013, available at http://www.lawyersweekly.ca/index.php?section=article&articleid=1846&rssid=4Figures from the US show the same trend, for example data from the Administrative Office of the U.S. Courts show that between 1991 and 1993 the number of pro se litigants in the Court of Appeals (Federal Circuit) increased by 49%.

[46] See the analysis and discussion in Macfarlane, J. The New Lawyer: How Settlement is Transforming the Practice of Law University of British Columbia Press 2008 at 59-60, and 126-129

[47] Walker, E. "DIisinternediation and its Effect on the Stability of Savings Capital at Financial Institutions ", Studies in Economics and Finance, Vol. 3 (1979) 63 - 75

[48] Zwiefelhofer D. "Disintermediation - Removing the Real Estate Agent from your Real Estate Sale" available at http://www.realestatereference.com/real_estate_article.php?id=1&real-estate

[49] AB57. The experience of many SRL's as they spent more time exploring on-line resources was often disappointing (see further detail below at (7)(b)).

respondents whether they had retained a lawyer in any *previous matter* (prompting them with, for example, writing your will, or a real estate matter?"[50]). 73% said that they had used a lawyer for a previous dispute or transaction. We then asked these same individuals if they could rank their experience as "mostly positive" ""acceptable, OK" or "mostly negative". Fully one third did not provide this assessment or found it difficult to generalize in this way[51]. Of those who, the largest group (39%) said that their experience had been good or mostly good. A further 25% said that the experience had been "OK", with nothing significant to complain about. 35% said that their experience had been bad or mostly bad.

The results for each SRL respondent were then correlated with whether or not they had originally retained legal counsel in *this* matter. 53% of the SRL sample had previously had legal representation (for the most part a private lawyer; see detail at 4(a)) but by the time they were interviewed, no longer had counsel representing them.

Of the group who had previously worked with a lawyer on a different matter or transaction, two thirds or 66% retained counsel for this action, working with them until the relationship ended and they became self-represented. Of those stating that "mistrust" of a lawyer or lawyers in general was a significant factor in their decision to self-represent[52], only one in five had had prior experience of legal representation.

75 SRL's had worked with legal counsel on a previous matter and provided their assessment ("good", "bad" or "OK") of their previous experience *and* initially retained counsel for this action. The prior experiences of this group with counsel were very mixed. Almost half of of this group (47%) said that their prior experience was "good", but a further 31% who assessed their prior experience as "bad" also began with a lawyer in the action in which they were now self-representing. Another group (n=39) who provided an assessment of their previous experience with legal counsel *and* who did not retain counsel at any stage in this matter were a similarly mixed bag. 26% assessed their prior experience as "good", 44% who assessed their prior experience as "bad" and 31% assessed their prior experience as "OK".

This analysis suggests that where a SRL respondent emphasized factors relating to their experience with a lawyer or lawyers in their decision to represent themselves, they are more likely to be referencing their (earlier) experience with legal counsel in the present matter, than a pre-disposition.

[50] See the SRL Interiew Template at Appendix E

[51] The somewhat primitive scale of "good" "bad" and "OK" was used here to avoid getting into further detail about previous experiences of legal representation; however this made the questions somewhat crude and difficult to answer for some respondents, especially if they had had more than one experience of prior legal representation, with mixed results.

[52] 20% of the sample described their mistrust of lawyers as a factor in their decision to self-represent (although in most of these cases, money was also an issue: see further detail below at (4)).

When correlated with their decision to retain counsel in the present case it appears that that a prior experience with legal counsel may have had some influence, but was not dispositive in their decision to self-represent. Further, this past experience appears to have had only a limited impact on their initial decision to retain counsel, which was more directly related to what they felt they could afford. Where a SRL respondent emphasized factors relating to their experience with a lawyer or lawyers in their decision to represent themselves, they are more likely to be referencing their (earlier) experience with legal counsel in the present matter, than a pre-disposition.

Where factors other than affordability come into play, the most significant influence on the decision to self represent appears to be negative experiences with lawyers in the present matter, rather than prior experience and pre-disposition. Bob's story is typical.

When Bob[53] faced an acrimonious divorce, it was natural for him to retain a lawyer. He earned a good salary – in excess of $100,000 – and hoped to use mediation to resolve the issues between himself and his wife. One year later, Bob had spent $80,000 on legal fees and was no closer to resolving a dispute over their assets. He now faced a trial, and with the proceeds from the sale of the matrimonial home in trust, could not afford to pay counsel. Instead he hired a lawyer (at half the regular hourly rate) to sit at the back of the courtroom and advise him while he represented himself in his trial.

### d. Considering alternatives to legal process

All respondents were asked what they did prior to commencing or becoming involved in legal action to resolve their dispute. Some clearly felt they were left with no choice because they were named as defendants/ respondents. Those who initiated the case themselves (63% of the sample) could sometimes point to efforts they made – via direct personal communication such as phone calls or letters or emails – to resolve the issue short of court. Some had made these efforts – unsuccessfully – for a significant period of time (up to a year or 18 months) before commencing action.

27% of SRL respondents (the vast majority of them plaintiffs) were coded as having given consideration to alternatives before litigation, including mediation, private arbitration and counseling, and other efforts at settlement with the other side (meetings, letters etc). A somewhat higher level of education appeared to correlate with

[53] BC21

consideration of alternatives to litigation. 64% of those who considered alternatives were university-educated, higher than the general level of the whole sample (50%). Similarly 28% were college educated, slightly higher than the level in the whole sample (23%).

We also asked service providers what they knew or believed about the extent to which clients had previously attempted to resolve their dispute short of commencing or becoming involved in ongoing legal action. This question is rarely explicitly asked by a service provider, and even less often at the court registry, so their comments are based on tangential discussions about alternatives with SRL's and their knowledge of individual cases. The almost universal perception, however, is that SRL's often do very little before coming to the court, preferring to turn the problem "over" to the justice system.

> "The justice system is the first place that they turn to for help…I think that people are so quick to litigate – but if they knew what it actually was, what would happen, they might look at other options."[54]

> "People keep coming to the courthouse because they believe in the system and want to be heard. They still have regard for the authority of the system – who else do you go to for authority? When they get a result, they attribute it to the system, not to the individual or individuals who made it happen. The system begins to substitute for having to deal directly with the other side."[55]

> "Very few understand that there are really alternatives – and few have thought about trying to have a conversation."[56]

## Part Two: Decision-Making over Self-Representation

### 4. Why are so many people representing themselves in family and civil court?

What is not in dispute is that the number of individuals representing themselves in both family and civil court has risen sharply. More complex is unraveling the reasons why.

Many of the SRL respondents spoke of more than one reason why they were representing themselves (although some said that it was just about money, and nothing else). It is clear that once a decision has been taken to move forward without legal representation, the experiences of that individual will also shape how they respond to a question about why they are self-representing (for example, with more or less self-confidence, with more or less emphasis on their disappointment with earlier legal services). Responses to the question "why are you self-representing" also reflected a personal sense of just what was possible and manageable for that individual. For example, some were despondent and overwhelmed, a smaller number were defiant and bullish, and

[54]ASP8
[55]BSP13
[56]BSP7

this emotional response also affected the way in which they would describe the reasons for self-representing.

### a. Financial reasons

**By far the most consistently cited reason for self-representation was the inability to afford to retain, or to continue to retain, legal counsel.**

Almost every respondent (more than 90% of the sample) – across all three provinces and whether in family or civil court – referred in some way to financial reasons for representing themselves[57]. This is consistent with other studies, although reported at a higher level here. The reason for this may lie in the research methodology adopted and the way the question is asked. Some people are uncomfortable acknowledging a lack of financial resources, for obvious reasons. In this study, respondents participated in extended (up to 90 minute) interviews which ranged across many aspects of their self-representation experience and the interviewees frequently returned, over and over, to the question of cost and affordability. While cost was clearly a major factor in self-representation for almost every respondent, many SRL's were explicit about their inability to pay for legal counsel, while others were more circumspect and advanced a range of blended reasons for self representation of which money was just one. Sometimes respondents became more open and frank about the impact of cost as the interview went on. This is a different way of collecting this data – and arguable more accurate – than asking individuals to complete a closed question survey.

More than half the interviews, however, contain detailed descriptions of lack of or exhaustion of financial resources.

"I have no choice. Its not that I think that I can do this better than a lawyer, I have no choice.
I don't have $350 an hour to pay a lawyer"[58].

[57] For example, in Nicolas Bala and Rachel Birbaum's recent survey of family SRL's in Ontario, they report that 49% of survey respondents stated that financial considerations were the primary factor in their decision to self-represent. See Bala N & Birnbaum R. "The Rise of Self-Representation in Canada's Family Courts" paper prepared for the National Family Law Program, Halifax Nova Scotia 2012 at 10. See also Langan A-M, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" 30 Queens's Law Journal (2005) 825 reports that 83% of the unrepresented lawyers in Kingston family court reported that they were unable to afford a lawyer. See also similar conclusions reached by Gayla Reid, Donna Senniw, and John Malcolmson, Developing Models for Coordinated Services for Self-Representing Litigants: Mapping Services, Gaps, Issues and Needs Law Courts Education Society of BC, 2004, available at http://www.lawcourtsed.ca/documents/research/srl_mapping_repo.pdf.)

[58] AB37. This respondent and a number of others referred to their expectation or experience that private legal services would cost in the region of $300-400 an hour. Some have speculated that individuals who do not retain lawyers because they are concerned

> "I can't feed my children –
> and the judge is telling me to hire a lawyer.[59]"

*i. SRL's who have self-represented throughout the process*

Circumstances under which the costs of legal representation became a primary motivation for self-representation vary from case to case. Some respondents said that they had *never* had the means to engage a lawyer; many of these said that the initial retainer was simply out of their reach, while others said that they realzed how quickly the hourly costs would mount up and that they simply could not afford to pay this. Many of these respondents spoke with resentment about the number of times they were told that they "ought to" hire a lawyer to represent them – by a judge, the lawyer on the other side, or by a counter clerk. The same message is repeated throughout many court forms that SRL's try to complete by themselves. These admonishments suggest that a person representing themselves could afford to hire a lawyer, but chooses not to.

An objective assessment of whether or not legal services are in fact "affordable" by individual clients is of course not possible. Most court administrators and service providers agree that Legal Aid eligibility is now set so low for family and civil clients that many people genuinely cannot afford a lawyer, yet do not qualify for Legal Aid. At the same time a few service providers pointed out that those who came to the court asserting that they could not afford the services of a lawyer nonetheless drove expensive cars or took foreign holidays[60]. Far more service providers however emphasized that if they needed to retain counsel they would be in the same position as the SRL's they saw – unable to afford legal counsel. Moreover several of the (n=4) lawyer SRL's in the sample made the observation that they could not afford themselves[61].

Any assessment of what people can "afford" is complexified by the fact that contemporary consumers – and many SRL's - have expectations of a relationship between service and cost that means that they do not accept that the work performed by legal counsel should be as costly as it is. There is a reluctance to pay rates of $350-400 an hour for work that the client often feels that they have little control over, and no real means of scrutinizing whether they are receiving value-for-money.

Changes in attitudes towards the role of professional advisors – including the so-called "death of deference" towards professionals and a growing disinclination to pay for "middle man" services such as financial, legal, real estate or other advice (described by

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about the cost do not in fact have a clear idea of what that cost would be. This sample seemed fairly well-informed about legal costs (and more than half had previously retained counsel and so knew precisely what that had cost them).

[59] ON64

[60] ASP20

[61] ON3

sociologists as "dis-intermediation"[62]) results in significant skepticism among would-be consumers about paying counsel at this level that over a period of weeks, months or even years. The resulting costs would, at best, be high if not very high and would probably require other sacrifices that individuals may not be prepared to make. For many low and middle-income families, the eventual costs of legal counsel may be simply beyond the reach of their income. As some of the higher income earners in the sample illustrated, even those earning more than $100,000 may eventually see expenditures in excess of $50,000 as a poor use of their resources. One high-income professional described a social gathering at her home in which the guests compared their expenditures on their divorces:

> "Of the ten adults (at the party) six had been divorced. The combined spending on legal costs of those six adults - $1.2 million."[63]

It is important to realize that these individuals do not see themselves as more competent than legal counsel – on the contrary, they knew that they were taking on a huge challenge and many were overwhelmed at the prospect ("scared to death", "absolutely terrified" were common comments about the task ahead). What has changed is that however hard, that self-representation is now at least a theoretical possibility given the widespread access to information on the World Wide Web. Lawyers are no longer the "gatekeepers" for this information.

Some of these SRL's are making a simple cost/benefit assessment and concluded that by saving legal costs they will still come out ahead, even if they recover less in dollars than they might with legal representation.

> "Even if I could not get as much spousal or child support as with a lawyer, if I factored in the legal fees I would be worse off by hiring the lawyers….I did not consider myself as skilled as a competent lawyer, but at the end I figured I would still end up ahead if I represented myself."[64]

Some of these respondents described trying to find a lawyer who would represent them on an "unbundled" basis[65] ie without paying a retainer, which they could not afford, and instead working on a task-by-task, hourly basis. Very few SRL's who had never hired

[62] Above note 47 and the further discussion at (3)(c)
[63] ON60
[64] AB50
[65] Unbundling" has been debated for more than 30 years and has been pioneered by Woody (Forest) Mosten. See Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte , Mosten F.S., American Bar Association 2000. For a Canadian analysis, see Doug Munro Limited Retainers: Professionalism and Practice (Report of the Unbundling of Legal Services Task Force) Vancouver 2008.

legal counsel at any stage in their case were able to access legal services this way in the first instance and therefore felt they had no alternative but to represent themselves[66].

*ii. SRL's who had received Legal Aid*

13% of the SRL sample had been represented by a Legal Aid funded lawyer earlier in their case, but their Legal Aid entitlement had run out and/or their financial circumstances had changed and they had been told they were no longer eligible for Legal Aid. They were now self-representing because they were unable to afford to pay for private legal counsel. Some still owed money to Legal Aid (where their representation was in the form of a "loan"[67]).

Some respondents had applied for and had been turned down for Legal Aid[68]. Others had not even attempted to apply, assuming that they would not qualify and discomforted at the idea of being turned away (similar anxieties seem to affect some individual willingness to approach free legal clinics or duty counsel, see below).[69].

*iii. SRL's who cannot afford to continue with counsel*

**More than half – 53% - of the SRL sample had retained a lawyer at some point in their case. Three quarters of these had retained a private lawyer (the remainder had been legally aided, but this was now discontinued). These respondents had exhausted their available resources and were often resentful that despite significant expenditures, they were still not at the end of their matter.**

It is evidently very common for a litigant to begin with private representation (for example at the time of filing an application) but to lose representation later on[70]. These

[66] See the further discussion below at (10)(g)(iii)

[67] For example, from the Alberta Legal Aid website "Legal aid in the province of Alberta is not free. LAA expects clients to repay the costs of their legal representation. Any services requiring full representation by a lawyer are not free. However, it is important to know that legal services provided by a lawyer through LAA are significantly less costly than hiring that same lawyer privately." www.legalaid.ab.ca. In Ontario this is called a "contribution agreement" which requires the repayment of some or all of the legal fees. See www.legalaid.on.ca. There does not appear to be a similar policy in BC.

[68] See further detail below at (10) (b)

[69] For example, a small number of BC respondents had been legally aided in their original application (eg for a divorce) but could not be legally aided in seeking a variation. The British Columbia Legal Services Society website states that an individual will only qualify for legal representation for a serious family matter once. It also appears that a variation would only be covered for legal representation if it involves a "serious situation involving a child." (www.lss.bc.ca).

[70] Note that this suggests that Ontario court recorded data on numbers of family SRL's is an under-estimate, since this is recorded only at the time of filing (see above at (3)(a)). This trend raises important questions about the circumstances in which lawyers "get off the record". Professional Codes of Conduct have traditionally dealt with this issue by requiring that a lawyer give reasonable notice to the client (obviously not at issue if it is the client who decides to end the relationship) and a general admonition that withdrawal of representation should not seriously prejudice the client. See for example, Law Society of Alberta, Code of Professional Conduct, Rule 2.07(3) Law Society of British Columbia, Professional Conduct Handbook, Rule 2.07(3). In light of this growing trend, these provisions need re-consideration and clarification. Note that a recent Supreme Court of Canada decision (R v Cunningham (2010) SCC 10) considered the

respondents said that they were no longer able to find the necessary funds to continue with legal representation – it was not unusual for them to still owe money to their lawyers and to be paying this back in instalments. Others who had borrowed money from family members or friends to pay for legal services had reached the point at which they could not bring themselves to go back and ask for a further loan.

Others ended their relationship with their legal representative when they found that they had reached the point that they would have to dip into other savings to pay for legal services – for example, a college fund for one of their children – and were unwilling to do so.

> "I don't feel like dropping $12,000 that could be used for my child's education down the road. Instead to use it on something as meaningless as this – it would not be a good use of money."[71]
>
> "I have some savings to put to good use or I could use it for more litigation."[72]

35 interviews record the dollar amount of expenditures on legal services. These numbers range from as much as $300,000 to $4000 [73] with eight describing legal costs of over $100,000 and another ten spending between $30-100,000.

A smaller group (n=12) were mostly representing themselves but would hire legal assistance at particularly crucial or difficult moments moments in their case. Perhaps they were offered financial assistance by a family member or friend, or were panicked followed a particularly traumatic court appearance, or perhaps they simply made a judgement that they needed help on a particular aspect of their case (document review, a court appearance). It was rare for SRL respondents to find counsel who would work on a task-by-task basis or "unbundle"[74] services, despite considerable efforts sometimes made to find a lawyer who would work on this basis. Most of the SRL's who did manage to find a lawyer who would help them on this basis were returning to their former counsel for these services.

Just like the SRL's who could not afford a lawyer at any stage in their case, the majority of represented clients who become SRL's did not make this move to represent themselves because they believed that they would do a better job than a competent client or because they felt confident that they could cope alone. Fred's story is typical.

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question of self-representation in *criminal* cases (see www.lawtimesnews.com/200911235858/Headline-News/When-can-counsel-withdraw-from-a-case)

[71] BC69

[72] AB15

[73] In some cases it felt intrusive to ask about this dollar amount and not every SRL was asked for this number in the earlier interviews; the significance of this issue only began to become apparent partway through the Project.

[74] Above note 67

Fred[75] was in dispute with his ex-wife over access to their young daughter. The Childrens' Aid Society had become involved and for a period Fred co-operated with supervised access. When supervision was removed, his ex-wife refused him access under an interim order. After expending $80,000 in legal fees, Fred was out of funds.

Despite being well-educated and in a professional job Fred was not at all confident that he was going to be able to represent himself effectively – and the stakes were really high.

"I was scared out of my mind. But I had a hard choice – either learning to do this for myself, or letting my daughter go, forever. I didn't know that even if I learned how to do this, anyone would believe me. But I could not give up without trying." A year later Fred won access to his daughter after a five-day trial.

One important difference between interview data collected from SRL's who had had counsel at an earlier stage in their case and those who self-represented throughoutn was that the former group frequently advanced detailed critiques of the legal services they had previously paid for and received.

### b. Dissatisfaction with their legal representative

Many SRL's were moderately or very dissatisfied with their legal representation earlier in this action. The overarching theme of these comments is that the legal services they paid for did not, in their view, represent value-for-money. This reflection was sometimes woven into their description of being unable to afford to continue with their lawyer. In these cases, respondent resentment at how much they had already spent, combined with a lack of belief that further engaging their lawyer would actually improve their situation, was an aspect of how they now rationaised their decision to self-represent. The majority of these respondents also made it clear that they could no longer afford to retain counsel.

These respondents made a wide range of complaints about their former legal representatives. These deserve to be set out here in some detail because this data is prominent in many of the interview transcripts. Presenting this data does not assume that it is objectively "true". Whatever the full story of these individual lawyer/client relationships – which we cannot know - what is clear is that many SRL's felt that their lawyers did a poor job of explaining their role to them, why they were doing (or not doing)

[75] ON20

particular things, and generally, just why clients were being charged the amount they were for counsel's services.

*i. Counsel "doing nothing"*

There is an extraordinarily widespread sentiment among many respondents that their former legal counsel did "nothing" to advance their case towards a realistic outcome. The word "nothing" appears repeatedly throughout the interview transcripts – for example, "nothing happened"; "my lawyer did nothing"; "nothing had been done"; "nothing was resolved". Many SRL's described difficulty getting updates from their lawyer as the weeks and months ticked by, despite repeated efforts to contact them[76].

Sometimes the grievance about "nothing" being done was framed around a related complaint that their former counsel had been unwilling to "stand up to" the lawyer on the other side. This was especially a problem in smaller communities, where clients were often keenly aware of the relationships among members of the local Bar - "we live in a small town and the lawyers all know each other"[77] - and the inevitable "pecking order" which some believed disadvantaged them if they had a less experienced, junior lawyer representing them. A more extreme version of this same complaint was the assertion made by SRL's that they could not find anyone to represent them in their town because of the power and prestige of the lawyer on the other side.

*ii. Counsel not interested in settling the case*

Others went further to complain that their counsel had intentionally "dragged things out", reflecting a common perception that lawyers deliberately slowed the process down in order to make more money from their clients[78]. Connected to this perception that their case was becoming unnecessarily protracted, there was a widespread feeling that some lawyers were less interested than they should be in resolution. Instead, there were frequent observations of aggressive and adversarial behavior by counsel; "the two lawyers were just saber rattling, seeing who could piss the other off the most."[79]. Many SRL's bemoaned the general lack of settlement orientation among the lawyers they encountered. "A lawyer should have the wisdom and skill to modify their approach to resolve matters for all parties as opposed to putting fuel in the fire."[80]

There were numerous references to antipathy towards mediation by counsel (back). The following comment is typical: "He (this respondents's former counsel) was not working to resolve the issues, but working for his payment."[81] Several respondents described commencing their divorce application with a tentative agreement between

[76] For example, AB14, AB46,
[77] BC13
[78] For example AB34
[79] AB37
[80] ON61
[81] AB12

themselves and their spouse, which then fell apart once each retained counsel[82]. Again, while it is not possible to independently verify these accounts, they contain many common elements (the lawyer not listening to the client, the lawyer ignoring the priorities of the client in favor of pursuing an outcome that the client was less interested in, and the lack of a plan for moving settlement forward).

*iii. Difficulty finding counsel to take their case*

A significant number of SRL's describe "shopping around" for a lawyer but with no success. Some SRL's complained that while they were willing to pay for legal services, they could not find a lawyer willing and competent to take their case on. These respondents described placing numerous phone calls to lawyer's offices – sometimes as many as 15 or 20 – and sought recommendations from friends and from the court, but found that their calls were not returned or that counsel was not interested in taking their case. The reasons they said that they were given varied from "too complicated" to "too sensitive" - in other cases, the unspoken assumption was that the case was too small/ a losing proposition.[83].

*iv. Counsel not listening or explaining*

"My lawyer never asked me what my goals or my expectations were." [84]

There was a general feeling among many SRL's that their former lawyers did not listen to them, either disregarding their specific instructions or, more commonly, not paying attention to what was really important to them. At minimum the narratives of these respondents suggest that their lawyers were not effective (perhaps did not give sufficient time to) explaining and evaluating different strategies with the client as a full partner in that discussion. Instead the lawyer appeared to the client to disregard their views and focus on taking charge. This may reflect an old fashioned perspective on the professional relationship as one between "expert: and "novice" that no longer works for many 21st century client. One respondent noted dryly that when she first "interviewed" prospective legal counsel (a new experience for some lawyers) "A lot of lawyers told me what they wanted to do as if it was *them* making the decision."[85] (my italics)

Some SRL's struggled with the uncertainty of the legal process. Whereas lawyers are familiar with the difficulty of offering certain results, many clients find it hard to understand how speculative the outcomes might be. At best, their legal counsel appear to have done a poor job of explaining the reasons why they cannot guarantee an outcome, and may exacerbate this by appearing unwilling to work with the client as a partner.

[82] BC23, BC2
[83] BC57, AB56, ON23
[84] BC42
[85] BC46

Jacob shopped around for a lawyer to represent him in his claim against his former employer. When he did find some with experience they wanted a very large retainer – $15-25,000 – and "they did not want me involved in the case." "They wanted to ensure that they would do it their way, and my input would be not a significant part of the case."

This left Jacob feeling "Why should I give you $15,000 without knowing if you can do any good or not?"[86]

*v. Counsel made mistakes/ was not competent*

There were numerous complaints of "sloppy" work by lawyers. Some respondents acknowledged that while they were unable to determine the quality of counsel's legal arguments, however:

> "I am not in a position to judge someone's legal work, but I can tell if someone had put in careful work, and the affidavits were not even proofed or edited."[87]

Other SRL's went further, complaining that the lawyer they retained proved to be unfamiliar with the law and procedure relevant to their case, or even, in their view, "incompetent". If there were mistakes or failings by counsel, the stress and immediacy of many family cases, and in particular those involving domestic violence, makes mismanagement or error by legal counsel even harder for the client to accept. One respondent described errors made by her legal counsel in making an application for a restraining order, which was subsequently set aside. "This was a very, very difficult time and I don't appreciate that my safety was jeopardized but also that of my children."[88] Inevitably, perception of effectiveness is part of the cost/ benefit assessment made by those who have worked with a lawyer, in contrast to those who have not (above), and exemplified by the following statement: "I was dissatisfied that there wasn't enough performance, and she was dissatisfied that there wasn't enough money - so we split."[89]

These types of negative experience with costly professional services lead to a kind of fatalist despondency amoung some SRL's, and provide them with a rationale for taking over their own case.

[86] AB24
[87] BC37
[88] BC2
[89] ON19

> "I don't mind lawyers being in charge but none of my lawyers ever had an action plan… Lawyers have poor organizational and customer skills and they charge ten times my hourly wage. Why would I pay (her lawyer) another $1,500 when she had no plan, no suggestions as to what would work? At this point I decided that I should represent myself."[90]
>
> "After $12,000 I was still exactly where I started. I couldn't keep on paying this kind of cost. It's a big money grab. So I went back to representing myself"[91]

The attitude of many SRL's who described negative experiences with legal counsel was "how could it be any worse than this if I do this alone?" At least if they were representing themselves they would not be continuing to pay for a service that they believed was not advancing their interests. When asked "what difference would it make now to you to have a lawyer representing you?" some in this group expressed skepticism that it would in fact make any difference at all, once they had come this far on their own. Their belief was that the only difference between their position now as a SRL and their position if they had a lawyer still would be the amount of money they would have expended on legal costs.

### c. A preference for handling the matter themselves

Around one in five SRL respondents expressed a personal determination to take their matter forward themselves, in addition to financial constraints that motivated them to self-represent. Typical of this view are sentiments such as "(I)t's my story and no one knows it better than me – I lived it and breathed it[92]" and "I wanted to be in control of my own destiny."[93]

A small number – around 10% of the SRL sample - expressed confidence from the outset that they could handle their case themselves and saw retaining legal counsel as a poor use of resources when relatively little money was at stake. This view was often associated with prior experiences that the individual believed equipped them well for tackling a court procedure. Sometimes this was direct experience with the legal system – for example as a para-legal or even a lawyer[94] – as well as previous experience as a SRL.

[90] AB65
[91] BC90
[92] BC46
[93] AB2
[94] There were four lawyer SRL's in the sample

David[95] felt "completely comfortable" with his decision to represent himself. He had had a number of previous experiences representing himself, and he had worked as a collections agent and as a bailiff. "It didn't even cross my mind to have a lawyer represent me."

He was encouraged to represent himself by the wealth of available resources, both on-line and in the law libraries. "You can fall over information just walking down the street in (his city)." In addition the staff at the courthouse were helpful and tried hard to help SRL's. "In any case in my case (he was suing a landlord for the return of his deposit after a job offer fell through) I did not need much help or explanation as I was familiar with the process."

In contrast to David, most of those who expressed a preference for handling their case themselves did not reach this conclusion immediately or even in the first few months or years of their experience. Many worked with legal counsel for some time before reaching the conclusion that they preferred to handle their case themselves. Many felt that they were not being listened to by their lawyer (above), and almost all also expressed concern about legal costs.

Despite these other elements, the sense that they were best placed to handle their own matter became an important element in their explanation of why they were self-representing. A common rationalization was that no lawyer could possibly understand the case, and what it meant to them, as well as they did themselves.

> "I don't regret not having a lawyer. This would introduce a new person who doesn't know about our situation. Why have two people (lawyers on each side) who don't know or understand them?"[96]

There is an internal tension in some of these SRL narratives. The importance of staying in charge of one's own case is genuinely important to many SRL's, perhaps becoming more important as time goes by (in a sense it is the "silver lining" of handling the matter themselves). Yet these same respondents also describe the stress and anxiety they suffer as a consequence of representing themselves – including speculation about the disadvantage they are at when facing counsel on the other side[97] - and many continue to make reference to the costs of legal representation.

[95] BC40
[96] BC18
[97] Research on the impact of legal representation on outcomes is limited to date and the results inconsistent. See for example The Importance of Representation in Eviction Cases and Homelessness Prevention Boston Bar Association Task Force on the Right to Civil Counsel, 2012. For a reviewof current research, see Rhode D. "Access to Justice: An Agenda for

When asked, "would you like to have a lawyer now if you could afford one and assuming you could find someone competent?"[98] some SRL's say that they now find it difficult to imagine that these conditions could be met and are dismissive about the assistance of a lawyer (although note that many more said that they would welcome the assistance of a competent lawyer if they could afford one[99].) There is a feeling of defiance in some of these respondent interviews, with these SRL's determined to manage without assistance now, despite the impact on their health and well-being.

### 5. How do SRL experiences match up to their expectations?

Some SRL's began with a sense of confidence, which usually drained away quickly when faced with the reality of the court process, often triggered by difficulties completing application forms and understanding the service process. For those who began with fears about their ability to represent themselves, their story just got worse and worse.

#### a. First steps: initial confidence

Among some SRL's, there was an initial sense of optimism that they would be able to handle representing themselves, and even, occasionally, a sense that it might be an interesting adventure. To the extent that SRL's expressed confidence at the outset (17%) this was somewhat correlated with a higher educational level; the largest group expressing initial confidence had university degrees, and the second largest group had a college qualification.

Some rationalized their confidence on the basis of prior experiences (for example, as a workplace grievance officer[100], or as a para-legal[101]) that allowed them to feel some familiarity with the justice system. Others pointed out that they appreciated that getting into the business of self-representation would take a great deal of time, but that they had this time available to them: "I was retired so I had lots of time to learn this game[102]."

Others talked about how they assumed that their education (especially those with university degrees) and their general life and work experience would enable them to undertake self-representation successfully

> "I decided, 'I can do this. It will be a learning experience – but I am an intelligent person, I can figure this out.'"[103]

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Legal Education and Research" forthcoming Journal of Legal Education. This study did not analyze the outcomes achieved by SRL's against a control group. In almost two thirds of the SRL sample, the case was not yet concluded

[98] SRL Interview Template Appendix E

[99] See the further discussion at (10)(a)

[100] BC44

[101] BC52

[102] AB2

[103] ON18

When asked about what they typically observed as SRL expectations at the outset, service providers observed this same initial optimism among some SRL's, describing it as an unrealistic assessment that they would be able to cope with the process. Some blamed the "overselling" of access to justice.

> "I think they can do it because we claim this access to justice bullshit."[104]

Service providers describe SRL naivety in relation to both the complexity of the process, and the resources that the court could provide to assist them.

> "It's not a fast food service – (SRL's) expect that they will make one or two court appearances. But in reality this will require multiple court attendances, summonses and a great deal of their time."[105]

Some SRL's talked about being "seduced" by the mantra of "access to justice", held out via public statements by the justice system. A similar point was widely made by service providers that "over-sell" of the access to justice theme created unrealistic expectations.

> "People get information from the website and show up at court with expectations of "Access to Justice". They imagine they will have everything done for them, including going into court."[106]

> "I think they think they can do it because we claim this access to justice b..s..t."[107]

Their actual experience usually turned out quite differently (below). "No more fairy tale about having access to a justice system"[108]. Even the few SRL's who remained "on top" of their case had many critiques of the complexity of the process and the elusiveness of "access to justice".[109]

Some service providers reflected on this issue of "over-sell" at a deeper level, describing what they understood as a fundamental disconnect between the expectations of the public and the reality of self representation which saw the justice system as a "service" facility, no different from other government offices. This lead them to expect that their own part would be relatively minimal – equivalent to applying for a passport or a vehicle licence – and that the court staff would take care of the rest for them. One duty counsel described this as follows:

[104] ASP20
[105] OSP16
[106] ASP21
[107] ASP14
[108] ON18
[109] BC30, ON54, JBC40

"They think of this as coming to get a service and a benefit….(they) believe that you go to courts to get justice services just like you to the motor vehicle office to get a license."[110]

### b. First steps: initial fears

Some SRL's told us that from the very beginning they were afraid of what they would face in representing themselves. As a result many of those who could not afford legal counsel, or had to end their relationship with counsel because they had run out of funds, expressed fears rather than confidence about representing themselves.

Janice[111] is a single mother. Her toddler daughter's father did not play a large role in their lives; Janice and her daughter had never lived with him. One day – "like a thunderbolt" – she was served with an application from him seeking joint custody.

A bitter court fight ensued "Once those papers were served, it was like a runaway train. There was no opportunity for us to talk reason."

Janice was very fearful about what she was facing and retained a lawyer right away. After six weeks she had used up her $5000 retainer and had received a bill for a further $24,000. She borrowed money from her family and paid this bill "I desperately needed (her lawyer). She told me 'if you represent yourself you will be eaten alive.'"

But now Janice was becoming equally scared about the prospect of what continuing legal work was going to cost her. She didn't qualify for Legal Aid – she earned more than $75,000 – but could not afford to keep paying at this rate. And the process had scarcely begun – she had had just one hearing so far.

Before the next hearing, Janice reluctantly told her lawyer that she was going to have to represent herself. "This was a no choice situation: I just could not afford to pay anymore. I was really scared."

Janice did eventually find a lawyer who would give her unbundled advice. She would see him every couple of weeks with a list of questions. Janice says that this was the only thing that got her through her nine-day trial.

[110] ASP7
[111] BC37

"I was preparing for it all summer (the trial took place in July). I stayed up until 3 or 4am most nights trying to put everything together." None of her friends and family could be with her in the courtroom with her because they were witnesses. "No one could understand the fear that was in me and how hard the work was. I remember thinking to myself – do these people (the court clerks, the judge, the lawyer on the other side) imagine that I am enjoying this? I am here because I have no other option. I am just a mom, trying to figure this out… it was so complex, daunting, intimidating."

Janice lost her trial.

Janice is not alone in starting with fears about the process. As one service provider put it, by the time that a SRL first presents themselves to the court, "their anxiety levels are already very high"[112]. SRL's described their fears as follows:

> "I'm scared because I doubt myself and there is a lawyer sitting on the other side."[113]

> "I felt scared – there was too much stuff to deal with. I'm really good if I can put a wrench on it, but I couldn't put a wrench anywhere on this problem.[114]

Or simply

> "I'm scared because I have no idea what to expect."[115]

### c. Becoming overwhelmed

For a few SRL's, their initial sense of confidence survived the bumps and bruises of the process, but they still had many critiques of the complexity and difficulty of the process, as well as they way they were treated by the courts. Two SRL's who found their way successfully to the end of their process and appeared to have retained their sense of composure throughout nonetheless made the following comments:

> "I expect to experience prejudice and discrimination as a SRL. But at my age, I'm damned if I am going to back off something that is reasonable and let the system add to the injury I have already received….(E)ven in small claims court, judges and lawyers regard SRL's as a nuisance – they are no more welcome than they are in criminal court."[116]

[112] ASP14
[113] ON2
[114] AB46
[115] B31
[116] ON54

> "My biggest disappointment – and surprise – is the overwhelming amount of prejudice I have encountered. I have not been taken seriously by both lawyers and judges."[117]

Only a small number of SRL's spoke with any confidence about returning to the courts another time. The majority were, quite simply, overwhelmed**.** Some said that the process was nothing like what they had expected, and far more demanding of both their skills[118] and their time ("all of which involved taking time off work."[119]). Even those who began apprehensive told us that their experience turned out to be even worse than they had ever imagined.

> "My expectations were that I would have to be sharp but I didn't think that it would come down like a deck of cards. It's an extremely sharp game. I had to begin to make my own filing systems – I became a bundle of nerves. "[120]

> "The procedure as I read it sounded easy. I thought it as going to be easy - but it was anything but."[121]

Four particular stages/ tasks within the legal process featured consistently in stories of feeling overwhelmed. These were: completing, filing and serving paperwork and forms; participating in the discovery process as a SRL ("I was eaten alive"[122]); and conducting one's case at a hearing. Finally there were also many disappointed and frustrated expectations regarding the post-trial process, especially regarding collections. Many SRL's assumed that having secured an order (this was particularly the case was the order was for the payment of monies) that the court would take responsibility for ensuring the money was paid. Instead, they were often appalled to learn that they now had to take further steps to collect the money themselves[123]. "What's the point of the judge giving orders if no one is going to enforce them?" [124]

Another frequently voiced complaint – and surprise - was about the length of time it took to complete each stage of the legal process. Few SRL's had any idea of just how much time representing themselves would consume, or how long the process would take. To many, the legal process seems (and with unresolved issues, perhaps is) interminable. Many SRL's expressed disbelief that the process could not be faster, or at least clearer guidelines provided to them about timelines. "It isn't like this when you buy any other service."[125] There was little or no understanding that litigation moves at the pace of the slowest party.

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[117] BC30
[118] AB23
[119] AB21
[120] AB11
[121] BC11
[122] AB2
[123] For example, BC84
[124] ON6
[125] AB16

Some service providers suggested that some SRL complaints about hearings go back to the erroneous belief that having filed an application, they would quickly be brought in front of a judge[126]. But other SRL's had researched and prepared carefully - and were still confounded by what happened when they got to court.

> Mustafa[127] became involved in legal action over the custody of his sister-in-law's young children, after he and his wife learned that she was being assaulted by the children's father. What began as a "good Samaritan" effort (Mustafa and his wife offered to take the children after CAS became involved) turned into a nightmare of litigation and self-representation.
>
> By the time Mustafa was interviewed, he had appeared in court on his own behalf (they did not qualify for Legal Aid) on 14 occasions.
>
> Mustafa tried to research what he needed to do to prepare for court but "(T)he typical procedure in court is not what the books describe—an opening, questioning, and closing. Instead it is just rambling on and on without a clear structure…I still was thinking the judge would ask for my information – I was ready to talk about case law and precedents. I thought the judge would read all the things you have to pay for (in advance), but in fact he doesn't get (the file) until that day. How can you judge something you haven't read? "
>
> Mustafa reflects that he and his wife did the right thing and they have no regrets about that, but "(T)his is not what we expected when we first took this on"

This final quote in this section effectively summarizes both the substantive and emotional content of what many SRL's said when asked about the relationship between their initial expectations of being a SRL, and their actual experience.

> "My expectations? I can't even remember my expectations anymore. My life just fell apart."[128]

The bottom line here is that most SRL's simply have no idea what to expect, or that their expectations are inaccurate.

[126] BSP21
[127] AB4
[128] BC28

## Part Three: Getting Started: How SRL's Engage with the Justice System

### 6. SRL's and court forms

#### a. Overview

A central component of courts administration strategy in dealing with the growth in the volume of SRL's has to be provide an increasing amount of information – forms, procedural guides and other information – on-line. A review of publications and Internet reports on SRL resources reveals that the majority of resources being developed for SRL's in both Canada and the Unites States are on-line.[129] For this reason alone, an evaluation of this material deserves close attention in this Report. The experiences of SRL's are often dominated by their experience with the user-friendly quality of these on-line resources.

All the SRL's interviewed spoke about their experience with completing court forms, and often numerous subsequent procedural aspects of their case. In many cases, these process issues dominated their experience and thus the interview; in most interviews, the process dimensions of the SRL experience - both negative and positive, but often negative – were talked about a great deal more and at greater length than their outcomes. In the 25% of cases which were concluded by the time of the interview, it was evident that the procdural aspects of the experience - – including the completion of court forms, which was often the first time a SRL realized the scale of the challenge they faced - were at least as important to the individual, as they recalled their experience, as the actual outcome.

This section (6) considers the information gathered by the study on the efficacy and accessibility of court forms, both on-line and hard copy. The next section (7) describes what SRL's told us about their experience with other types of on-line resources, including court guides, legal overviews and primers, and other substantive resources - some of which are offered by the courts and some by other service providers.

In addition to questions asked in interviews and focus groups with SRL's, two secondary projects were conducted to explore the accessibility of court forms and procedural guides. The first of these relates to court forms. The second relates to court guides (see (7)(c) below).

#### b. The Divorce Applications Project (Kyla Fair)

Kyla Fair is a research assistant to the SRL project who will graduate from the University of Windsor Faculty of Law in 2013.

[129] See for example the programs reviewed in Innovations for Self-Represented Litigants Hough B. and Pamela Cardullo Ortiz P. (eds) Association of Family Conciliation Courts 2012

In the summer of 2012, Kyla – who had just taken Family Law and Civil Procedure at law school – was assigned to complete the forms to file for divorce in the three provinces in which we are interviewing self represented litigants (Alberta, BC and Ontario). She was asked to keep a log of her time spent and to record any other comments about her experience as she went through the relevant courts forms, which she could access on-line.

Kyla began her summer assignment with enthusiasm and confidence. She anticipated that this would be a relatively straightforward assignment, and expected to learn a great deal from the real-life experience of completing the court forms. In fact, she found the assignment extremely difficult and very frustrating.

*i. Language and terminology*

Kyla noted that a significant amount of the language and terminology in the forms was accessible to her only because she had taken Civil Procedure in law school. However there were still many examples in all the forms of terms and vocabulary that she did not recognize[130]. Kyla commented "I saw a number of terms that I did not understand, and many more that a person without legal training would have no idea what they meant."

*ii. Picking the "right" form(s)*

Kyla's second major observation was that in each province, the length and number of the forms quickly became overwhelming. "I was quickly losing track of all the forms I needed to fill out." This challenge was exacerbated by the fact that it was sometimes difficult to know which form was the correct form to complete, with many possible choices. In one case Kyla described how she spent considerable time completing a British Columbia Supreme Court form which turned out to be only appropriate for an uncontested divorce.

> "After reading through steps 1-5 for over 30 minutes, I have learned that this information package is only for an uncontested divorce ie. When you do not need to appear in front of a judge. This was frustrating because I wasted time reading a lot of information that does not apply to me, and I had already filled out forms that do not apply to me."[131]

*iii. Complexity of forms and information required*

Kyla noted that all the forms she completed were complex and time-consuming – and singled out a few examples that were especially daunting, even for someone with legal training. For example, after spending 30 minutes attempting to fill out Ontario's Form 13.1 (application for spousal support) "…I am completely overwhelmed; the amount of detail required about the value of everything you own/ all of your monthly/yearly expenses is

[130] For example from the Alberta forms, "Praecipe to note in default"
[131] Time log of Kyla Fair, July 2012

extreme. I am only about halfway through the form but I am ready to give up…(for example), I am required to provide a valuation of every item I owned on the date of my marriage, the valuation date… in reality, this form would take days to complete. At the end of the form, you are required to provide a complete calculation of net family property derived from all of the valuations previously entered. The math alone is complicated, and I feel as though many errors would be made without some legal assistance."[132]

*iv. Commonplace and unhelpful notations*

Kyla noted some particularly unhelpful notations which she found in virtually all the forms she worked with. For example, there was a frequent mention of "supporting documentation", without explaining what type of documentation was needed (and what would be inadequate). Similarly there were frequent references to "service" and "serving" of documents, without any explanation for a lay-person about what this meant. Some forms did provide a link to another website where these terms would be explained.[133]

Kyla made the further observation – heard independently from many SRL respondents in interviews - that each form included multiple references (sometimes on each page) to the need to retain a lawyer. While this is a perfectly reasonable suggestion – especially in light of the difficulties experienced by so many SRL's with completing court forms and procedures – it is not terribly practical when the individual has no (further) resources for a lawyer, and does not qualify for Legal Aid. Some SRL's complained that it was irritating rather than helpful to be constantly reminded in this way of a resource that they could not afford.

*v. What happens next?*

Kyla noted in relation to each form, from each province, that there was little or no information about the next steps in the process or what to expect. For example,

> "I am not sure what court I am supposed to bring these forms to, or what the process is after I have filed the forms and served them ie. Does the court contact me? How long will it be until trial? What will the process be at trial? What documentation will I need to bring to trial? After trial, am I legally divorced? What happens if my husband contests the information I provided? Do I get copies of his statements before trial? "[134]

While it may be difficult for all this additional information to be contained in one place (eg on the court forms), it is important to note that without some guidance as to "next steps" many SRL's are confused about what to do. Most will simply bring the forms back to the courthouse, where they once again wait in line and absorb a great deal of registry staff time.

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[132] Time log of Kyla Fair, July 2012. See Report of the Divorce Applications Project, Appendix H
[133] For example, http://www.servicebc.gov.bc.ca/life_events/divorce/index.html
[134] Time log of Kyla Fair, July 2012. See Report of the Divorce Applications Project, Appendix H

Kyla's complete time log is contained below at Appendix H.

### c. SRL experiences with court forms

Many SRL respondents described how difficult they found court forms to complete. The problem is exacerbated by the fact that, as one court clerk put it, "there a million forms out there."[135] Sometimes the clerk as well as the SRL is also seeing a particular form for the first time. As Crystal described,

> "When I took the forms in to the court, the clerks told me that I had filled the forms in wrongly. I burst into tears. The journey from my home to the courthouse was a 150 mile drive and a ferry ride. In fact the forms were fine – the clerks did not actually know the procedure and it turned out the forms were OK." [136]

Crystal's story was repeated in various ways over and over again by SRL respondents. It seemed that everyone had a story about a disaster (or multiple disasters) with completing and filing court forms, and many of these included a claim that they were given misinformation or information that they thought that they had followed, only to be corrected by another justice officer.

The most consistent complaints from SRL's about court forms and guides were as follows.

#### *i. Difficulty knowing which form(s) to use*

Many SRL's talked about the difficulty of ascertaining which court forms they needed to complete.

> "I have the choice of three forms – but I don't know which form I need? How would I know? It's so overwhelming. Then you read the question and think, what does this mean? I would pay a lawyer to tell me what I need to do."[137]

[135] BSP21
[136] BC53
[137] ON49

> Marie was sent forms to complete by her provincial support enforcement agency. She took three days off work to complete the forms (Marie is a university educated professional). However when she brought the forms into the agency, she was told that she had completed the wrong forms. Marie said "The agency is still giving these packages out to people – even though they are, in fact, the wrong forms."[138]

Like Marie, some SRL's complained that they had expended substantial time completing forms that turned out to be irrelevant or inappropriate to their matter.[139]

*ii. Difficulty with language used on forms*

Virtually every SRL in the sample complained that they found the language in the court forms confusing, complex and, and some cases, simply incomprehensible – referring to terms and concepts with which they were unfamiliar. This reaction was the same across all types of litigant no matter what court or province they filed in (although there were somewhat fewer complaints about small claims court forms and procedures, these were not devoid of criticism either).

In every case, significant time and effort is required to complete court forms. When Kyla Fair the project Research Assistant, was assigned to complete the forms to file for divorce in each province, she approached the task with her knowledge of family law and civil procedure. Nonetheless Kyla's timelog reveals just how difficult the forms were to complete - frequently containing terms that even as an upper year law student, Kyla was unfamiliar with – and how long each step took her (see also above at (c)).

*iii. Complaints about inconsistent information*

While many SRL's were appreciative of the assistance they were provided by court staff and especially counter staff at the court registry, a number complained that they were given contradictory information by different clerks.

> "Two people look at your forms, one accepts it and one says this is wrong"[140].

One SRL said that she had got into the habit of leaving parts of her forms blank until she went to the counter, because of the likelihood if being told by the clerk she saw that day that her previous information had been incorrect.[141] There were also complaints that information about completing court forms was sometimes inconsistent between

[138] AB14
[139] This was also a challenge for the Project Research Assistant Kyla Fair, see above at (c)
[140] ON2
[141] BC58

judges and court staff. This was a complaint echoed by court staff in interviews who told us that sometimes a SRL would come to the counter and ask for a form that "the judge said I should get" – but which did not exist.[142] This further adds to the pressure that counter staff are experiencing, and sometimes results in expressions of frustration directed at them by SRL's.

*iv. Consequences of difficulties completing forms*

When a form is incorrectly or inadequately completed, the consequences can be significant.

> "The judge said that she saw no safety issues preventing me seeing my son – but that I had filed the wrong application. It should have been a application to vary, not an application for access. So she made no order. I lost not because of what I said about my son, but because of a technical thing about law."[143]

Some SRL's tell stories of working on their papers, and then submitting what they had thought were the right documents, correctly completed, to the court – but when they took a day off work to appear at a hearing, being told that they could not be heard because their paperwork was incorrectly completed. Service providers note that this causes a great deal of aggravation and frustration[144], and suggests that a procedure for checking forms and alerting SRL's to evident errors or omissions beforehand would save considerable judicial as well as SRL time. Along these lines, one court program is considering establishing a position of "SRL Navigator" in order to review forms with SRL's and prepare them for next steps[145]. A similar approach is taken by using a First Appearance Master at Jarvis Street[146] where SRL's appear before a special master who reviews their paperwork before their first OCJ appearance. ""I don't ready anyone for their appearance before me, I ready them for afterwards. I can also offer them more resources to help them self represent after their first appearance."[147]

The final story in this section comes from a university-educated SRL with a physical disability, who represented herself in (first instance) civil court because she could not afford to hire a lawyer.

[142] OSP31. Also BSP16
[143] BC59
[144] OSP16
[145] ASP16
[146] OSP26
[147] OSP26

"I have to say that as a person with a chronic illness it has been challenging to learn about court procedures and laws. I chose to represent myself because I am on a fixed income (disability) and can no longer afford counsel. I have spent all my life savings and more on a five-year divorce process...

The saddest part is that it is difficult to get accurate directions that allow me to get relevant information to help me make educated decisions. Forms are available on line if you know which ones you need. Filling them in properly is another issue. I know I am not the only one feeling this way." [148]

### d. Service providers comments on court forms

It is not just SRL's who are affected by the complexity of court forms. One veteran courthouse manager told us, "The forms are ridiculous. The lawyers can't do it either. It creates more work for the counter staff. In Queens Bench it got so bad that we gave up using the four different forms and instead created our own single affidavit system."[149] Moreover, court staff talked at length in interviews of the tension between the overwhelming difficulty some SRL's had with completing the forms, and constraints on them assisting them to do so. Many court staff said that SRL's often came in expecting that the counter staff would complete the forms for them[150], and were disappointed and sometimes angry when they discovered that this was not a part of their job. Some SRL's appeared hopeless in the face of the requirement that they complete their own forms in order to file.

> "I can see in their face that if I have given them information, but they still have to complete their forms, they are completely at a loss."[151]

Many counter staff at the court registries spoke about how upsetting it was to be constantly faced with SRL's who were unable to complete their forms. They often feel very sympathetic towards them, but at the same time have clear instructions not to complete forms for litigants. Some counter staff told us that they wished that their job description could be changed to reflect the reality that many SRL's needed more assistance with their forms[152]. A few courthouses are experimenting with a station at the registry that offers assistance with form filling to SRL's.

[148] ON62
[149] AS2P0
[150] ASP15
[151] ASP7
[152] BSP1

Working under their current constraints, however, is often stressful for counter staff. They are often looking at a long line stretching out behind a SRL who is begging them for help that they cannot give. One courthouse manager told a story of an effort she made personally to try to alleviate the difficulty for one elderly couple.

> "I see the greatest problems for the older litigants – I think it's generational....I also see all the time that the way that a self rep handles their preparation has a lot to do with their perception of the court and the justice system – so we have an interest in making that a positive experience, when we can. The other day, I was driving back to X from Y, and I stopped at Z to meet an elderly man who is representing himself in a dispute over a line fence. He said to me "I don't even know if I will still be alive by the court date." So I stopped at the side of the road and met him and his wife and helped them with the forms."[153]

### 7. On-line self-help resources for SRL's

There is a huge amount of information available on the World Wide Web that is either designed for, or used by, SRL's in preparing their case. Some of this takes the form of resources prepared by the courts as procedural guides for SRL's (see (d) below). Some is provided by private law firms. Other websites are maintained by individuals and yet others are archives of specific resources, for example Canadian caselaw.

#### a. What on-line resources do SRL's identify as most helpful?

Each SRL respondent was asked to identify any especially useful or helpful on-line resource that they used. By far the most frequently mentioned site by SRL's in all three provinces was Can Lii[154]. The next most frequently mentioned sites were all from British Columbia: they were the Justice Education Society of British Columbia's video collection[155]; the British Columbia Legal Services Society family law website[156]; and JP Boyd's family law website (a privately maintained website)[157]. In Alberta, a number of SRL's said that they had found the Alberta Court Services (and especially Family Justice Services/Family Legal Information Centre) on-line resources to be very helpful[158]In Ontario, some respondents mentioned the Ministry of the Attorney General website[159], but not always positively ("adequate" was a typical description) and various private law firm sites that provide basic information.

Respondents found that these favorably mentioned websites were helpful, invaluable even, to them because they did not have the deficiencies and limitations described below.

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[153] ASP20
[154] A site devoted to Canadian caselaw
[155] See www. SupremeCourtBC.ca.
[156] See http://www.familylaw.lss.bc.ca
[157] See http://www.bcfamilylawresource.com
[158] See http://www.albertacourts.ab.ca
[159] See www.attorneygeneral.jus.gov.on.ca

### b. Website deficiencies and limitations

The sheer volume of information available on the Internet is problematic. It is often difficult for SRL's to know which site to use and how to move from one to another without finding apparent contradictions or gaps. Another problem is that it is clear from interviews that SRL's ability to navigate and utilize information and forms provided on-line is affected by their emotional condition as they proceed through a contentious matter. In addition, a small number have no access to the Internet outside public facilities and/or are not comfortable using the Internet. This underscores the problem of over-reliance on on-line resources without also offering SRL's face-to- assistance and support.

In addition to these general themes, there were many detailed complaints about websites. SRL's consistently complained that on-line resources:

(i) Emphasized substantive legal information but did not include information on practical tasks, for example how to serve a document, or presentation and procedure, for example how to present your case in court, how to address the judge, what to bring to court and how to prepare[160];

"I have read many different family law books and have been on lots of family websites, but I am still not clear about the procedure. These resources don't tell you how to write a motion, or the wording to use."[161]

A related problem is understanding how to apply substantive information in the absence of FAQ's or other question-and–answer formats which would anticipate common questions and misunderstandings from the perspective of a SRL.

(ii) Did not include strategic coaching and or advice on how to talk to the other side, how to approach settlement, and whether and how to use mediation;

(iii) Often directed users to other sites, giving rise to inconsistent information and difficulties navigating between sites;

"When you read information on the Internet and then it refers you to something else – which refers you to something else – by this time you are overwhelmed. It is endless mayhem."[162]

"We need to develop a website to put all the resources into one place, one site. The information is too disparate."[163]

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[160] The Justice Education Society of British Columbia's website videos were the one resource that SRL's mentioned that was helpful in this respect (procedural information and tips). See www.justiceeducation.ca. Further and better resources are being added all the time; see for example http://www.justiceeducation.ca/resources/administrative-law-bc

[161] ON62

[162] BC45

[163] ON10

(iv) URL links were frequently broken or not working (including on government sites);

(v) Generally, on-line resources often required some level of understanding and knowledge in order to be able to make best use of them.

"What about someone without my research capabilities? I did all this research and I still had just questions – it was scary."

### c. The Court Guides Assessment project

This project was conducted by Cynthia Eagan, an information technology specialist residing in Windsor, Ontario who works in the Detroit Public Library system. Cynthia contacted the Project after reading a local media article about the study in July 2012 and graciously offered her expertise and assistance on a voluntary basis. After a series of discussions, we decided that she could utilize her considerable experience with reviewing the accessibility of information as an information technology specialist to assist us in evaluating a selection of (on-line) procedural guides provided by the courts.

Together Cynthia and the Principal Investigator developed a template of questions that she would apply to a Court Guide from each provincial ministry. The questions used for Cynthia's evaluation were:

1. Does the material use accessible and easily understood language?
2. Does the material avoid technical and legal jargon?
3. Is the use of language and terms consistent throughout the guide?
4. Do there seem to be any important unanswered questions?
5. Is there a reference point for further questions?
6. What is the material's "reading level"?[164]
7. What is the experience of navigating amongst URL's cited in order to complete the form?

The three court guides that Cynthia evaluated using these criteria were:

1. From British Columbia, "Applications to Court" page 9 "Get Help with Your Case" at http://www.supremecourtbc.ca/sites/default/files/web/Applications-in-Supreme-Court.pdf

[164] For this assessment, Cynthia used the Flesch-Kincaid Grade Level test. This test rates text on a U.S. school grade level. For example, a score of 8.0 means that an eighth grader can understand the document. The formula for the Flesch-Kincaid Grade Level score is: (.39 x ASL) + (11.8 x ASW) – 15.59 where: ASL = average sentence length (the number of words divided by the number of sentences) ASW = average number of syllables per word (the number of syllables divided by the number of words

2. From Alberta, Alberta's Family Law Act: An Overview at http://www.albertacourts.ab.ca/cs/familyjustice/FLAOverview.pdf and Child Support Order kit (for both the applicant and the respondent). It can be downloaded at http://www.albertacourts.ab.ca/forms/Kit-Directory-CTS3854.pdf
3. From Ontario, the guide to making a claim in small claims court available at http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Making_a_Claim_EN.pdf

Cynthia's assessment turned up many of the same issues that SRL's complained about. In auditing the Court Guides for jargon and difficult and inconsistent language (questions 1-3 above), Cynthia found many problems ranging from unclear grammatical expression through to numerous technical terms that are not explained (for example, "adult interdependent partner"[165]; "endorsement record" [166].

Cynthia's assessment also turned up many "important unanswered questions" (question 4 above). On some occasions a description given in the Court Guide was too vague to be helpful to a lay-person (for example, "Remember that preparing for and attending at a chambers application will cost you time and money". In other instances it was incomplete (for example, "You should request costs in the event that your application succeeds" but no information on how[167], or instruction to have a 'sworn affidavit" without information on how to go about this process[168]) begging the question of how a SRL would put this information into practice. Occasionally (but by no means always) a further reference point was provided (question 5 above), but in some cases these URL's were broken or not working (question 7).

Cynthia found that the reading level of some of these on-line guides (question 6 above) varied widely and in the worst cases was probably set too high for some users. For example, she found that the reading level of an excerpt from the overview of the family law system provided by the Alberta courts[169] is 13.6 (meaning that it could be only read and understood by a reader reading at a Grade 13 level); in the Ontario Ministry of the Attorney-General guide to serving documents it is 8.9[170]; and in British Columbia's Guidebook for Representing Yourself in Supreme Court Civil Matters[171]it is 5.1 (easily the most accessible on this measure).

Cynthia's complete report (Report of the Court Guides Assessment Project) is contained below at Appendix I.

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[165] Example from http://www.albertacourts.ab.ca/cs/familyjustice/FLAOverview.pdf
[166] Example from http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Serving_Documents_EN.pdf
[167] Example from http://www.supremecourtbc.ca/sites/default/files/web/Applications-in-Supreme-Court.pdf
[168] Example from http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Serving_Documents_EN.pdf
[169] Example from http://www.albertacourts.ab.ca/cs/familyjustice/FLAOverview.pdf
[170] Example from http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Serving_Documents_EN.pdf
[171] http://www.supremecourtbc.ca/sites/default/files/web/Applications-in-Supreme-Court.pdf

### d. Conclusions

On-line information and resources for SRL's clearly have great potential as a means of delivering information. Creative use of on-line technologies including videos and interactive websites offer further promise.

However there are currently many deficiencies in the substantive quality of the material available to SRL's. Moreover on-line material is being developed in a piecemeal fashion – even within particular courts or ministries – and SRL's complain that it is difficult to know just what to read and what to prioritize. There is duplication in some cases and important information missing – especially on "how to" and procedural matters – in others[172].

While doing everything we can to enhance the accessibility and utility of on-line information, it is important to recognize the limitations of even the very best of these resources. One SRL made the important observation that in order to operate competently in a new "culture" (ie the courts) she needed more than simply information.

> "It's the unspoken protocols that you can't read about. These are the kinds of things that are so critical. If it's not your culture, it can reflect badly on you." [173]

This type of orientation is not easily provided on-line. Instead, "I needed somewhere to go and ask questions – and she (an individual in court information service) answered them. She told me to go into the court and watch. I learned things like, the judge does not like to be interrupted, and when it was my turn to speak."[174]

Many other SRL's expressed the need for more than on-line resources, however good – a need for human contact and support as they navigate the justice system and prepare their case to the best of their ability. This reality was continually recognized by service providers.

> "You can set up all the websites you want, but often sitting face-to-face with someone is what people really need." [175]

## 8. Legal information for SRL's

### a. Overview

The most frequently accessed source of face-to-face "legal information" for SRL's are the staff who work at the registry counters, and to a lesser extent (that is, more informally) the court clerks. In addition to these longstanding roles inside the courthouse

[172] AB73
[173] AB58. Also ON32
[174] AB39
[175] ASP14

positions, there are now a number of "non-lawyer" staff positions in in-court and community programs who interface continuously with SRL's. These include Family Justice Services (offering and Justice Access Centres (offering both family and civil assistance) operated by the Ministry of Justice in British Columbia; Alberta Family Justice Services, which includes the Family Legal Information Centres , and Law Information Centres (providing advice on civil matters), all operated by Alberta Justice and staffed by the Alberta courts; and Pro Bono Ontario (operating Law Help Ontario), Family Legal Information Centres (operated by the Ontario Ministry of the Attorney-General) and Family Law Service Centres (operated by Legal Aid Ontario). In addition, some especially busy courthouses (for example, Brampton Ontario, Jarvis Street Ontario) operate a "triage" / information desk positioned immediately after entry security screening. One or more staff are located at this desk and deal all day with an endless line of confused and anxious people, acting as "traffic cops" who direct them to the right counter/ service.

Relative to other justice system actors such as lawyers and judges, all these positions are poorly remunerated and staff receive minimal training to prepare them to interface on a daily basis with SRL's. The impact of the growth in numbers of SRL's is having at least as significant an impact on the work of court and program staff as on members of the Bar and Bench. Day after day they are facing a deluge of anxious, upset and often increasingly frustrated people. Registry and program staff were eager to be interviewed by the Project – in part to describe the difficulties they faced, and in part, one felt, just to get a break from the stress and pressure of the counters for thirty or forty minutes. Interviews with registry staff in all three provinces exposed the pressure and stress of these positions; there was frequently a feeling of siege and even desperation in these interviews.

It was striking how directly the experiences and perspectives described by SRL's and by registry and program staff in interviews and focus groups were mirror images of one another – for the SRL's from one side of the counter, and for the registry staff/ legal information centre staff from the other. When asked to describe what they saw as the major frustrations of the SRL's, counter staff were always able to accurately describe the same issues that SRL's talked about, in particular difficulty completing court forms; false expectations that the counter staff could do more to assist them in this and other respects; bruising experiences with judges; and general despair over how to navigate the court process with so little knowledge and understanding. Their own frustrations stemmed from trying to do the best job they could to assist upset and anxious SRL's who expected a great deal more from them than they could offer, both in terms of time and in relation to legal advice/ information.

Staff working at the registry and in other parts of the courthouse with SRL's often experience an emotional toll that is also a mirror of the stress and upset experienced by some SRL's. Many talked about taking work "home", where they continued to worry about individuals whom they encountered in various stages of desperation. Some further complained that they receive insufficient support following particularly upsetting incidents.

> "I had been working here for six months and a woman got dragged out by knifepoint by her husband. We got no debriefing or support. It was the most traumatic thing I've seen….*The emotional baggage that they (SRL's) come in with is only matched by our own*". (my italics)[176]

Managers described in interviews how registry staff positions have historically been very stable, with many court workers serving for ten, twenty or even thirty years. Some of these long-term workers were interviewed by the Project (below). However managers also observed that these positions were becoming increasingly transitional as a result of the very high stress of the job. This means that it is commonplace for staff to be away on stress-related leaves, leaving the counters short-staffed. As staff turnover increases, courts and programs are constantly training new workers who inevitably begin with a more shallow knowledge than more experienced staff – and may then leave after a short time only to be replaced with others.

### b. The legal information/ legal advice distinction

At the heart of the job description for each "non-lawyer" staff person is the dubious distinction between "legal information" and "legal advice". This constraint operates for registry staff and court clerks as well as for non-lawyer staff at a variety of court and community programs serving serve SRL's (see above at (a)[177]).

Many registry and program staff complained in interviews – some of them in dropped voices, aware that they were questioning an important orthodoxy of their role – that there was no clear or meaningful distinction between what they were allowed to dispense ("legal information") and what they were not permitted to talk to SRL's about ("legal advice:"). The SRL Survey conducted by Trevor Farrow et al for the Association of Canadian Court Administrators found that 55% of court workers found the distinction they were provided with between these two activities either inadequate or non-existent[178].

Many court staff said in interviews that they felt hamstrung in their dealings with SRL's at the registry counter and under pressure to refuse simple yet critical "advice", for example about which form to complete or how to complete the form. Others complained that in the absence of clear directions that determined how much assistance of this type they should give SRL's, they had little choice but to err on the side of withholding, especially given the volume of SRL's standing in line each day. One family justice worker described this pressure as follows:

> "Everyone's kids are a priority to them, and they think that they should have special treatment. We understand, but they don't realize that everyone else in line has kids

[176] APS20
[177] Note that this is not an exhaustive list but includes the most significant programs in the three provinces in terms of service provision
[178] See Addressing the Needs of Self-Represented Litigants in the Canadian Justice System" A White Paper prepared for the Association of Canadian Court Administrators, Trevor Farrow et al 2010

too."[179]

If registry and program staff experience difficulty with the legal information/ legal advice distinction, this is even less meaningful for SRL's. Many are frustrated by what they see as the unwillingness of the counter staff to assist them – whereas the counter staff feels that to give further advice would go beyond their constraints imposed on them. One SRL who appreciated this tension described it as follows:

> "I understand that the counter staff cannot give legal advice but most people do not. Instead, they think that what they are asking is a simple question and that the counter staff are just passing the buck."[180]

A further consequence of the ambiguity and uncertainty of the legal information/ legal advice distinction is that in effect court staff are constantly exercising personal discretion in their dealings with SRL's[181]. How much help should they give Mr A who is elderly and has already stood in line for an hour? How much should they say to Ms B who is confused about which forms she needs to complete and what information she needs to provide, and is having difficulty concentrating as she has a cranky two year old in tow? A constant problem is how far registry staff should go to review documentation before it is filed. If they do not, it may be rejected and the SRL will be back in line again in a few weeks time, more frustrated than ever. If they do, are they providing legal advice? And what about all the others in the line who want the same help?

A number of SRL's pointed out that whether or not they reached someone who was willing to go a little further in assisting them was "…a matter of luck – whether you get a helpful person or not is a lottery"[182] Again, the comments of the registry staff themselves bear this out. Some SRL's – usually those who can present themselves sympathetically, and may be higher functioning and with better social skills - will get more help and attention than others. This is borne out by the stories of SRL's who managed to get a little extra help from counter staff by establishing personal relationships with them; for example presenting themselves as "a pleasant person"[183] in an effort to gain more help.

### c. Interaction between SRL's and court staff

When asked in interviews "who was the most helpful person you encountered as a SRL?" the majority of SRL's described someone who worked at a courthouse registry, in a courthouse information program, or as a court clerk. While some SRL's complained that staff were not sufficiently patient or friendly (below), the majority appear to understand the pressure that court staff are working under and appreciated their kindness.

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[179] ASP6
[180] AB24
[181] A problem pointed out by John Graecen. See John M. Greacen, "No Legal Advice from Court Personnel: What Does that Mean?" (1995) 34 Judges' J. 10, online: American Judicature Society <http://www.ajs.org/prose/pro_greacen.asp>; John M. Greacen, "Legal Information vs. Legal Advice: Developments During the Last Five Years" (2001) 84 Judicature 198
[182] BC11
[183] BC72

"People working at the court counter are completely overwhelmed. At the beginning you think you have the right to help, and don't understand why no one is offering it – but then you see how overwhelmed they are and understand how they could not possibly help everyone."[184]

Some SRL's talked about relationships they developed with particular staff who they came to rely on for help but also for moral support. One man described the counter staff at his courthouse as "the angels."[185], another woman as "the little fairies"[186]. A few SRL's recognized that as they returned over and over, the patience and resources of the court staff to help them began to run out. Similarly courthouse staff talked in interviews about SRL's who would come to the counter over and over and whom they began to wish to avoid.

Some SRL's are also very aware that the people who help them the most are those on the lower end of the courthouse hierarchy.

> "It is the grade 12 girls – the clerks – that really have the brains and the compassion to make things happen. They knew how to short cut certain things, and if they could see that you wee getting a dirty deal, they would sort it out for you."

There were some noticeable differences between data collected that relates to registry staff (who may have begun their careers at a time when SRL's were the exception rather than the rule), and staff working in court-based legal information program directed at helping SRL's, such as the Justice Access Centres or the Family Legal Information Centres. Those in the latter group understand their job as helping SRL's, and by and large accept the trials and stresses of the job. For example, "It can be very rewarding to help people. I …deal directly with people and although it's always challenging, I am always learning new things. Most people are very happy when we help…It's like we are all at war together – it's tough, but we have fun."[187]

Like this young woman, staff who have been hired specifically to work with SLR clients tend to be more engaged and willing to interact with this client group (compared to some staff who have worked at the registry counter for several decades and are now required to adjust their expectations). This relates to establishing clear expectations in a job description but may make an important difference to the quality of customer service. This difference was suggested by SRL comments about the assistance they received from legal information programs. SRL's were for the most part very positive about these programs, and especially the JAC's, FLIC's and LinC's. A few were frustrated by the constraints on how much assistance these programs could give them (the same tension around legal information/ legal advice described above) but most SRL's appreciated the kindness and professionalism shown to them by the staff in these programs.

[184] BC48
[185] BC44
[186] BC45
[187] BSP14

Similarly, offices that have been designed to serve the SRL population tend to be differently laid out and organized than traditional courthouse facilities and may be more hospitable and practical for SRL's. For example, the Vancouver Justice Access Centre has a check-in counter, but there is no glass between the client and the staff person, whose job is to refer each client to the appropriate resources / person within the Centre. There are two rooms containing computers and printers which can be used by SRL's where professional staff circulate, offering assistance and answering questions. This set-up is both more conducive to SRL's working for themselves and more welcoming in terms of offering help than a traditional line up in front of a desk.

There may be some generational differences in expectations that are reflected in different styles of dealing with SRL's. One fascinating discussion among a group of courthouse and agency staff in a smaller centre illustrated this well. One older and senior agency staff (also a lawyer) suggested that SRL's "should make affording a lawyer a priority. So maybe you have to sell your four wheeler?"[188] A younger registry clerk shifted uncomfortably in her seat. "I couldn't afford a lawyer. And I'm not sure you can tell people what to spend their money on."[189]

At the same time, many long-serving court staff have clearly adapted to the new SRL reality. Virtually all courthouse staff came across as compassionate and empathetic towards SRL's in their interviews. What they are able to offer in practice, however, may vary from day to day and reflect both their workload and their personal stamina. A few SRL's complained that the counter staff were only interested in helping "people in suits" [190] (ie lawyers) and that they were treated without interest or compassion. There was a sense from some SRL's that the counter staff were unwilling to try to understand their position.

> "Some clerks, if you don't phrase the question correctly, they will not rephrase it to help you out."[191]

One SRL proposed that the counter staff "should be like crossing guards and be helping us cross the street."[192] Some accept this role, while others may be less willing to do so. One SRL who effectively summed up what many SRL's say they are really looking for from courthouse staff, whether or not this includes "legal advice" or "legal information".

> "More kindness is needed in the system. Its OK to give guidance, and not all guidance is legal advice." [193]

[188] APS20
[189] APS20
[190] BC40, BC25
[191] AB24
[192] ON2
[193] AB31

### d. Other stresses for court staff

Court staff frequently complained about the difficulty of keeping up with the ever-changing law and procedure in their area, and especially in family law. These personnel are required to be familiar with an enormous amount of information, with little formal training and supervision. It is hardly surprising that SRL's complain that they are sometimes given inconsistent information by different counter staff, as well as inconsistent information between a judge or master and the counter staff.

## 9. Other resources for SRL's

### a. Mediation services

Court-based mediation services are also seeing increasing numbers of SRL's. One mediation program manager commented that she was seeing more and more clients who did not have lawyers, and that the primary factor was "…legal costs. They say that fees are astronomical and by the time they are through with legal costs, there are not many assets left….(and) more recently there is this huge mistrust of lawyers, because they've spoken with people with bad experiences or have themselves have had a previous bad experience."[194]

Many service providers talked about the value of offering mediation once legal action begins. There was a widespread sense that mediation was often very effective, but that there was still limited knowledge among SRL's about how they might use mediation: "some are not open to mediation because they …don't understand the purpose of know that it may help – people don't realise what mediators actually do."[195] This means that cases that could be settled tend to get "stuck" in the system because the SRL does not have the skills and tools to effect a settlement (see also below). A master at a busy urban courthouse pointed out,

> "If people could afford a lawyer, the lawyer could work out a consent for them so two weeks later they aren't back in court again – but they don't know how to do this and just keep coming back over and over again."[196]

Amoung some SRL's there is a sense that mediation is more intimidating than going to court – "they are mistrustful of the mediation process."[197] "It's human nature to want to avoid confrontation and it seems easier to go to court."[198]

All SRL's were asked in interviews whether they had either considered or had been offered a chance to mediate. Many said that they did not know about mediation, and/or

[194] OSP1
[195] OSP21
[196] OSP26
[197] OSP20
[198] ASP5

said that it had not been offered to them. From field trips to courthouses it was evident that there is an uneven provision of on-site mediation services, with larger centres such as Jarvis and Sheppard offering mediation services all day, five days a week, and other more rural centres such as Wetaskiwin only able to offer mediation on one day a week.

Even among those who were aware of mediation and in some cases eager to use this as a possible means of resolution, many problems were noted. Most frequently SRL's said that they wanted to try mediation but the other side would not co-operate. This is a familiar refrain in other mediation studies and of course cannot be objectively verified. What is clear is that "Mediation means nothing if the other person doesn't want to mediate or is not willing to settle."[199]

Other comments by SRL's about mediation that came up fairly consistently suggest different challenges. A number described what they saw as a culture of opposition to mediation among the legal profession, either discouraged from mediation by their own lawyer or rebuffed by the lawyer on the other side. Some complained that even when they asked about mediation, their legal counsel (if they were represented at the time) or counsel on the other side did not take it seriously. Some complained that mediation was simply used as an opportunity to stall by experienced parties[200] or counsel[201]. Even when mediation did take place, in some cases the parties did not participate, as this woman describes:

> "The lawyers are making a farce out of mediation….The present mediation system does not work. Lawyers are treating it as a silly game and thinking of ways to beat the system. They are making a mockery of what should have been a good solution. Litigation lawyers do not want it to work. …What is the advantage to them?... I think if I had been allowed in the mediation I would have been able to settle at that time."[202]

Others complained that mediation was costly (several SRL's[203] spent a significant amount on mediation but the case did not settle – obviously this is always a risk) and some had specific complaints about mediator competency. A few made the perennial complaint that mediation agreements "had no teeth" and that the other side was able to default without consequence[204]. The overall sense of all comments made about mediation programs and the work of mediators is that these services are still not offered at a consistently professional and credible level, and are only just beginning to gain public trust.

[199] ON48
[200] BC48
[201] ON65, BC63
[202] ON55
[203] BC21, AB13
[204] AB14, AB58

A few SRL's spoke about how helpful they found mediation to be. One businessman who used mediation to resolve his case commented

> "(T)his is my second experience with mandatory mediation, and in each case the process was very fair. The ability to be heard without restrictions is so helpful, and healing. The positive outcomes for my side are a bonus."[205]

A larger number of SRL's who had not been able to use mediation – because the other side refused or because they were not offered mediation – spoke about their belief that mediation should be mandatory – in order to bring the other side to the table and at least try to settle – or at least pressed much harder by judges and court staff.[206] The sentiment expressed by this frustrated SRL was reiterated by others:

> "Mediation needs to be pushed by the court. Give me a good reason why you can't do mediation. Domestic violence? Do shuttle mediation. You are wasting the court's time, (and that means) taxpayers dollars." [207]

These comments suggested a future in which mediation would be normative and even assumed. As one SRL who had had a number of experiences in the courts for small claims matters over several decades put it,

> " (Mediation is) a star glowing on the horizon - but it never gets any closer.[208]"

Obviously mediation will not resolve all matters, but many SRL's were of the view that at least it would be tried. Many also understood that this will take a stronger push from the court services and the Bench. With increasing recourse, one might also expect the standard of professional services to rise.

### b. Community-based support for SRL's

This study engaged some of the community agencies that operate in the locale of the courthouse sites, among them advocacy centres for both men and women (including domestic violence programs and men's groups), Native Friendship Centres, the Elizabeth Fry Society, and public libraries. The support of domestic violence support groups was especially critical to some female SRL respondents[209], and a few male SRL's spoke about the importance of the support provided by a men's group[210]. We also interviewed staff at some unique agencies offering resources to SRL's such as the Justice Education Society of British Columbia, and others that did not have a brief for assisting SRL's but nonetheless frequently encountered clients who were pursing legal action without representation (usually family matters), foe example Prince George Action Against Poverty, Nanaimo

[205] AB75
[206] BC67, ON11, ON62, AB48
[207] BC69
[208] ON54
[209] ON6, ON64, BC8
[210] AB29, ON14

Citizen Advocacy, Peel Poverty Action Group. The project materials were distributed to many of these agencies, and some interviews conducted with staff.

Every individual interviewed from a community agency attested to the rapid growth in the numbers of SRL's they were seeing, and the "downloading" of some areas formerly served by public legal services to their agencies. . One domestic violence worker described how they had formerly referred women to Legal Aid lawyers, but as the program was cut, so her role changed.

> "Our previous role was supportive – to go with women clients to see their lawyers. Now women don't get lawyers – now we are the "lawyers"!"[211]

While welcoming the introduction of "legal advocate" (advocates who accompany women to court, not qualified lawyers) programs for women who suffer domestic violence, another domestic violence worker emphasized the need for women facing abusive partners to have legal representation.

> "They need lawyers. Everyone in family court does but domestic violence victims absolutely need lawyers. They need a family court process that understands that their situation is not the same as those who have not experienced domestic violence." [212]

As the numbers of SRL's continue to rise, we may see some community agencies starting to develop new resources to assist this population. In addition, public libraries are frequently used by SRL's and anecdotally librarians report many more queries related to legal procedures[213]. Future research could consider ways in which the library system might meet some SRL needs, for example by providing Internet access to on-line resources, specialist librarians, and access to other "office" facilities such as printing and photocopying.

### c. Access to law libraries

A significant group of SRL respondents used their local law library for research. Several singled out the law librarian for especial praise.[214] Some SRL's clearly became regulars at their local law library.

A law librarian who contacted the Project asking to be interviewed had some interesting observations about the SRL's whom he regularly assists at his court library.

> "The ones that come to the library and make an attempt (to research) - they clearly have some sense that there is a gap in their knowledge and they are there because they recognize they need help….. Money is far and away the primary motivation. (to

[211] BSP16
[212] OSP25
[213] Conversations with librarians in public libraries at the field sites.
[214] AB12, ON24, AB39, AB37

self-represent). From what I see, only a small fraction of SRL's think that they are smarter than the lawyers, or think they don't need a lawyer, or have an ideological axe to grind that a lawyer may not buy into….(the rest) are so desperate for assistance that they trust their fate to a stranger (ie a law librarian) who they think will help them".[215]

### d. Support person

All SRL's were asked if they customarily took a support person with them when they went to the courthouse, either for an appearance or to file documents or any other appointment (for example at a help service). We were interested to know how often a family member or a friend who was there for emotional or psychological support rather than to offer expert advice was a part of process. An anecdotal observation from spending time in the courthouses was that there were many people in the hallways and waiting rooms who were not litigants themselves, but were there to give support to litigants. Whereas friends and supporters might also attend a hearing where a person is represented by legal counsel, the role of a friend for a SRL is somewhat different and may present different needs and challenges for court services staff. We were curious about the role played by the "friends of the SRL's".

Only 37% of SRL's reported that they regularly took a support person with them to court. This was sometimes a friend, sometimes a family member, or sometimes members of a wider support group (for example, a father's rights group, or a women's support group). One SRL said that she took along a friend "who dresses and looks like a lawyer."[216]

Many other SRL's said that they had initially taken along a family member or a friend, but the process was taking so much time and was so stressful that they felt that they could not keep on asking for this type of time and support[217]. Several commented that the only person who could possibly have the time to attend all the hearings with them would be someone who was retired or unemployed[218]. Among the 55% who answered "no" therefore were a significant number who had previously had a support person accompany them, but no longer had this resource. Instead, they made do with a sense of solidarity with the SRL's around them: "The other people in the line – they are your buddies." [219]Interviews with court staff confirmed that many informal friendships get struck up amoung SRL's as they wait in line or for a hearing[220].

Where they did have a dedicated support person with them, SRL's reported the assistance in a variety of ways, including helping them to figure out forms and procedures, keeping them company, helping them to stay calm and focused, having another person listen to instructions to ensure that they got them right, or assisting them with language

[215] ASP11
[216] BC84
[217] AB74
[218] BC76
[219] AB14
[220] ASP5

issues. One described the benefit of having friends or family in the hearing room: "You need someone in the crowd to focus on."[221]

For the court staff on the other side of the counter, or the clerk in the hearing room, the presence of a support person can be both positive and negative. Some counter staff commented that it can be difficult to deal with two people at once, especially when the support person "wants to do all the talking".[222] As another put it, "some of them want to be lawyers" and "you find that you can't get a word in edgewise – people bring their moms, their new girlfriends, their cousins etc."[223] Where the support person is "egging them on" this can be a problem[224] – but in most cases, court staff and service providers see the presence of a support person is a positive development. The SRL "buddy" usually has the "cooler head"[225] and their primary role is to keep the SRL calm and centred.

The next most common function for a support person is to provide translation services for SRL's whose English (or French) is weak[226]. In the absence of clear rules and parameters for the intervention of a support person, especially in initial interviews with duty counsel or in hearings, there is a sense that a person whose role is to translate will generally be allowed more latitude and greater access. A few service providers told us that unless the buddy is there to provide language assistance they will generally not allow a support person to accompany a SRL into an interview[227].

A few SRL's described the benefit to them of bringing along a friend or family member who has had some legal training:

> "My friend is my "technician" who makes sure that my paperwork is "spot on" – I could not have done this without him."[228]
>
> "I did the desk order with my dad, who is a lawyer – this saved me $20,000. I did all the research and made the major decisions about what would be included in my affidavit and what was the right thing to do. I was vey privileged…how people do this without money or resources I do not know…it would have made me sick from the very beginning.[229]"

[221] AB71
[222] BSP22
[223] OSP2
[224] BSP7
[225] OSP4
[226] ASP10, BSP8, OSP6
[227] OSP26, BSP11
[228] AB19. Also ON37, BC59
[229] AB48

A small number of SRL's reported that they brought their support person into a hearing with them in order to act as a "McKenzie friend"[230]. There was some confusion about the role and limits of the input of a McKenzie friend (for example, most judges will not allow them to speak in court but they may whisper advice and provide moral support[231]). A discussion on the Facebook page in February 2013 illustrated the lack of widespread knowledge about the concept and the confusion over what they could and could not do. Some SRL's reported in interviews that they asked for a friend to be able to sit at the front table at their hearing but were told that their friend must instead sit at the back of the courtroom.

> "I tried to go into help my friend who's case I have been helping her with and I wasn't allowed to sit beside her in court or help her find something. If an attorney can have their assistant help them find something, why can't a self rep have someone beside them to assist with the paperwork or to take notes?"[232]

It may be very helpful for court services and service provider staff to contemplate a more complete research study aimed at collecting more data about the role of support persons, and how they might be educated to be constructive in the process. The relationship between a "friend" or support person and a McKenzie friend also requires clarification.[233]

### e. What other resources are SRL's asking for?

*i. SRL orientation and education*

Some SRL's expressed an interest in receiving earlier orientation that would enable them to better anticipate what lay ahead of them.

> "The … government… should hold a no fee group information session (for SRL's) – talking about forms needed, time limits, what evidence is, etc. This would be an opportunity to learn about the system.".

These suggestions consistently emphasized orientation to the procedural and even cultural aspects of self-representation (for example, how to behave, what to wear, what to expect) rather than substantive learning "about" law. Others suggested workshops that helped family SRL's to prepare a parenting plan, or a budget, a proposal for creating child

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[230] A McKenzie friend is a lay person who stands with a person who is otherwise unrepresented and assists them in court. The expression derived from the English case of McKenzie v McKenzie (1970) 3 All ER 1340. The original McKenzie friend was an Australian barrister who was not entitled to practice in the English courts. The principle has developed into a general right of assistance for SRL's but substantial discretion is exercised by individual judges. In Canada see Children's Aid Society of Niagara v P(D) (2002) 62 O.R. 3d 668 and Moss v NN Life Insurance Co. of Canada (2004) 180 Man R. 2d 253.

[231] . See the guide created for Pro Bono BC by David Mossop, available at www.clasbc.net/publications/stream

[232] BC2

[233] See the remarks on this subject by the Alberta Rules of Court Project, Self-Represented Litigants, Alberta Law Reform Institite 2005 available at www.law.ualberta.ca/alri/docs/cm12-18.pdf

support, or a proposal on property distribution, that would be offered by financial planners, psychologists and other appropriate professionals rather than by lawyers.[234]

This type of early orientation could provide some "realty-checking" before individuals begin to self-represent.

> "We have marriage courses, pre-planning for funerals but no one knows what will happen when you go into the courts. If they did know, they may not choose to go though it. [235]"

Even where they have no choice but to continue to self-represent, early orientation and information would at least allow them to begin the process with more and better information than they have at present (SRL's frequently told us that they really had no idea what to expect[236]).

> "We need more services to prime or prepare you, before you dive in to the court process."[237]

One speculated that SRL orientation might save the system time and money.

> "If resources were redistributed to SRL education and support in the beginning then you would spend less money later. This would make a difference to the entire process."[238]

A Facebook discussion on the idea of an orientation program drew many favorable comments but some resistance to the idea that it should be mandatory[239].

*ii. Office facilities*

Some SRL's describe struggles with accessing computers and more describe not having access to a printer or a photocopier. Office facilities inside the courthouse that would enable SRL's, perhaps at cost, to access the Internet, print out documents, make copies etc would be extremely useful and would reduce the stress of trying to independently utlise commercial facilities outside the courthouse.

*iii. Coaching/ mentoring*

Another type of assistance described by some SRL's emphasized one-on-one contact but was focused less on legal advice or even information, and more on "coaching" ie helping them to make their own decisions about procedure and strategy, review of their

[234] AB14
[235] ON2
[236] See the further discussion above at (5)
[237] BC42
[238] B48
[239] As in one Maryland courts: see http://www.selfrepresent.mo.gov/page.jsp?id=37293

work to date. For example, "person to person assistance with walking through my paperwork" and checks on "my lawyer homework"[240]. The important distinction here from a traditional advisor is that this person would "coach me to do it myself. Someone …who knows what questions I should expect, who can give really practical advice on what to say and what not to say…"[241]

A similar idea - of assistance provided by a person who is not a lawyer and does not take control of the case, but instead guides and supports the SRL - is described by some SRL respondents as "mentoring".

> "There should be a mentor program available, not so much for the legal expertise, but more of a hand to guide you on the path through the process." [242]

A related idea described by other respondents would be for SRL's (at their request) to be assigned a "buddy" offering moral support rather than advice or information, for example accompanying them into the courtroom for a hearing. Some SRL's bring supporters or friends with them to court (see above at XXX) and others meet and make friends in the registry line-up. A more formalized protocol for including friends or assigning a volunteer SRL "buddy" – perhaps using the model of victims services – would add value for some SRL's and would enable consistent expectations and practice (a problem in some courthouses).

## Part 4: SRL's, Lawyers and Judges

### 10. Delivering legal services to SRL's

#### a. SRL recourse to legal services

More than half the respondents in the SRL sample (53%) had a lawyer who acted for them at an earlier stage in their case. One quarter of these were Legal Aid clients. Private clients typically ran out of funds to continue to retain their counsel, and Legal Aid clients had reached the end of their Legal Aid entitlement and/or their financial circumstances had now changed and they could no longer access Legal Aid.

In a small number of cases where they were privately represented, SRL's continued to refer to this counsel for occasional advice as they proceeded on their own. Most of these previously represented individuals sought free legal advice in some form once they became SRL's (64%) although 35% said that they did not (some of these may have been using private "unbundling" instead, below). The reason most commonly given for not seeking *pro bono* legal services was that the respondent assumed that they would not be eligible. Some SRL's expressed embarrassment at the idea of applying, and then being rejected for, free legal assistance.

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[240] ON2
[241] BC50
[242] BC44

While 37% of the whole sample did not retain counsel at any stage in this matter (primarily because of the cost; see back at (4)) many of these individuals sought legal advice in a variety of ways. Some tried (for the most part unsuccessfully in the absence of a prior relationship) to persuade a private lawyer to give them "unbundled" advice. 60% of this group sought free legal advice via in-court programming, duty counsel or some other agency. Again, among those who did not seek free legal assistance the most common reason was an assumption that they would not qualify.

This data establishes that most respondents (86% of the sample) attempted to access legal advice services in some form, depending on their means. 53% had counsel representing them at some stage; a further 33% sought *pro bono* assistance. Those who neither retained a lawyer to represent them at any stage in their case (usually for financial reasons) nor sought free legal advice (usually because of concerns over eligibility) – represented just 14% of the sample.

A closer examination of the 33 files that comprise this 14% is very revealing. Virtually every respondent in this group said that the reason they did not have a lawyer was because of financial restrictions. Of the 33, about one in five added that the amount at stake in their case made it appear not worthwhile to hire counsel and have to pay them out of anything they won. A further one in five added that could not find a lawyer to represent them with whom they felt comfortable (having tried to find a lawyer at an earlier stage) and/or preferred to handle the matter themselves.

Just one in five of this group (n=7) voiced a specific criticism of lawyers as factoring into their economic decision to self-represent (most commonly concerns about not knowing what they would have to pay/ lawyers "overcharging"; and concerns about lawyers being ineffectual around settlement and raising the "ante": for example, "having lawyers involved in cases escalates the matter and is detrimental"[243].)

This data shows that at the beginning of their SRL experience, most respondents were either positive or neutral towards the idea of lawyers acting for them. They were acting alone not because they disliked lawyers or rejected the idea of legal advice services, but for practical reasons – they could not afford to retain or continue to retain counsel. Many in this group then sought *pro bono* legal advice services, unless they believed that they did not qualify for such assistance.

SRL attitudes towards lawyers and legal services may change during the course of their SRL experience. When asked in interviews what they would ask a lawyer to do for

[243] AB75

them now, assuming that an affordable and competent counsel could be provided to them, some SRL's said that they would no longer be interested in working with a lawyer – usually reflecting a combination of a bad prior experience, and their own determination now to manage their case themselves.

Many more SRL respondents responded by talking about the ways in which a lawyer could help them. They stated that they would have preferred to be (or continued to be) represented by counsel.

"Oh my goodness yes, in a heartbeat." [244]

In summary, a majority of the SRL sample would have preferred to have legal representation, if they found this affordable, offered them tangible value-for-money as they understood this (ie offered them expertise which they lacked and which brought the prospect of a better outcome), and would allow them to remain in control of major decisions about the direction and conclusion of their case. Unfortunately, a smaller but significant group simply did not believe that these criteria would or could be met in legal representation.

### b. Legal Aid

13% of the SRL sample (and one quarter of the 53% of the sample who said that they had previously retained counsel in this matter) said that their prior representation had been via Legal Aid. Their access to Legal Aid had been discontinued or had run out, and these individuals were now representing themselves. Typically they had been legally aided for their original divorce application, but were unable to receive public assistance for a subsequent variation[245], or their financial circumstances changed (for example they began to receive support, or went back to work) and they no longer qualified for Legal Aid[246].

A number of other SRL's in the sample (principally in family cases) described applying for Legal Aid but being refused because they owned a home, received a pension, or a disability benefit. Unsurprisingly, many in this group were dissatisfied with the criteria applied to them that excluded them from the provision of Legal Aid.

While some were very happy with their Legal Aid lawyer, and regretted very much that they no longer qualified for representation, a significant group expressed dissatisfaction with quality of legal services they had received from their Legal Aid lawyer. Some said that their assigned lawyer was not sufficiently experienced or knowledgeable in

[244] BC75

[245] For example, the website of the British Columbia Legal Services Society makes it clear that in most cases, an individual will only qualify for legal representation for a serious family matter once. It also appears that a variation that is not based on a serious situation involving a child would not be covered by legal representation, but rather legal advice. www.lss.ca

[246] Financial eligibility for legal aid advice and representation is set at under $2060 monthly income for a family of four in Ontario; $3340 for a family of four in Alberta; and $3230 for a family of four in British Columbia. All figures current from the 2012 websites of the Legal Aid Societies (www.lss.ca; www.legalaid.on.ca; www.legalaidab.ca)

the area of law required for their case. A few stated their belief that Legal Aid lawyers were generally of a lower quality than other private lawyers. The most frequent complaint was similar to the complaint made about private lawyers – that the lawyer was unresponsive, did not seem to care about their care, and did not "do" much.

An obviously highly intelligent young woman, Frances was perplexed by the difficulty she had in establishing any real communication with her lawyer.

> Frances was relieved when she was told that she qualified for Legal Aid in order apply for full custody of her two young children from a common law relationship. The relationship had been abusive and she was concerned about sharing custody with her ex. She wanted to have a woman lawyer represent her, and picked a name from the list provided by Legal Aid.
>
> However Frances found that her lawyer "really did not communicate with me, and I could not see what she was actually doing.". She wanted to know more about what was happening in her case, but instead found herself "shut out" from any information. "My lawyer just seemed really withdrawn from me. So I asked her "Do you want this case? If not, maybe I should find another lawyer."
>
> The lawyer responded that Frances' case was very demanding and required a lot of attention. Frances didn't understand – she could not see what attention the lawyer was giving her case.
>
> As the case progressed, Frances increasingly felt that she and her lawyer were not on the same page. Her lawyer told Frances that she should not be asking for sole custody - "you will lose" - but did not give her a clear explanation. In the end, Frances walked away from her Legal Aid lawyer and represented herself. "I wanted to be in charge of her case so that I, and not my lawyer, could decide what was right." She said "Even if I was offered anther Legal Aid lawyer now, I would try this on my own – I want to be in control of this. I am not confident – but I am determined."[247]

Some of these dissatisfied individuals said that they were no longer interested in working with a lawyer after their Legal Aid ran out, and that they had "lost faith in the legal system and lawyers."[248] Others went to a private lawyer when their Legal Aid ran out, before expending all their available resources and becoming self-represented.[249]

[247] BC43
[248] AB18
[249] For example AB16 and BC45

### c. Duty counsel and summary advice services

During the time we spent in the courthouses during this project we met a number of duty counsel, and conducted formal interviews (usually by follow up phone call) with five. Much of the time duty counsel was simply too busy to speak with us at length. We also met and interviewed twelve personnel from in-court service providers[250] who offered summary advice services, usually a pre-booked appointment with a volunteer lawyer. Finally we conducted interviews with a further ten individuals who worked for outside programs that offered a summary advice model. Many of the comments made by SRL's about their experience with these forms of assistance – duty counsel and free summary advice inside or outside the courthouse – are relevant to assessing the future efficacy of these types of legal services, and so they have been combined below.

By far the most common model for delivering legal advice services to SRL's is a summary advice model, where a lawyer will spend a limited time (usually 30 minutes) one-on-one with a SRL providing guidance on how to progress their case. Most of these programs are by appointment only, and many will only permit one session (although some SRL's told us that they persuaded services to bend this rule). Some of these programs operate inside the courthouse (for example Pro Bono Ontario is located in some Ontario courthouses, and the Justice Access Centres that operate in some British Columbia courthouses). Other programs offering similar services are located outside the courthouse (such as Pro Bono Alberta, the Legal Guidance clinics in Alberta and community legal clinics in Ontario).

The most common "walk-in" summary advice model is family duty counsel, staffed by provincial Legal Aid lawyers and offered in most family courts, (although not on a daily basis in smaller courthouses; for example, family duty counsel is available just once a week in Wetaskiwn, Alberta).

33% of the SRL sample used of *pro bono* legal services, most of them (27%) by accessing duty counsel in the courthouse. A small number of respondents said that they had been told that they did not qualify for free advice from duty counsel because of their income level, although others told us that duty counsel was persuaded to talk to them in any case[251]. In two instances, a SRL said that they could not use duty counsel in their courthouse because the other side (their ex in a divorce case) had already used the same duty counsel[252]. This is likely to become an increasing problem as the proportion of SRL's in family court increases.

Some of those using duty counsel also used other *pro bono* services via in-court programming or in the local community. A further 6% described using these services but

[250]For example, the Family Legal Information Centres / Law Information Centres in Alberta, Pro Bono Ontario in Ontario and the Justice Access Centres and Family Justice Services in British Columbia
[251] For example, BC38
[252] ON32 and BC44

not duty counsel. These programs included university law school clinics and a variety of community legal guidance clinics. In Ontario, a few respondents had used the Lawyer Referral Service (now the Law Society Referral Service) to obtain a free half hour summary advice session. In-court programs – for example Pro Bon Ontario, the Family Law Information Centres in Alberta, or the Justice Access Centres in British Columbia - appeared to be more widely used by respondents than community based services (instead those described by SRL respondents were more typically domestic violence support services for women or men's support and advocacy groups (see below at (9)) rather than legal advice resources).

### d. SRL evaluation of the summary advice model

Many SRL's had positive comments about duty counsel and their willingness to assist them in a time of stress and anxiety. Some individuals working in these positions are clearly very dedicated and their clients sense that commitment to them[253]. This SRL explained how duty counsel helped her. Interestingly, she frames this as a coaching experience for her, rather than duty counsel telling her what to do:

> "I went to duty counsel to try to present my case so I could properly follow procedure to try to get things settled. Talking with duty counsel helped me confirm that I was understanding what was going on. I have no previous knowledge of the procedure or the language. …The duty counsel was the best resource in helping me to know that I was doing this right."[254]

This positive view was not shared by all respondents. Some SRL's were evidently able to make much better use of limited advice sessions than others. Those respondents who were most satisfied with the value they got from the summary advice model spoke about preparing their questions in advance, anticipating additional information that they needed; being ready for the fact that duty counsel/ pro bono counsel would have limited time available for them; and going in for the meeting "with a resolution agenda, not an emotional agenda."[255]

Among those who seemed pleased with the assistance they received from duty counsel/ a limited time advice session with *pro bono* counsel were a number who made the important point that individuals with mental health issues and/or poor cognitive abilities would have great difficulty absorbing all the information that they would receive in a summary advice session[256]. They would likely also have difficulty planning how to use the session effectively to answer their questions.

Indeed, other SRL's the sample spoke about feeling "overwhelmed"[257] and confused"[258]" after talking with duty / *pro bono* counsel. These same respondents were

[253] For example, ON49, BC56
[254] BC27
[255] BC23
[256] BC69
[257] BC69

also more likely to complain about feeling rushed ("if you get ten seconds than you are lucky." [259]) and generally feeling poorly served. Some SRL's told us that they would often think of a pertinent question only after their session is over, and feel exasperated about how long it would take them to be able to get another appointment. This dynamic is corroborated by agency staff. "They call and say, I have just have one question and want an answer and don't want to make an appointment for just one question."[260]

Another factor in the usefulness of summary advice is the timing of the meeting in relation to key SRL tasks and actions. A number of SRL's described experiences in which they discovered mistakes only after they had completed and submitted court forms, or made assumptions about making their case which they were now told were erroneous. Earlier assistance would have enabled them to complete forms accurately[261], and/or reassess their evidence and arguments, saving both the SRL and the court considerable time and energy.

A discouraging number of SRL's complained that they believed that lawyers working in public legal services, either as volunteers or employees, were of a poorer quality than those in the private bar. Similar comments were made about lawyers assigned to respondents by Legal Aid. Some SRL's understand that these positions are not well compensated and they appear to believe that this affects the quality of counsel available to them via publicly funded services. This may be a very unfair criticism but it is reported here because it was made by a significant number of SRL's.

> "Duty counsel –I think they are punished by being there. ..the service they provide is dismal at best, confusing at worst, really no use at all."[262]

> "Duty counsel was rude and abrasive to me. (C)ourt services provide very little service…what is deemed a s service in the courthouse is very far from it in my opinion.""[263]

While these comments may be unfair given the stress that duty counsel and pro bono lawyers often work under, it is also the case that many in this group are relatively junior lawyers gaining experience – and managing a 30 minute interview with an anxious and often emotional SRL is a challenging task for even the most experienced lawyer.

Even SRL's who had good experiences with duty counsel often made the point that their services were too limited to be really helpful to them. For example, the high demand for duty counsel services means that in some courthouses, duty counsel will not appear with a SRL in court but provide advice before only. Others complained that duty counsel

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[258] BC84
[259] AB7
[260] BSP15
[261] This may not require a qualified lawyer: "There should be someone to review the paperwork and say "we need a, b and c. You don't need a lawyer but the courthouse needs someone to review the documents – it could be relatively simple – yet there is no one there to say "this is complete" or not." ON38
[262] ON27
[263] ON38

could only see them on the day of their appearance and they needed more assistance to prepare beforehand[264]. Others commented that duty counsel in their courthouse only provided one session and could not help them if they came back on another day. Some were upset that when they returned for more help duty counsel was less helpful than the first time. "Initially duty counsel very sympathetic and gave me priority…"I could not have got a restraining order without her – I could not have filled out all those papers. But the next time I had to appear she said "I don't have the time today". [265] The growing volume of SRL's makes this restriction is problematic for those who must return to the courthouse on numerous occasions, as this woman (who was seeking a restraining order against her spouse).

These comments raise the question of how much value duty counsel and summary advice models bring to SRL's - and whether this represents the best use of the available resources for SRL's. A more complete cost/benefit analysis would be necessary to answer this question conclusively. However this data suggests some modifications that might maximize the value of this model – which represents a significant volunteer contribution by some members of the Bar - and for more SRL's.

### e. What might make the summary advice model more effective?

Duty counsel and *pro bono* summary advice are certainly "lifesavers" for a significant number of SRL's and the interviews contain many statements of appreciation and thanks for these services. However there is also a significant group for whom these types of services do not seem to be "working". The types of modifications suggested by both SRL's and service providers that might enhance the value of the duty counsel/ summary advice model of legal services include:

#### *i. Preparing SRL's*

SRL's who would like advice on how to prepare for a interview with counsel could be offered this assistance, either by other staff at the service provider or as part of courthouse orientation and education for SRL's.

#### *ii. Specilaized training for counsel*

Particular training and experience is necessary to undertake the considerable challenges of working with SRL's. Instead of regarding this work as the purview of younger, junior lawyers or law students, it is critical for this type of work to be seen as specialized, difficult and attracting additional educational and mentoring support. This might include developing training programs with the input of the clients themselves, in order to focus on their particular needs which may be quite different to traditional clients of private legal services.

[264] ON24
[265] BC35

For example, many SRL's have already conducted some of their own research and may not present as traditional deferential clients. Their research may be incomplete or even wrong – but the fact that the client has already acted on their own behalf means that the professional relationship is a different one. One para-legal working with SRL's observed "Many SRL's do not want the advice, they know what they want to do they just need to know how to do it."[266]. A similar comment is made by a courthouse service provider:

> "After a while, some SRL's don't want to listen as they no longer system so long some feel they "know" what they are doing."[267]

SRL's who have been working on their own for some time are also likely to be extremely invested and emotional regarding their case, and demand skilful and patient listening and careful explanations. They may also be looking for understanding and support, especially if they are being given "bad news" by counsel.

All these skills are less likely to be developed in younger and less experienced lawyers. Again, this suggests that the type of service offered by *pro bono* counsel requires specialized training and support.

*iii. Building in flexibility*

The timing of summary advice is clearly a problem in some cases, where it comes too late to avoid the filing of incomplete forms, or to deter an action that may have little merit. The sooner that an SR: can receive advice and assistance, the better able they are to assess the potential risks and rewards of their case. While this requires the type of listening and explaining skills described above at (ii), it is probably easier to deliver at an earlier stage before a SRL has already expended time and energy of working on their case**.**

The limit on advice sessions to one per client – a stricture clearly circumvented by the most persuasive SRL's who can talk their way into more sessions – is too rigid/ limited. Assessment on a case-by-case basis is time consuming and gives discretion to the "gatekeepers" who set appointments, but could be governed by guidelines that provide criteria for booking more than one appointments in some cases. At present the system seems to be *ad hoc*.

Most programming does not offer a lawyer to accompany a SRL to court (with the exception of court-based duty counsel models). Many SRL's said that this was what they most wanted help with, because they were extremely intimidated of standing up and speaking for themselves in court. When asked in interviews, "How would you use a lawyer now, if you could have one? What would you ask a lawyer to do for you?" a majority of respondents who specified a particular form of assistance replied that they would like a lawyer to come with them to court and speak for them. This suggests that more thought

[266] ASP4
[267] ASP10

should be given to the balance between offering in-court representation and the present model of summary legal advice.

Finally, it is noteworthy that community-based support services for the most vulnerable SRL's – often women facing domestic violence – operate a somewhat different service model that emphasizes ongoing advocacy and support rather than one-off technical advice. These srvices are often delivered primarily by counselors and domestic violence workers, who have access to lawyers for legal advice and in-court representation[268]. Some SRL's may need support and advocacy more than they need (or want) legal advice, and certainly more than they want a single limited legal advice session[269].

### f. Private legal services

#### *i. SRL critiques*

There was a great deal of very negative comment in the SRL interviews about the conduct of both their own (previously retained) counsel, and counsel on the other side. The broad themes of criticisms made of legal counsel whom they had previously retained are described above at 4(b). The general tone of these comments was that respondents who were critical of their former legal counsel were extremely resentful that they had spent so much money (in a few cases more than $75,000, with a significant group expending more than $20,000) on legal services that they felt did not represent value-for-money. Looking back, they did not understand why they had paid so much and achieved, in their view, so little in return. This resentment was sometimes heightened by a complaint that their lawyer had not listened to them or taken their input seriously, but had instead behaved as if it were "their" decision(s) to make.

The highest response to any one of our regular Facebook "Question of the Week" came to a question we posed in October 2012 about the education of future lawyers who would encounter SRL's. The question read:

> "Law school does not teach prospective lawyers very much about the needs of clients, and nothing about working with a self represented litigant on the other side. What would you like a law student and prospective lawyer to be taught about working with self reps? If you were addressing a law school class, what information would you offer them that would help them to approach self reps with understanding and professionalism?"

The emphasis in the many comments posted by SRL's was on respect. For example,

> "I would like to tell future lawyers that when working with a self-represented litigant, that they should show them the same respect and courtesy that they would

[268] For example, in the fieldsite locations, South Fraser Legal Services, Luke's Place, Osahwa, Hiatus House, Windsor Ontario
[269] OSP25

> to another lawyer. I would encourage them to negotiate with a self-rep. and go forward with a focus on mediation as opposed to trial."[270]

> "Treat us with the same respect you want. Don't assume we are stupid just because we have not gone to law school… Be prepared to face a person who will not back down and wants this resolved quickly and soon. They are not in it to make money but to get their lives back in order."[271]

Despite these criticisms, most of those SRL's asked in their interview if they would want a lawyer to help them if they could now be provided with affordable, competent counsel responded in the affirmative[272].

*ii. Comments about opposing counsel*

In addition, there were many complaints by SRL's about the conduct of opposing counsel in the 75% of cases where there was a legal representative on the other side. A few spoke about the helpfulness and civility of the lawyer on the other side – but these were a minority group. Many others described behavior and tactics that they understood as intentionally designed to bully and intimidate a person who is representing themselves. For example,

"As soon as he knew I was representing myself, he went in for the kill."[273]

> "The lawyer for the plaintiff uses tactics such as harassment and bullying to try to confuse and intimidate me. It is very sad. "[274]

References abound in the transcripts to lawyers' using what SRL's describe as "tricks of the trade" such as "snowing" them in paperwork, last minute cancellations, threatening them with costs, and refusal or delays in providing information. These comments may be understood as "merely" reactions to the inherently adversarial nature of legal proceedings, but nevertheless SRL's response to this type of behavior lowers the reputation of the legal profession and raises public ire (see below, "complaints").

Some SRL's go further to claim that judges and lawyers see themselves as above the rules, whereas they are strictly imposed on a SRL.

> "My ex's lawyer treated me very poorly. When I pointed out to him that he needed to provide me with information and within a specified period, he responded "You're not a lawyer, we don't have to follow the rules."[275]

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[270] BC47
[271] ON22
[272] See above at (10)(a)
[273] BC2
[274] ON29
[275] BC46

The small group (n=four) of lawyer SRL's expressed the greatest shock - and sometimes disappointment - about the behavior of opposing counsel.

> "The lawyers strategize to marginalize you because you are a SRL. And in fact, destroy one's procedural rights by painting you as the angry stereotype SRL. I am shocked at the success of this stereotyping and how negative it is. Its unbelievable the contempt I am treated with.[276]"

From the perspective of some counsel, SRL's are given an unfair advantage because some judges will take more time with them and even "bend the rules" for them[277]. Unsurprisingly, lawyers generally see the problem from the perspective of difficulties faced by counsel when there is an individual without representation on the others side. For example, should they provide them with any information or guidance? How should they communicate with them? Can they negotiate on equal terms?

However this issue is framed – and both perspectives without doubt have validity – the obvious response is to engage the Professional Code of Conduct for lawyers in each province. The Code could provide clear guidance to lawyers and should also entrench a commitment to respectful behavior by counsel towards SRL's. Some excellent initial proposals have emerged over the last few years[278]; a sustained effort is now needed to bring this material into the provincial Codes.

### *iii. Unbundled legal services*

Many SRL respondents described a fruitless search for a lawyer who would "just" help them with a [art of their case – for example, reviewing their documents, checking their forms or coming with them to a hearing or court appearance. None called this "unbundling", a term of art developed to describe the delivery of legal services on a task-by-task basis but that was exactly what they were describing. Respondents described seeking assistance with completing forms; reviewing completed forms and other documents; writing a letter to the other side; answering questions of law; preparing for a hearing; and representation in court for one hearing only (or someone to work with them in court, as one SRL called it "a switch-hitter" for his trial[279])

Those who were unable to find a lawyer who would provide services on this basis were both frustrated and perplexed. Part of their frustration related to not understanding why a lawyer could not give them some type of reasonable estimate of cost in advance.

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[276] ON60

[277] Carson G. & Stangarone M. "Self-Represented Litigants in the Family Courts: is Self-Representation an Unfair Tactic?' available at http://www.macdonaldpartners.com/articles/articles_georgina_carson.html

[278] See for example Wilding, K "Tips for Dealing with the Self-Represented Litigant" Ontario Bar Association Continuing Legal Education 2010, available at http://www.oba.org/oba/CDMarker/CDfiles/10INST2010/856110INST2010547123421538/PUBTab2B.pdf and "Canadian Code of Conduct for Trial Lawyers Involved in Civil Actions Involving Unrepresented Litigants" American College of Trial Lawyers, 2009. Note that among many promising provisions in the latter document, there is no mention of a duty to respect the SRL (just the court), which is one of the issues most frequently mentioned by SRL's.

[279] ON47

"A mechanic will tell you how long it will take and about how much it will cost – a lawyer won't do that."[280]

SRL's who had previously retained legal counsel were generally more successful in finding a lawyer (often their former legal counsel) who would assist them on an unbundled, task-by-task basis, for example, by making a one-off court appearance or reviewing documents. Even this group was small – just thirteen respondents in total. Each considered the input they received from a lawyer on an unbundled basis to be critical in enabling them to proceed effectively.

Janice[281] had previously retained legal counsel in her dispute over custody with her daughter's father with whom she had had a brief relationship. Having spent $29,000 on counsel within a few months, she could not longer afford him.

As the date of her trial (scheduled for nine days) approached, Janice (in the final trimester of a new pregnancy) searched for a lawyer who would give her unbundled advice. She knew she could not afford to pay for a lawyer to represent her at trial, but she needed at least to find someone who would help her to get ready and organized. One day she worked with her former lawyer's secretary, who helped her organize her binders (she paid her at a lower hourly rate than the lawyer for this assistance).

Finally Janice found a lawyer who would give her unbundled advice. "Before the trial, I saw him every couple of weeks with a list of questions. This was what got me through the trial ."

*iv. Para-legal services*

Para-legals usually work under the supervision of lawyers in Canada and the United States, typically undertaking tasks that focus on legal procedures and paperwork such as drafting, assessing and filing documents, preparing motions and other paperwork. In other jurisdictions (for example the United Kingdom[282]) the development of para-legal work outside the supervision of he profession has meant its expansion into areas that would traditionally be considered "legal work", such as providing legal advice and opinions.

In contrast, Law Societies in Canada have been diligent in prosecuting the "unauthorized practice of law" where notaries, consultants and other para-legals venture outside the narrow scopes of practice that presently restrict them. In Ontario, the Law Society offers a licensing process (creating "licensed para-legals"[283] ) which is compulsory

[280] ON2
[281] BC37. Her story is also told above at page 71
[282] For information see www.nationalparalegals.co.uk and www.theiop.org
[283] http://www.lsuc.on.ca/licensingprocessparalegal/

for any paralegal wishing to act as an advocate in a court or before a tribunal. The licensing process enables the Society to have oversight of para-legals and explicitly prohibits them from taking on any family work, restricting their practice to small claims, traffic and tribunal work, along with some provincial offences.

Some SRL's complained that they did not understand why they needed to pay a lawyer's hourly rate for some tasks which they believed could be carried out by a para-legal. advance – and another part questioned the need for a person with the qualifications and hourly rate of a lawyer to undertake certain relatively simple tasks.

"Why can't I get a sworn affidavit for $60? Why does a lawyer have to do it?" [284]

A few SRL respondents talked about their interest in assisting other SRL's as a para-legal, and three told me that they were developing a small business assisting SRL's. One former SRL who is now assisting others commented that she was often shown lawyers correspondence by other SRL's who asked her to help them understand what was written, and that she often ended up advising people how to deal with their lawyers. She commented:

> "Many of my clients have lawyers, but they do not seem to understand them, or the clients feel they are not getting a straight answer to their questions. They end up asking me to coach them to deal with their lawyers. Some of these lawyers are charging $400-500 an hour and their clients ask me "Am I being duped?" [285]

Three SRL respondents were themselves para-legals. Each commented that this was somewhat helpful since they already had some familiarity with legal procedure. In addition the study interviewed three para-legals, one from each province. Each of these individuals felt that there was an urgent need to re-examine present restrictions on para-legal work in light of public need for less costly legal services. Further, they each pointed out that the type of assistance that they could provide without formal legal qualifications was often just what some SRL's actually wanted and needed in handling their own case; "(most people) do not want the advice, they know what they want to do and they just need to know how to do it."[286] Another pointed out the appearance of conflict if the determination of the parameters of para-legal activity remains solely in the hands of the profession:

> "I do not trust the Benchers to decide the appropriate role of para-legals in the public interest – there is too much conflict of interest."[287]

This study suggests that further study is needed of the extent to which para-legal assistance could be utilized by SRL's, the types of existing para-legal activity are seen as

[284] BC60. In some provinces (eg British Columbia) notaries do offer this service for a lower cost than a typical hourly rate for counsel. Presumably this respondent was unaware of this.
[285] BC52
[286] ASP4
[287] OSP35

most helpful by SRL's, as well as a re-examination of the public interest in setting parameters for para-legal assistance.

## 11. Court appearances and interactions with judges

This study did not interview judges[288]. This was not because their views on the topic of SRL's are not extremely important – but because the study focused on the experience from the perspective of the SRL (as well as the observations of court staff working with SRL's on a daily basis). The following section summarizes this data.

### a. Negative experiences: overview

Whatever the stress and anxiety created by completing forms, filing and serving documents, and communicating with a lawyer on the other side, it is appearing in court – whether at a preliminary hearing or a full trial – that is always the most intensely anticipated and intimidating aspect of the SRL experience. Aside from a couple of individuals whose cases had only just commenced, almost all the SRL's in the sample experienced appearing before a judge – and in many cases, multiple judges.

Even the most self-confident SRL's experienced anxiety about speaking for themselves in front of a judge. Those who felt that they were well-prepared for the experience told us that they were surprised at how nervous they became as their court date approached, often losing sleep and sometimes becoming fixated on their case and arguments. This more confident and well-educated group also reflected that if they experienced this level of stress, how much harder it would be for others without their skills and advantages. One university-educated, confident and articulate SRL spent six years working on a case that required her to appear before a number of different administrative tribunals and judges.

> "It was tremendously, tremendously difficult. I am an educated individual – but I go to court all the time with other people who are just way over their heads...(H)ow can a person handling issues like this on their own figure this out?""[289]

Many SRL's described themselves as terrified about the prospect of appearing in court. Some broke into tears in our interviews just thinking about it[290]. Many recounted being unable to sleep for several or many nights before their appearance; shaking with nerves as they stood to speak; leaving court feeling upset, shaken and even humiliated; and experiencing stress-related symptoms for days afterwards.

[288] However for a view from the Bench see for example, The Honorable Madam Justice Jennifer Blishen "Self-Represented Litiagnts in Family and Civil Disputes" 25 CFLQ 117 (year?) and the Honorable Madam Justice Trussler "A Judicial View on Self-Represented Litigants" 19 CFLQ 547 (year)
[289] AB71
[290] For example, ON64

> "Everyday I went to court I was shivering and shaking all day. I was always concerned about what I would say – I just wanted to get it over with"[291]

Most tellingly, the small number of SRL's in the sample who also practice law described similar bouts of nerves. All these respondents described the difference they experienced between appearing as a professional on behalf of a client, and presenting an argument which had personal emotional and practical import. One lawyer-SRL, the applicant in a family dispute, described the impact of appearing on his own behalf – "even on uncontested motions, even for a case conference" – as follows.

> "Every hearing, the week before and the week after, I'm a wreck. After one appearance, I went back to my office and started to work on a file. I realized I couldn't focus and then that I couldn't remember anything about the file. In the end, feeling like an idiot, I went to the emergency room. I had temporary amnesia ….I lost my memory for 24 hours. Even coming in here today for this interview (this respondent was interviewed in a courthouse), I felt sick to my stomach"[292]

The impact of unpleasant experiences in court is recounted many times in SRL interviews. The following story, recounted by a well-educated businessman in his 50's, sets the scene. This respondent broke into tears as he spoke about his experience.

> Paul 's lawyer said he could no longer represent him because he did not want to continue with a case that appeared to be heading to trial. Paul asked for an adjournment – giving notice to the other lawyer – in order that he could find another lawyer.
>
> The experience of asking for an adjournment "was the worst experience of my whole life…it was embarrassing and humiliating. The judge blasted me as an incompetent father – I was shaking. I had never been treated like that in my whole life. He sent me out of the court and told me not to come back until I had a lawyer."[293]

It is clear from interviews that anxiety is a natural consequence of the fact that SRL's generally have less understanding of the hearings process than trained lawyers or judges. However, this anxiety has a very significant impact on the hearings process itself (including how a SRL feels when the hearing is over, a feeling that is often carried into subsequent hearings), as well as the overall SRL experience of "access to justice". SRL appearance anxiety needs to be carefully analyzed in order to explore its multiple causes to enable consideration of ways in which it might be reduced, in the interests of all parties (including members of the judiciary).

[291] BC35
[292] ON3
[293] ON65

SRL anxiety about court appearances was related to a number of common themes, described below.

*i. Feeling like an outsider*

The mildest expression of anxiety about appearing in court focuses on the feeling of being an outsider, unable to properly participate due to the unfamiliar language, procedures and customs of the courtroom. One SRL described this as "(L)ike going as agnostic to a religious court" [294] Some SRL's worried about appearing impolite to the Bench as a result of their lack of knowledge (see (b) below).

Many SRL's commented about the impact of legal language used by judges and lawyers which they felt distanced them from the proceedings and made it hard for them to be sure they were following what was happening in the courtroom. In contrast, they observe, "(T)he lawyers and the judges speak the same language."[295] While it is inevitable that lawyers and judges will use legal expressions that may not be familiar to SRL's, this unfortunately contributes to a feeling of exclusion and even (from a SRL perspective) "collusion"[296] between lawyers and judges. "There is the appearance that the lawyers get special treatment because they understand the language."[297] One SRL reflected this sense of disadvantage when he commented that going into court without counsel "(I)s like going into a gunfight armed only with a knife." [298]

Whereas some judges were complimented for going to some lengths to ensure that a SRL appearing in their court felt comfortable and understood the proceedings, others were described as behaving in ways that exacerbated the distance between the SRL and the court process. Sometimes the use of legal language appeared to be an intentional strategy to position the SRL outside the conversation.

> "The judge told me to go and look up "*res judicata"* in the library. The lawyer for the other side wrote it on a piece of paper and tore it off and gave it to me". [299]

Other examples of judicial behavior described to me which created distance / exclusion included the judge talking primarily with the lawyer on the other side[300], cutting off the SRL when they asked a question (many described being told to "sit down"[301] in an abrupt and discourteous manner), or simply remaining aloof and distant in a way that created a feeling of exclusion ("the judge stayed on his throne"[302]).

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[294] ON54
[295] BC44
[296] Add ref
[297] AB66
[298] AB46
[299] BC14
[300] For example, ON14, AB33
[301] For example, AB15, BC17
[302] BC37

One SRL respondent made the interesting comment that this sense of exclusion could be addressed by the Bench simply showing "more kindness and compassion"[303] towards SRL's appearing before them.

*ii. Not knowing how to behave*

Many SRL's told us that despite their best efforts, they did not know how they were expected to behave in court. Some worried about appearing impolite or discourteous. "I was so confused. I didn't know when to sit and stand – I didn't want to appear rude or disrespectful – I was so worried about that "[304] There were frequent complaints that this aspect of court procedure – for example, how to address the judge, when to stand and when to sit – was not covered in available on-line resources. "There's nothing that says, "This is what you are supposed to say at trial."[305]

The anticipation that they would not be able to properly manage their court appearance created further anxiety amoung SRL's, and sometimes resentment.

> "When I tell myself my story, it makes sense. So I think that when I stand up in front of a judge and tell my story, I can explain myself. But I am so worried that when I stand up, I shall be cut down and not be able to make myself clear and stand up for myself."[306]

*iii. Emotional investment*

Some SRL's spoke about the difficulty of managing their emotions when they were so personally invested in the outcome of their case. Most understood that if they presented their case with a great deal of emotion, they would almost certainly not succeed. Some described how they had trained themselves through a series of appearances to go to court with their emotions carefully checked.

> "It's hard but you have to wait your turn to speak and present yourself without emotion. When you do that, you can play on their field"[307]

A number of SRL's made this same point – "keep your emotions out of it. "[308]when asked what advice they had for other SRL's.

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[303] BC31
[304] BC13
[305] BC57
[306] ON65
[307] AB30
[308] ON8. Also AB3. A similar point is made in relation to all forms of communication with the other side. For example, "Remove emotion from your communication, state what you want, when you want it and when you want an answer." BC42

*iv. Multiple judges*

There were many complaints about the difficulty of appearing before multiple judges, especially in family matters. As one SRL put it, "Its like a box of chocolates – you never know what you are going to get."[309] Some family SRL's complained that they felt as if they had to begin afresh each time they saw a new judge – in part by reviewing the facts but also, crucially, in developing a relationship with the judge and establishing their own credibility.

Occasionally a SRL found themselves in a case management system that meant that they saw the same judge several times over. This was always highlighted and welcomed. Aside from the practical efficiency, this continuity was extremely important in creating a sense of confidence in the system and reducing anxiety.

*v. Judge did not read materials*

There were many complaints that the presiding judge had not read the materials the SRL had worked on in advance.[310] While this may sometimes be difficult given demands on judicial time, this left some SRL's feeling that their efforts in preparing materials were for naught.

> "The judge came into the courtroom and the first thing she said was "I haven't read anything". "I was shocked, I was naïve enough to believe that the judge would at least have an overview of why the parties were there."[311]

This problem becomes further exacerbated when multiple judges sitting at different points during a single case. In the most extreme example,

> "One time in court, the judges switched after a break and the new judge didn't even look at the file. She had no idea of what had happened previously, or what point we were at." [312]

A few SRL's told us that they believed that the judge only read the materials provided by legal counsel, and not by SRL's, and many believed that their materials were treated as less important by the judge than materials provided by a lawyer on the other side[313].

[309] BC71
[310] For example AB23
[311] BC52
[312] AB40
[313] Add refs. See also vii below

*vi. Prejudged by the judge*

> "I really don't think that judges like SRL's. The judge appeared annoyed with my attempt to self-represent and showed total (sic) bias and condescension in his tone. He had already subconsciously tagged me as an idiot. " [314]

Many SRL's told us that they were not taken seriously by the judge. This leads to a widespread belief among SRL's that since they are going to be really listened to, they cannot expect a positive result.

> "From my limited experience representing myself so far, I find that the judges sometimes go with the source that they perceive as "credible" – this means that big corporations or government with lawyers are always going to win"[315]

In one case this assumption was made explicit by the judge.

> "There was a settlement conference scheduled but the judge ordered that I must get a lawyer to represent me, or not take any further steps in the matter. The judge said 'All self represented litigants lose.' I did not reply - I was stunned."[316]

SRL's who had spent many hours preparing for their hearing felt disappointed and discouraged when they encountered this attitude from the Bench.

> "The judicial case conference was my first appearance…The master belittled me – he made a comment "just because you are a self rep, don't expect any leniency here." In fact I was well prepared. But he gave me a lecture instead."[317].

Some SRL's described particular non-verbal behaviors by the judges who heard their submissions that left them feeling, just like this woman, "belittled."[318] One described how "the judge rolled his eyes and played with his elastic band all the way through"[319] as she presented her case. Several talked about what they experienced as an inappropriate use of humor/ laughter, usually between the judge and the lawyer on the other side. Others felt offended by the disregard they saw conveyed by the judge's body language, for example; "He (the judge) sat back, swinging his chair, and eating candies, while he handed down his decision about where my children would live."[320] Another SRL described a similar experience as she watched another case involving two SRL's.

[314] AB2, also AB27
[315] BC44
[316] ON50
[317] BC46, also AB51
[318] For example BC88
[319] BC8
[320] AB44

> "At the Court of Queens Bench I observed two self representing parties. The judge had mentioned she had a 12:30 appointment and asked the people to 'make it quick'. The gentleman was seeking the court's help as his wife was taking his kids to Turkey. However, time was up and the Judge needed to move on. If I hadn't seen it for myself, I wouldn't have believed that a decision of this magnitude could be addressed with proper consideration."[321]

While there is often time pressure in the courts, there may be a failure in some instances to provide this explanation to the parties in a way that they can understand. In the absence of this clarity, some SRL's believe that this means that the court does not care about ordinary people and their problems.

*vii. A "two-tiered system"*

Many of the complaints about not being taken seriously were associated with the observation that the judge preferred to talk with a lawyer (the other side was represented in 75% of the sample).

> "Judges used to be lawyers, and they are biased in favour of the lawyers. The judges are only interested in talking to the lawyers. One judge actually said to me "I have no time for you."[322]

At best, as one SRL put it, "I was always going second".[323] Others complained that they were not permitted to speak at anything like the same length as the lawyer on the other side[324], and/or that they were cut short in their presentations, and/or that they were not consulted on procedural issues like adjournments or scheduling future events. Some complained that they believed that lawyers were given more leeway regarding procedural requirements while the SRL was held to a more rigid standard[325]. The following is a typical example of such a complaint:

> "On my last appearance the lawyer on the other side did not show up. The Master made me wait for four hours and then the lawyer rushed in at the last minute. If it had been the other way around this would not have happened."[326]

A practical example of the consequences of the more natural conversation and interaction between judge and counsel - which came up in several interviews[327] - relates to the drafting of consent orders. The usual procedure with both parties represented is for this document to be exchanged and approved by each prior to filing with the court. Where

[321] AB70
[322] ON50. Also ON54
[323] AB33
[324] BC61
[325] AB4, BC19
[326] AB51
[327] For example, BC91

only one side has legal counsel, the practice appears to be developing that that representative will draft the order and submit it to the court. In several cases, this meant that the order was then filed without any review by the SRL (who then raised issues about its content and accuracy). Inevitably, this led to further disputes[328]. This particular problem – and its possible solutions - is a good illustration of the interdependency of enhancements for SRL's and efficiencies for the court.

The sensitivities of the larger and larger numbers of public visitors to the courthouses challenge some of our previously uncontested assumptions about access and privilege. Some SRL's described the courthouse as having an embedded "apartheid" that privileged legal counsel. The examples they gave included: a registry counter system with lines for lawyers – shorter and faster – and lines for SRL's; different security lines to enter the courthouse (again, the longer lines are the public lines); and even access to a water cooler at the front of one courtroom deemed "lawyers only". Even the siting of the barristers lounge could raise hackles. For example, in Brampton, the comfortable couches and coffee machines inside the barristers lounge are clearly visible to members of the public through large plate windows as they wait in long security lines outside the courthouse.

*viii. Experiencing hostility*

> Fiona was owed almost $300,000 in support arrears - her ex-husband had stopped making any payments to her years before. After suffering a brain injury in an accident, Fiona was no longer able to work. She began an action to try to collect her support. She told me that she imagined at the outset that they would negotiate an agreement over the arrears; her main concern was to ensure that her ex-husband began to pay her support now that she no longer had an income.
>
> Fiona was represented by counsel for more than two years, but ran out of money to pay her lawyer. She said that in this period, "nothing had changed – there had been no proposals for settlement, no meetings, no negotiation". So she began to represent herself.
>
> Fiona asked for a settlement conference, but nervous about her ability to manage an appearance, she asked her former lawyer to come with her just for that day. "I just couldn't stop crying."

[328] For a different (and unusual approach), see AB4

> Fiona's fears of handling the settlement conference solo turned out to be well founded. As a person with a brain injury, she needed to take notes for her future recall, but the judge would not let her and told her, "Put your pen down." Fiona explained why she needed to take notes and asked if someone else might sit with her and take notes on her behalf. The judge refused this request as well. "You must respect the court and you should not take notes when I am talking."
>
> Fiona tried one more time to explain that she had a brain injury. "You look pretty good to me" said the judge. "Sit down".[329]

While stories that could be described as illustrating "hostile" attitudes towards SRL's were far less common than those that suggested irritation, impatience, or dismissive attitudes, a few – like Fiona's - stand out. A few judges appear to be have adopted a siege-like mentality towards SRL's, treating them rudely and harshly (a point also made by many service providers and court staff[330]).

This hostility was illustrated in various ways in SRL narratives , including conflicts over the scheduling of hearings (for example conflicts with medical appointments or child care responsibilities[331]), allowing multiple adjournments against the wishes of the SRL[332], accepting evidence that was out of time or improperly served documents – and sometimes in direct interaction between the SRL and the judge.

> "The judge told me 'Don't bother coming back to court tomorrow if you're not wearing a tie' – this was his opening remark to me. It was just hostility, all the time."[333]

*ix. Experiencing moral judgment*

A very consistent theme among SRL respondents was that many judges seemed to view SRL's as a nuisance and an irritation. Many report being told by judges – sometimes over and over in the course of their case – that they "ought to" retain counsel, along with an implicit or explicit statement that the fact that they were not represented was their "fault." The SRL often described their attempt to explain that they could not afford a lawyer, but found their explanation dismissed.

[329] ON1
[330] For example, BSP20, OSP36. See also the further discussion below at (c)
[331] For example, BC78, BC82
[332] For example, AB18, AB45
[333] BC14

> "The judge I appear before keeps telling me that I need a lawyer. I keep saying that I cannot afford one. The judge asked me about my assets in court in front of other people, which was
> embarrassing – and then said that she does not understand why I don't qualify for Legal Aid." [334]

Another described this as ".. a catch 22 - you can't afford to hire a lawyer, but the courts don't want you to represent yourself - and you can't qualify for Legal Aid. "[335]

Judicial attitudes may stem from the continued assumption that individuals who are self-representing are "choosing" this course of action and "rejecting" legal counsel. As this study clearly shows, this is rarely the case; financial constraints are far more likely to be the real reason why an individual is self-representing (and many will have previously used counsel until they ran out of funds).

The persistence of the assumption that SRL's want to "take on the system" may be the reason that so many told us that the judge not only failed to take their efforts at advocacy seriously (above), but also communicated their moral disapproval that they were representing themselves. One SRL reflected on the pervasiveness of this attitude, which so many experience and feel offended by.

> "I'm afraid it only takes one influential judge to influence the others in coffee break chatter – that SRL's are a bunch of dimwits. Then the standard is established and although they may be judges – and you would think they would be above this type of blanket perception – in the end, they are just people."[336]

A few respondents speculated on the rationale for this pattern of behavior by judges. One mused,

> "They (judges) seem to assume that if SRL's lose, we shall have less of them. But its not working that way."[337]

Several respondents who then went on to retain or to rehire lawyers (having had bad experiences in the first hearing representing themselves), talked about now being "a good girl/boy"[338] now that they were represented.

> "You have to have a lawyer so you can be part of this club…and appear to the judges to be a more conforming person."[339]

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[334] ON21
[335] AB35
[336] AB2
[337] BC52. A more likely rationale is that some judges may feel concerned that they might be charged with showing "favour" towards a SRL, and go to some (perhaps extreme) lengths to avoid this.
[338] AB2
[339] AB38

### b. Positive experiences: overview

Some – although sadly far fewer – SRL's described a good experience with a judge who showed them understanding and kindness, and/or specifically helped them in some way. Where a SRL appeared before multiple judges, they fairly often (but by no means always) could identify one judge among the total (usually three to six different judges/ masters) who they felt had treated them kindly. This comment – showing kindness - was the most commonly cited positive experience. We asked for further information about what that judge did that was particularly helpful[340].

#### *i. Respectful communication*

> "I recently attended a Family Court application with my self rep clients in X before Justice Y. He was absolutely wonderful to my self reps, he gave then time to speak, as well explained the procedures very clearly to them and treated them very respectfully."[341]

Many SRL's in their negative comments about judges emphasized that what they were seeking was respectful communication, rather than particular assistance or aid. For example, many emphasized the importance of being taken seriously,[342]. This para-legal (above) reflected on a good experience in which the judge provided some information to SRL's but also, crucially, treated them "respectfully."

#### *ii. Assisted in problem-solving and settlement*

A few judges were singled out for special thanks for assisting the parties move towards a settlement, a goal expressed by many SRL's but often without a clear sense of how to achieve this. For example, this judge used a settlement conference to advance the resolution of a family case.

> "She did more in one conversation – through some direct questions to the parties separate from their lawyers, in essence to interview them – more than my lawyer could do in three years." [343]

A few family judges were complimented for demonstrating a real commitment to put the rights and interests of children first. "The judge was amazing. She wasn't on my side, but she was on the side of 'what's good for this kid.'" [344]

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[340] See the excellent study by John Greacen "Effectiveness of Courtroom Communication in Hearings Involving Two Self Represented Litigants" Greacen and Associates for the Self Represented Litigants Network, published by the National Center for State Courts 2008. Greacen and his researchers watched judges in 15 hearings in US courtrooms dealing with self-represented litigants and found that the most effective judges developed a range of communication practices with SRL's including asking questions, framing the issues, explaining the law, explaining their decisions, and describing compliance and effects of non-compliance.

[341] ASP4

[342] Being listened to and taken seriously is a well-established aspect of "voice" according to procedural justice research. See for example, Lind, E.A. & Tyler, T., The Social Psychology of Procedural Justice (New York: Plenum Press, 1988

[343] BC2

*iii. Coaching*

Some SRL's commented on assistance they received on their presentations. This was a small number, challenging the assumption in some parts of the legal profession that judges uniformly assist SRL's, thereby giving them an unfair advantage[345]. An even smaller number said that they received any help with legal argument; most of this assistance was in the form of style, not substance. For example, one SRL who was, by her own account, very upset and strained as she argued her case over custody, was told by the judge "If you change how you talk to people, then they will want to talk to you – you are making me bristly." She appreciated – and adopted - this advice[346].

Some SRL's commented that in their experience judges were generally more patient, understanding and respectful towards them than lawyers – perhaps because they have more experience than lawyers in dealing with SRL's every day in their courtrooms[347].

**c. Comments from court staff and service providers**

Consistent with data from SRL interviews, court staff and service providers spoke about some judges who were willing to be helpful to SRL's and others who were "getting better"[348] – and others who had no time for them at all. Some saw judges expressing anger towards SRL's[349]. One group of service providers described SRL's commonly feeling "scolded" by judges – "because they are not organized or do not know what to do."[350] While a few court staff and service providers named a particular judge whom they saw as going to great lengths to help SRL's – sometimes too far, in their view – far more often they described judges as being disconnected from the reality of the SRL experience.

> "Judges need to be less afraid and roll up their sleeves and deal with the public. …Judges need to be dealing with the human side first - keep the formality, but be respectful of the human condition." [351]

When asked "what do you think are SRL's most common frustrations?" a significant number of court staff and service providers mentioned judges[352]. They talked about a widespread assumption among SRL's that they would be able to speak directly to a judge and "make them understand".[353]

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[344] BC69
[345] For example, Carson, G. & Stangarone, M. "Self-Represented Litigants in the Family Courts: is Self-Representation an Unfair Tactic?" available at http://www.macdonaldpartners.com/articles/articles_georgina_carson.html
[346] BC8. Also ON42
[347] BC63
[348] ASP5
[349] BSP20
[350] BSP7
[351] OSP16
[352] BSP10, BSP16
[353] BSP21

Some court staff complained that information they gave to SRL's was sometimes contradicted by the judge, or that the judge might tell a SRL something that they could not achieve for them[354]. This added to the frustration of the SRL and hence to the burden on counter staff.

### d. Conclusions

> "There are all these buildings – the courthouses - that are like false front buildings, like they have at Universal studios – they are supposed to help you, but they don't."[355]

The negativity of so many SRL comments about judges make for upsetting reading, but they point to some deep-rooted problems that require our urgent attention. Read alongside the poor experiences of many SRL's with legal counsel, they suggest that public confidence in the justice system is damaged, and diminishing further day by day.

A critical first step is to address the widespread misapprehension among members of the Bench and the Bar that SRL's have other (better) choices to representing themselves. This fundamental misreading of the SRL phenomenon in 2013 leads to many other unhelpful assumptions – that SRL's are intentionally bringing a feeling of chaos to their courtrooms, which they use to take unfair advantage. These assumptions are reflected over and over in the comments that SRL's make about their treatment by judges. One SRL who had had a number of successful experiences in the past in small claims court said that he now saw a different climate in the courts, with judges "…corrupted by this SRL stereotype and (using) it to justify (their) own logic."[356]

Judicial appointment and education needs to reflect the new reality – especially in family court – that judges now deal with SRL's on a daily basis. This is a huge change from 20 years ago and an unwelcome one for some judges. Discussing a matter with trained professionals is a completely different process – and one that judges have been well trained to undertake – than communicating with an (often) emotional and overwhelmed SRL. Some useful work has already been done to create judicial guidelines for working with SRL's[357], and it is hoped that the conclusions of this study will feed into this ongoing work. However far more work remains to prepare judges for working with SRL's (see Recommendations, below).

A few especially busy courts[358] are beginning to offer a less intimidating forum for SRL's at first appearance, with a special master assisting them to get ready to speak to a judge. This is a sensible development and should be considered more widely.

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[354] For example APS20, OSP37
[355] BC8
[356] ON54
[357] See for example E. Richardson "Self-represented parties: a trial management guide for the judiciary" Melbourne, County Court of Victoria 2004
[358] For exmple the OCJ in Jarvis Street, Toronto

A few SRL's[359] point to a systemic problem. The foundational principle of the justice system (even in family matters) is adversarial advocacy. Judges and lawyers are accustomed to framing every interaction in these terms. SRL's who lack training in law do not fit easily into this framework; and when they make efforts to adopt this strategy, they are often seen as unreasonable, ignorant and obstructive.

## 12. Personal and social impact on SRL's

SRL respondents described a wide range of impacts and consequences for them arising out of their decision to self-represent. Many if not most of these were unanticipated, a least to the degree that they became a problem. The experience of speaking with so many SRL's over the 13 months of data collection left the Principal Investigator with a very real sense of the impact experienced by many. At the same time, few SRL respondents saw any other choice. Where there were negative consequences for their lives they therefore saw these inevitable. This did not mean however that they did not carry a sense of grievance – and in some cases, embarrassment and astonishment – over the extent of these consequences.

### a. Personal health issues

Many SRL's describe stress-related consequences of acting as a SRL including depression and physical ailments (e.g. sleep disorders, headaches, weight loss, and depression). Some of these appear to be similar to the symptoms of post-traumatic stress disorder[360].

> "It's a traumatic experience every time I walk into the court. The last time I went to court I couldn't get out of bed after for three days."

> "The stress was making me stutter in court….you are so stressed, out of your mind, it all becomes a confusing mess. if I have to go to trial I just don't know if I'm able to do it." (in tears)

> "For a while (after the trial) I could not physically go within a two block perimeter of the courthouse in X….I could not go on the computer after the trial either – I had spent so much time on that computer. I got rid of it and had no computer for six

[359] ON54

[360] PTSD is characterized by extreme anxiety, depression, difficulty concentrating, difficulty sleeping, and panic attacks that are "triggered" by a particular experience. There is an ongoing debate over the "stressor criterion" which is the "gatekeeper" for the American Psychiatric Association's definition of PTSD. The most recent (1994, 4th edition) Diagnostic and Statistical Manual of Mental Disorders describes a traumatic event as any incident that involves "…a threat to the physical integrity of self or others." Others have argued for a broader definition to include non-life threatening events; see Anders, S.L., Frazier, P.A. & Frankfurt, S.B. "Variations in Criterion A and PTSD rates in a community sample of women" 25(2) Journal of Anxiety Disorders (2011) 176. A much anticipated 5th edition will be published in May 2013 that may reflect this debate. The second part of the APA definition is that ". . . the person's response involves intense fear, helplessness, or horror".

> months. Then I bought a different computer and put it in a different place in my house."[361]

It is important to understand these symptoms as beyond the control of the individual. It also appears to be the case (as for example with PTSD) that these symptoms are not related to a pre-existing depressive or anxiety condition or vulnerability. Several SRL's spoke about their amazement that the experience produced such strong emotions in them. In an interview with Macleans magazine in February 2013, one of the study respondents, a mild-mannered middle-class professional whom we have met and spoken with on several occasions described his experience this way:

> "I truly believe I became borderline psychopathic," he says. "I felt so frustrated, so limited in what I could do. I could write a blockbuster story about the nasty, mean thoughts that went through my head."[362]

A number of others described having to take time off work to recover from their symptoms, and a few gave up work altogether[363].

The experience for some of the small number of lawyer SRL's in the sample was equally intense, despite the fact that they were accustomed to appearing in court on behalf of clients.

> "I would say I was traumatized. I was sick for a long time, and I'm not over it.[364]

All the SRL's in the sample had families and friends who were also affected by their experience.

> **"**Judges, policymakers and justice system officers would benefit from the knowledge that intimidation, prejudice and not taking people seriously are not only stressful (and harmful) to those immediately involved, but to those people who love and support them as well."[365]

### b. Financial implications

Some SRL's describe having already expended their savings on legal counsel in earlier litigation. A few have now given up work in order to concentrate on preparing for their court case. One woman who is a Human Resources professional described how her increasingly acrimonious custody case – where her ex-husband is represented by counsel – "created so much work for me (like many SRL's, she felt obligated to respond to everything she received from the other side lest she suffer some disadvantage) that it was impossible

[361] BC37
[362] "Why people representing themselves in court are clogging the justice system" Macleans magazine February 04 2013, available at http://www2.macleans.ca/2013/02/04/courting-a-crisis/
[363] B32, BC82
[364] ON3
[365] BC30

to keep working." The consequence as she described it is "that my son and I are being pushed into poverty."[366]

Others describe the impact of the time they spend working on their case on their work responsibilities, including days taken off to attend court and exhaustion from long nights spent preparing their case. Others say that they cannot look for work while they are absorbed with their legal action.

### c. Social isolation

Despite their large and growing numbers, SRL's have little contact with one another and their preoccupation with their legal case often isolates them from family and friends. As one respondent acknowledged:

> "I dwell on it all day, every day. There is not a day that goes by when I don't research this, think about it, I am basically fixated on this."[367]

> "I became so overwhelmed that I kept talking about it all the time and alienated myself from my friends."[368]

At the same time, some family SRL's suggested that it was inevitable that they would become "fixated" on their case if they were to commit the time and energy that they believed that it required especially if the matter came to trial.

> "I lost touch with my sons during this time, I was so taken up with the trial. My relationship with my new girlfriend suffered. I was totally immersed in it, *but I had to be*."[369] (my italics)

The Project Facebook page has gradually developed a community of people who want to talk to one another. As further evidence of the extent of this isolation for some SRL's, many said that they needed some face-to-face contact – and a sympathetic ear – even if they could access all the information they needed electronically[370].

### d. Failing faith in the justice system

The depth of skepticism being expressed in these interviews about the justice system is difficult to over-state. While some of the most extreme reactions border on the paranoid, many SRL's appraise their experience in a rational and balanced way in coming to the conclusion that the justice system is "broken". Their basic complaint is clear - that instead of a user-friendly, practical means of resolving disputes the courts offer a false promise of "access to justice".

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[366] BC83
[367] ON47
[368] BC29
[369] BC21
[370] See above at (7)(b)

"No matter how right your cause is, you do not get the justice you deserve because it is about your resources."

This loss of faith is further expressed and reinforced by accounts of negative experiences with justice actors, primarily judges and lawyers. It is deepened by a widespread sense that judges and lawyers are not accountable for their behaviors. A very large number of those complaining about the actions of their own lawyer, the lawyer on the other side, and/or a judge who heard their case described their sense of injustice that there was in their view no effective process to hold this person accountable, anticipating that existing regulatory procedures for bringing a complaint would be ineffectual and a waste of their time, citing what many called "the old boys club."[371]. A few SRL's have brought forward formal complaints, either regarding a lawyer or a judge; all but one have been unsuccessful. Just one respondent in the sample had succeeded in an action against her former counsel for negligence[372].

The final story in this section synthesizes many of the points made above. It comes from a very sophisticated respondent who was pursuing a relatively "trivial" claim for property damage. It illustrates the way in which some SRL's get pulled into the vortex of a case that then begins to impact their life to a far greater extent than anything they could have imagined.

Sonia[373] was horrified when her artist's studio was damaged in a fire. The fire had been accidentally caused by the landlord, and the resulting smoke and water damaged many of her paintings beyond repair.

While the landlord accepted responsibility for the damage, he did not want to make a claim on his insurance to meet Sonia's claim for compensation. They negotiated for a while – she was asking for $1200 to cover the damage to her studio - but the relationship began to get acrimonious and Sonia realized she wasn't going to resolve this by agreement. However "(A)s artists, we had no money to pay for a lawyer." Sonia thought about dropping the case when she discovered how much work it was actually going to be – but she had had some other experiences in which she felt she had been taken advantage of – an accident in her car and another on her bike – and she now felt it was time to stand up for herself. So she decided to press ahead. "I felt at the time, "I can't keep backing down, I need to stand up for myself."

[371] AB27
[372] AB65
[373] BC48

Despite her education and determination, Sonia found the process far more complex than she had expected. Filing the forms and serving the documents was difficult and time-consuming, but this was just the beginning. Sonia's case began in a BC tribunal, moved into the small claims court, and then was appealed by the landlord into the BC Supreme Court.

When Sonia appeared in court for the first time, "I was terrified. It was so strange to find yourself in a courtroom and suddenly I felt like I had done something wrong." All the paperwork filed by the defendant was about her character and made allegations about her truthfulness. By now the defendant was also representing himself and would not settle. In a full day mediation he proposed that both sides drop their claims. Sonia felt she could not give up and accept this.

They went to a three-day trial in the small claims court. "I felt like I was in a comedy law series, because the plot they had spun was so out of control but the problem was, it was being taken seriously. I had to pull in my whole family to help me – there were allegations being made about me that had to be addressed." Sonia says that she was fortunate to appear before a patient and effective judge but he could not persuade the defendant to settle either.

Sonia won in the small claims court but the landlord appealed. She considered again hiring a lawyer, but was worried that it would be "cripplingly expensive". By now, "I felt trapped – if I dropped out now, I might end up paying his costs". She felt that she needed to finish this. Eventually the landlord's appeal was dismissed. However Sonia never received any money from her judgment against him.

"If I have reached such an emotional breaking point over such a trivial issue, where no one was hurt and only a small amount of money is involved, what is it like for people who have lost significant amounts and have had real trauma? I was stuck in the system and could not get out. … I would never ever bring anything into the justice system again, but if there is something really important at stake, that is where the system should be working."

## Part 5: Preliminary Recommendations

There is an urgent need to address the consequences of the large and growing numbers of people representing themselves in both family and civil court. Current initiatives are having some impact but are insufficient in terms of both scope and creativity. All parts of the justice system are affected, including courts administration but also members of the legal profession and the Bench.

These preliminary recommendations propose some first steps towards a proactive approach, while recognizing that the complexity of the shift away from representation by agents towards self-representation involves many unknowns. An overarching recommendation therefore is that in order to address this issue we remain open-minded, willing to innovate and experiment, and open to listening to the SRL experience. Taking a systems approach to the challenges we face is also more likely to be effective over the long-term than apportioning blame or privileging any single analysis.

Hopefully, the Dialogue Event ("Opening the Dialogue: the SRL Phenomenon" to be held at the University of Windsor May 9-11th 2013) will build on and strengthen these preliminary recommendations.

How SRL's engage with the justice system

### 1. Court forms

*Study findings:*

While on-line court forms appear to offer the prospect of enhanced access to justice, many forms are complex and difficult to complete, and SRL's often find they have made mistakes and omissions. The most common complaints include difficulty knowing which form(s) to use; apparently inconsistent information from court staff/ judges; difficulty with the language used on forms; and the consequences of mistakes including adjournments and more wasted time and stress. These widespread difficulties result in frustration for SRL's and additional burdens on court personnel, including registry staff and judges.

There has been some progress made towards developing user-friendly and simplified court forms, but it is far too little. Many court staff commented that they (and some lawyers) also had difficulty completing complex and lengthy court forms and keeping up with constant changes. In her assignment to apply for a divorce in the three provinces (The Divorce Applications Project), Kyla Fair also found that even with legal training, the forms were confusing, contained terminology she did not understand, and required an enormous amount of work and concentration.

Court guides are an important step towards assisting SRL's complete forms and understand court procedure but these too are often written in a confusing and complex

manner. In her "audit" of three sample Court Guides, Cynthia Eagan found problems very similar to those highlighted above by SRL's regarding court forms (see (2) below).

*Preliminary recommendations:*

1(a) "Best practice" standards are needed that recognize the nature and scale of SRL problems with comprehending and completing court forms. Best practice standards should reflect systemic problems (above) and include: reducing the multiplicity of forms; simplifying language used on forms which is sometimes at a very high (grade 12 or 13) reading level and frequently includes legal terminology that SRL's do not understand; ensure that information (and vocabulary) is consistent. Where forms are provided on-line, these should also follow the best practice standards adopted for on-line resources (above at (1)(a)).

1(b) It is not helpful for SRL's who cannot afford to pay for legal counsel to be constantly faced with the admonition on each court form (and sometimes on each page of each form) that they "should" retain legal counsel. While this advice is important, there may be more sensitive and effective ways to bring it to the attention of SRL's.

1(c) Complementary court guides for court forms and procedures should adopt the same standards. Where guides are provided on-line, these should also follow the best practice standards adopted for on-line resources (above).

1(d) Individuals (laypersons from a range of educational backgrounds) who have acted as SRL's should be included in planning and reviewing materials and formats in order to develop and to achieve best practice standards.

1(e) The consequence of improperly completed forms is often severe for SRL's, including delays in hearings and their access to a decision. A system for reviewing court forms and documentation prior to submission would save a great deal of judicial and administrative time and ensure that when SRL's take time away from their employment and other responsibilities to attend court, they are not adjourned because of deficiencies with their paperwork. Providing a "form checker" to SRL's would require some resources but would probably be more cost-efficient than allowing unchecked paperwork to go forward.

## 2. On-line resources

*Study findings:*

A large amount of the assistance presently made available to SRL's by the courts (and some service providers) is in the form of on-line information and related technologies (on-line forms, informational websites, and some video material). New initiatives in programming and support for SRL's in both Canada and the United States are largely based on the premise that access to the Internet can promote access to justice for SRL's.

While many of these initiatives are in relatively early stages of development, this study suggests there are significant limitations and deficiencies to this material. SRL's who anticipated that the proliferation of on-line resources would enable them to represent themselves successfully became disillusioned and disappointed once they began to try to work with what is presently available on-line. In particular, they identified the following weaknesses: an emphasis on substantive legal information and an absence of information on practical tasks like filing or serving, advice on negotiation or a strategy for talking to the other side, presentation techniques, or even legal procedure; often directed them to other sites (sometimes with broken links) with inconsistent information; and multiplicity of sites with no means of differentiating which is the most "legitimate". On-line resources often required some level of understanding and knowledge in order to be able to make best use of them.

The study data also shows that no matter how complete, comprehensive and user-friendly (standards we are still far from meeting), on-line resources are insufficient to meet SRL needs for face-to-face orientation, education and other support. Enhanced on-line technologies can be an important component of SRL programming – for example the development of sites developed specifically for SRL's making use of interactive technology - but cannot provide a complete service.

*Preliminary recommendations:*

2(a) Continued development of on-line materials for SRL's (by courts and other service providers) needs to take into account the considerable difficulties faced by many SRL's in navigating and utilizing existing resources. In order to address these difficulties, "best practice" standards should be developed to include: eliminating legal jargon, ensuring consistency, enhancing the procedural "know how" aspect of on-line resources (presently focused primarily on substance), consolidating information as much as possible to avoid duplication and navigation among multiple websites, maintaining active links, and ensuring an appropriate reading level to enable accessibility for SRL's with a range of levels of education.

2(b) Individuals (from a range of educational backgrounds) who have acted as SRL's should be included in planning and reviewing materials, formats and the development of best practice standards.

2(c) Questions and answers (including, for example, both a "decision-tree" style to direct users to the correct procedures/ forms and "FAQ's") are essential to assisting SRL's. Development of FAQ's (frequently asked questions) for websites is another obvious way in which those who have had their own SRL experience could assist in the development of better resources for others.

2(d) Websites could play a larger role in directing SRL's to the appropriate resources available in their community (mediation services, legal advice and legal information services).

2(e) There is the potential for greater interactivity in on-line platforms, as well as links to personal support via chat and phone. This would enhance the accessibility of on-line material and while not equal to face-to-face contact could help to personalize the experience and convey the sense that this material is fashioned *for* SRL's, rather than treating them as "intruders" into the world of legal rules of procedures.

2(f) There is a similar potential for SRL's to support and even mentor one another using on-line platforms. The experience of the Project Facebook (now more than 160 members and still growing) demonstrates that SRL's appreciate the chance to develop a sense of community and mutual support.

2(g) Technical support and maintenance (eg maintaining live links, updating) for on-line resources is also lacking and requires investment and enhancement.

## 3. Access to legal information

*Study findings:*

It is clear that many SRL's are eager to access further and better sources of legal information. This fits with the aspiration of many SRL's to continue working on their case themselves once they have determined that they cannot afford to pay (or continue to pay) a private lawyer. SRL's in the study were often seeking "guidance" rather than "direction". The amount of work that many SRL respondents were prepared to do demonstrates their commitment to "get it right" – but they often lack the necessary resources and in particular, information. The expansion of legal information services (and the practical clarification of the legal information/ legal advice distinction, below) has the potential to relieve pressure on more costly public legal services such as duty counsel (see below at (4)).

The most common source of legal information for SRL's are court staff, primarily those working at the registry counters but also staff working in court programs such as Pro Bono

Ontario, FLIC & LinC in Alberta, and the Justice Access Centres in British Columbia. These excellent services are not always clearly "signposted" in the courthouse or on the courthouse website; as a consequence some SRL's appeared to have missed the opportunity to use these programs (this was also a problem for mediation services; see below at (4)). SRL's consistently described staff working in these locations as the "most helpful" person they encountered during their SRL experience. However they also complained about the restrictions on the time and scope of information that these staff can offer, because of the limitation on their providing "legal advice" (which results in substantial personal discretion, which some SRL's are better at exploiting than others) or because of the sheer volume of people they are dealing with.

The distinction between legal information/ legal advice which lies at the heart of the job descriptions of staff working on the court counters and in information services is consistently complained about by both SRL's and staff, as at best unclear and at worst practically unworkable. The present situation places an unfair burden on court staff who are required to make constant determinations of how much information they can provide to frustrated and even angry SRL's. This leads to inconsistent applications and creates a barrier between SRL's and certain basic information that may be construed as "legal advice".

Court and agency staff providing legal information to SRL's described an almost identical set of frustrations and challenges to the SRL sample from their own perspective. They also accurately identified the primary frustrations and challenges of the SRL's. Court and agency staff are working under enormous pressure dealing with the growing SRL population and constantly changing court forms and procedures. These are very stressful jobs, for which they poorly trained and remunerated.

*Preliminary recommendations:*

3(a) It is critical to ensure that local information services are clearly signposted both in the courthouse and on the court website, with a toll free number widely posted in the community.

3(b) The conventional distinction between legal information and legal advice requires urgent re-examination. It should be possible to achieve the assumed objective – constraining the "unauthorized practice of law" – in a more consumer-friendly and feasible way. In addition it may be important to revisit exactly what this constraint should mean in the new context of widespread representation without agents (for example discussing court procedures – or predicting what a judge would say?). Court staff need more and clearer guidelines to help them to determine, consistently and fairly, what they may and may not provide as information and in response to SRL questions.

3(c) Court staff – whether working on the counter, as court clerks, or in general or legal information services - require training that prepares them to deal with members of the public on a regular basis, including dealing with distressed and emotional people.

3(d) Regular training updates - whether on court forms or procedural changes - should be built into staff development budgets, to avoid staff being faced with forms and questions with which they are unfamiliar / cannot answer. This type of substantive and procedural updating could be offered on-line using a suitable web-based learning platform.

3(e) Court staff should have access to support services (for example as a part of an EAP) offering counseling and stress management programs.

3(f) Each courthouse should examine its present security systems (both inside the courtrooms and also at the counters) to ensure that staff can feel secure in the event of a disruptive person causing a disturbance.

## 4. Other support & resources for SRL's

*Study findings:*

SRL's talked about a variety of "non-legal" services that they needed but either were not available to them or in their present form, did not meet their needs. Service providers recognized over and over in interviews that the frustrations of SRL's are a source of pressure on the justice system in general and on court staff and judicial officers in particular. Improving the experience for SRL's by developing low cost support services for them has the potential for improving the efficiency and enhancing the morale of the entire justice system.

SRL's particularly identified the need for orientation and education (aside from legal training) to enable them to better anticipate and plan for what is involved in self-representation. While this study did not evaluate the effectiveness of existing mandatory education programs, it is clear from the study data that many SRL's are looking for different forms of educational workshops to prepare them for the SRL experience. In particular, they are asking for practical tools and skills that they can apply.

SRL's also described a need for one-on-one assistance in the form of "coaching" (eg document review, answering questions) which support them to handle their own case but als provide checks and moral support. For many SRL's who wish to remain in control of their own case, coaching would be an important resource.

A significant number of SRL's say that they were never offered mediation, and/or do not know what it is. This is a clear gap that needs to be urgently addressed (for example in both educational workshops and better publicity). Some SRL's were nervous about participating in mediation, especially where there was a lawyer representing the other side. Some SRL's who wished to try to resolve their case expressed frustration that the Bench would not exercise greater pressure on a recalcitrant opposing side to come to mediation.

At present many SRL's bring friends and/or family members with them to the courthouse for moral support, especially on appearance days. This is a reflection of the need expressed

by many SRL respondents for some type of protection aganst what many experience as a lack of compassion and kindness in the system, especially from some judges. However there is a great deal of confusion and inconsistency surrounding the role of friends or supporters of SRL's, as well as the potential for an unrepresented person to being a McKenzie friend into the courtroom. This lack of clarity and wide exercise of discretion by some judges is creating resentment and confusion.

Finally, many SRL's do not have access to the types of office facilities that they require in order to represent themselves including printing services, photocopying facilities and even computers. Some services are presently provided by counter staff (informally) or overburdened court-based programming.

*Preliminary recommendations:*

### 4(a) Educational workshops

If educational workshops are to be attractive to SRL's they should focus on offering practical skills and information, offered by instructors who can provide a skills-based focus, with opportunity for interactivity and asking questions, in group sizes that permit this. Workshops should not be mandatory but SRL's could be strongly encouraged to participate in such sessions. If SRL's perceived such workshops to be useful to them in preparing for their SRL experience, they would participate.

An SRL orientation workshop should be offered in every courthouse (perhaps less frequently for smaller courthouses) for all individuals filing without representation. Given that so many SRL's evidently begin with representation (53% in this study) such information should also be provided to any individual at the time of filing, whether represented or not. An orientation workshop should be framed less as a legal information seminar and more as an orientation to what lies ahead, and might be best offered by non-lawyers. Such workshops should include time for questions and answers, which may or may not require the presence of qualified lawyers. SRL's need to be better informed about the many challenges they will face, including the amount of time required to complete the necessary preparation, the potential impact on their work commitments, the emotional toll of self-representation, the potential impact on social relationships, and even the mental health consequences. At the same time (and this is a difficult balance) it is very important that SRL orientation is not designed to discourage or deter self-representation – but rather to be clear and concrete about its challenges.

Another critical area of SRL education presently lacking is how to progress one's case towards an acceptable negotiated outcome. SRL's receive little or no information about how to resolve their case and how to talk to the other side about a possible settlement (which may be especially intimidating if the other side is represented by a lawyer). A workshop or workshops could prepare SRL's for thinking about settlement and how to make effective use of available settlement processes, including how to prepare for and behave in mediation and judicial settlement conferences, how to negotiate directly with the other side about settlement, how to generate settlement proposals, and how to finalize

settlement agreements by consent order. Where a court offers mediation services, this program should consider offering an orientation workshop that offers practical skills and tips to SRL's.

SRL education should be the responsibility of the justice ministries and ideally promoted and offered in the courthouses. Programming could be provided by outside specialists with the input and assistance of court staff. In developing programs and workshops, those who have had the experience of being a SRL should be consulted.

### 4(b) Coaching

Rather than focusing on legal issues and procedures, coaching could be offered by specialists in (e.g.) communication, negotiation, and presentation skills (all areas that SRL's described as important but often lacking from their own experience and expertise). In particular, one-on-one coaching for settlement / preparation for mediation / strategic assessment of resolution options would be extremely valuable for many SRL's who wish to pursue settlement, but do not have the tools and skills to do so.

### 4 (c) Mediation services

It is critical to ensure that local mediation services are clearly signposted both in the courthouse and on the court website, with a toll free number widely posted in the community.

Mediation services should consider offering initial orientation and training specifically designed for SRL's, to enable them to participate more fully and confidently in their programs. This could take the form of an initial session with the mediator in their case. Competent and experiences mediators are already accustomed to accommodating any additional time that some parties require for coaching and preparation before mediation without compromising neutrality.

SRL's who have had good experiences in mediation should be invited to provide "testimonials" to other SRL's who may be nervous about the idea of using mediation.

Where one side is interested in mediation, the Bench should consider using their persuasive powers to encourage the other side to seriously consider this. At minimum, judges should enquire whether SRL's have considered using mediation.

### 4(d) "Office" services

Office services available for use by SRL's should be consolidated in a central coalition in each courthouse. Such services would have to be operated at cost, but there it is clear that the convenience of such a facility in the courthouse would be significant. This would also relieve pressure on court staff and staff at court-based programs who are currently bearing the brunt of such demands.

## 4(e) Mentoring and "friends" of SRL's

There is a clear need for a "buddy" / mentoring system to support SRL's in their emotional as well as their substantive and procedural journey. Each courthouse should develop a clear and consistent protocol for the role of SRL "friends" (that is, informal supporters rather than "McKenzie friends": see below) that sets out expectations and responsibilities for appropriate access and behavior. Since physical facilities vary among courthouses it is important that the local protocol is practical and feasible for that building, although general guidelines could be set provincially. Ideally, local protocol could be determined by a committee that includes some SRL representatives. A similar protocol should be established in each courthouse for the use of "McKenzie friends" to avoid confusion and inconsistency.

Each courthouse should also explore the possibility of developing a formal buddy/mentoring scheme utilizing volunteers (perhaps along the lines of Victim Assistance programs) for SRL's. This should build on the premise that assisting a SRL to feel supported and calm will enhance their experience, as well as the experience of those who deal with them.

## 4(f) Opening hours

Courts should consider some extension of opening hours in order to accommodate the growing numbers of SRL's who have to take time away from their employment in order to file documents and appear in court.

<u>SRL's, judges and lawyers</u>

## 5. The delivery of legal services to SRL's

*Study findings:*

This study shows clearly (and consistent with other recent studies) that the primary reason for self-representation is financial. Many SRL's find that the legal services that they can realistically afford are simply not available to them. They also often find that their desire to prioritise the specific areas in which they want assistance is not possible. What they are faced with is a decision to engage in a traditional legal services model or to forego legal services. The problem for many SRL's is that financial retainers and services billed at a rate of $350-400 an hour are beyond their means, and even those who can afford to pay initially often run out of funds or willingness to continue to pay at a certain point

At the same time, 86% of the SRL sample sought legal counsel, either in the form of private legal services of legally aided/ *pro bono* assistance. SRL's are not saying that they do not want lawyers to help them – but that the way in which lawyers are currently offering their services does not fit within their budget. Some are also saying that they prefer to have more control over the progression of their case and resist the traditional assumption of professional control by their lawyer.

Other complaints made consistently by some SRL's about their prior legal services in their case include: counsel "doing nothing", no progress; counsel being disinterested in settlement possibilities and processes (including mediation); counsel not listening to them or consulting them in decision-making; and a sense that their lawyer was insufficiently familiar in the relevant area of law to be effective as counsel. A further complaint was that lawyers were not truly accountable to the public, and that efforts to question their competence (including but not limited to costs in relation to the services provided) were often not taken seriously by the courts or the regulators.

While many SRL's appreciated the assistance they received from duty counsel or other *pro bono* legal services, the study also found dissatisfaction with the most common model of delivery ie the summary legal advice model. While this model works well for some SRL's, others find a time limited opportunity to speak with legal counsel leaves them more confused, and even panicked, than before. At the same time, court duty counsel models are in serious overload. For both reasons, there is a need for a reassessment of how to offer the maximum value to the maximum number of SRL's via the summary advice model.

Respondents frequently questioned the limitations placed on the provision of assistance by para-legals, especially in relation to family matters.

Finally, many SRL's sought some type of "unbundled" legal services from legal counsel; for example, assistance with document review, writing a letter, or appearing in court. Relatively few were successful in accessing legal services on this basis despite a sustained effort. This was perplexing to many respondents, who could not afford to pay a traditional retainer and envisaged that they could undertake some parts of the necessary work themselves, with assistance.

These findings (which are supported by other studies) raise the pressing question of how private legal services are structured and delivered in an era in which a majority of litigants in some family and civil courts are without counsel.

*Preliminary recommendations:*

### 5(a) The summary advice model

In order to fully evaluate and enhance the summary legal advice model, we need to:

(i) Re-evaluate the types of advice that must be provided by lawyers, and the potential for other important and needed information and assistance to be offered by para-legals (see also (3)(b) above).

(ii) Offer SRL's an orientation with a staff person before they meet with counsel (either duty counsel or a limited legal advice session) to enable them to prepare questions and focus their concerns, in order that they may obtain maximum benefit from that limited session

(iii) Consider the present system of limiting access to a fixed number of legal advice sessions. Where a SRL returns over and over again to try to access a limited legal advice session, a different strategy is needed to help/ support that SRL and relieve the burden on a single source and type of assistance.

(iv) Consider including a workshop format for answering questions. For example, an open workshop could be offered on questions regarding filing and serving documents, preparing to appear in court, making a proposal for settlement to the other side etc. Such sessions would require experienced counsel and could include a (non-lawyer) moderator.

(v) Consider extending the role of *pro bono* counsel to court appearances in particular circumstances. Where this is not possible, an alternative course might be for counsel to brief a McKenzie friend along with a SRL prior to a court appearance.

## 5(b) Para-legals

Policymakers and professional regulators should commit to a re-evaluation of the historical reasons for the restriction of para-legal services in Canada, in the light of data in this and other studies on SRL needs. This evaluation should consider what rights-protections require the intervention of a qualified lawyer and how to identify and prioritize those cases in a public legal services model. Such an evaluation should consult SRL's as well as lawyers, court staff and other stakeholders.

This evaluation of para-legal services should also consider private paral-legal services. Many of the needs described by SRL's in this study could be met by para-legals at a much more affordable rate than lawyers. Such an evaluation should include urgent reconsideration of the types of assistance that can be lawfully offered by (licensed) para-legals, especially in relation to family matters where the need appears to be greatest.

## 5(c) "Unbundling"

Demand from clients for models of legal service beyond the raditional retainer arrangement is becoming deafening. This is especially clear in relation to requests for "unbundling" from personal clients who cannot otherwise afford to pay for legal services. The historical reluctance of the Bar to consider "unbundling" nneds to be transformed into efforts to find answers to legitimate concerns about due diligence and insurance issues. These issues are solvable within (e.g.) a modified professional indemnity model, and appropriate rules of professional conduct. While no lawyer can be required to offer unbundling, CLE programming should be developed to offer skills training, file management and billing procedures that are compatible with offering unbundled legal services.

## 5(d) Legal costs

There were numerous complaints from SRL's about the failure of lawyers to describe or explain the costs of their services. There is an urgent need to train lawyers to provide more

complete and transparent information about costs to their clients and before they present them with a bill. Sensible cost estimates are possible, and failure to provide them is bringing the profession into disrepute.

### 5(e) Complaints against lawyers

The present system of accountability – whether the court assessment procedure for legal costs or bringing conduct complaints to the professional bodies for conduct complaints – requires re-examination in the face of widespread public skepticism.

### 5(f) Code of Conduct

The widespread complaints of both SRL's and lawyers about the uncertainties and tensions where a SRL faces off against legal counsel will not be dealt with simply by developing more "rules" – but that would be a good place to start. It is important to revisit the Professional Code of Conduct for lawyers in each province on the question of the conduct of lawyers facing a SRL. The Code could provide clear guidance to lawyers and should also entrench a commitment to respectful behavior by counsel towards SRL's. This does not negate the responsibility on the part of SRL's to adhere to appropriate and respectful standards of behavior in court and in dealings with counsel (as well as judges and other court staff) but the framework of a Professional Code is an important step in these discussions.

### 5(g) Legal education

Prospective lawyers need to be exposed to the realities of the SRL phenomenon. The law schools should urgently consider developing courses that as well as providing up-to-date information about the influx of SRL's into family and civil courts, also take on the challenge of teaching law students skills that are important for dealing with a SRL on the other side. Course should also address practical issues such as how to evaluate providing "unbundled" client services. SRL's highlight in particular the need for lawyers to be more engaged in settlement and open to resolving matters with them. There may also be a role for law school to take on some of the orientation for SRL's described above at (4)(b).

## 6. The judicial role

*Study findings:*

The influx of SRL's into the family and civil courts has dramatically altered the judicial role. Judges, especially in family court, now find themselves dealing with SRL's as often as with lawyers representing clients. This is a huge sea change that some members of the judiciary are clearly adjusting to better than others. The study data is replete with SRL descriptions of negative experiences with judges, some of which suggest basic incivility and rudeness. There are also some examples of judicial interventions such as providing advice regarding court procedure, coaching on presentation, and progress towards settlement, which attract positive comments from SRL's. Other studies show that judges are concerned about

showing “favour” towards SRL’s and find themselves in a difficult position when one side is represented by counsel, and the other is not.

Most SRL’s saw numerous judges during the progress of their case, and many complained that this created inconsistencies and required them to re-establish their credibility with each appearance. Very few SRL’s experienced a single judge who managed their entire case, but those who did were far more satisfied with their overall experience.

Whatever the merit of their individual complaints, there was a very widespread sentiment among SRL’s that judges were not truly accountable and that the current mechanism (under the auspices of the Canadian Judicial Council) is a protective rather than an investigative system.

*Preliminary recommendations:*

**Judicial education**

6(a) Further judicial training to support judges in working with SRL’s on a regular basis is urgently needed. This training should include effective communication skills, facilitation skills and stress reduction strategies.

6(b) Judicial education should be developed with reference to the perspective of SRL’s *as well as* legal actors. Training should be based on dealing with “ordinary/ majority” SRL’s, for example those who contributed to this study. It is important that such training is not framed from a “siege” mentality but rather considers the needs of the ordinary SRL.

6(c) Additional training to enable the identification and management of vexatious and disruptive SRL’s should also be provided.

**Judicial appointments**

6(d) The demands of dealing with SRL’s, and the relative skills and willingness of the candidate in this respect, should be considered factors in criteria for judicial appointments, and especially to the Family Bench.

**Judicial procedures**

6(e) A Code of Conduct for judicial management of SRL’s should establish appropriate new norms of judicial practice. Such a Code should be based on common problems and difficulties faced on both sides (judges and SRL’s; it could also consult court clerks). This is a project that could be taken on by judicial educators and developed through judicial training sessions (see above at (b)).

In the absence of a formal Code, the study data suggests the following recommendations where one side is represented by counsel, and the other is not:

6(e)(i) A judge might consider opening the hearing with a short speech from the Bench welcoming the parties and setting out his or her expectations for the conduct and procedure of the hearing (including explaining and establishing his or her authority over process in the courtroom) This might include giving an opportunity to the SRL to ask a question / clear up any misapprehensions about procedure at the outset. Such an opening would need to be time limited, but with careful planning could be delivered in 5-8 minutes.

6(e)(ii) A judge should give serious consideration to allowing the SRL to bring a friend and/or a McKenzie friend into the courtroom with them (see also above at (4)(e)).

6(e)(iii) A judge should ensure that the SRL understands when s/he is to be asked to speak and should take care not to give the impression that the Bench is only interested in what counsel has to say.

6(e)(iv) A judge should ensure that any forthcoming consent order drafted by counsel is sent to the SRL for review before being submitted to the court.

### 6(f) Single judge case management

Progress towards maximizing single judge case management (especially for family matters) should be seriously considered in every courthouse. While this has immediate resource implications, single judge case management may save time and money in the long-term and has been shown to greatly enhance litigant satisfaction.

### 6(g) SRL courts

There is some limited experience with special SRL courts (eg in Calgary) and this is a development that may have promise. Moreover, it allows judges who are willing to work with this population to begin to develop this as a judicial specialty. A related and promising innovation that deserves a full evaluation is the use of a “First Appearance Master” at Jarvis Street OCJ who readies family SRL’s for their first court appearance.

### 6(h) Complaints against judges

The present system of judicial accountability via the Canadian Judicial Council requires re-examination in the face of widespread public skepticism.

System Implications of the SRL Phenomenon

## 7. Social impact and consequences

*Study findings:*

The study data vividly illustrates the range of negative consequences experienced by SRL's as a result of representing themselves. These include depletion of personal funds and savings for other purposes, instability or loss of employment caused by the amount of time required to manage their legal case themselves, social and emotional isolation from friends and family as the case becomes increasingly complex and overwhelming, and a myriad of health issues both physical and emotionally. The scale and frequency of these individually experienced consequences represent a social problem on a scale that requires recognition and attention. The costs are as yet unknown.

*Preliminary recommendations:*

7(a) Further research should be conducted as a matter of urgency to investigate the relationship between litigation as a SRL and social consequences including financial hardship, difficulty maintaining employment, personal and mental health issues, as well as the broader impact on children affected by the SRL phenomenon. This research agenda should also include an assessmnt of the fiscal impact of these social consequences in relation to (eg) court time, welfare systems, and public services.

7(b) Community agencies that presently do not focus their work on SRL's but see growing numbers of clients who are involved with self-representation should consider what resources and relative funding they should anticipate going forward in order to provide support services to this population.

7(c) SRL's themselves should consider forming support groups to enable other SRL's to find a community that can offer morale support during and even after their self-representation experience.

## 8. Culture change

*Study findings:*

This study shows clearly that amoung most SRL's, self-representation is not a choice but a last resort or a necessity. A reorientation to a justice system in which individuals frequently represent themselves rather than relying on expert agents has implications for how SRL's are regarded, welcomes and treated in the courts by staff, lawyers and judges. This is creating a crisis of faith in the Canadian justice system.

*Preliminary recommendations:*

The following are critical elements in this culture shift that the professional bodies – for example the provincial law societies, the National Judicial Institute, the Canadian Judicial Council, and the Canadian Bar Association – as well as the Canadian law schools are encouraged to consider the following:

8(a) That most SRL's are unrepresented by necessity, and not by choice. This recognition alone has many implications for how we think about SRL's and how to best meet their needs.

8(b) The parallel recognition that pressure on public resources and the cost of private legal services makes it likely that a substantial SRL population in the courts is here to stay.

8(c) The importance of creating more choices for clients in accessing private legal services, and in particular in the financial structure of legal services.

8(d) The role of the law schools and other legal educators (including CLE providers and judicial educators) in integrating changes in the traditional "rules of engagement" of professional services (in which the professional, here the lawyer, is "in charge" and "knows best") into their programs. Lawyers need to be better prepared to work in partnership with their clients in making both strategic and financial decisions.

8(e) A open-minded re-examination of the protected parameters of the lawyers' role in Canada and serious consideration of the potential role of other legally trained professionals who are not qualified lawyers.

8(f) A move away from the adversarial model and a reorientation to problem-solving in a multi-professional context. This includes: more widespread, consistent and effectively endorsed provision of mediation services, both inside and outside the courthouse; further judicial education in the conduct of settlement conferences, including conferences in which one or both parties are self-represented; and the development of specialized services for SRL's that offer them assistance with negotiation and participating in mediation.

8(g) The establishment of an ongoing policy dialogue in the form of an national steering group/ advisory body that is inclusive of all stakeholders, that can act as a convenor for further dialogues, initiate and continue research, and make further recommendations and monitor new pilot programs and initiatives.

## APPENDICES

### Appendix A: Total Completed Interviews by Province

**OVERVIEW OF SRL INTERVIEWS**

**ALBERTA**

| LOCATION | #1 | #2 | Total |
|---|---|---|---|
| Calgary | 48 | 1 | |
| Edmonton | 44 | | |
| Lethbridge | 5 | | |
| Wetaskiwin | 2 | | |
| Other | 2 | | |
| Secondary interviews | | 3 | |
| **ALBERTA SRL TOTAL** | 101 | 4 | **105** |

| TOTAL ALBERTA INTERVIEWS | 105 |
|---|---|

**BRITISH COLUMBIA**

| LOCATION | #1 | #2 | Total |
|---|---|---|---|
| Vancouver | 43 | 5 | |
| Surrey | 10 | 1 | |
| Nanaimo | 15 | 1 | |
| Prince George | 12 | 1 | |
| Other | 12 | | |
| Secondary Interviews | | | |
| **BC SRL TOTAL** | 92 | 8 | **100** |

| TOTAL BC INTERVIEWS | 100 |
|---|---|

**ONTARIO**

| LOCATION | #1 | #2 | Total |
|---|---|---|---|
| Brampton | 8 | | |
| Sudbury | 1 | | |

**OVERVIEW OF STAFF/AGENCY INTERVIEWS**

| LOCATION | #1 | #2 | Total |
|---|---|---|---|
| | | | |
| CALGARY | 13 | | |
| EDMONTON | 9 | | |
| LETHBRIDGE | 6 | | |
| WETASKIWIN | 10 | | |
| OTHER | 0 | | |
| **ALBERTA STAFF/AGENCY TOTAL** | 38 | | **38** |

| LOCATION | #1 | #2 | Total |
|---|---|---|---|
| PRINCE GEORGE | 5 | | |
| NANAIMO | 5 | | |
| SURREY | 8 | | |
| VANCOUVER | 8 | | |
| SECONDARY | | 1 | |
| TOTAL PRIMARY | 26 | | |
| **BC STAFF/AGENCY TOTAL** | | | **27** |

| LOCATION | | | |
|---|---|---|---|
| BRAMPTON | 3 | | |
| SUDBURY | 8 | | |

| | | | |
|---|---|---|---|
| Windsor | 14 | | |
| Other | 43 | | |
| Secondary Interviews | | 12 | |
| **TOTAL** | 66 | 12 | **78** |

| | | | |
|---|---|---|---|
| WINDSOR | 12 | | |
| OTHER | 19 | | |
| TOTAL PRIMARY INTERVIEWS | 42 | | |
| **TOTAL INTERVIEWS** | **42** | | **42** |

| | |
|---|---|
| **TOTAL ONTARIO INTERVIEWS** | **78** |

| | | | |
|---|---|---|---|
| **TOTAL PRIMARY INTERVIEWS** | 259 | | |
| **TOTAL SECONDARY INTERVIEWS** | | 24 | |
| **TOTAL SRL INTERVIEWS** | | | **283** |
| **TOTAL PROJECT INTERVIEWS** | **390** | | |

| | | | |
|---|---|---|---|
| **TOTAL PRIMARY INTERVIEWS** | 106 | | |
| **TOTAL SECONDARY INTERVIEWS** | | 1 | |
| **TOTAL STAFF/AGENCY INTERVIEWS** | | | **107** |

## Appendix B: All Field Sites in All Provinces

**British Columbia** Nanaimo (Provincial and Supreme Court)
Prince George (Provincial and Supreme Court)
Vancouver (Provincial and Supreme Court)
Surrey (Provincial Court only)

A focus group was also conducted in Victoria

**Alberta**
Calgary (Provincial Court and Court of QB)
Edmonton (Provincial Court and Court of QB)
Wetaskiwin (Provincial Court and Court of QB)
Lethbridge (Provincial Court and Court of QB)

**Ontario**
Windsor (OCJ and Superior Court)
Sudbury (OCJ and Superior Court)
Brampton (OCJ and Superior Court)
Jarvis, Toronto (OCJ)
Sheppard, Toronto (OCJ and Superior Court)

## Appendix C: Service Provider Interview Template

1. Have you seen significant changes in the last 3-5 years?

2. What do your users come asking for/ expecting?

3. What are the socio-economic characteristics of the SRL's you see at your agency? Are there are other characteristic patterns (substantive/ issue-based, psychological, ideological) of the SRL's you see at your agency?

4. What do you think are the most common motivations for self representation – money or other reasons?

5. How often do they have friends with them to help/ support?

6. Have they considered / tried alternatives to court?

7. What is their most common frustration?

8. What is your most common frustration?

## Appendix D: SRL Focus Group Template Questions

1. Why did they decide to represent themselves? Was this due to financial reasons? Were there other reasons? Does anyone feel that they would have done much better with a lawyer to represent them? What difference would a lawyer make?

2. What is the distance between what they expected at the outset – and what actually happened (court process, interaction with justice system actors, challenges, rewards)?

3. What was the impact of the experience on them? Emotionally – economically – in relationship terms – other?

4. How could the system work better if it was adjusted to meet the needs of SRL's? Could there be more opportunities for early resolution? More information for SRL's? Access to legal advice/ services?

*Some focus group participants also provided demographic data as set out at Part A of the SRL Interview Template, Appendix D below.*

## Appendix E: SRL Interview Template

### A. DEMOGRAPHICS

i. Gender
ii. Are you the plaintiff (petitioner) / the defendant (respondent)?
iii. Is your case ongoing/ concluded?
iv. Age (banded)

Under 20
20-25
25-30
30-40
40-50
50 plus

v. What is your income level (banded)

Under $30,000
$30,000 - 50,000
$50-75,000
$75,000 - 100,000
More than $100,00

vi. What is your highest level of education (banded)

No high school diploma
High school diploma
College
University/ professional qualification
Other (specify)

vii. Have you ever retained a lawyer in the past?

If yes, was that experience good – OK – bad?

viii.Have you retained a lawyer (may include a Legal Aid lawyer on retainer but not an occasional advisor eg duty counsel) to represent you at any stage *in this case*

ix. Are you receiving free legal advice from a service or agency?
If yes, from what source

x. In which court is your action filed?

a. Family
b. Civil (under $25,000)
c. Civil (over $25,000)

First language?

Do you take a support person with you into the court?

Are you comfortable using the computer for research?

Is the other side represented by a lawyer?

## B. TOPIC GUIDE

### 1. Deciding to use a legal process (as plaintiff/ defendant, applicant/ respondent)

*Previous experience with the legal system; expectation at the outset of this case of what you could achieve; how likely? (above); did you consider any alternatives to using the legal system? Why did you decide not to pursue alternatives? (cost, process, outcomes, emotions)*

### 2. Deciding to represent yourself

*Previous experience with lawyers; assessment of what you would gain by being represented by counsel; assessment of your own ability to represent yourself; did you bring anyone else along with you to help? How important was the issue of costs in deciding to represent yourself? If you could have representation at just one step in the process when would that be?*

### 3. Resources

*What resources have you used? What difference did these resources make to you? Who was the most helpful person you have met so far? What was the most helpful resource(s)?*

### 4. Your experience and appraisal

*How close was what has happened in the legal process to what you expected? What are the major differences? What was your biggest surprise? Your biggest disappointment? The best moment? What else would you like to happen procedurally that has not? Did you use / are you planning to use mediation? Why/ why not? What would you tell another SRL are your lessons from this experience? Would you choose to represent yourself again? What would you do differently another time? ? If you could have a (free, competent) lawyer now, what would you ask them to do for you? What would you say to the Chief Justice's Task Force on Access to Justice which is currently working on these issues?*

## Appendix F: SRL Interview Codes

### Nodes used in NVivo to code the SRL interview data (in alphabetical order)

(Please note that words in parentheses are sub-sets of that node)

Advice for other SRL's
Confusion about the law/ lack of legal knowledge
Considered alternatives to court
Contact with duty counsel (positive, negative)
Cultural discrimination issues
Different judges heard their case (and impact)
Disappointed with case outcome
Disconnect between expectations and experience
Disconnect between information provided and actual process (lawyers, court personnel)
Domestic violence case
Emotional impact of process (intimidation, humiliation, frustration, bullying)
Employment issues (because of court dates etc)
Expectations of process and outcome
Expectations played out
Experience with court personnel (positive, negative)
Experiences with judges (positive, negative)
Experiences with lawyers (positive, negative)
Gender bias
How to be an effective SRL
Judicial bias towards SRL's
Lawyer not acting in best interests of client
Lawyer unfamiliar with case/ law
Lawyer unwilling to take case
Legal advice or information provided by an agency (and types of other assistance)
Medical Issues and Self -Representation
Memorable quotes
Opposing counsel: tactics and problems
Other resources used
Other side not co-operating
Problems filing paperwork
Problems with lawyers complaints systems
Reasons for representing yourself (financial, mistrust of lawyers, personal interest and confidence, other)
Reasons for retaining a lawyer
Rewards of SRL experience
Support person
Surprises
System improvements

## SRL variables noted and analysed

Civil / family
Court
Retained a lawyer in the past and found this experience good, mediocre/ mixed, bad
Used a Legal Aid Lawyer
Have been represented by a lawyer at some point during this case
Received free legal advice at some point in this case
Customarily bring a support person to court with them
Comfortable using the Internet for research
Education (in bands) (no high school diploma, nigh school diploma, college, university/ professional qualification, other
Age (in bands) (under 20, 20-25, 25-30, 30-40, 40-50, 50 plus)
Income (in bands) (under $30,000, $30,000 - 50,000**,** $50-75,000, $75,000 - 100,000, more than $100,00)
Case is concluded / ongoing
Is the Other Side represented?

## Appendix G: Service Provider Interview Codes

Agency/staff most common frustration
Alternatives to court
Disconnect between information and process
Expectations of staff by SRL's
Programs that help SRL"s
Reasons SRL's represent themselves
Significant changes in the past five years
Socio-economic characteristics of SRL's
SRL's most common frustration
Support persons
Ways to improve the system

## Appendix H: Report of the Divorce Applications Project (by Kyla Fair)

| **GETTING DIVORCED IN ONTARIO** | |
|---|---|
| **ACTION** | **OBSERVATIONS** |
| Googled "how to get divorced in Ontario | |
| Clicked on a government link, clicked "Guide to Procedures in Family Court" | -the guide is extremely extensive, multiple pages of PDF documents<br>-intimidating to begin reading through all of this material<br>-first two pages of the guide suggest seeking a lawyer<br>-took ten minutes to read through intro, many terms I only know because of my training in civil procedure<br>- intro tells me to visit ontariocourtforms.on.ca for forms |
| Clicked section 2 of "Guide" | -discusses the 3 types of applications, I determine I need a general application<br>-lists the forms I will need to fill out, there are 7 in the list with no detail of how to fill them out<br>-I am surprised at the number of forms necessary, beginning to feel overwhelmed<br>-I had to copy the list into a word doc so I can continue to refer back to it |
| Skimmed through other sections of the "Guide" | -continually suggests seeking legal advice- this would feel frustrating to me if I could not afford a lawyer- may feel helpless trying to get through this on my own |
| Navigated to Ontariocourtforms.on.ca | -found form 8 (General Application) fairly easily, though the list of forms was very long |
| Filled out form 8 (General Application For Divorce) | -it took me 20 minutes to fill out my basic information<br>-there was a "forms assistant" option, which really made no difference in making the form any easier to fill out<br>-each section requests "supporting documentation" and "supporting facts" but does not explain what this supporting documentation should be comprised of<br>-these forms do not feel "user friendly", they appear to be made for lawyers- very frustrating to have no guidance<br>- at the end of the general application, there is a list of other forms i must fill out if I plan to claim child or spousal support (in addition to the 7 previous forms)<br>-I am starting to lose track of which forms I need to complete |
| Filled out form 13.1 (Spousal Support) | -after attempting to fill out this form for 30 minutes, I am completely overwhelmed; the amount of detail required about the value of everything you own/ all of your monthly/yearly expenses is extreme<br>-about halfway through the form I am ready to give up- required to give valuation of every item you own on date of marriage, |

| | |
|---|---|
| | valuation date, and today<br>-in reality, this form would take days to complete<br>-at the end, you are required to provide a complete calculation of net family property derived from all of the valuations previously entered<br>-the math alone is complicated, and I feel as though many errors would be made without some legal assistance |
| Final thoughts | -i am not sure what court I am supposed to bring these forms to, or what the process is after I have filed the forms and served them ie. Does the court contact me? How long will it be until trial? What will the process be at trial? What documentation will I need to bring to trial? After trial, am I legally divorced? What happens if my husband contests the information I provided? Do I get copies of his statements before trial?<br>-This process proved to be much more difficult than I anticipated, and I only filled out parts of the general forms- I have no idea how someone could do this on their own, especially in a time of emotional turmoil |

| **GETTING DIVORCED IN ALBERTA** | |
|---|---|
| **ACTION** | **OBSERVATIONS** |
| Googled "how to get divorced in Alberta" | -came to a government website, followed links on how to apply for divorce<br>-information was not specific to AB, just said to fill out appropriate forms in your province |
| Googled "divorce forms Alberta" | |
| Navigated to www.albertacourts.ab.ca | -directions on this website were listed as "steps to follow"- a brief description of the forms needed and where to bring them<br>-the forms needed were then listed at the bottom<br>-some of the terms really difficult to ascertain ie. "Praecipe to note in default"<br>-Also, there does not seem to be a description of what to do if you have oral evidence you want to provide |
| Clicked on form entitled "Statement of Claim for divorce" | -no explanations or definition given- many people wouldn't even understand what "serve" means, or how to reach a "commissioner of oaths"<br>-this form slightly more confusing than ON, although much shorter ex. Uses words like collusion, connived, etc<br>-asks Plaintiff to propose custody and financial arrangements for children, but they may not know what the options are, or what would be appropriate to ask for given the circumstances<br>-when looking at the affidavit of the applicant form, i am confused because under "grounds" for divorce, one of the options in that my spouse committed adultery as evidenced by |

| | |
|---|---|
| | *my spouses affidavit* herein... does that mean my evidence doesn't count to prove my spouse committed adultery? |
| Final Thoughts | -it appears that there would be a substantially greater number of forms to fill out if there are children involved<br>-there are other forms listed that I would need to bring to the court that I do not understand how to obtain (ex. Praecipe to note in default, divorce judgement, etc.)<br>-still left with the same questions I was after applying for divorce in Ontario |

| **GETTING DIVORCED IN BRITISH COLUMBIA** | |
|---|---|
| **ACTION** | **OBSERVATIONS** |
| Googled "Getting divorced in BC" | |
| Navigated to a service BC website | (http://www.servicebc.gov.bc.ca/life_events/divorce/index.html)<br>-there is a list of options to select from that look useful ie. Legal terms defined, basic family law, legal advice options, mediation, and the divorce act |
| Clicked on "Do-It-Yourself Divorce" | -page not found? |
| Went back to options, selected "Information about Separation and Divorce" | -after reading through, there are no options on how to begin the process |
| Clicked a link that led me to a "divorce self help kit" | (http://www.familylaw.lss.bc.ca/guides/divorce/)<br>-gives a very detailed list of step-by-step instructions- very long, intimidating<br>-going through each step is fairly easy, there is information on how to fill out each form as well as a link to the form<br>-there are also help videos and a list of agencies that you could call for help<br>-the financial statement, like the other provinces, was long, detailed, and frustrating<br>-After reading through steps 1-5 for over 30 minutes, I have learned that this information package is only for an uncontested divorce ie. When you do not need to appear in front of a judge<br>-this is frustrating because I wasted time reading a lot of information that does not apply to me- already filled out forms that do not apply to me |
| Googled "contested divorce steps BC" | -Was directed back to the website above<br>-found a section on contested divorces- basically says to resolve it outside of court or get legal advice, "The process for getting a contested divorce is complicated and can take many paths, so we don't offer a guide for it on this website.You don't have to have a |

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| | lawyer to get a divorce, whether defended or undefended, but it's strongly recommended that you get some form of legal advice, especially if you need to settle issues about property, custody, access, guardianship, or support." |
| Googled "contested divorce BC steps to follow" | -4th or 5th option down in Google was this link: (http://www.justice.gc.ca/e ng/pi/fcy-fea/lib-bib/pub/divorce/pdf/divorce.pdf)<br>-this is a guide to getting divorced<br>- after 20 mins, I have determined that this guide is useful only in giving the "broad brushstrokes"<br>- explains what divorce and separation are, what the general process is, what happens after divorce etc., but gives no indication of how to start the process |
| Googled "how to start a contested divorce BC" | -links no help |
| Googled "applying for divorce BC" | - i keep getting led back to the http://www.familylaw.lss.bc.ca/guides/divorce/ link, so I clicked a link called "legislation/court rules" under this website and came to a very long PDF doc of the *Court Rules Act*<br>- this is exactly like what I would see in a Civ Pro law class- how could an average person even begin to decipher this?<br>-also, I am not sure if I need provincial court rules or superior court rules, and cant find any information on this<br>- after reading through the rules for a few minutes, I have determined I need to look at the Superior court rules<br>-when I go to the superior court rules, I am shocked at how long they are.. the table of contents is 20 pages |
| Navigated to Part 3 of the *Court Rules Act:* "How to start/defend a family law case" | - completely confusing- detailed rules and sub-rules about how to fill out each form- I know I have to fill out form F3 and then serve it (rule 6 discusses requirements I must meet while serving), and there are separate forms for child support and spousal support that all have their own rule requirements that must be met.<br>-after looking through these rules, I am wondering whether I found the correct forms for the Ontario and Alberta divorces, because BC has been much more difficult |
| Clicked "Court Forms" link, navigated to form F3 (General Application) | - very easy to miss a step because there are drop down boxes on the left that require information but can be easily missed<br>-as I am going through this form it is becoming apparent that I have to keep referring back to the rules, because the question will state for example "I have not condoned any act relied on under section 8 (2) (b) of the Divorce Act (Canada) as a ground for divorce."<br>-like the other provinces, this form asks that if you are claiming division of property or spousal support etc, you propose the |

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| | grounds. This would be difficult for someone who has no idea what is reasonable to ask for/suggest |
| Final Thoughts | - I have no idea what the next steps are in processing this claim for divorce, or what other forms I need<br>-Having to go through the *Court Rules Act* was extremely challenging even with mny training in the law<br>- BC was the hardest province to find information on how to begin a claim for a contested divorce |

## Appendix I: Report of the Court Guides Assessment Project (by Cynthia Eagan)

I volunteered to assist Dr. Macfarlane's work after reading about her in the July 8, 2012 edition of *The Windsor Star*. I am a public librarian and on occasion, I am asked to help locate and evaluate legal information. I took an elective in university, years ago, on legal research. This is my background. It may be more than many SRL's who come to this task with no background at all. However I am certainly no expert in this field.

This was not an extensive review. It was a volunteer, time-limited effort. I don't want my report to be considered fault-finding. Legal information is complex, time-sensitive, and often structured in ways not intuitive to the public. It just is. For my small part, I felt overwhelmed by the amount of material online. I could have spent hours scaling the terrain. And when I printed it out--thinking that doing so would simplify it, make it tangible-- I just made mountains. We still need legal professionals.

I volunteered to review a document to evaluate:

- the document's reading level
- whether the experience of navigating URL's was easy
- whether the material used accessible and easily understood language
- whether the material avoided jargon
- whether language and terms were consistent throughout
- whether there seemed to be important unanswered questions
- whether there was a reference point for further questions

In consultation with Julie Macfarlane, I chose the following documents to review:

From British Columbia:
"Applications to Court" available at:
http://www.supremecourtbc.ca/sites/default/files/web/Applications-in-Supreme-Court.pdf

From Alberta:
"Alberta's Family Law Act: an Overview" available at:
http://www.albertacourts.ab.ca/cs/familyjustice/FLAOverview.pdf

From Ontario:
"Guide to Serving Documents" available at:
http://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Serving_Documents_EN.pdf

## 1. Reading Level

I used Microsoft Word's readability tool and sampled what I thought were representative pages. The Flesch-Kincaid Reading Grade Level results were: Ontario (p.11) 8.9; British Columbia (p.5) 5.1; and Alberta (p.7) 13.6.

Using a word processing program in this way is mentioned in an excellent document that Sue Rice discovered. I encourage any one, any profession, to read it:

"Writing for Self-Represented Litigants: A guide for Maryland's courts and civil legal services providers" available at :
http://www.mdcourts.gov/mdatjc/pdfs/writingforsrls.pdf

## 2. The URL experience

Occasionally I'd come across a broken link within a recommended website. Not at the top-level domain.

This is not surprising! We see on-screen resources, but not how many (or few) human resources are dedicated to website maintenance.

An example: Student Legal Services of Edmonton. It's listed as an additional resource.
From http://www.slsedmonton.com/where-to-start/
The hyperlink "Will my criminal record stop me from entering other countries?" no longer works.

A different URL situation: Ontario's print document gives me www.ontario.ca/attorneygeneral/ as a URL for further information. It is actually now: http://www.attorneygeneral.jus.gov.on.ca/english/default.asp.

This domain resolves itself—the hyperlink still works. I mention this because some people are lost if a URL does not "switch over" automatically. They don't know the difference between the location bar and the search bar in browsing software. They unwittingly start "searching" Yahoo or Google to find their document, and soon end up way off course from officially-sanctioned information. I've seen this, many times, at the public library.

I have a few other comments on on-line searching, again coming from the place of a public librarian.

a. Alberta: knowing where to access an official copy is very important. I try to find reputable and free resources. I don't encourage using public library computers to purchase items. So I was confused by the Alberta's Queen's Printer website.
Laws Online appeared to be only where you could <u>purchase</u> a copy of the laws.

b. Ontario: when I go onto E-Laws and find the Rules of the Small Claims Court, it is under "Courts of Justice"- not under "Rules" or "Small Claims". This is confusing. People who are not legally trained – myself included - always have the nagging feeling that they are **not** where they need to be-- unless they are explicitly shown/ directed.

c. British Columbia: at the Supreme Court of B.C. website's I felt unsure about the relationship between the Justice Education Society and the related organizations listed in the pull-down menu. How are these organizations working together? Who is in charge of the material? I think it's wonderful material - but I want to be secure in knowing that what I reach for a source it has been sanctioned by the courts/ relevant authorities. Remember a SRL is quickly accessing the website with no background into the hierarchy.

**3. Does the material use accessible and easily understood language? Does it avoid jargon or technical terms?**

**ALBERTA—**

**Page 1:** "on October 1, 2005 Alberta's new Family Law Act will come into effect".
So it's dated.

**Page 2:** —a significant ambiguity—"Lawyers are required to discuss the different ways of resolving family matters." This could mean:
1.)You must use a lawyer in order to proceed, or
2.) If you hire a lawyer, they must discuss with you the ways of resolving family matters.

**Page 4:** "adult interdependent partner" this term is used in a few other places, what does it mean, perhaps common-law marriage? Possibly needs defining.

**Page 4:** "Parents...may apply to either the Provincial Court or the Court of Queens' Bench....
What is it difference, why are there two locations. Possibly needs explaining.

**Page 5: (referring to division of property)**
Terms: "trust law" "unjust enrichment" "adult interdependent partners"
A sentence that probably could be worded easier: "Support orders and agreements will bind the estate of the paying person."
A possibly ominous paragraph about DNA testing refusal: "...the court can draw any inference considered appropriate to establish the parentage of a child." "Drawing an inference" is a mental activity but as a verb "draw" can mean extract, as in: "draw blood".

**Page 6:** Who is a guardian -- an example of something perhaps better illustrated by a chart versus a paragraph.

**ONTARIO:**

**Page 4:** Unclear term "endorsement record"

It's helpful that portions of the Rules are reproduced and aligned with the topic and that there is a chart for serving documents.

**Page 5:** Annoying that you will have to refer to another document for fees. At least I think it'd be good to get some idea of what copy fees (or any other legal fee) might be, for example, "as of March 22, 2013 copy costs are 10 cents per page". Okay the price may have gone up but you would have an idea of what to expect.

**Page 7:** Along those same lines, this section talks about affidavits being "sworn' before a variety of eligible individuals. But is doesn't tell you what these individuals actually "do" (do they have a unique stamp?) so that you would know that they are legitimate. This section also doesn't mention everything that you might need to do to obtain the sworn document —it does state that you show them your **unsigned document,** but do you have to have government or other I.D. to prove who you are? I have had many questions about notary services at the library.

**Page 18:**
There is probably a clearer way to say the following:
"The affidavit must be signed in the presence of the person before whom it is sworn" and "NOTE: It is a criminal offense to knowingly swear a false affidavit."

**BRITISH COLUMBIA**

**Page 1:** Unlike Ontario's material, BC doesn't show portions of it's rules, it just names them "Part 8 of the rules" is that the same thing as Rule 8?

**Page 2:** Term—"Master in Court" what is this, how does it differ from a judge. Why are there two names for judges?

**Page 2:** "The registry staff may be able to help you determine whether a judge or master should hear your application". Would they then be giving legal advice? Or is this considered legal information?

**Page 2**: "Remember that preparing for and attending at a chambers application will cost you time and money." Very vague—is there a ballpark figure (minimum?) for how much money, how much time?

**Page 3:** Term "draft order". This idea shows up written in various ways, all of which probably allude to the same thing: eg "draft of the proposed order", "attach a draft of the order", and "use this to draft your order" - using it as the same part of speech each time would be better.

**Page 5:** "Your application record must contain an index". An example would be helpful.

**Page 5:** Serving your documents. Table format would probably be clearer.

**Page 7: "**You should request costs in the event that your application succeeds." How? Give better details for anything concerning money or time.

**Page 7:** "Try not to switch back and forth between facts and law". How? Give examples.

### 3. Terminology, jargon, and consistency within the documents

A glossary for each province is available online at its own website. However for me, it was unnerving to have one computer window open to a glossary and another at the website I needed it for. Or go to the online glossary and search on paper for the term I remembered just seeing and didn't understand.

It might be helpful to just include the definitions at a document's outset. This is how literacy materials (early readers) are often structured for children.

"Adult interdependent partners" a term used in the Alberta document shows up on pages 2, 4 and 5 but is finally explained on page 8.

Early on, I was clued into the need for clearly arranged documents in print. It's a certain kind of crazy when legal papers get out of order. All three guides use page numbering. British Columbia's footer is exemplary.

### 4. Unanswered Questions and Reference Points for Further Questions:

Both the Ontario and British Columbia document had a section on affidavits.

I didn't read in either that a person needs I.D. As a librarian in a community with a large immigrant population, I have noticed that many people do not understand the requirements for obtaining a sworn document. Critical procedures need to be made really clear for laypeople. What you need /who you need/ when are they available?

The British Columbia document covers part of the affidavit process on page 4 and referred me to a subsequent document for more information on page 5. Whenever possible I'd suggest building redundancy within documents to help with possible unanswered questions. People will not necessarily read things in order, and certainly not each time they consult them. Nor might they have them all present each time. Redundancy is not boring, it's reassuring.

The British Columbia document page 2, mentions that a court application will "cost time and money". It is meant generally to imply what's ahead, no doubt. Page 3 suggests people to visit a chamber hearing and/or to contact the registry for details.

Page 7 instructs people to request costs in their application record. However no details are given on how to do this here.

I would have liked to have seen money and time issues more concretely addressed in all these documents. From how much legal professional might charge for doing something, to the copy costs at the courthouse, to when would be a good time to observe court sessions. Practical information given alongside legal information, in the same place, makes it easier to prepare mentally and physically (and fiscally).