ACCESS TO JUSTICE: A GOVERNMENT PERSPECTIVE

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INTRODUCTION

This paper looks at the problem of diminishing access to civil justice from a provincial government perspective.[1] It considers the particular role and responsibilities of provincial governments in responding to this problem, and looks at some of the challenges that characterize the current civil justice environment as well as how those challenges are shaping provincial policy and program responses. It touches on some values and principles that could inform provincial government actions and proposes a model for thinking about government services in a way that could maximize limited justice system resources in support of expanded access.

Background

In considering these matters it is taken as a given that civil and family courts across Canada have become largely unaffordable and inaccessible. A wealth of commentary over the last decade or so in the form of reports, recommendations, studies, research papers and speeches tells us that the civil courts are too expensive, too complex, too slow, and that they are increasingly unavailable as a forum where citizens can assert their rights.[2] These commentaries also observe that trials are getting longer and fewer and that courtrooms are increasingly filled with unrepresented and self-represented litigants who are trying, often unsuccessfully, to navigate the complexities of civil procedure. The tone of the commentary is sometimes urgent,[3] and the suggestion is not uncommonly made that the civil justice system is in need of fundamental reform.[4]

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[1] The opinions in this paper are the author's alone and are not those of any provincial government.

[2] The Canadian Forum on Civil Justice website identifies about 600 reports, articles, book chapters, etc. on the topic of access to justice, online: <http://cfcj-fcjc.org/clearinghouse/>.

[3] Tracey Tyler, "Access to Justice a 'basic right'" The Toronto Star (12 August 2007) "Chief Justice Beverley McLachlin has issued a call to action to governments, lawyers and judges to find solutions to the access-to-justice "crisis" imperilling the country's legal system... [and] citing what she described as an "increasingly urgent situation"," online: The Star <http://www.thestar.com/News/Canada/article/245548>.

[4] See for example, Effective and Affordable Civil Justice, The Report of the Civil Justice Reform Working Group to The BC Justice Review Task Force (November 2006) [Affordable Civil Justice] at vii, online: <http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf>.

A significant number of reforms aimed at mitigating cost or complexity have in fact been recommended over the past several years, and some have been implemented.[5] These recommendations cover a broad range of initiatives including dispute prevention, streamlined civil procedure, increased judicial case management, judicial specialization, changes to court structure, alternative trial formats, costs reform, alternative legal billing arrangements, point of entry triage or streaming of cases, expanded education, information and advice services for unrepresented litigants, enhanced or mandated mediation, more arbitration, changes to legal education and to legal culture, increased utilization of technology, and increased government funding for all of the above as well as for legal aid, civil and family duty counsel, family law programs, and other justice-related services.

When recommendations for change are made, the question arises as to who gets to decide upon and implement such changes. Provincial governments have two primary roles to play in this respect. One role is to provide resources for the justice system and the other is to administer it – that is, on matters within provincial jurisdiction, to develop policies, implement programs, operate services and make decisions about operating priorities. An examination of each of these roles, and the internal and external forces that impinge upon them, will provide a context and identify some of the complexities now confronting provincial governments as they attempt to respond to the problem of diminishing access to justice.

The Province as Administrator

The authority of provincial governments respecting the courts is set out in section 92 of the Constitution Act 1867, which provides that they have power over the administration of justice, including the "constitution, maintenance, and organization" of provincial courts of both civil and criminal jurisdiction.[6] Corresponding provincial legislation speaks to provincial responsibility for the court system. In British Columbia for example, the Attorney General is responsible to see that the administration of public affairs is in accordance with law and must superintend all matters within provincial jurisdiction connected with the administration of justice.[7] The Supreme Court Act [RSBC 1996] Chapter 443, s.10 provides that the Attorney General is responsible for "the provision, operation and maintenance of court facilities, registries and administrative services" and that the province may appoint a

[5] An inventory of reforms kept on the Canadian Forum on Civil Justice website lists nearly 150 civil justice reforms that have been implemented across Canada, online: <http://cfcj-fcjc.org/inventory/>.

[6] Section 92(14) says "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say... (14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts...".

[7] *Attorney General Act*, RSBC 1996, c 22, s 2(b) and (c).

chief administrator of court services.[8] Some differences exist between the provinces in terms of the form and extent of judicial control over budgetary or administrative matters, but the basic format is that the executive administers the courts.[9]

This authority gives the provinces a very large share of both responsibility and power in terms of responding to the access to justice problem. Of course this administrative capacity is not without limits; it is formally restricted on several sides. These limitations take the form of the independence of the judiciary, the independence of the bar, and the fact that the provinces share jurisdiction in a number of areas with Canada. In addition to the formal, jurisdictional restrictions, there are also informal limitations on the practical capacity a provincial government has to unilaterally decide upon and make policy, program, procedural, or structural changes to the justice system.

These informal limitations arise from the fact that the authority and the activities of each of the bench, the bar and the administration intersect so frequently and so totally in the daily operation of the courts that it is generally perilous for one of these bodies to attempt a meaningful change without some reasonable degree of coordination with, and cooperation from the others. Some unilateral changes are possible, but more often either the formal authority to make the desired changes is shared, or the practicalities of the situation dictate that a reform can neither be designed nor implemented by the administration, the judiciary or the bar alone.[10] The effect of this is that, notwithstanding a very broad constitutional authority to organize and administer the courts, there is little that a province can do, in practical terms, to

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[8] This legal framework allocates powers but gives no direction about minimum levels of administrative support or about the quantity or adequacy of services. It has been argued that the minimum service level implied is that which is "required to protect judicial independence and ensure that the court is able to carry out its core adjudicative function. Similarly, the court must have the resourcing necessary to allow it to give effect to the rule of law."[8] British Columbia Supreme Court Chief Justice Robert Bauman, Challenges to the Budget for the Court Services Branch at the Canadian Bar Association, BC Branch meeting (19 November 2011), online: <http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/speeches/Challenges%20to%20the%20Budget%20for%20Court%20Services%20Branch-%20CBA-BC%20Las%20Vegas%20meeting.pdf>. This is a sound formulation, but the harder question is when and how those in authority would measure, or agree, that service levels were actually inadequate to the reasonable needs of judicial independence or the rule of law.

[9] For discussion of the executive model of court administration and a description of some of its forms see: Canadian Judicial Council, "Alternative Models of Court Administration" (July 2006), online: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_Alternative_en.pdf>, and Canadian Judicial Council, "Administering Justice for the Public" (November 2007), available on the CJC website at <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_AdministeringJustice_2007_en.pdf>.

[10] The judiciary can make unilateral changes within the scope of judicial administrative independence. Law Societies can decide on changes relating to lawyer competency, billing methods, limited scope retainers, pro bono work and so on, although even here legislative or regulatory changes are not infrequently needed to give effect to such decisions. The provinces have authority to design and implement court connected justice services such as family law programs although, again, these will very often be designed in close consultation with the bench and the bar.

make significant operational or administrative changes to the justice system without the cooperation of the bench and/or the bar.

There are numerous influences that support and encourage a cooperative working relationship between these three bodies. They are bound by a common obligation to foundational ideals such as the rule of law, fairness and due process. They also share a common interest in an affordable and accessible justice system that enjoys the public's confidence. Their ability to work together is evidenced by many productive joint change initiatives that have been successfully implemented across the country over the years.

At the same time, aligning the bench, the bar and the administration behind a single policy, plan or approach can be a formidable challenge. Over the last 15 years, for example, many recommendations have been made for changes to civil process in the superior courts. Recommended changes include, but are not limited to, the use of non-binding dispute resolution processes as a precondition for using the courts, development of case flow management systems, enhanced case management, judges and masters taking a more active role in the management and resolution of cases, creation of multi-track systems for the resolution of civil disputes, setting timelines for the overall determination of civil cases, simplifying pleadings, limiting the parameters of expert evidence, streamlining motions practice, imposing limitations on discovery processes, and so on. Some of these recommendations were made in a 2006 British Columbia report published by a Task Force made up of senior representatives from the courts, the Ministry of Attorney General and the bar.[11] The report was premised upon the existence of "a widening gap between our current system and our vision" and "several troubling indicators of serious problems in the system."[12] It described a pressing need to enhance access to justice through "fundamental change" to the civil justice system because "maintaining the status quo is not an option".[13] The provincial government fully endorsed the report and expressed the wish to proceed with its recommendations. However, the bar, or at least a portion of the bar, took a different view and opposed several of the recommendations.[14] By the time that the new rules came into force in July of 2010, a number of key recommendations were, as a consequence of this opposition, eliminated and others were watered down.[15] The final product amounted to

[11] Affordable Civil Justice, *supra* note 4. Representatives on the Justice Review Task Force included the Chief Justice of the Supreme Court, the Chief Judge of the Provincial Court, the Deputy Attorney General and former presidents of the Law Society of British Columbia and the BC Branch of the Canadian Bar Association.

[12] *Ibid* at 79.

[13] *Ibid* at v.

[14] The Trial Lawyers Association of British Columbia, with some support from the Law Society of British Columbia, took the position that civil justice would take longer and cost more under the proposed rules.

[15] Key recommendations that were not implemented include: requiring parties to personally attend a "case planning conference" to, inter alia, address settlement possibilities and narrow issues, before they actively

appreciably less than the "fundamental change" that had originally been proposed, and it is not clear that the Task Force's objective of "providing a streamlined and accessible Supreme Court system where matters would be settled early, quickly and affordably" will be achieved.

The point of this particular example is not the merits of the debate, but what the process says about efforts to make fundamental changes to the system. It illustrates that even with a reasonably broad consensus about the need for fundamental reform, as well as enthusiastic government support and significant senior sponsorship from some members of the judiciary and bar, key elements of the proposed reform were eliminated. The province's constitutional authority (including the legal authority to make court rules by Order in Counsel) was not enough, in a practical sense, to carry the day.

The "politics" of justice system change is that no single authority within the system can purport to speak for the system. It is similarly the case - whether it is a consequence of the division of powers, custom or simple pragmatics - that rarely can a single authority implement a meaningful reform initiative alone. This state of affairs undoubtedly mitigates the weight of a province's authority as the justice system's policy maker and priority setter. It also presents a thorny problem for a justice system in need of fundamental change.

The Province as Funder

While provincial efforts to make structural changes to the justice system may face opposition, proposals to increase provincial funding are rarely resisted. A different set of complications arises however for the province in its role as funder of the justice system.

There are many variables that determine a province's response to calls for increased funding, not the least of which is how much money there is in the treasury. The current global financial downturn has impacted provincial economies and provincial justice ministries. Of course, calls for increased government funding do not abate when the economy and revenues are down. In fact, when the fiscal side of the teeter totter drops, it appears to raise the demand for justice system services and funding. Thus, many provinces are confronted by demands for greater justice system expenditures at a time when discouraging economic indicators are driving conservative revenue assumptions and cautious spending plans.

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engage the court system; replacing the pleadings process (requiring parties to accurately and succinctly state the facts and issues in dispute and to provide a plan for conducting the case and moving to resolution); and consolidating quasi-mandatory mediation regulations into the Supreme Court rules. As well, while some changes were made to discovery procedures and to interlocutory process, they were not as far reaching as many argued they should have been.

The revenue picture is complicated by the activity on the expense side of the ledger. Mounting operational costs mean that provinces have to put more money into the courts just to maintain the status quo. Rising costs are driven by several rather discouragingly robust forces. The same complexity that drives the length of hearings and the cost of legal services for litigants also drives up the cost of operating the courts for governments.

Provinces also live with the risk of incurring supplementary costs to accommodate initiatives imposed by the federal government. Unilateral federal decisions to change, for example, immigration procedure or the substantive criminal law can have major fiscal consequences for the provinces. There are a number of political and administrative mechanisms in place to facilitate the federal - provincial working relationship and to support effective management of shared responsibilities. Nonetheless, federal decisions can sometimes override provincial plans and force the provinces to redirect capital and operational spending priorities, even in support of policy values that a province does not accept. In the zero-sum game of provincial budgets, money diverted to support federal justice priorities is unavailable for the province to apply elsewhere.[16]

In addition to the issue of the size of the overall budget that a provincial government has available to spend, there is the ensuing issue of how governments choose to allocate that budget. For justice ministries, the problem has become that not only must they share in a smaller pie if government revenues decline, they must also be concerned about receiving a smaller portion of a smaller pie. For some years now, justice ministries have been losing out to health and education ministries in the competition for provincial revenues.

In the British Columbia provincial budget for 2010/11, for example, health accounted for 44% and education 26% of all provincial government spending, while justice and public safety accounted for 4%. That is, 2/3 of provincial revenues were

[16] *Federal Bill C-10* 2011, the Safe Streets and Communities Act exemplifies this problem. The bill was put forward by the federal government as an omnibus crime bill which, amongst other tough on crime measures, creates new mandatory minimum sentences for a wide variety of offences. The bill has significant cost consequences for provinces. Quebec Justice Minister Jean-Marc Fournier is quoted as telling a federal parliamentary committee that "This bill will cost hundreds of millions over the years just to incarcerate people, not to mention tens of millions in court and legal costs ...We have no intention of paying for this because we are against the very idea of such a law." Ontario Premier Dalton McGuinty said on the same issue, "It's easy for the federal government to pass new laws dealing with crime, but if there are new costs associated with those laws that have to be borne by taxpayers in the province of Ontario, then I expect that the feds will pick up that tab" Daniel Leblanc and Rhéal Séguin, "Quebec balks at Ottawa's law and order agenda" The Globe and Mail (Nov. 02, 2011), online: <http://m.theglobeandmail.com/news/politics/quebec-and-ontario-refuse-to-pay-costs-of-federal-crime-bill/article2221192/comments/?service=mobile>.

allocated to health and education while less than 1/20 was allocated to the justice system (including here both the Ministry of Attorney General and Ministry of Solicitor General and Public Safety). The general trend in the provinces is that health spending is on an upward trajectory while justice spending is either flat or on a downward curve.[17] Health spending in British Columbia rose a total of approximately $4.7 billion from 2008/9 to 2011/12, while Ministry of Attorney General funding decreased 8% in 2011/12 alone. This necessarily translates into service reductions in the justice sector. By way of example, in the fiscal year 2000/01 the grant to the B.C. Legal Services Society (the province's primary legal aid provider) was $81M, which was 0.4% of a $22B budget, while health received $8.3B, or 37%, of that same budget. By 2010/11, the Legal Services Society grant had declined to $66M or 0.2% of a $34B budget, while health had increased to $14.7B or 44% of that budget.[18]

Provincial treasury boards are responsible for budget and fiscal management matters. The government ministers who sit on these boards develop government economic policies, identify fiscal priorities, and generally oversee government spending and the use of public resources. Funding decisions made by provincial treasury boards make it clear that health care spending has, over the last couple of decades, become an entrenched political priority. If share of public funding is one measure of public priority – and it obviously is – then the national reality is that justice systems place back in the pack while health care and education are moving further out ahead. As Hazel Genn observes, "there are few votes in civil justice...."[19]

There are at least three problems here that the justice system should be considering if it wishes to reassert its priority to treasury boards. The first is the lack of management data and research about how the civil justice system works. Justice systems are generally unable to empirically measure or describe what they do.[20] Civil justice systems possess little by way of defined performance measures or measures

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[17] As a matter of historical interest, in the British Columbia Public Accounts of 1879/80 the administration of justice and legislation accounted for 21.1% of all government expenditures, while health and education accounted for 4% and 10.5% respectively.

[18] These are the author's calculations based on published BC Ministry of Attorney General Budgets and Service Plans for the fiscal years referred to.

[19] Hazel Genn, "Understanding Civil Justice" (1997) 50(1) Curr Legal Probs 155 at 159.

[20] See Robert M. Goldschmid, "Major Themes of Civil Justice Reform" (January 2006) B.C. Ministry of Attorney General Discussion Paper at 1 which says "We have not found any formal studies showing empirical data on the cost, delay and complexity of litigation in BC. The Ontario Civil Justice Review stated, "On such an important issue, one would expect to find a wealth of research. Surprisingly, there is little analysis or hard data available. This is true not only for Ontario but for most jurisdictions around the world." (Ontario, Ministry of Attorney General, Ontario Civil Justice Review, First Report (Toronto: Queen's Printer for Ontario, March 1995), s 11.3". Some provinces, B.C. for example, recognize and are responding to this gap and are now developing enhanced data collection systems and performance measurement frameworks.

of effectiveness. The number of cases coming into the system and the number going to trial are counted but, except in the most global terms, neither judicial nor government managers know much about the course of cases that go trial, and there is virtually no objective data about the cases that do not go to trial. Whether or when or on what basis those cases do or do not resolve is simply not known. Nor do we know who litigates, the value of the claims, or the cost of pursuing them. In large part, the data that is available measures only outputs. That is, it simply counts things like appearances, the number of cases, the number of orders, the days to trial or the number of hours consumed by various judicial events. There is relatively little data that measures justice system outcomes, defines effectiveness or evaluates performance.

The consequence is that policies are developed and programs and services are planned largely on the basis of unverified assumptions and anecdotal evidence. This data deficit exists in circumstances where better data tools are widely available and where sophisticated information technologies have driven a change in organizational management standards in many other institutions. Justice is late to this game. Civil justice system policy, administrative and management decisions need to be based on more and better information. Justice systems need to undertake research while learning how to better exploit existing information technologies. To do so would not only enable better planning, it would also enhance the system's ability to assert the value of justice programs to treasury boards. In the contemporary management environment the expectation is increasingly that arguments about program needs and potential benefits will be supported by data and that planning will be supported by research and modeling. It is no longer sufficient to argue what is logical; the justice sector needs to be able to objectively demonstrate, for example, that reducing justice revenues may cost more than it saves. Justice ministry funding arguments would be much stronger if justice systems could objectively quantify the cost of unresolved disputes. It would be very useful to be able to reframe the access to justice discussion to speak more convincingly about the social and fiscal costs associated with inadequate access to justice.

This want of technical information mirrors a general lack of academic study and scholarship in the areas of procedural law and access to justice. The focus in academic legal research is on substantive law with comparatively little attention given to questions of procedural law or to the administrative frameworks through which substantive law is delivered. In this respect Hazel Genn describes civil justice as a field that is "under-researched and under-theorized", and adds that "this relative lack of knowledge and enthusiasm for the civil justice field is important and reflects a wider indifference at the political and social level."[21]

[21] Understanding Civil Justice, supra note 17 at 159. Note however that there are some encouraging signs of emerging academic interest in these questions. The University of Toronto, the University of Windsor and the University of Victoria offer dedicated courses on access to justice. York University and Osgoode Law School each explore the issue in various courses. The University of Toronto Faculty of Law has launched a "multi-pronged initiative" aimed at addressing the growing problem of middle income access

The second problem in seeking funding from treasury boards is the growing and obvious inefficiency of the justice system. It is no longer news that the courts do not fulfill their core function in a way that is affordable for litigants.[22] A responsible funder might legitimately be expected to question the merits of investing in a system where the primary service is largely unaffordable, and where taxpayer dollars purchase a smaller number of trials than they once did.[23] In this respect, the fate of civil justice system funding is directly tied to the rising cost of the increasingly slow and complicated criminal courts. The cost of funding growing complexity in the criminal system has direct fiscal implications for the civil system. The unrelenting trend in criminal cases toward longer time to trial, higher numbers of appearances, protracted pre-trial motions, lengthy criminal hearings, and a growing number of complicated, unwieldy and incredibly expensive criminal "mega-trials" all translate into increased strain on the entire justice system.[24]

Is the solution as simple as spending more money? To the extent that more money buys more of the same, it clearly is not. The justice system will not spend its way out of the complexity problem. The fundamental problem of complexity must be brought back under control in order to restore balance and scale to the length of hearings in all courts and also, collaterally, to help restore the confidence of funders and the public.

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to the civil legal justice system in Canada, online: <http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/5/4/0/0&contentId=2113> While only some of it is coming out of the universities, the growing body research exploring legal needs (see note 33) is proving extremely useful.

[22] Studies going back at least twenty years make this point. A number of Ontario studies conducted in the early nineties demonstrated that litigants with low-end claims retain little of their award after paying legal fees. When factoring in the legal costs of both parties, the Ontario Civil Justice Review concluded: ". . . the inference is strong that the combined legal costs of the parties to a lawsuit are, on average, about 3/4 of the judgment obtained; and on a median basis, are perhaps more than the judgment obtained." Ontario Civil Justice Review First Report, Chapter 11.4 (March 1995), online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/>.

[23] In 1996, Vancouver Law Courts, the largest of the B.C. Supreme Court courthouses, heard more than 800 civil trials, and the average length of a trial was 12.9 hours. In 2002 BC Supreme Court heard less than half that many civil trials (393) and the average length of trial doubled to 25.7 hours. See The Verdict, "Trends in the Supreme Court of BC" Issue 99 (December 2003) at 58. The Court Heard 400 civil trials in Vancouver in 2010. BC Supreme Court Annual Report (2010) at 48, online: <http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2010%20Annual%20Report.pdf>.

[24] The Revised 2011/12 BC Ministry of Attorney General Service Plan says that in 1996, the average impaired driving trial lasted 2.5 hours, whereas now the same trial can run up to three days. The Service Plan says at page 8 that "since 2005/06, the average number of court appearances ...in adult and youth criminal proceedings... increased by five per cent," online: <http://www.bcbudget.gov.bc.ca/2011/sp/pdf/ministry/ag.pdf>.

This leads directly to the third problem justice ministries have in establishing funding priority: the strength of the justice argument is weakened significantly by the lack of public understanding and lack of public confidence in the system. An unacceptably high proportion of Canadians do not believe that the law is fair; nor do they believe that the justice system works effectively.[25] As they presumably should in a democratic society, treasury board decisions reflect public values and the public valuation of the system. In this respect, lack of public understanding, lack of public confidence and lack of public funding are causally linked.

Another way to frame this problem is to say that there needs to be a renewed recognition in society of civil justice as a public good. One might wish to assume that the social value of a viable civil justice system and its foundational role in maintaining public order is obvious and widely understood. As Alexander Hamilton observed more than 200 years ago, "Justice is the end of government. It is the end of civil society."[26] Yet, it may be that this fact is not so apparent and not so widely recognized. Hazel Genn argues that there is a diminishing appreciation of the value of a well-functioning civil justice system in the United Kingdom. [27] Lord Neuberger of Abbotsbury, Master of the Roles, took up the question of the relative value of law and other government services in a recent speech on the topic of justice in a time of economic crisis. He said, in part:

> ... the state's most basic role is to protect its citizens; to secure their security and freedoms from being undermined by threats from abroad and at home. Threats from abroad should be dealt with by property financed, manned, equipped and armed forces and security services. Domestically, the government ensures security and freedom through the rule of law. These two functions have represented the fundamental duty of any civilized government for millennia. Modern political and media debates concentrate on making taxpayers' money available for health, welfare and education. But they are not only relative newcomers in the field of

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[25] A recent study found that almost 80 per cent of Ontarians believe that the legal system works better for the rich than for the poor. See Report of the Ontario Civil Legal Needs Project, "Listening to Ontarians" (May 2010), online: <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf> at 9. Other studies show between 29% and 40% of people disagree with the statement ""The laws and justice system in Canadian society are essentially fair." Ipsos Reid Survey, "Legal Problems Faced in Everyday Lives of British Columbians" (December 2008), online: <http://www.lss.bc.ca/assets/aboutUs/reports/legalAid/IPSOS_Reid_Poll_Dec08.pdf>.

[26] Alexander Hamilton US lawyer & politician (1755 – 1804), online: <http://www.quotationspage.com/quote/29321.html>.

[27] See Hazel Genn, Judging Civil Justice (Cambridge University Press, 2010) at 24 and 36, where she says, in the UK context, that "... recent policy on the administration of civil justice has disregarded the social importance of a well-functioning civil justice system." She quotes Robert Dingwall, "[S]uccessive UK governments have decided that, although civil justice may be a public service, it is not a public good in the sense that Lord Woolf asserted in his first report... they see the system is providing only private benefits for individuals rather than collective benefits for the society as a whole...".

> government responsibility. They are in truth secondary to defence and the rule of law. If we live in a country which is successfully attacked or which does not enjoy rule of law, there would be little point in spending money on welfare, education and health: government will not be able to ensure that such services will be maintained, and citizens will not be able property to benefit from such expenditure.[28]

The value of civil justice as a fundamental public good must be reasserted in the public mind, although it is not easy to know how to do this. A recent investigation into legal aid in British Columbia recommended that legal aid be recognized by statute as "an essential public service".[29] This is arguably an attempt to accomplish by statutory fiat an elevated standing in the general public esteem that may in fact only be earned by a combination of enhanced public legal literacy with publicly visible improvements to the cost, accessibility and effectiveness of the justice system.[30]

All of which is to say that while increased funding for justice systems is essential to solve the access problem, it is not enough. In any event, funding is tied to more than better financial times and increased government revenues. It also depends upon increased public confidence, and upon the justice system coming to terms with its own overwhelming complexity while managing and measuring itself more efficiently through information technology.

An Access to Justice Strategy

How, in the context of this mix of provincial powers and responsibilities, the need to work with an independent bench and bar, declining revenues, increased costs and limited control over expenditures, can provinces organize existing revenues and services so as to maximize access to civil justice?

When provincial governments seek to enhance access to justice they have only three broad strategies available: to invest more resources, to reduce case

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[28] Lord Neuberger Of Abbotsbury, "Justice in a Time of Economic Crisis and in the Age of the Internet" (October 13, 2011) at 4, online: Judiciary of England and Wales, online: <http://www.judiciary.gov.uk/media/speeches/2011/mr-speech-justice-in-age-internet-13102011>.

[29] See Leonard T. Doust, QC, Foundation for Change, Report Of The Public Commission On Legal Aid In British Columbia (March 2011), online: <http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf> at 9 and 12.

[30] Part of the "public esteem" problem here for the civil system is that the public tends to see the justice system through the criminal lens. Notwithstanding the many people who experience the justice system through commercial or family matters, it seems that public understanding is shaped substantially by media reports about criminal matters.

volumes or to create efficiencies within existing justice services.[31] As suggested above, while enhanced resources would certainly help, resources alone are not the complete answer. The access to justice problem is deeper and more complex than that, and the solution must be premised on not just money, but also on fulfilling the justice mandate more effectively.

In this respect, a few preliminary points must be made about the nature of the need for civil and family law services in society. We need extensive and sophisticated justice services to manage the highly complex, "hyper-regulated"[32] and rights-conscious society in which we live. Classically, the level of need for civil justice services has been more or less equated with the number of actions that are commenced in the civil and family courts. However, research out of the United Kingdom and Canada has given us some very important information about the nature and scale of the need for justice services in society.[33] This is a large body of research and a complex topic which, for the purposes of this paper, must be reduced to the following selected conclusions:

- The incidence of civil legal problems in society is very high;[34]
- Many people do not turn to the justice system and the majority of legal problems are resolved outside the justice system;
- The disputes that come into the system are not generally representative of the number, nature or kinds of disputes that exist in society;
- A significant proportion of disputes are left unresolved;

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[31] The term "justice services" is used here broadly and is intended to include any and all organized services that contribute to or result in the settlement of disputes, whether by judicial order or by agreement. The term encompasses much more than the courtroom.

[32] Susskind refers to the phenomenon of "hyper regulation" by which he means that "we are all governed today by a body of rules and laws that are so complex and so large in extent that no one can pretend to have mastery of them all." See Richard Susskind, The End of Lawyers? (Oxford University Press, 2008) at 18.

[33] See, for example, Hazel Genn, Paths To Justice: What People Do And Think About Going To Law (Oxford – Portland Oregon: Hart Publishing, 1999); Pascoe Pleasance, "Causes Of Action: Civil Law And Social Justice" (2004), online: <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/Causes%20of%20Action.pdf>; Pleasence et al, "Civil Justice In England And Wales 2009" (2010), online: <http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010CSJSAnnualReport.pdf>; Report of the Ontario Civil Legal Needs Project, "Listening to Ontarians" (May 2010), online: <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf>, Ab Currie, "A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns" (April 2005), online: <http://cfcj-fcjc.org/docs/2006/currie-en.pdf>; and Carol McEown, "Civil Legal Needs Research Report" (Law Foundation of BC, March 2009), online: <http://www.lawfoundationbc.org/reports-papers/>.

[34] The research speaks in terms of non-trivial justiciable events, i.e. problems resolvable through legal process.

- Unresolved legal problems cause significant disruption for people; they tend to attract additional legal problems and they are also linked to health, economic and social problems;
- many people do not understand the justice system or legal process and do not know where or how to get legal help; and
- the way in which disputes are organized by lawyers and courts often does not correspond to the needs of the parties.

Ideally, a provincial access to justice strategy would respond to all of these important findings. One implication of this research is that as great as the challenge is for the civil justice system to manage the disputes presently within its borders, these are only a portion of the actual number of justiciable disputes that exist in society. There are many more civil disputes that never enter the justice system, and of those, many never resolve. We can safely assume that there is a social cost associated with neglecting these cases. The research tells us that unresolved legal problems tend to "trigger" additional legal problems and at the same time, unresolved legal problems tend to attract a "cluster" of associated family, health, housing, debt and employment problems. There are many implications that flow from this research. For one thing, these findings certainly argue for organizing provincial justice services in a way that recognizes this large pool of unresolved disputes, and targets the lack of public legal information as well as the problems of clustering and triggering. Justice services should be client centered and should respond to the challenge so many people face in trying to find help for their legal problems.[35]

This paper proposes that the management of disputes in the justice system and the provision of justice services be governed by the following service delivery principles:

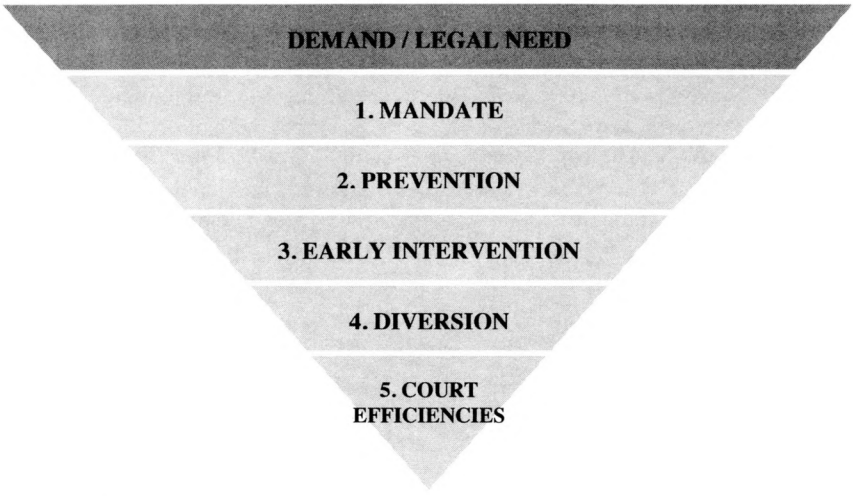
- Justice service planning should include a greater emphasis on dispute prevention and dispute avoidance.
- Enhanced and easily-located information, education and triage services need to be available at the front-end (point of entry) of the justice system to accommodate people seeking preliminary advice, orientation and direction respecting legal problems.
- The justice system should be organized to provide effective early intervention and resolution of disputes. This principle is premised on the assumption that the longer a dispute survives in the system the more complex it is likely to become, the more resources it is

[35] The task of tailoring services to the needs of clients has a number of dimensions. For example, 75% per cent of British Columbia's growth is projected coming from immigrants, a large proportion of whom will be from China and South Asia. Differences in language and culture can complicate the issue of legal education and understanding for new residents.

likely to consume and the more likely the parties are to become polarized and entrenched in their conflict.

- Cases should be managed to settlement, not to trial. Traditionally, each new case is treated as a potential trial and managed as if it will be resolved at trial, notwithstanding that only 2 to 5 per cent of disputes are resolved this way. We built into the design of our systems the implicit assumption that cases are destined for our most expensive dispute resolution process – trial. Systems should in fact be designed on the presumption of resolution and overtly managed toward early settlement.
- One size does not fit all; different disputes require different kinds and quantities of process. Because access to justice is more than a matter of access to courts and formal legal proceedings, a fully developed range of proportional, interest based and rights-based services and resources should be available to litigants. Generally, early, informal and collaborative approaches to problem-solving are preferred over formal, procedurally complex and adversarial approaches.
- Systems and services should be client-centred, that is, systems should be designed around the needs of the citizens who use them, not around the needs of the professionals who run them.
- Justice services should be integrated and coordinated with human services across the health, welfare, social, and educational sectors.

The next step in translating these principles into a justice services delivery model is to conceive of the organization and delivery of legal services as a funnel. At the top, seeking entry to the funnel, as represented by the diagram below, is the existing demand for legal services. This includes demand that takes the form of cases initiated in the courts, as well as the unmet legal need that research tells us exists in our communities but that does not result in the initiation of court cases.



The disputes that constitute this demand are seen as moving from top to bottom through a number of levels, with the general direction of effort being to resolve cases at the highest possible level in the funnel. Higher levels on the funnel generally represent earlier and more informal dispute resolution. Dispute resolution grows more formal and more costly (for both litigants and governments) as cases proceed down the funnel. The last level – the court – is generally the system's most expensive dispute resolution process and is reserved for only those cases that are inappropriate for or incapable of resolution in any less formal setting. This posits the objective that the many cases that now resolve just short of trial are identified at an earlier stage of litigation and firmly managed toward out-of-court resolution.

Many reports call for the creation of a "multi-option civil justice system" where early settlement is the focus, trial is regarded as a valued but last resort, and parties to a dispute can utilize a range of both collaborative and rights based dispute resolution processes. The strategy represented in the diagram above is a variation on this theme, organized in five separate but linked levels of planning and service delivery:

1. Mandate and organization: this stage is administrative. It involves stepping back and looking at the system as a whole and asking whether or not the existing court and administrative framework actually manages classes of cases in the best possible way. Questions asked here include whether the justice sector could be reorganized to resolve certain cases with less process or by means of a different process. For example, some provinces have increased small claims civil monetary jurisdiction in order to make simpler and less costly procedures available for a broader range of cases. The move to "no fault" insurance schemes in some provinces is another example of the kind of strategy that can be considered here. Provinces might also explore whether there are civil disputes in the courts that

could be managed more efficiently by tribunals; or conversely, whether the work of some tribunals might be more efficiently managed by the courts.

2. Prevention: the best way to deal with a dispute is to prevent it or avoid it. The justice system has not traditionally focused much attention on conflict prevention but interest in this area is growing rapidly. Conflict theory and dispute resolution system design theory have made significant contributions to the thinking about prevention over the last twenty years.[36] This theory describes a pre-dispute stage where structured interventions can contain conflict and prevent disputes from arising. Mediation can be a prevention strategy in the sense that mediation outcomes tend to be more durable than litigated outcomes. Parties are generally more likely to "own" mediated solutions than adjudicated or imposed outcomes, and this diminishes the prospect of new or ongoing conflict. At least two provinces, British Columbia and Quebec, are exploring administrative child maintenance variation systems to avoid disputes when orders or agreements become dated. Prevention strategies often involve the coordination of legal and non-legal services. For example, support services for needy families in the child welfare context can protect children while keeping families out of the court system. In the criminal law context, "community courts" are attempting to reduce recidivism and deal with prolific offenders by addressing the personal and social problems that drive them to crime.

3. Early intervention: information is a dispute resolution tool. Early information, orientation and advice are ways to get help to people who might otherwise be unable to engage with the system or who might otherwise do so very inefficiently. It also contributes to the possibility of early dispute resolution. Public legal education in Canada is becoming increasingly sophisticated.[37] A number of jurisdictions are providing self help services to litigants. Early intervention services often target self-represented litigants on the theory that timely assistance at the point of entry into the justice system may help to manage down the life span of the dispute. Services can include individual assessments, information about court procedures, triage and referral to mediation or to pro bono assistance or to legal aid representation, as well as referral to non-legal community services for help with the social problems – like housing, debt or mental health issues - that tend to "cluster" with legal problems. A number of provinces provide early intervention services for family disputes.[38] Technology

[36] See Cathy Costantino and Christina Sickles Merchant, Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations (San Francisco: Jossey-Bass Conflict Resolution, 1996).

[37] Law societies, the Canadian Bar Association, legal aid providers, government and non government service providers provide an array of legal education services in print, in person and through the Internet.

[38] For example, community justice centres in Quebec, Justice Access Centres in British Columbia and Family Law Information Centres in Ontario. Referrals for housing, counselling, legal services and mediation are provided at 17 Family Court locations in Ontario by Information and Referral Coordinators

also offers enormous potential for providing early information, advice and assistance to litigants.

4. Diversion: at this level, off-ramps are created to encourage (or mandate) the appropriate use of alternative dispute resolution processes such as arbitration, mediation, neutral evaluation, judicial settlement processes, collaborative law and parenting coordination. The use of consensual dispute resolution processes like mediation is now well entrenched in most provinces, although there is a general recognition that the justice system is not yet utilizing the full potential of these processes. Some jurisdictions are also exploring the use of "online dispute resolution" and the potential for technology to deliver services as diverse as legal information, online assistance to complete court forms and diversion of disputes to online negotiation, mediation and arbitration.

5. Court efficiencies: resources are applied at this level to make the court process as efficient as possible by streamlining civil procedure through the application of principles like proportionality, flexibility and matching. Here too, there is the potential for considerable help from technology. British Columbia is actively developing "tele-presence" to facilitate video distance participation in court proceedings, as well as e-filing, e-search and a fully electronic "e-court".[39]

This overall approach is premised on the notion of focusing limited resources where they will have the greatest impact. It also involves shifting some attention toward the front end of the justice system on the theory that money invested early in upstream dispute prevention, mitigation and collaborative resolution will ultimately provide more justice services to more people. The goal is to deliver more legal services at less cost, while remaining fully committed to fairness and quality outcomes.

CONCLUSION

In 1996 The Canadian Bar Association, Systems of Civil Justice Task Force Report observed that:

> ... A fair, effective and accessible civil justice system is essential to the peaceful ordering and the economic and social well-being of our society. Yet...many Canadians feel that they cannot exercise their rights effectively because using the civil justice system takes too long, is too expensive, or is too difficult to understand.[40]

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[39] See "BC Court Services Online", online: <https://eservice.ag.gov.bc.ca/cso/index.do> and <http://www.cba.org/bc/bartalk_06_10/12_10/guest_wood.aspx>.

[40] Canadian Bar Association "Systems of Civil Justice Task Force Report" (1996) at 11, online: <http://www.cba.org/cba/pubs/pdf/systemscivil_tfreport.pdf>.

Some of the 53 recommendations made by this Task Force have been implemented, and there have been additional reports and many more recommendations made in the intervening 15 years, but the problem of an inaccessible civil justice system is very far from resolved.

By virtue of their constitutional authority and their control over funding, the provinces have the responsibility and the capacity to solve this critically important social problem. They can do this as funders who supply resources to the justice system and as administrators who organize and manage it. Funding is a necessary but not sufficient part of the solution. In their role as funders provinces can ease but not resolve the problem. While provinces may invest more resources, there will never be enough resources to respond to the current level of legal need using the current models. More is required, and it is in their role as administrators that the provinces must demonstrate the considerable innovation and leadership necessary to realize the necessary fundamental procedural and structural reforms. The measure of fundamental procedural reform in the civil justice system will be affordability and accessibility. That is, success will be recognized by a meaningful reduction in the cost, delay and complexity associated with civil process, combined with a growth in the system's capacity to service many more disputes than it does now. While the provinces have the central role to play in this, it is not theirs alone to make these changes. In any event, it will be essentially impossible for any province to achieve civil justice reform on this scale without the active support and cooperation of its judiciary and bar.