

# News & Views ON CIVIL JUSTICE REFORM

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

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# The End of Lawyers? Rethinking the Nature of Legal Services

Richard Susskind, OBE

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## 7.1 Redefining access to justice

It has been fashionable for some time now, amongst policy-makers, law reformers, and commentators, to speak of increasing ‘access to justice’. While everyone seems to agree that access to justice is a fine thing, there is less unanimity over what this actually involves in practice. As a term of art, ‘access to justice’ perhaps peaked in popularity in the mid-1990s, when Lord Woolf’s seminal reports bore the phrase as their title.<sup>3</sup> His emphasis was consistent with much theorizing and policy-making that has followed — on providing easier access to improved, cheaper, and fairer means of resolving legal disputes. While I emphatically welcome any initiatives that improve the accessibility and efficiency of our courts and of other methods of resolving disputes, and I remain a strong supporter of Lord Woolf’s work, I do not think we should be satisfied that improving dispute resolution will be sufficient to achieve justice under the law. To be wholly or even largely focused on disputes in our pursuit of justice is, I submit, to miss much that we should expect of our legal systems.

A richer analysis is needed. I could turn here, as I have done in the past, to a fairly philosophical approach to justice and look in turn at categories such as formal justice, substantive justice, and distributive justice.<sup>4</sup> But I do not think these are the right tools for the job. Much as I enjoy legal theory, the discussion would run the risk of being too abstract. Instead, I prefer to draw a simple analogy—from the world of health care. In law, as in medicine, I believe that prevention is better than cure. Most people would surely prefer to avoid legal problems altogether than to have them well resolved. As I say in relation to clients in Section 6.7, most people would surely prefer a fence at the top of the cliff rather than an ambulance at the bottom (no matter how swift or well-equipped). If this is so, then access to justice is as much about *dispute avoidance* as it is about dispute resolution. Just as lawyers are themselves able, because of their training and experience, to recognize and avoid legal pitfalls, in a just society (one in which legal insight is an evenly distributed resource) we should want non-lawyers to be similarly forewarned. In large part, this will involve introducing novel ways of putting legal insight at everyone’s fingertips; and to an extent that has not been possible in the past.

This readier, cheaper, and more widespread access to legal guidance should give rise to a more just society in the same way that immunization leads to a healthier community. Another effect is

also likely —more widespread understanding of the law and access to legal remedies may deter unscrupulous individuals (such as some landlords) from pursuing unlawful or exploitative courses of action. In the past, they may have behaved as they wished regardless of the law, secure in the knowledge that those to whom they were causing suffering were deterred from taking action precisely because of the complexity or inaccessibility of the law and the courts.

The medical analogy also helps identify a third sense of access to justice. I am thinking here of relatively recent work on health promotion—we are advised today to exercise aerobically for at least 20 minutes, three times a week, not just because this will reduce our chances of, for example, coronary heart disease but because it will make us feel a whole lot better. The idea is not only to prevent ill-health but to promote our physical and mental well-being. Similarly, the law can also provide us with ways in which we can improve our general well-being; and not simply by helping to resolve or avoid problems. Instead, there are many benefits, improvements, and advantages that the law can confer, even when there is no perceived problem or difficulty. And yet, many people are lamentably unaware of the full range of facilities available today—from welfare benefits through tax planning to making a will. In contrast, I look forward to the day when we will be committed to *legal health promotion* underpinned by community legal services that are akin perhaps to community medicine programmes. Providing access to justice, in this third sense, will mean offering access to the opportunities that the law creates. This underlies one of the themes of *The Future of Law*—that in legal systems of tomorrow, the law will come to be seen as empowering and not simply restrictive.<sup>5</sup>

To summarize this line of argument so far—when I speak of improving access to justice, I mean more than providing access to speedier, cheaper, and less combative mechanisms for resolving disputes. I am also referring to the introduction of techniques that help all members of society to avoid disputes in the first place and, further, to have greater insight into the benefits that the law can confer.

To translate this aspiration into reality, however, we must go further than simply re-scoping the term, ‘access to justice’. We need to assess, more systematically than we have been inclined to in the past, the facilities and techniques that will help to bring about this extended access to justice. My starting point here is a model that I developed some years ago—the Client Service Chain.<sup>6</sup> A simple variant of this is presented in Figure 7.1.

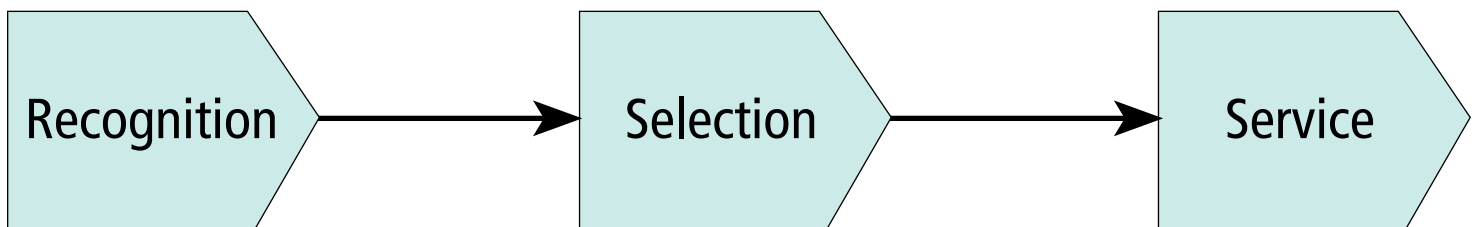


Fig. 7.1: The Client Service Chain

This model proposes that the activity of obtaining legal guidance can be represented along a simple life cycle, made up of three basic processes. The first is *recognition*, which is the process by which citizens or clients recognize, in respect of their particular circumstances, that they would benefit from legal guidance. Second is *selection*, the process by which citizens or clients select the particular source of legal guidance to help them in their given circumstances. And the third is *service*, the process by which legal guidance is received.

Each of these elements raises access to justice issues. The first, the process of recognition, is characterized today by what I call the ‘blatant trigger’. By this I mean that the client is urged to seek legal guidance on the occurrence of some event, or in a set of circumstances, that quite patently call for formal legal input. It is at the client’s instigation, therefore, that the legal machine rolls into action. It is in this context, in *The Future of Law*, that I characterize traditional legal service as being ‘reactive’ in nature.<sup>7</sup> The blatant trigger (perhaps the receipt of a claim, the death of a relative, the commencement of negotiations on some major deal, or some similar such occurrence which clearly demands proper legal help) leads a client of today to instruct his or her lawyer. In other words, the lawyer reacts to the client’s call for help. All too often, and unhelpfully, the lawyer responds in the first instance (accompanied by an irritating intake of breath) by saying that it would have been better if the client had come along earlier. This is the basis of what I have called the ‘paradox of traditional reactive legal service’—you need to know rather a lot about the law to recognize not just that you need legal help but when best to seek such counsel. The net result is that clients are often disadvantaged, either because they look for legal guidance too late or because they miss altogether an opportunity to assert their entitlements. In a society in which there is genuine access to justice, there should be facilities in place to help non-lawyers to recognize, at the most propitious time, that the law impacts on them (whether to empower or inhibit them).

As for the selection process, currently this remains rather hit-and-miss. Traditionally, a variety of factors have brought a lawyer’s capability to the attention of potential clients, including advertising, local physical presence, recommendations, and general reputation. Sometimes non-lawyers will instruct a law firm, not with any knowledge that the legal business has relevant skills but simply in the comfort that that same firm has undertaken legal work satisfactorily for them in the past. Even for the most sophisticated users of legal service, like the General Counsel in charge of a substantial in-house legal department, the full range of law firms in practice gives rise to a bewildering selection process, given the diversity, complexity, and sheer numbers of apparently qualified legal providers. If we are sensibly to claim that our legal system affords access to justice, we must surely have processes in place that enable clients with no legal knowledge to find appropriately qualified lawyers who will offer a competitively priced legal service. And similar assistance will also soon be needed to help citizens to make sense of what may appear to be a bewildering array of online legal tools.

What about the third element in today’s client service chain? This is the service element. Today, the dominant means of imparting legal guidance is through the delivery of advice by lawyers, invariably reduced at some stage to writing, usually after face-to-face consultation, and normally invoiced on an hourly billing basis. More, the advice tendered is packaged for the direct consumption of one particular client; rarely is it intended that that guidance

should be re-used by others (even the client themselves). If we are to increase access to justice, I submit that we must continually be exploring and introducing methods of legal service that are less costly, time-consuming, emotionally-draining, and forbidding than the time-honoured consultative, advisory approach. Much that is said in Section 2.5, about the multi-sourcing of legal service, can therefore be applied in the context of the citizen.

Improving access to justice, therefore, will require much improved facilities in place to support clients: to recognize that they need or would benefit from guidance on dispute resolution, dispute avoidance, and legal health promotion; to help them to identify and select the most appropriate source of guidance (under all three headings); and to ensure that a wide range of sources are indeed available.

Improving access to justice, on this more ambitious scale, should also help us to liberate what I call ‘the latent legal market’.<sup>8</sup> I am alluding here to the innumerable situations, in the domestic and working lives of all non-lawyers, in which they need and would benefit from legal guidance (or earlier, more timely, or empowering insight) but obtaining that legal input today seems to be too costly, excessively time consuming, too cumbersome and convoluted, or just plain scary. I believe this market will be liberated by the availability of straightforward, no-nonsense, online legal guidance systems and by other methods of sourcing legal service. They will not always replace conventional legal service, but they will provide affordable, easy access to legal guidance where this may have been unaffordable or impractical in the past. I have often been asked if my latent legal market is just a fancy term for the rather more earthy concept of ‘unmet legal need’. In a sense it is, in that they are two sides of the same coin. The underpinning fact here is that specialist legal help is needed today far more extensively that it can be offered and taken. From the point of view of society generally, this is well characterized as unmet legal need; whereas from the lawyers’ perspective, I regard this as a large untapped market, happily not an opportunity for exploitation or monopoly but the chance to contribute, at a fair rate of return, to the grave problem of inaccess to justice. In law, as elsewhere, there seems to be a ‘long tail’ of demand that has not been satisfied by the working practices of the past.<sup>9</sup>

## 7.2 The building blocks of access to justice

With this analysis of access to justice to hand, we can now pin down the fundamental social challenge. The standard rendition of the problem proceeds along these lines—insofar as lawyers and (sometimes) the courts are involved, solving legal problems and resolving disputes is affordable, in practice, only to the very rich or those who are eligible for some kind of state support. And the standard question that follows this bleak peroration runs something like this—how can we extend the availability of legal services so they are not confined to the poles of the financial spectrum?

If my thesis of the previous section is accepted, this standard analysis understates the dilemma. The broader reality is that it is not just legal problem solving and dispute resolution that require legal experience and knowledge that most citizens do not possess and cannot afford. Also beyond their ken and wallet are problem recognition, adviser selection, dispute avoidance, and legal health promotion. How on earth, at affordable cost, can we deliver this full range of legal tools and facilities and, in turn, access to justice?

The options are limited. One possibility is to increase state funding of legal services. In most jurisdictions with which I am familiar, this looks very unlikely to happen, not least because justice (especially civil justice) tends to compete poorly with other demands on the public purse, most notably health, defence, education, and transport. We can argue with conviction, along with Lord Neuberger, the Law Lord, that civil justice and the preservation of civil society (through enforceable contracts and property rights, for example) are the foundations upon which nation states are built and so should have a first call on public funding.<sup>10</sup> I fear, however, and for reasons too numerous to itemize, that this line of thought does not resonate with today's policy-makers and politicians. I have seen inside the workings of government for long enough now to hazard instead that there will be less rather than more funding made available to promote access to justice in the foreseeable future.

This situation is in many ways similar to that facing in-house lawyers who are strapped for resources. Like General Counsel, citizens who hanker after greater access to justice want more for less. If this is so, they should pursue the two basic strategies that I put forward in Section 5.7,—the efficiency strategy and the collaboration strategy. Using the former, we can *cut the costs* of providing access to justice—for example radical efficiency gains and cost savings should be achieved within law firms through standardization and computerization, while various other sources of legal counsel can also be brought into play, often using different channels for delivery, such as call centres and video calling. Or, following the latter strategy, we can *share the costs* of providing access to justice amongst the participants involved—for example through legal open-sourcing or closed legal communities that enable the burden to be shared across large communities of those in legal need (see Sections 4.6 and 4.7).

In seeking to meet the grave social and economic challenge of providing greater access to justice at less cost to the public purse and the citizen, I therefore hope we can draw on the thinking and practical suggestions made elsewhere in this book in relation to commercial clients. Even if the legal problems of the citizen are quite different from those of the in-house lawyer, the more general theme—that of providing more for less—is remarkably similar. In the pages that follow, then, I point once again to the wide range of disruptive legal technologies, as discussed in Chapter 4 and Section 6.6. As ever, while these systems may be unattractive and threatening to conventional legal businesses, the changes they bring will often deliver direct benefits (especially cost savings and quality improvements) to the client. And, once again, those legal businesses that choose to embrace disruptive technologies ahead of later adopters, may in so doing secure some kind of advantage in the marketplace. More generally, though, the challenge of increasing access to justice can be met, at least in part, by using the techniques of decomposing and multi-sourcing, as introduced in Section 2.5. If we are serious about reducing the costs of legal service, we should be decomposing legal work that has been, or should be undertaken, for citizens, into constituent tasks and allocating these to the least costly sources of service that we can find, so long as this multi-sourcing and mass customization (Section 2.5) does not fail to deliver the requisite quality of guidance that the non-lawyer needs.

We can look at the future in another way—in terms of the evolutionary path that I lay out in Section 2.1. On this model, I am anticipating a move away from an arbitrary few citizens receiving

traditional bespoke legal advice to many more members of society benefiting from the efficiencies and savings that can be achieved across the justice system, along my evolutionary path, through standardization and computerization. In a more efficient justice system, when there is mass customization, the unit cost of individual bits of legal service will reduce and, in turn, there should be greater access to legal services and to justice. We will get more punch from our pound.

In practice, assuming that there is no radical change (up or down) to the level of public funding made available for legal services, and in parallel with the improvements to the court system that I recommend in Sections 6.4 and 6.5, I propose that improved access to justice can be achieved in the future by a combination of six building blocks, as follows. First of all, citizens themselves must be appropriately empowered, so that they can take care of some legal affairs on their own and work more productively with those who advise them, if guidance from others is needed. The second building block is a streamlined legal profession with law firms that multi-source, embrace technology, progress towards commoditization, and offer pro bono services that dovetail sensibly with other sources of legal guidance. The third is a healthy third sector; recognizing that many citizens who are in need of legal assistance want a kind, empathetic ear with only a light sprinkling of legal expertise. Fourth, a new wave of imaginative, entrepreneurial, and market-driven alternative providers of legal service are vital to the mix, bringing new ways of making state funding go further, keeping law firms on their toes, and delivering service in a manner with which consumers are comfortable. Penultimately, to support all who need to wade their way through the law, statutory source materials and case law should be easily accessible and digestible through no-cost (to users) legal information systems. In turn and finally, there must be in place and in practice an enlightened set of government policies relating to the availability of public sector information. In the remainder of this chapter, I look at each of the six in turn.

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## Endnotes

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3 See Section 6.1 and notes 4 and 5 to Ch 6.

4 R Susskind, *Transforming the Law* (Oxford: Oxford University Press, 2000; paperback edition, 2003) ix-x.

5 R Susskind, *The Future of Law* (Oxford: Oxford University Press, 1996; paperback edition, 1998) 288.

6 Susskind (n 4 above) Ch 2.

7 Susskind (n 5 above) 23-6.

8 Susskind (n 5 above) 27.

9 See C Anderson, *The Long Tail* (London: Random House, 2006).

10 Lord Neuberger, unpublished speech at Property Litigation Association Dinner, 2 October 2007.

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# This is Not the End of Lawyers ...but this is the End of the Traditional Legal Business Model

Jordan Furlong, lawyer and legal journalist, Law21.ca

A glance at the headlines of legal news services in the US and the UK is enough to make lawyers nervous even in Canada. Thousands upon thousands of lawyers and staff laid off, associate pay and partner draws cut back, some firms even dissolving or filing for bankruptcy — it's hard to believe this is the same profession that basked in rising profits only a year or so ago. Yet it seems certain that the hard times are going to continue for several months yet, and it's not unlikely that they might get worse. Canadian firms have not been hit as hard, but nobody really expects the legal profession in this country to escape this storm unaffected.

Most of the blame for this carnage, of course, is laid at the feet of the recession. But although the economic downturn is a proximate cause of law firms' troubles, it's not the only one — if anything, it has simply accelerated a trend that was already underway. Law firms are suffering because their traditional business models are breaking down in the face of a whole host of unprecedented developments.

What do we mean when we talk about “a traditional law practice model”? Actual examples vary, but the template looks something like this: performing traditional legal tasks much the same way they've always been performed, routinely billing clients for these tasks by the hour, compensating and promoting lawyers on the basis of those billed hours, and relying on lawyers' longstanding knowledge and power advantages over clients to maintain what amounts to a captive market.

In the near future, each of these elements of traditional practice is going to fall away in the face of massive change. These changes include competition from outside the legal profession (often overseas), technological advances that render once-profitable activities fully automatable, tremendous pressure from corporate clients to control fees in a global marketplace, the rise of collaborative communities that disseminate once-inaccessible legal knowledge, and generational changes that create enormous strains in firms' financial culture. The recession did not create these trends, but it has amplified their effect.

An excellent exposition of these trends and the powerful blow they're poised to deliver to the legal services marketplace can be found in a new book by Richard Susskind, an English law professor and legal futurist. Provocatively titled *The End of Lawyers?*, it provides a sweeping assessment (and in places, an indictment) of today's legal services landscape and describes the architecture of the systems that will replace it. It offers a comprehensive depiction of a profession undergoing massive transformation. And it relates how technology (especially the Internet), collaboration, globalization, and other forces are changing the fundamental rules by which legal services are bought and sold.

Here are three examples of unfolding trends that Prof. Susskind thinks will revolutionize the legal marketplace:

- The identification of an evolving and fluid spectrum of legal services categories: bespoke (one-off, customized or tailored), standardized (drawing upon precedents, process or previous

work), systematized (reduced and applied to automated systems), packaged (systematized services exported to clients) and commoditized (packaged services so commonplace as to have little or no market value).

- The decomposition of legal tasks into component parts that can be delegated to various sources, few of them actual law firm lawyers. Twelve types of destinations for this multi-sourcing (reminiscent of unbundling) are identified: in-sourcing, de-lawyering, relocating, offshoring, outsourcing, subcontracting, co-sourcing, leasing, home-sourcing, open-sourcing, computerizing and no-sourcing, each of which the book explains in more illuminating detail.
- In the context of astonishingly deep and rapid technological advances, the emergence of no fewer than ten disruptive legal technologies: automated document assembly, relentless connectivity, the electronic legal marketplace, e-learning, on-line legal guidance, legal open-sourcing, closed legal communities, workflow and project management, embedded legal knowledge, and on-line dispute resolution. These developments represent major threats to various aspects of the traditional law firm business model.

The myriad trends identified in the book all have one thing in common: they strip lawyers of the control and influence they're accustomed to exercising over the legal services marketplace. The clearest message in *The End of Lawyers?* is that from this point onwards, and to a increasing degree as time goes on, clients will call the shots. They will learn from the previous experiences of similarly situated clients, obtain services from reliable sources outside the legal profession, and benefit from technological advances that knock down price and access barriers. The means by which and the price at which legal services are delivered will be shaped by the marketplace, not by lawyers.

For lawyers, that's a heart-stopping prediction. Most lawyers who hear Richard's prognostications react either with anger or denial — and as we all know by now, these are the first two stages in the process of accepting loss. But it doesn't need to be that way. I think lawyers would be far better off to adopt a positive view of these developments and recognize them for what they represent: an opportunity to transform the practice of law and the lives of both lawyers and clients.

On the business side, to take one example, the rapid growth of alternative providers of legal services (everything from advanced software programs to offshore lawyers in India) will make it very difficult for lawyers to continue to charge high fees for knowledge and process tasks that others can and will provide at much lower prices. That will hurt firms built on mountains of hours billed for low-level work. But it will also open up unprecedented opportunities for lawyers to focus on high-end work that requires judgment, analysis, wise counsel — things no machine can replicate and that most lawyers actually enjoy doing.

To take another example, the growing demands for controlling legal fees — and even more importantly, making those fees more predictable — will make “billing by the hour” increasingly unac-

ceptable to all but the most unsophisticated buyer of legal services. Lawyers will no longer be able simply to monitor time spent on a task, multiply it by their “going rate,” and render a bill. They’ll no longer be able to run up as many costs as they like, secure in the knowledge that those costs can be passed directly on to the client. But the upside of this development is clear: in a coming era of predictable or fixed fees, lawyers will be obliged to focus much more on controlling their own costs. And that will introduce them to an exciting world where they can essentially compete against their own fees, constantly driving to introduce as much efficiency into their own systems as possible, in order to generate as much profit as possible.

It is no contradiction, and it should come as no surprise, that changes to the legal services delivery model that benefit clients can and should also benefit lawyers. And this applies to more than just monetary considerations. Even though lawyers have benefitted financially from the structure of the legal marketplace, you’d be hard-pressed to successfully argue that the current setup has also made lawyers happy and fulfilled. And clients certainly would not complain if their legal affairs could be handled more quickly, more cost-effectively, and with more input into the process.

In this respect, lawyers should encourage the growing knowledge and sophistication of their clients, and should do whatever they can to empower their clients. A true partnership between lawyers and clients — a meeting of equals, rather than a one-sided relationship — could form the basis of a new approach to the practice of law, less adversarial, less zero-sum. Lawyers should not feel they have to be in control of their clients’ legal matters and their clients’ legal lives. They should see themselves as facilitators of better results and happier lives.

And that, in turn, introduces one other important element of the changes underway: they offer unprecedented opportunities to improve access to justice. *The End of Lawyers?* speaks to this issue — to the unmet legal needs of literally millions of people, and the social cost this unmet need extracts. It’s not just that so many people can’t afford to access legal services— it’s that so many people don’t even know that their unhappy situations merit a legal solution, that they have rights and channels through which they can exercise those rights. The law delivers what Prof. Susskind calls too many ambulances at the bottom of cliffs and not enough railings at the top. But that may soon change.

In the coming era, the price of many legal services, especially those for individual consumers, will drop, while the amount of knowledge available to clients will rise. Accordingly, we’re poised to enter a time when people’s access to knowledge about the law — and in particular, about the rights and remedies available to them — will skyrocket. The Internet will make the ability to assemble, share and collaborate about legal knowledge so easy that the cost of such knowledge will approach zero. That, in turn, promises to finally open up the long-neglected field of preventive law.

Preventive legal services — customized legal checkups and health regimens that anticipate and reduce the occurrence and impact of legal problems — are the way of the future for many lawyers. Whether on-line or in person, for corporations or individuals, bespoke or varying slightly from a standard construction, these kinds of services promise the dual benefit of using lawyers’ most valuable skills as well as helping achieve the larger social good of a more legally informed and prepared population. A legal problem may be solved in months or weeks; good legal health requires a lifetime of wise legal advice. Unrecognized and unmet (or met too late) legal needs are a blight on society, but the rise of preventive law — made possible, if not necessary, by the collapse of the traditional law practice model — is a very promising way to make sure nobody is left uninformed about his or her legal rights.

Changes are coming — major changes — to the ways in which law practices are run, legal services are delivered, and legal knowledge and power are distributed and controlled. These changes will be upsetting and disruptive to many lawyers. But they are not something to be feared. If we do this right, we in the legal profession have an unprecedented opportunity to remake the delivery of legal services according to new standards and expectations of efficiency, effectiveness, and justice. That’s not the end of lawyers. In some ways, it may be our new beginning.

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## Creation of the National Action Committee on Access to Justice in Civil and Family Matters

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Many of the most important participants in Canada’s civil and family justice systems are pooling their efforts to find solutions to the problems of effective and affordable access to justice.

Last September, a group of representatives from the judiciary, the Bar, and provincial governments, among others, got together in Edmonton for the first meeting of the Action Committee on Access to Justice in Civil and Family Matters.

The Chief Justice of Canada, the Rt. Hon. Beverley McLachlin, PC, who has made the issue of access to justice one of the themes of her tenure, spoke to the Committee about the importance of bringing together representatives from different jurisdictions and with different roles within the system to find ways to address existing and emerging challenges. Quoting Margaret Mead, the Chief Justice of Canada expressed her confidence and trust in the

## Current Participants in the Action Committee on Access to Justice in Civil and Family Matters:

Canadian Judicial Council  
Canadian Council of Chief Judges  
Canadian Superior Court Judges Association  
Canadian Association of Provincial Court Judges  
Canadian Bar Association  
Federation of Law Societies  
Association of Legal Aid Plans  
Public Legal Education Association of Canada  
Canadian Forum on Civil Justice  
Some Deputy Ministers of Justice/Attorneys General  
Some *pro bono* organizations  
Public representatives

Action Committee - “Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed it is the only thing that ever has.”

Our civil and family justice systems, like many other aspects of Canadian governance, vary markedly from jurisdiction to jurisdiction. But unlike, for example, our health or education systems, we have relatively little understanding of the range of different approaches within the civil and family justice systems. The Canadian Forum on Civil Justice has begun developing a searchable database of reform initiatives called the Inventory of Reforms (see page 24 Cross Country Snapshots for more on the Inventory). The Inventory is accessible to and has input from every jurisdiction in Canada and the Committee encouraged the continued expansion of this valuable resource. However, much more needs to be done.

At its inaugural meeting, members of the Action Committee suggested some key areas for consideration. These included the formulation of a “national vision” for access to civil and family justice which could provide the basis for the development of national models, targets, thresholds and even standards. At present, there are certainly no common metrics for measuring the cost, speed or accessibility of civil or family justice in this country, much less anything like benchmarks or standards that would facilitate comparison across jurisdictions and encourage effective reform. The Committee unanimously supported research to establish the evidence base and tools that would enable meaningful comparisons among existing practices in various jurisdictions.

This is only a beginning. As those attending this first meeting saw it, the near-term goals of the Action Committee should be:

- tapping the knowledge and insight of various system constituencies including judges, lawyers, government administrators and the public;
- filling in gaps in knowledge and avoiding duplication of effort;
- stimulating debate within jurisdictions and within various professional communities which can feed into a national discussion of the issue of access to justice; and

- creating a credible and authoritative national voice, raising awareness of access to justice issues with the public, the justice community and governments.

The Committee put a special emphasis on the matter of the cost of justice and various Committee members suggested possible initiatives for action in areas such as:

- information sharing;
- improving the availability of affordable legal services;
- proportionality of legal proceedings to the matters at stake; and
- reconsidering the “loser pays” rules.

With regard to public engagement in the justice system, the Committee discussed:

- resources to assist the public in accessing legal services;
- law-related education; and
- support for self-represented litigants.

It was clear from the Committee’s first meeting that all the participants share a common interest in improving access to justice in civil and family matters. Of course, each comes with a unique perspective, and the intention of the Committee is to draw on the opinions, expertise, and resources within each of the sectors that are represented and pursue our common goals in a spirit of consensus-building. The aim is to find common ground, and build on that to achieve results.

The Action Committee is examining ways to build its public component, allowing it to be more diverse and representative of the Canadians served by our justice systems. The Committee struck a working group, which this winter began developing a further action plan. The working group will help in the design of a consultation framework, research on the cost of justice and other issues, and a strategy to communicate with both the legal professions and the general public – all issues identified by the Action Committee. This working group has been active since September and is planning the second meeting of the Committee, to be held in the coming months.

The Canadian Forum on Civil Justice is pleased that it has a special role to play within the Committee. In addition to contributing as a member, the Forum will also serve as the convener for the Action Committee and its working group. It will coordinate meetings and develop materials to facilitate our deliberations as well as assembling resources from members and outside parties to carry on the Committee’s work.

### Definition of Collaboration:

The following definition is proposed as a starting point for defining the role of individual Committee members and their respective organizations/sectors:

*Working together in a cooperative, equitable and dynamic relationship, in which knowledge and resources are shared in order to attain goals and take action that is educational, meaningful, and beneficial to all.*

*It is understood by this definition that all collaborators have different, but equally important knowledge and resources to both share with, and gain from each other.*



# An Emerging Model of Access to Justice

This issue begins with the keen observations, insight and advice of Richard Susskind and Jordan Furlong about models of practice and responding to unmet legal needs. Their observations are the most recent in a long line of reports and recommendations aimed at improving access to justice.

We are struck by the parallels in the 1996 CBA *Task Force Report on the Systems of Civil Justice*<sup>1</sup>, which referred throughout to the growing need for the justice system to be user-oriented. It included specific recommendations like:

- every court should provide point-of-entry advice to members of the public (Recommendation 27);
- every court should undertake initiatives to assist unrepresented litigants (Recommendation 28);
- lawyers should use a variety of billing methods, with an emphasis on value and timeliness rather than time spent (Recommendation 45);
- the CBA should take a leadership role in disseminating information about the integration of new technologies in legal practices (Recommendation 47);
- recognizing that access to legal services is integral to access to justice and that the legal profession has a major responsibility to assist efforts to increase access to legal services. The Task Force focused on *pro bono* initiatives, although as you can see from the articles included here, there are many possible ways to increase access to legal services. (Recommendation 48);
- education and training opportunities should reflect the changing expectations and responsibilities for lawyers, law students and the whole spectrum of service providers (Recommendation 49).

What has changed in the years since the release of the *Task Force Report*, is that research in Canada and internationally now provides powerful evidence about the extent of unmet legal needs, bringing into clear focus the need to act. As the diagram at page 10 underlines, an estimated 90% of justiciable legal problems remain outside of the formal justice system. While some of these problems are resolved, many are not. And the cost of unresolved legal disputes is worrisome both at an individual and societal level.

A more comprehensive model of access to justice, which acknowledges that formal court processes account for the resolution of only a small portion of legal problems, is emerging. Improving access to justice necessarily requires a focus on resolving the significant proportion of legal problems that remain outside of the justice system. New approaches to legal practice and an expanding spectrum of legal services are arising, some of which are highlighted in the following articles. We invite you to share your examples and ideas, which we will capture on our website. Write to us at: [cjforum@law.ualberta.ca](mailto:cjforum@law.ualberta.ca).

## Endnotes

- 1 Available online at: [www.cba.org/cba/pubs/pdf/systemscivil\\_tfreport.pdf](http://www.cba.org/cba/pubs/pdf/systemscivil_tfreport.pdf)

## The Spectrum of Legal Services in Canada

# PLEI as part of the Legal Services Spectrum in a Changing World

Rick Craig, Executive Director, Law Courts Education Society of BC

The excerpt from *The End of Lawyers?* by Richard Susskind reflects part of the current search for understanding as to whether our present justice system is relevant, credible and accessible to most Canadians.

The problems of excessive cost, complexity and delay exist throughout the common law world and there are numerous reform efforts underway in Canada, Great Britain, the United States and other countries using this legal system. According to the Green Paper on Civil Justice Reform published by the British Columbia Civil Justice Working Group in September 2004:

*We must begin to think in a fundamentally different way about how our civil justice system can work. We must be open to re-examining conventional attitudes and assumptions and, possibly, to reshaping the fundamental elements of the system. (Page 9)*

Currently, many would argue that this is not just a challenge for civil justice in Canada, but applicable to all areas of our country's

justice system. Given this challenge, where does Public Legal Education and Information (PLEI) fit in? If the civil justice system needs to change, how should PLEI respond?

PLEI has been part of the spectrum of legal services for over four decades, starting as one of the elements of 1960s activism. Knowledge about law was seen as an important way to promote social justice and in the early years, PLEI activists were closely linked to the anti-poverty movement.

There have been many definitions of PLEI over these 40+ years but one of the simplest is "any activity which allows individuals or groups to understand and use the law." The objectives of Canadian PLEI have always been multifaceted - to promote citizenship, to help people avoid legal problems, and to provide resources to those who have differing legal needs and problems so that they may understand how to address these issues.

With the development of legal aid programs throughout Canada during the 1970s, PLEI became an integral part of the delivery

of legal services in a number of Canadian provinces. Currently, there is at least one organization with the mandate to deliver PLEI services in every Canadian province and territory. These organizations see themselves as part of a national community with a common voice - the Public Legal Education Association of Canada.

PLEI provides resources and programs on all areas of the law for schools, and free law classes, informational booklets and media resources for the public. The range of programs and products available to the public is impressive and has grown substantially as PLEI organizations have increasingly sought to assist more diverse communities of need and ability. More recently, multi-media website resources, as well as self-help resources for self-representing litigants (SRLs) have been developed.

After almost 30 years involvement in PLEI, working on hundreds of projects creating resources in each of these areas, serving six years on the Board of the Legal Services Society of BC and almost 20 years as Executive Director of the Law Courts Education Society of BC, I believe that the primary vision of PLEI has continued to be tied to legal aid. As such, a primary objective has been to focus on the needs of low-income Canadians and those with disabilities. While this is a very important objective, how does this vision of PLEI fit into the debate about fundamental systemic reform?

In 2006, the BC Civil Justice Task Force Report *Effective and Affordable Civil Justice* presented a view of the entire legal system as a triangle:

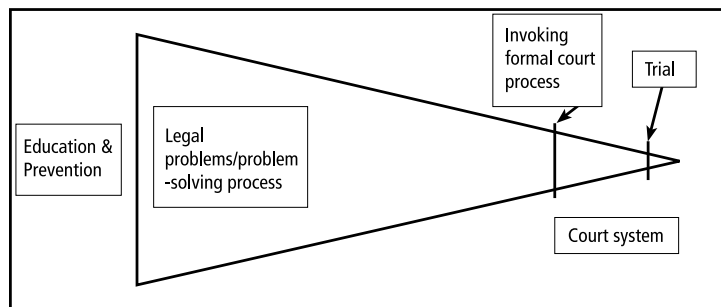


Fig. 1: The legal system as a triangle

This triangle concept is enormously useful as it illustrates the relationship between formal court processes and the rest of our legal problem-solving. The report argues that for too long we have focused resources on the tip of the triangle and now need to focus on a broader range of problem-solving processes.

For some reason, the areas of education and prevention are not seen as part of the legal system triangle. The triangle only starts with people's existing legal problems and PLEI has no clear role shown within the legal system triangle. This is similar to viewing health education as not being part of our medical system. The links between preventive education and the effective operation of our health care system are well-documented and understood. Healthy living reduces spending on medical services. Unfortunately, similar links in the legal world are neither so well-documented nor understood. If they were, then we might spend more on preventative PLEI as opposed to responding to the need to solve legal problems, some of which could be avoided through education.

An important part of this process is our need to look at what kind of PLEI resources we are developing. Experience has taught us

that education on the law, the legal processes and legal rights is not enough. PLEI needs to address both the legal issues and the corresponding social and personal contexts. Examples of this are the *Parenting After Separation* programs that now exist across Canada and the new forms of online PLEI that show SRLs what they need to do and also what they should not be doing.

As an example, the development and implementation of the BC Supreme Court Self-help Information Centre in Vancouver involved the work and commitment of many people over several years. There were nine separate drafts and substantial back-and-forth between stakeholders on the framework. In the end, we concluded that SRLs needed a range of support services to address their needs. These services were:

- PLEI – a front-end service that SRLs could use to identify their legal problem(s), their legal options and where to get assistance
- Legal Advice – so SRLs could understand the issues involved with their legal problem(s) and how to proceed
- Forms Assistance - so SRLs could properly complete the forms required to initiate and complete their legal process
- Legal Research – so SRLs would have assistance to undertake necessary legal research
- Self-representation Resources - to assist SRLs to present effectively before a tribunal or the Court

After launching the Centre and continuing to work on education resources, it has become clear that this characterization of what is needed is incorrect; the definition of PLEI is far too narrow. PLEI is not the front-end of the legal process; it is instead the common thread that ties together all parts of the process.

In the role of a common or connecting thread, PLEI can help SRLs understand how to do legal research and how to present their matters at a hearing. While SRLs and others need to understand their legal options, they also need PLEI to understand how to prepare to meet with lawyers for legal advice so that the time can be used efficiently and cost-effectively.

We need to do more than give people forms to be completed or access to assistance in filling out those forms. We need to develop 'intelligent' forms, PLEI resources to educate people on how to use these forms, and then work with the Courts to ensure that PLEI is tied to simplified forms. To be effective, we need to examine how our concept of PLEI fits into both our evolving legal system and the new technologies that are available.

PLEI has historically been closely linked to legal aid and perhaps this has helped frame our conception of what PLEI should be. Most of our legal aid today is in criminal law and, while our criminal justice system format has not changed dramatically in the past 30 years, our family and civil justice procedures have evolved substantially.

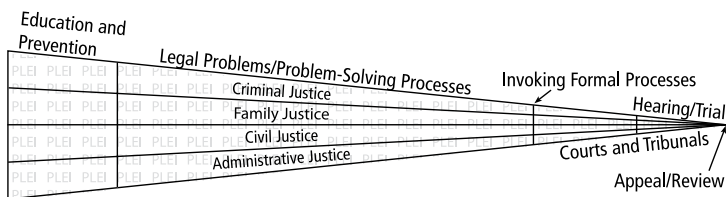
For us to define the role of PLEI in the spectrum of justice services, we need to define the role of PLEI as it relates to each separate area of our justice services. In the area of family justice for example, PLEI has seen many advances. A range of new resources -from self-help websites to *Parenting after Separation* programs - demonstrate how PLEI is central to all aspects of our family justice system. PLEI also has a critical role to play in educating Canadians on the advantages of seeking alternatives to court resolution processes and the importance of developing healthy communication and co-parenting skills that can be used when dealing with ex-spouses or children.

PLEI has an essential role to play in how people access all civil justice services. This includes the myriad administrative law tribunals; we have over 100 of these tribunals in British Columbia alone. PLEI also needs to be part of all small claims processes, from filling in forms to complete self-representation. The same applies to Supreme Court cases involving SRLs who have chambers applications or full trials.

The approach to this work needs to be coordinated and to have a common perspective – not a collection of independent and unconnected parts. This means that we should have a more coordinated and collaborative approach to how we educate our citizens about the justice system and how to interact with it.

In some respects, the criminal justice system is the area where defining the scope of an evolving role for PLEI may be more challenging. PLEI has always been important in educating Canadians about their legal rights and responsibilities under the criminal law. Over the years, the PLEI world has developed valuable preventative education resources for youth-at-risk by educating them on the dangers of gang involvement, drugs and criminal behaviours. More recently, again using the Internet as a tool, PLEI has developed new educational resources for offenders which should prove to be extremely valuable when used as part of innovative programs such as the Vancouver Downtown Community Court.

Given all the above, a more accurate triangle to illustrate our legal system might look like the following:



In this view, education and prevention are part of the system and PLEI plays a role at every stage of the process. Further, the concept of PLEI's role as it relates to our different justice systems is seen clearly. PLEI is a thread that weaves through the processes involved in each of our justice systems, keeping in mind that the way this occurs differs depending on whether the matter is criminal, family, civil or administrative in nature.

In conclusion, I am suggesting that we need to re-examine the way that we view PLEI as part of the spectrum of legal services today. Our justice system is evolving to respond to some serious challenges and PLEI is evolving in its role as part of the system. It can no longer be viewed as only the 'front-end piece', isolated from the rest of the system. Rather, it is one of the threads weaving through the justice system, helping Canadians understand their social responsibilities as well as address their legal needs.

Given this integration, we need to see the role of PLEI more holistically and move towards creating PLEI services that are comprehensive, cohesive, collaborative and more integrated. They must be designed with an understanding that the PLEI frameworks for our criminal, family, civil and administrative justice systems will be different. These frameworks, although dissimilar in nature, will each focus on one common objective: helping Canadians understand and use the law.

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## Access to Justice with Legal Advice Lines

John Simpson, Manager, Community Services,  
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In the past ten years, advances in technology, the growing cost of legal advice and representation and steadily increasing demand for self-help services have spurred interest in civil legal advice and information lines ("legal hotlines").

Evaluations have shown that these services meet an important need for many people who otherwise would not get help. As we gain experience and new technologies are introduced, these services are continuously refined and improved.

This article focuses on the experience in British Columbia and on how LawLINE developed to address both the needs of callers and changing circumstances.

## Legal Hotlines in BC

Legal hotlines evolved from legal information services and date back more than a quarter century. In the early 1980's, the Legal Services Society (LSS) had a system of community-based offices but people frequently called the administration office in Vancouver seeking help with legal problems. LSS established a dedicated telephone information service through its public law library, the Legal Resource Centre, to address this need.

Originally staffed with law librarians, LawLINE provided legal information and directed callers to other legal information and resources to help them resolve their legal problems. It did not

provide legal advice and service was restricted to the Metro Vancouver area. Nevertheless, LawLINE satisfied a demand for legal information that was not met by other means. By 2002, LawLINE handled 17,000 calls each year and helped many people to find resources and services to answer to their legal questions.<sup>1</sup>

In September 2002, LawLINE was expanded to a province-wide, toll-free phone service. It continued to provide a legal information and referral service, but not legal advice.

Meanwhile, drastic cuts to legal aid funding in the United States after 1995 forced many legal aid plans to lay off staff, close offices and terminate core programs. Telephone advice lines were seen as a way to continue to provide access to legal advice. Many legal aid plans integrated their services with a telephone delivery system with support from the Legal Services Corporation (LSC), which provides much of the funding for civil legal aid programs in the United States.

## The Enhanced LawLINE Project

Adapting lessons learned from this experience, in September 2003 LSS added telephone legal advice to the existing LawLINE services. Funded by BC's Law Foundation, the first legal hotline service for low-income people in Canada was staffed with a mix of lawyers and paralegals.

LawLINE provided a defined range of services within set eligibility and coverage criteria. Innovations introduced with LawLINE included the use of telephone interpreters through three-way conference calls.

Evaluations showed that LawLINE filled a significant gap in existing services for many callers. The vast majority (85%) said that LawLINE made a difference for them. People with family, health, transportation or scheduling problems said it served their needs better than a walk-in service.

## Telephone Triage and Redesign

In 2007, LSS launched a review of LawLINE services to improve efficiency, reduce wait times and make best use of limited resources. Numerous changes were implemented in 2007 and 2008 through the Telephone Triage Project. These included revising message scripts to improve diversion of callers to in-person services, where appropriate, and better integrating LawLINE's intake process with the intake process for the LSS Call Centre (where callers can apply for representation by a lawyer).

The Telephone Triage Project has offered callers a single point of entry to many legal aid services. To improve the intake process, Intake Legal Assistants screen calls and Legal Information Outreach Workers (LIOWs) respond to requests for legal information. New steps have been introduced to speed the escalation of calls to paralegals and lawyers, and simplified scripts were created for automated greetings.

In 2009, LSS made further operational and staffing changes to many programs because government and non-government revenues were insufficient to cover the current demand for legal aid. LawLINE advice services are funded for another year and will continue until at least March 31, 2010. However, with reductions in LawLINE staff, the scope of coverage was redefined to tailor the service primarily to issues arising from the current economy;

fewer areas of law are now covered. These changes to LawLINE take effect April 6, 2009.

## Making a difference

Legal hotlines are intended to assist those who cannot access other services and who qualify for assistance. Among other things, legal hotlines improve access to justice by providing:

- Convenient access to legal advice and information anywhere callers have access to a phone.
- Efficient delivery of unbundled services through use of telephone technology. (Advice provided in a telephone conversation or in follow-up communications is by definition an unbundled or "discrete task" service. Unbundled services can help many people to take the next step to resolve their legal problems. Legal aid programs have provided unbundled services for many years in the form of brief advice clinics and duty counsel services.)
- Service to people in remote and rural communities who would otherwise not have access to legal advice.
- Service to people who need immediate assistance or cannot visit an office location.
- Advice in areas of law that affect those with low-income
- Cross-referrals with other agencies that can help resolve legal and related problems.

Despite these benefits, many people are not as satisfied with a phone service as with a walk-in service. Some of the continuing challenges for legal hotlines are that:

- Valuable information may be lost when you cannot see the other person. Trained staff can compensate to some degree by using other techniques to ensure that communication is clear and that information is understood.
- Barriers to access may include low literacy, limited education, cultural differences and expectations, language, and personal disabilities. Awareness of barriers and methods that may be employed to respond to them is essential to delivering an effective hotline service.
- The common experience of navigating through automated greetings or being put on hold waiting for the next available staff member can be frustrating. However, these factors have to be balanced against the accessibility of calling from home (or anywhere) compared to traveling to an office and waiting to see a staff member with the attendant expense and inconvenience.
- As cell phones increasingly become the preferred means of phone communication, new concerns arise about wait times. Cell phones have battery time, coverage and cost issues attached. Warnings about wait times, suggestions to call from a landline and automated or manual call-backs can address this concern.
- Some kinds of legal problems are more amenable to hotline assistance than others.

Legal hotlines must also adapt to rapid advances in technology and attendant increases in callers' comfort level using technology. Many callers do not have, or have delayed access to technology, but the use of cell phones, computers and high speed Internet services is growing steadily. Responding to this need, in 2006 LawLINE introduced a blog to share information about common legal problems.

Legal hotlines must therefore continuously improve, while ensuring that their services remain accessible to a broad range of callers with differing needs and capabilities.

## The Role of Hotlines in Access to Justice

Legal advice hotlines are part of a continuum of services for those with low-income who cannot afford a lawyer and an important way to deliver unbundled services. The full range of legal aid services includes legal information, advice and representation. Each plays a role in meeting the legal needs of low-income people, which is the LSS mandate.

In addition to providing legal information and advice, legal hotlines have a responsibility to ensure that callers are referred to other legal services, as well as to agencies that provide other kinds of services that might better meet the needs of the caller.

Legal hotlines are not a perfect solution for all callers, nor are they intended to replace in-person advice and representation when needed. The ability to effectively screen and refer callers as well as provide advice and information are essential attributes of a successful legal hotline.

What lies ahead for legal hotlines? The demand for legal advice over the telephone is bound to continue and to grow. Hotlines will be able to distribute calls to remote lawyers and others for response and video-conferencing will improve communication; some hotlines are already using these technologies. Phone services will

become integrated with the Internet. This trend is best illustrated by two fairly recent developments: the use of online chat and phone services to help visitors navigate legal websites, and websites that are designed to be viewed on mobile devices.

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## Endnotes

- 1 This article is necessarily a brief description of LawLINE. More information can be found at [www.lss.bc.ca/general/LawLINE.asp](http://www.lss.bc.ca/general/LawLINE.asp). LawLINE currently deals only with the following issues: Debtors' assistance; Employment law issues; Family law issues; Health; Estates law and Seniors' issues; Housing law-related issues; Income security law-related issues.

## Paralegals, A Worthwhile Option

Geneviève Forget, Canadian Association of Paralegals

Under the supervision of a lawyer paralegals perform various legal tasks on a daily basis such as the drafting of legal documents including resolutions, directions, motions, contracts, solemn declarations, settlement documents, and outlines and summaries for interrogatories. They conduct specific and precise research, corporate audits of minute books, take minutes during meetings, draft proceedings, etc.

There are many advantages to doing business with a paralegal working under the supervision of a lawyer, including:

- Benefitting from a financial margin that is more accessible to individuals as well as small and medium-sized businesses to obtain quality legal services;
- Enjoying a relationship of trust with a professional other than a lawyer, as well as improved business dealings;
- Benefitting from the knowledge of a professional who is familiar with your situation and who understands all of the technicalities relating to your case;
- Benefitting from the professional services of a paralegal protected by legal insurance, etc.

In spite of the fact that people are increasingly aware of the benefits associated with using the services of a paralegal, this profession remains largely unknown to the public. Professional associations and educational institutions are working to promote this



profession's development by increasing their visibility, accessibility, and the quality of available programs.

Given the current financial crisis, chances are very good that the paralegal profession will undergo a sizable expansion. Clients are more sensitive to billing and are looking for better hourly rates as well as more rigour concerning hours worked. In that legal fees must be reduced, the paralegal-lawyer equation is proving to be a winning and intelligent solution for all.

It would be to the advantage of paralegals across Canada to unite and promote the development of their profession in order to better define tasks and responsibilities as well as to ensure its development and its accessibility for all.

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# Unbundling Legal Services: Is the Time Now?

Jeanette Fedorak, Senior Policy Counsel, Safe Communities Secretariat, Alberta Justice

For Canadians struggling with consumer debt issues, family breakdown and other legal problems, the recent economic crisis has only made things worse. The headline and article “When lawyers are only for the rich” in the January 19, 2009 issue of *Maclean’s* magazine reminds us that affordability of legal services continues to be a pressing issue for many Canadians.

In Alberta, for example, the median family income (2006) is \$78,400.<sup>1</sup> We know from The Vanier Institute of the Family that the total debt for Canadian households is now 131% of income<sup>2</sup> (debt/income ratio), with expenditures eating up most of that income. This leaves little money available for unforeseen or even anticipated legal services. With *Canadian Lawyer* magazine showing the average cost of a 2-day civil trial in Alberta at \$23,750<sup>3</sup>, it’s easy to see why the cost of legal services is out of reach for many families.

## Traditional Legal Services

In the traditional, full-representation model of legal services, a lawyer takes on all aspects of the client’s legal issue. The client pays a retainer and agrees to continue paying for services until the matter is concluded. Usually, the client pays an hourly rate for the lawyer’s time and that of the lawyer’s staff, until the matter is concluded or the client runs out of money.

As more low and middle-income earners find themselves unable to afford traditional full-representation, litigants are appearing in court on their own or turning to non-lawyers for assistance, and self-help centers have proliferated. These efforts have varying degrees of effectiveness.

There is still a need, however, for legal advice to help individuals understand how the law applies to their situation, to set out their legal options or to assist by representing them in court. The assistance of counsel to answer even part of a legal question or issue, however, may be invaluable in allowing someone to avoid further problems. There are also clients who can afford to pay for some assistance, but full-representation is beyond their means.

## Limited Scope Retainers or Unbundling of Legal Services

Lawyers looking at new ways to meet client demand for affordable services could offer unbundled services or limited-scope retainers. There has been a cultural shift in the expectation of clients in the information age; many people access legal and other information on the Internet. Some are willing and able to take on a portion of the work necessary and having done so, are appreciative of a lawyer’s assistance with other parts of it. Clients who might otherwise be forced to deal with legal problems and perhaps even go to court entirely on their own would now have the option of this type of assistance for various parts of their process.

## The US Experience

Limited-scope retainers (also referred to as limited assistance representation or unbundled legal services) have been explored in the United States since the 1990s as one possible solution to this lack of access to justice. A limited-scope retainer allows the litigant and the lawyer to agree that the lawyer will handle only a specific

part (or parts) of the case and that the litigant will deal with the rest. Limited-scope retainers can take many forms: research, coaching, scripting questions, providing strategy, assisting with drafting documents or appearing in court to assist with a single application.

The trend towards unbundled legal services has gained momentum across the United States and in the last 10 to 15 years has dramatically shifted how many lawyers practice. Previously fearful lawyers, concerned about being sued or having the courts expand their limited retainer, have instead found satisfied clients and grateful courts.

Limited-scope retainer use has expanded beyond family law to other civil matters such as landlord and tenant, probate, and small claims. They are used in large cities like New York and in rural areas where they are a response to a lack of lawyers and less affluent clients. There is even a course being taught in “Unbundling legal services” at a new on-line Solo Practice University for American practitioners.<sup>4</sup>

## The Canadian Experience

Lawyers, particularly solicitors, already provide many types of unbundled services such as contract review or negotiation assistance. Boutique law firms often limit their practices to a particular area of the law, for example tax matters. *Pro bono* clinics and Legal Aid duty counsel also provide limited assistance. Pre-paid legal insurance programs have been providing unbundled services for clients as part of their service.

## Parameters for success

The use of limited-scope retainers requires collaboration between the courts and the Bar to ensure success, and are an innovative approach to the delivery of legal services. In order to gain widespread acceptance by the Bar and the courts, however, it is necessary to remove the actual or perceived barriers to its use. Many US states<sup>5</sup> have modified their Rules of Court and Codes of Conduct to provide lawyers with guidelines and training so that they can effectively provide limited retainer services to their clients. Canadian provinces may need to do the same to encourage unbundling.

While there is on-going debate, the American experience has generally shown that clients want choice in their legal services and that they are satisfied with the limited retainer services they receive. This demonstrates that limited-scope retainers enhance access to justice for clients. It is no doubt why the recent *Task Force Report of the British Columbia Law Society*<sup>6</sup> endorsed the limited retainer model for the provision of legal services. Alberta Justice, with the Law Society of Alberta and the Canadian Bar Association, is exploring the possibility of encouraging limited-scope retainers in Alberta. We can hope that this innovative approach will be adopted in other Canadian jurisdictions, improving access to justice for many low and middle-income clients.

Limited assistance representation is one of many possible stops along a continuum of legal service provision. When encouraged by the courts and the Bar, supported by training and risk management materials, court rules and forms, it can expand lawyers’ ability to provide legal services to more clients. It is neither for every client nor for every case. Tailored to the individual client’s needs, however, it can provide a safe and manageable route for access to

justice for some who need and would not otherwise have it. Limited assistance representation is also helpful to the courts as they struggle to respond to self-represented litigants.

Change is here now for the legal profession. We can choose to embrace the opportunity and look at new practices to assist our clients, or stay-the-course, and watch as more clients self-represent or select non-lawyer helpers.

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## Putting Legal Aid in the Paths of Clients

Mark Benton, QC, Executive Director, Legal Services Society of BC

A province-wide survey by BC's legal aid provider shows that low and middle-income people see the spectrum of legal assistance available to them as going well beyond the traditional borders of the justice system.

The survey, which was adapted from a Canada-wide study conducted in 2006 by Ab Currie of the Department of Justice, suggests legal aid programs should look for innovative ways to put their services into the paths of their potential clients.

More than 80 per cent of those surveyed said they experienced a legal problem in the past three years that was serious and difficult to resolve. This is significantly higher than the DOJ survey where only 45 per cent of respondents reported a legal problem over a similar time period. Respondents to both surveys, however, ranked consumer, debt, housing and employment problems among the top six most common legal issues.

Of those who experienced a legal problem, the vast majority took some action to resolve the issue. While this initially sounds good, it quickly pales when we look at where they turned for assistance.

The survey found that most people took action on their own without the benefit of help from anyone at all. Those who sought non-legal assistance looked most often to family and friends for advice. And while those who sought legal advice overwhelmingly went to a lawyer, a significant number assumed they could get valid legal advice from a range of non-lawyers including community advocates and government offices, as well more dubious sources such as the Internet.

Anyone familiar with the legal system will see these responses as troubling. Acting on one's own is certainly appropriate for some legal disputes. But is self-help best in a family law matter or a dispute over welfare benefits? The root cause of both may well be the person's inability to resolve disputes or to deal with complex,

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## Endnotes

- 1 Statistics Canada, Summary Tables, "Median total income, by family type, by province and territory (all census families)" [www40.statcan.gc.ca/101/cst01/famil108a-eng.htm](http://www40.statcan.gc.ca/101/cst01/famil108a-eng.htm) accessed March 19, 2009.
- 2 *The Current State of Canadian Family Finances* - 2007 Report, Roger Sauvé, The Vanier Institute of the Family, February 11, 2008 pg. 5.
- 3 "The Going Rate" Kirsten McMahon, *Canadian Lawyer*, July 2008, Pg 42 at 46. [www.canadianlawyermag.com/images/stories/pdfs/Surveys/2008/03CL\\_legal%20fees%20survey.pdf](http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2008/03CL_legal%20fees%20survey.pdf)
- 4 See <http://solopracticeuniversity.com/2009/02/23/faculty-announcement-richard-granat/>
- 5 See <http://www.unbundledlaw.org/default.htm> for survey results and the National Centre for State Courts' FAQs on Unbundled Legal Services at [www.ncsconline.org/wc/courttopics/FAQs.asp?topic=ProBon&mode=p#FAQ746](http://www.ncsconline.org/wc/courttopics/FAQs.asp?topic=ProBon&mode=p#FAQ746)
- 6 "Report of the Unbundling of Legal Services Task Force - Limited Retainers: Professionalism and Practice", The Law Society of British Columbia, April 4, 2008. [www.lawsociety.bc.ca/publications\\_forms/report-committees/docs/LimitedRetainers\\_2008.pdf](http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/LimitedRetainers_2008.pdf) accessed March 20, 2009.

stressful situations. Family and friends are good sources of support, but do they know the law and can they provide an unbiased opinion? And although there are non-lawyers and organizations that can legitimately provide legal advice, should the Internet be included among them?

While these may be important questions for those involved in the justice system, the survey suggests that they mean little to low- and middle-income people. Fifty-nine percent of those who sought either legal or non-legal assistance were, in fact, satisfied with the help they received regardless of the source of the assistance.

This suggests that consumers of legal services don't view the spectrum of legal assistance the same way legal professionals do. They do not look at it as a "lawyercentric" continuum that ranges from a traditional-solicitor client relationship to a limited-scope or "unbundled" retainer, with some alternative services along the way. Rather, they see a plethora of contact points many of which are outside what we traditionally think of as legal service providers.

The survey also confirms what the earlier DOJ study found – that legal problems trigger non-legal problems. More than half the people who reported a legal problem also reported emotional or physical health issues flowing from their legal problem, while more than one-third said their legal problems triggered drug or alcohol problems. This suggests that money spent on early intervention is good public policy because it will lead to even greater savings down the road by eliminating future problems before they become an additional burden on the justice system and other social services.

What all this means is that legal aid programs – or anyone else who provides legal services to low- and middle-income people – must ensure their services are not just accessible, but in the paths of their potential clients. If legal aid or other poverty law services are not readily available, low-income consumers are likely to turn to any one

of a number of non-legal service providers, some of whom are less than qualified to provide legal information, advice or representation. While satisfaction rates may be high, there is no way of knowing whether these alternative sources of advice provided real solutions, filed the rough edges off part of the problem, or simply made things worse. And if they weren't providing real solutions, what were they doing? Perhaps that is a question for our next survey.

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## Resourcing Access to Justice: Legal Expenses Insurance (LEI)<sup>1</sup>

Kenning Marchant, D Jur

If you're a person who can't afford \$50-100,000 to go to court, what are your options? You could forget about your claim; or, if you are sued, take the best deal you can get without going to court. Or you can act for yourself without a lawyer, or with whatever partial legal assistance you can afford. In many European countries you have a third option: call on your legal expenses insurance to provide legal counsel. In Canada, most people don't have that option. Why is litigation insurance available in some countries, but not commonly available in Canada? This article looks at several factors, and the prospects for change.

The economics of the justice industry are less well understood than would be desirable.<sup>2</sup> We know how to produce and distribute food, cars, banking services and energy at affordable cost on an individual basis. We make health care affordable by making it regulated, tax supported and universal. Justice – the use of the legal system to resolve disputes – falls into neither category. It is often inefficient and frequently unaffordable for all but the wealthy.

Economic analysis of litigation has tended to focus on the incentives acting on justice system participants: litigants; lawyers as agents of litigants; judges and courts.<sup>3</sup> Such studies are not directed to the problem of whether the justice system is adequately resourced, especially where the resources depend on the means of litigants. Political discourse about justice system resourcing tends to focus on court facilities and numbers of judges; and, especially, on the availability of legal aid. However, no Canadian government has shown an appetite to extend legal aid to the middle class. Indeed, legal aid is generally considered underfunded even for the poor.<sup>4</sup>

Concerns about efficiency typically focus on changes to rules of procedure: the amount of discovery, use of experts, case management, and use of alternative dispute resolution, including mandatory mediation, particularly in estate or family law matters. There have also been some improvements in court administration and in expanding the scope for use of paralegals.<sup>5</sup> Legal system efficiency appears to be more extensively studied in Europe, notably the work of European Commission for the Efficiency of Justice.<sup>6</sup>

Litigation has classic insurance features. In any year, a tiny fraction of the population needs litigation services. We do not know in advance who will be subject to wrongful dismissal, division of family assets, purchase of a condo with construction deficiencies, or having a youth family member charged with an offence that calls for legal representation. And while research would be required, in

principle, insurers could develop the statistics they need on how frequently various types of claims occur, what they cost, and if and how they settle. Research to help answer such questions is currently being proposed by the Canadian Forum on Civil Justice. (Editor's note: See description of proposed research on page 23.)

Legal expenses insurance policies are publicly available in many European countries, often as employee benefits or riders on household policies. Germany and the UK are two examples and, in Sweden, such insurance is universal.<sup>7</sup>

Legal expenses insurance could improve the economics of the justice system in at least two ways. First, it could bring carefully targeted additional resources to bear, making legitimate litigation affordable where one party or another would otherwise be denied access to justice for lack of financial means. Second, it could promote greater cost predictability and efficiency, since these are pre-requisites to viable insurance programs. Conversely, greater predictability and efficiency in Canadian court systems may also be a prerequisite to insurance availability. Justice systems with little cost predictability and excessive costs may not be insurable.

Some steps have already been taken. The principle of cost proportionality – that the time and expense devoted to a proceeding ought to be proportionate to what is at stake,<sup>8</sup> or some reasonable fraction of the value of the dispute, is being expanded in several jurisdictions. This is often associated with triage or other streaming to determine the best use of resources e.g. deciding between small claims, simplified procedure in superior court, using a specialized court or having large, complex matters dealt with by the full panoply of resources. These are the kind of reforms that should attract the interest of insurers who might offer a legal expenses insurance product.

Legal expenses insurance is available in Canada as a feature of a small number of collective agreements and for particular occupational groups, such as directors and officers of corporations, lawyers and other professions in connection with professional liability. It is also implicit in third party liability components of automobile and residential insurance due to the insurer's duty to defend its insured.<sup>9</sup> There are also legal services plans that provide access to lawyers up to specified limits, such as the programs sponsored by the Barreau du Québec.<sup>10</sup> *Maclean's* magazine recently reported that DAS, a large German legal expenses insurer, will begin offering such insurance in Canada this year.



There are barriers to the successful introduction of legal expenses insurance for the wider public. Experience in the United Kingdom and Australia suggests that legal expenses insurance is difficult to market as a stand-alone product. An insurance plan needs a large pool of insured. Continental Europe suggests that wide coverage can be achieved when legal expenses insurance is offered as part of an employee benefit plan as it is in Germany, or bundled with homeowner or tenant insurance as it is in the UK.

Marketing challenges may reflect some known psychological barriers. People tend to overestimate the probabilities of events that are more familiar – the incidence of crimes such as burglaries or gang shootings based on media reports – or desirable, like their chances of winning the lottery. However, they tend to underestimate the probabilities of events that are unfamiliar or unwelcome – having to go to court, wrongful dismissal, separation and divorce, or personal injury. People’s decisions are also influenced by how the choices are presented to them, or ‘framed’.<sup>11</sup>

Keeping these factors in mind, what steps might be taken to encourage people to obtain coverage by legal expenses insurance?

First, the insurance industry must be prepared to offer insurance product. This could be encouraged by implementing more ways to make litigation streamlined, cost-effective and predictable, while retaining fairness. Government and industry could meet to discuss ways to widen legal service insurance availability.

Second, an immediate large pool of insureds could be created by offering legal expenses insurance as an employee benefit for public servants. It could be rendered cost effective to public sector employers by inviting bids from companies wanting to enter this market. This could help launch a broader legal expenses insurance sector.

Governments could also consider favourable tax treatment for legal expenses insurance as a private sector employee benefit. They could encourage property and casualty insurers to add expanded legal expenses coverage to residential and automotive policies that people are already buying. Credit card issuers could offer legal expenses insurance and assistance with consumer disputes resolution.

As legal expenses insurance becomes more available, governments could consider subsidizing insurance for low-income groups as an alternative, and possibly fairer alternative to legal aid. For example, in Finland, legal aid is coordinated with legal expenses insurance, including financial assistance to those with insurance who are unable to afford the deductible when legal services are needed.<sup>12</sup>

The list of possible initiatives is not closed.

The ‘elephant in the room’ in access to justice discussions is the need for expanded financial resources. There is little prospect, however, that governments will expand legal aid or fund legal coverage like they fund health care. If there is a trend, it is towards the self-representation model. But, except for minor matters, our legal dispute resolution systems are not designed for amateurs.

Litigation counsel are not just for going to court. Many justiciable issues go unrecognized. Of those that are recognized, many of them never reach the court system. Once in the court system, the majority of cases never go to trial before a judge. At all stages, counsel can provide advice and negotiating skills to hopefully achieve a mutually agreed resolution.

When those cases that actually reach the trial stage get to court, it is important to everyone – the parties and the justice system – that the cases be properly prepared. Self-representation puts new responsibilities on the shoulders of judges to compensate for a litigant’s lack of legal expertise. It increases costs for both the court system and represented litigants on the other side. It also increases the risks of injustice.

We seem, nonetheless, to be heading for an expanding self-representation model, mostly for lack of available financial resources. Legal expenses insurance is one major option, and perhaps the only one, that could offer a real alternative. It deserves more public policy attention and discussion.

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## Endnotes

- 1 The definition of legal expenses insurance from Carlo Isola’s *Legal expenses insurance: origins and development: From protection for motorists to access to law* “[t]he risk covered by LEI is the need to receive assistance in a dispute. Contracts will flesh out this broad definition, specifying the nature of the assistance (information, advice, assistance in the strict sense, in or out of court) and the type of dispute to which the cover relates in particular circumstances.” International Association Of Legal Expenses Insurance [www.riad-online.net/3.0.html?&L=0](http://www.riad-online.net/3.0.html?&L=0) Today, ‘Before-the-Event’ and ‘After-the-Event’ insurance is available, as well as pre-paid legal plans and litigation loans, all as means of dealing with the cost of legal services.
- 2 See, for example, Francisco Cabrillo and Sean Fitzpatrick (2008), *The Economics of Courts and Litigation*. Northampton, MA: Edward Elgar.
- 3 Robert G. Bone (2003), *The Economics of Civil Procedure*. New York: Foundation Press; Thomas J. Miceli (1997). *Economics of the Law: Torts, Contracts, Property, Litigation*. New York: Oxford University Press.
- 4 For a recent example, see Michael Trebilcock, *Report of the Legal Aid Review 2008*, Ontario Ministry of the Attorney General. Trebilcock’s recommendations include consideration of legal expenses insurance, as does the Ontario Bar Association’s Access to Justice Conference report, *Getting It Right* (2008).
- 5 See, for example, Margaret Shone, “Civil Justice Reform in Canada 1996 to 2006 and Beyond”, <http://cfcj-fcjc.org/docs/2006/shone-final-en.pdf>
- 6 E.g. European Commission for the Efficiency of Justice, *European judicial systems - Edition 2008 (data 2006) Efficiency and quality of justice (2008)*. Paris, Council of Europe.
- 7 Articles on the German, Swedish and other models can be found in Richard Moorhead & Pascoe Pleasance, eds. (2003), *After Universalism: Reengineering Access to Justice*. West Sussex: Wiley-Blackwell. (*Journal of Law and Society* Special Issue, May 2003). A study of access to justice in 12 European countries commissioned by the International Association of Legal Expenses Insurance, “Regulation of the legal profession and access to law, an economic perspective” is at [www.riad-online.net/fileadmin/documents/homepage/publications/press\\_releases/SEO\\_Executive\\_Summary\\_080512\\_en.pdf](http://www.riad-online.net/fileadmin/documents/homepage/publications/press_releases/SEO_Executive_Summary_080512_en.pdf)
- 8 The Honourable Coulter A. Osborne, Q.C., “Proportionality and Costs of Litigation” in *Civil Justice Reform Project: Summary of Findings & Recommendations* [www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report\\_EN.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf) (Toronto: Ministry of the Attorney General, 2007) 134.
- 9 See for example *Nichols v American Home Assurance Co.*, 1990 CanLII 144 (SCC).
- 10 The Supreme Court of Canada drew attention to the importance of legal expenses insurance in *R v Delaronde*, 1997 CanLII 404 (S.C.C.), a *Charter* case. The Court noted that failure to receive timely notice of a charge could lead to one’s legal expenses insurance being allowed to lapse.
- 11 Two classics in the field of economic psychology are Daniel Kahneman & Amos Tversky (1982), *Judgment Under Uncertainty: Heuristics and Biases*; and Daniel Kahneman, Paul Slovic & Amos Tversky (2000), *Choices, Values and Frames*. Cambridge: Cambridge University Press. Kahneman won a Nobel Prize in Economics in 2002.
- 12 [www.oikeus.fi/20616.htm](http://www.oikeus.fi/20616.htm)

# Pro Bono Publico – For the Public Good

## Pro Bono Law Ontario

Lynn Burns, Executive Director, Pro Bono Law Ontario

Since 2002, Pro Bono Law Ontario (PBL0) has played a major role in increasing access to justice for Ontario's citizens. Together with our partners, we have been able to serve thousands of low-income and disadvantaged individuals who cannot afford legal services and are ineligible for legal aid. For almost as long, PBL0 has made addressing the unmet needs of unrepresented litigants a strategic priority. We have developed pro bono projects for almost every level of the civil litigation process, from Small Claims to the Federal Court of Appeal.

In recent years, our projects have taken on a distinctly court-based focus as we attempt to provide legal services at the primary point of interaction between the unrepresented litigant and the justice system. We currently have two projects in Toronto – the Small Claims Court Duty Counsel Project at 47 Sheppard Avenue and Law Help Ontario (LHO) at the Superior Court of Justice at 393 University Avenue. A second LHO centre will be opening in Ottawa later this year.

Not surprisingly, these projects have given us insight into the kinds of challenges that unrepresented litigants face when they go to court on their own. Depending on the litigant and the case, their

struggles range from not understanding the substantive law being litigated, to not knowing how to conduct effective cross-examinations. Mastering simple procedures like knowing how to properly format a back page and fax cover sheet is a stumbling block, let alone understanding more complex procedural rules for forms that they must submit to the court.

LHO was designed specifically to address these barriers. The two Toronto walk-in centres offer a range of discrete services, which are provided on an as-needed basis to litigants with civil, non-family matters. The services are client-centred, educational and goal oriented; they help litigants navigate their way through the justice system and help move them from one stage of litigation to the next.

The centres are staffed by a licensed paralegal who acts like a front-line triage worker interviewing applicants, assessing individual needs and designating the centre's resources accordingly. Resources include plain-language procedural information kits to help litigants understand the purpose of an affidavit or a motion, for example, or to highlight the existence and implications of adverse cost awards. LHO provides computerized court-form completion assistance. The centres have two *pro bono* lawyers onsite every day to provide

## Pro Bono Students Canada

Noah Aiken-Klar, National Director, Pro Bono Students Canada

It has been 13 years since Pro Bono Students Canada (PBSC) – the only national *pro bono* service organization in Canada, and the only national *pro bono* law student organization in the world – was founded at the University of Toronto, Faculty of Law. During that time, we have witnessed a growing recognition of the need for *pro bono* legal services to complement legal aid, public legal education and self-help initiatives for those lacking access to justice. There is an increased awareness of the vital role that law students can play in providing these services.

Today, every Canadian law school has a PBSC program, and many also have legal clinics and other volunteer programs for students. Each year through PBSC alone, 2,000 law students across the country contribute over 100,000 *pro bono* hours to the work of hundreds of community groups, public interest organizations, legal clinics, government agencies, courts and tribunals, and lawyers working *pro bono*. Students research pending legislation, legal issues and policy questions; draft policies and manuals; conduct public legal education; help provide legal information and assistance to clients; and much more.

Law students cannot provide legal advice, nor can they remove the need for other services. But they are a valuable and much-needed support for the *pro bono* and clinic lawyers and lawyers working on legal aid certificates who supervise the students' work. The students enable these lawyers to serve more clients who are struggling with more complicated matters and at a higher level. And, the experience enriches students' legal education and cultivates their *pro bono* ethic establishing the next generation of *pro bono* lawyers and tomorrow's leaders in engaging our profession in access to justice initiatives.

*Pro bono* service requires partnership. PBSC could not exist without our partnerships with every Canadian law school (including the U of T, which houses the PBSC National Office), provincial law foundations (like The Law Foundation of Ontario, our primary funder), the legal profession (including law firms like McCarthy Tétrault LLP, our national firm partner), government agencies and community and public interest organizations across Canada. As a network, we have transformed law school culture, law students' experiences and aspirations, and the lives of those at the margins of our society. And, as this network continues to grow, with waves of lawyers graduating our programs and entering the profession, so too does the recognition that *pro bono* service is not simply an approach for enhancing access to justice – it is a responsibility that we all share.

Noah Aiken-Klar is PBSC's National Director. For more information about PBSC or how to join its national *pro bono* network, contact the PBSC National Office at (416) 978-4048 or [natl.coordinator@probonostudents.ca](mailto:natl.coordinator@probonostudents.ca), or visit [www.probonostudents.ca](http://www.probonostudents.ca).

summary advice and duty counsel services to qualified litigants. Moreover, the centre makes referrals to social services, other *pro bono* projects and legal aid programs, as well as referrals to the Law Society's Lawyer Referral Service for those litigants with needs that are too complex to be competently addressed in a brief services setting.

To date, our court-based projects have been a tremendous success. In the first year of LHO's existence, the centre served 2,914 unrepresented litigants, created 3,032 court forms using our document assembly program, and generated over 64,000 page views on its website. This last figure is particularly impressive because PBLO has done no advertising or project outreach outside the walls of the Superior Court at 393 University Avenue. The fact that we are seeing web traffic at this level only begins to hint at the public's thirst for these basic legal services.

In 2008, the Small Claims Pro Bono Project, which only operates two days per week in a tiny, 24 square metre office, served 1,471 litigants on site. Between LHO and Small Claims Court, PBLO provided brief legal services to almost 4,400 low-income self-represented litigants. In the first quarter of 2009, the demand for services has increased nearly 300% - a clear indicator of the staggering demand for supportive services in litigation.

It should be noted that PBLO would not be in a position to address this need without the unflagging support of the legal profession, which, to date, has been tremendous. We've received assistance from the judiciary and court staff — who facilitate referrals to the project — and from the private Bar, which is coming out in droves to volunteer at the centres. When resources allow, PBLO intends to expand this project to other major centres such as Windsor, London and Peel as well as develop alternative service delivery models to serve remote and rural communities.

One of the most valuable lessons learned through its efforts to assist low-income self-represented litigants is that the need for legal services falls across a continuum. The appropriate response, therefore, should be to provide a continuum of service.

To explain the continuum, I'll use the analogy to medical care, which we frequently hear from advocates for increased legal aid funding. And for the record, PBLO is a full and vocal supporter for adequate legal aid funding — it is the cornerstone of our justice system. But when advocates make the case that the legal aid system should be funded like the medical system, they usually focus on the need for more money for legal aid or tariff lawyers to represent people.

But the medical system in this province is a rationed system; and as a result, users are encouraged to resolve their problems through a combination of public and private resources and in proportion to the problem they are experiencing. A person with a headache is not encouraged to manage the pain by going to a neurologist. Instead people suffering from headaches will likely go to a pharmacy to buy some Tylenol to self-medicate. They may even want to consult with a pharmacist for options, or search websites created by hospitals or other health care providers for more information about their symptoms. If the problem persists, they may want to visit a walk-in clinic or family doctor. If it is more serious they may need to see a neurologist, for which they require a referral. By comparison, the main options in the legal system are the neurosurgeon or self-medication, with nothing in between.

PBLO's goal is to build an infrastructure that begins to fill the gaps. The best way to do this is to invest in discrete service programs that provide plain language information and education that help litigants complete basic tasks related to their litigation and that provide summary advice and duty counsel services. We must also invest in "triage" mechanisms that provide front-end intervention to help litigants assess their issues and determine the appropriate level of support that is required.

These basic principles are being practiced in the described court-based *pro bono* projects. They are iterated in many of the recommendations of the Osborne *Report on Civil Justice Reform*; and we are about to see the fruits of the simplification of some civil procedures. But as stated, this is a problem that will only be addressed if all segments of the profession collaborate and contribute.

One issue that remains to be addressed is the all-or-nothing approach to legal services that is the norm in private practice. Obviously, we will always need full-service lawyers for those who can pay for them (either privately or through legal aid) and for those who face additional barriers to justice whether that includes case complexity, language barriers or domestic violence. However, it would behoove us to recognize how ill-equipped the entire justice system is to serve self-represented litigants: the system was not designed for their direct use despite the fact that as citizens they pay for it through taxes and court fees. It was set up without a real understanding of their characteristics and needs — or even what they want from the system. And finally, it is operated by a profession that treats an individual's inability to pay for legal services as a perfect proxy for their inability to self-represent effectively. These practices — along with truly honourable intentions — have made the perfect the enemy of the good.

We must recognize that there is a vast, untapped market of working and middle-class litigants that can pay for some services, but not full representation. Today they are nobody's clients, and they cannot all be served by legal aid or *pro bono* programs. But tomorrow — if we undertake appropriate systemic reform — their needs can provide paid work to many lawyers and paraprofessionals.

Reform includes the ongoing efforts to simplify rules and procedures, and to effectively communicate the mechanics of the litigation process to the public. It includes the development of good triage systems and enhanced stakeholder collaboration. And finally it includes reforming the way that legal services are packaged and sold to litigants so that they can buy them in proportion to their needs and resources. Today, as the economy continues to spiral downward causing so many to lose their jobs and homes, it is incumbent upon all of us to ensure that the justice system can meet the demands of the 21st Century.

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# Connecting On-line....Two Examples Affordable Justice Program - Lawyers Aid Canada<sup>1</sup>

Heidi Mottahedin, C Med, Acc FM, CSFT, Executive Director, Lawyers Aid Canada

No current initiative, public or private, fully addresses the broad-spectrum issue of access to justice. While legal aid programs provide much needed legal assistance to the neediest Canadians with specific and limited legal issues, extending their mandates to include individuals in higher income brackets and a wider range of legal issues would likely be prohibitively expensive and probably unsustainable with current funding models. A large segment of Canada's population – comprising the average middle-class – is effectively shut out of the justice system. Justice is not served, therefore, for thousands who forgo the legal process because they face a system that has priced itself out of their reach.

The legal profession has a crucial role to play in providing access to justice and must be proactively engaged in any collective effort to remedy the problem. The Lawyers Aid Canada Affordable Justice program allows lawyers to provide access to justice for lower-income members of the public needing legal help, who can demonstrably not afford traditional fees, and yet do not qualify for legal aid.

Participating lawyers agree to devote a portion of their practice at reduced hourly fees to cases of low and medium income clients. Fees are calculated according to a sliding scale, taking into account

## A Better Mousetrap?

Michael Carabash, BA, LLB, MBA, President, Dynamic Lawyers Ltd, and Principal, Carabash Law

Toronto lawyer Michael Carabash thinks he has come up with a better way to connect clients and lawyers and thereby provide the public with better access to justice. Last year, Carabash launched [www.DynamicLawyers.com](http://www.DynamicLawyers.com) – a website that allows users to freely and anonymously post their legal issue(s) and get free information and quotes from Toronto lawyers.

Motivated to start the website after reading Richard Susskind's book, *The Future of Law*, and from watching the success of popular websites such as free classified site [www.Craigslist.org](http://www.Craigslist.org) and auction site [www.eBay.com](http://www.eBay.com), Carabash wanted to come up with a "specialized form of Craigslist for the legal industry". With the help of two business school friends, he spent much of last year developing [www.DynamicLawyers.com](http://www.DynamicLawyers.com).

The website tries to address the various difficulties everyday people have in finding the right lawyer for the right price. Such difficulties include people having to pay hundreds of dollars for an initial consultation with a lawyer, relying (sometimes to their detriment) on word-of-mouth or the Yellow Pages to find a lawyer, and turning to the Law Society of Upper Canada's Lawyer Referral Services (which costs users \$6 for a 30 minute conversation with only one lawyer).

Unlike these traditional methods of finding the right lawyer, [www.DynamicLawyers.com](http://www.DynamicLawyers.com) is completely free of charge for users. Posts are made anonymously and remain on the website for up to 45 days, and users are capable of obtaining information from multiple lawyers who focus in the area of law requested. Users decide whether to make their post public, where all website visitors can see them, or private, so only lawyers registered on the website can view them. Every time a new post is made, it is displayed on the website on the appropriate public or private page and is also automatically forwarded via e-mail to those lawyers who practice in the legal area requested. Those lawyers can then respond instantly to user posts with information and quotes. This process ensures that users are receiving information and quotes from lawyers who practice in the specific legal area requested.

For lawyers, the benefits include being able to conveniently pitch their services to those looking for legal help. Lawyers pay only a modest fee of \$30 per month for the right to respond to posts on the website. The website also features a blog for registered lawyers to express their views and promote their services. It also contains statistics and reports relevant to the Toronto legal community and general public. The website will also soon start to feature a database of free, short, and practical legal guides written by Toronto lawyers.

Since launching last November, [www.DynamicLawyers.com](http://www.DynamicLawyers.com) has been featured in various Toronto media (Globe and Mail, Toronto Star, Toronto Sun, CFRB1010 radio) and legal trade publications (Law Times, Lawyers Weekly, Canadian Lawyer). The website has been a hit both for users, who love the idea of getting specialized lawyers competing on pricing, and for lawyers, who can conveniently and cost-effectively market their particular services to those who need them. Based on its initial success, there are plans to expand [www.DynamicLawyers.com](http://www.DynamicLawyers.com) beyond its geographic (limited cities in Ontario only) and functional limits.

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client annual income, number of dependants, province of residence and type of law. Fees are generally above those provided by legal aid programs, but below typical hourly rates. Clients must fit within a specific income bracket in order to qualify for the service. All Affordable Justice cases must be billed according to the Affordable Justice Fee Schedule.

The Program includes a publicly available online directory of participating lawyers and a telephone-based service. The online directory connects members of the public with qualified lawyers registered in the Program. Users can search for a registered lawyer using the website's "Search" pages. Searches can be filtered by location and proximity, areas of law practiced and languages spoken. Each lawyer listing includes a personal profile page, with detailed information about the lawyer and his or her professional practice.

For members of the public who are not online, a call centre agent assesses the caller's needs and provides a short list of matching lawyers practicing in the callers' local area. The service, including the website and the call centre, is fully bilingual.

Lawyers register with Affordable Justice by filling out a simple online application form, or faxing or mailing a hardcopy form, and paying a nominal yearly service fee. Accepting an Affordable Justice case is completely voluntary and each lawyer can decide and show his or her availability via the webpage.

Affordable Justice seeks to complement, not duplicate or compete against, existing access to justice programs. It is specifically designed for clients who do not qualify for legal aid, and is meant to work in concert with legal aid to close the justice gap for all Canadians. Affordable Justice adds another dimension, another venue and operating model through which lawyers' commitment to the public good can be channeled. The Program offers a viable, sustainable solution to a national problem, while benefiting all stakeholders in Canada's justice system.

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## Endnotes

- 1 Lawyers Aid Canada is a national not-for-profit organization located in Toronto providing the design and administrative framework of the Affordable Justice Program.

# Finding Help

## What legal services exist?

## And how do people find the ones they need?

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A common theme that runs through the articles in this issue is the need for assistance in finding legal services. This is true for both frontline service providers and for the public.

Public participants in the *Civil Justice System & the Public* research of the Canadian Forum on Civil Justice invariably told us they knew little about the civil justice system; they had not recognized a need to gain that knowledge before they became personally involved in a legal dispute. As the following research participant explained, when confronted with a need for legal information, members of the public do not know where to begin, what to do, where to go, or who to speak to:

*I had no clue ... I initially asked my friends ... my brother ... "Dial- a-Lawyer" ... I called the courthouse ... I went to the police station ... If you don't know where to start, you don't know what questions to ask, and if no one is giving you the answers to the questions you don't ask, you're not going to learn new stuff. [Public 202]*

Research confirms that many people with legal problems do not recognize their need for legal assistance or do not know where to begin in seeking legal information, advice and representation.<sup>1</sup> Consequently, when they have a legal problem they often have a difficult time identifying, accessing and negotiating the elements of the justice system and the related legal services that they need.

## Providing the Public with Easily Accessible Resources

The work of public legal education organizations lies at the heart of the justice community response to the public's legal information needs. Access to legal education and information is critical to ensuring that the public has the knowledge they require.

To fully integrate access to legal information into the justice system, it is essential to provide the public with a highly visible starting point. Current initiatives that have the potential to create cohesive and efficient systems for the dissemination of legal services and information include:

## 1. BC Supreme Court Self-Help Centre

The BC Supreme Court Self-Help Information Centre in Vancouver can help you get the information you need to prepare your Supreme Court family or civil case. Use the centre to learn about the court system and court procedures, get legal information, locate and fill out the relevant court forms, find out about free legal advice, and find alternatives to court.

See [www.supremecourtsselfhelp.bc.ca](http://www.supremecourtsselfhelp.bc.ca)

## 2. Justice Access Centres – Nanaimo and Vancouver, BC

Justice Access Centres provide help with problems and legal issues that affect everyday life such as separation or divorce, income security, employment, housing, or debt. They were created in response to justice reforms suggested by the Justice Review Task Force (JRTF).

The JRTF recommended that new information and service centres be established, based on the recognition that:

- the availability of more services and coordination of existing services would make it easier for people to use the justice system and
- providing information and services early is the best way to help people prevent legal problems from arising and to resolve problems quickly when they do occur.

The focus is on solving problems through out-of-court settlements, but also to better prepare those who do go to court. This broader approach will allow staff to recognize and help solve the social problems that often accompany clients' legal problems. The Legal Services Society and the Ministry of Attorney General are working in partnership to operate Justice Access Centres in BC. The Centres are funded, in part, through grants from the Law Foundation of BC. See [www.justiceaccesscenter.bc.ca/default.asp](http://www.justiceaccesscenter.bc.ca/default.asp)

## 3. Law Information Centres (LInCs) – Alberta

The Law Information Centre can help you get the information you need for civil and criminal matters. At LInC, a professional staff member will help you learn about general court procedures, locate and fill out court forms, learn about legal advice options, find out about alternatives to court and get legal information. They can also refer you to legal and other resources in the community.

See [www.albertacourts.ab.ca/CourtServices/LInCLawInformation-Centres/tabid/275/Default.aspx](http://www.albertacourts.ab.ca/CourtServices/LInCLawInformation-Centres/tabid/275/Default.aspx)

## 4. Law Help – Ontario

Law Help Ontario is a project of Pro Bono Law Ontario that provides *pro bono* legal services to people who cannot afford to hire a lawyer and are unrepresented in a legal matter. The project is currently piloting two self-help centres in courthouses in the Toronto area. In the future, centres may be launched in other locations across Ontario. See [www.lawhelpontario.org](http://www.lawhelpontario.org)

## 5. Community Justice Centres Pilot Project - Québec

Three new community justice centres will be accessible to all citizens, whatever their income and the nature of their concerns. The centres will provide services mainly in the area of civil and family law, but will offer assistance for citizens facing other types of problems. This recently announced pilot project will be implemented in Québec City, Rimouski and Sherbrooke by the end of 2009.

See [www.justice.gouv.qc.ca/english/commun/centres-a.htm](http://www.justice.gouv.qc.ca/english/commun/centres-a.htm)



## 6. BC Clicklaw

BC's *Clicklaw* was launched in April 2009 as an online portal to legal information and education resources from 24 contributor organizations. *Clicklaw* now allows British Columbians to look for help solving legal problems. They can also access resources that build awareness of laws and how the legal system works, as well as resources on legal reform and innovation.

By October 2009, the *Clicklaw HelpMap*, integrated with Google™ Maps, will be added to assist the public in finding law-related help, including *pro bono* clinics, legal aid offices, courthouse libraries, self-help and justice access centres, and more.

## Finding What Exists

To support these types of programs in providing access and referrals to legal services, we must first know what legal services people need, whether such services already exist, and how people who need them access them. Here are some examples of how that information is obtained and used.

### A. Mapping:

A 'mapping process' is a form of needs assessment research that takes a collaborative network approach<sup>2</sup> to creating a picture of what programs and services exist, and how they are experienced. This process also reveals strengths in current programs on which to build and gaps in services that need to be addressed in order to improve the administration of justice.

Mapping has been used to support the development of the BC Self-Help Information Centre, the Alberta LInCs, and the BC Justice Access Centres. It will also be used to assist *Clicklaw* in creating its *HelpMap*.

The Alberta Legal Services Mapping Project is the most comprehensive mapping of legal services to date. It will provide information for frontline service providers and the public, as well as to government and other agencies in order to develop effective policy and programs.<sup>3</sup>

See <http://cfcj-fcjc.org/research/mapping-en.php>

## B. Needs Assessments:

### 1. Ontario Civil Legal Needs Project

In response to the Honourable Coulter Osborne's recommendation in the *Civil Justice Reform Project* for a civil needs assessment, the Ontario Civil Legal Needs Project is a comprehensive research and strategy development initiative. It will improve access to justice for low and middle-income Ontarians by identifying and building innovative solutions to address civil legal needs. Benefits expected include:

- Improved access to justice for low and middle-income Ontarians through the identification of cost-effective strategies to improve the efficiency, effectiveness and delivery of legal services and enhanced availability of public legal information.
- Enhanced collaboration between front-line legal and social service providers.
- Production of data about civil legal and social needs from the perspective of the public to be referenced by the justice system and other stakeholders.

### 2. Law Commission of Ontario Family Pilot Project:

"Best Practices at Family Justice System Entry Points: Needs of Users and Responses of Workers in the Justice System"

[www.lco-cdo.org/en/familylaw.html](http://www.lco-cdo.org/en/familylaw.html)

Based on the premise that threshold issues are usually the most important ones to get "right", this means that if people are able to identify their legal and other needs at an early stage, more effective and responsive ways of resolving their disputes can be offered. This

project will explore how Ontarians find their way to the legal system when they experience family conflicts, what kind of information and services they receive at these entry points, and how justice system workers can best orient users and facilitate early conflict resolution.

These studies provide information necessary for us to determine what legal services exist, which ones people need, and how they find them. Following the paths identified by the research will allow us to place the right legal services where the public who need them are most likely to find and be able to make use of them – putting access to justice in the paths of those seeking it.

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## Endnotes

- 1 See for example, Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*. (Ottawa: Department of Justice, 2007); Barbara Billingsley, Diana Lowe and Mary Stratton, *Civil Justice System and the Public: Learning from Experiences to find Practices that Work* (Edmonton: Canadian Forum on Civil Justice, 2006), online: [www.cfcj-fcjc.org/docs/CJSPLearningFromExperiences.pdf](http://www.cfcj-fcjc.org/docs/CJSPLearningFromExperiences.pdf); Mary Stratton & Travis Anderson, *Social, Economic and Health Problems Associated with a Lack of Access to the Courts*, (Final Report to Ab Currie, Principal Researcher, Research and Statistics Division, Department of Justice Canada, March 2006). <http://cfcj-fcjc.org/docs/2008/cjsp-socialproblems-en.pdf>
- 2 For over a decade, civil justice reform reports have underlined the need to involve a wide and representative group of stakeholders in developing policies that make the civil and family justice systems more accessible, effective, fair and efficient for the people it serves. A collaborative, action approach to research is invaluable in achieving effective policy and program change.
- 3 The collaborative design of the Alberta province-wide mapping project will also encourage networking between individuals and organizations within the civil justice system and the larger community, and will lead to better integration of services within the justice system, and ultimately improved access for the public.

# The Cost of Justice

## Weighing the Costs of Fair and Effective Resolution of Legal Problems

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There is a growing belief that our civil and family justice system is in crisis. Evidence is mounting that the public cannot afford to resolve their legal problems through the formal processes of our courts, and it is unclear whether they are accessing other services in the justice system to reach resolution or whether their legal problems remain unresolved. This is a vital concern not only for the individuals who are unable to pursue their claims, but for the economic, health and social well-being of all Canadians. We are increasingly aware that unresolved disputes have a significant negative impact on individuals, their families, businesses and society as a whole. The Forum is seeking funding to undertake a collaborative program of research seeking the critical information needed to understand how costs accrue in the civil justice system – both the

cost of resolving legal problems and the cost of failing to do so.

### Research Questions & Methodology:

The research will begin with collecting the extensive information that is needed to understand the current state of affairs in the civil justice system. We will begin by asking:

1. What are the costs of accessing civil justice resolutions to legal problems?
2. What is the cost of not achieving resolution?
3. Is the cost of accessing civil justice economically and socially warranted? (the costs in question #1 balanced against the costs in question #2)
4. What changes are recommended on the evidence?

## We want to hear from you

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

# Cross Country Snapshots – Justice System Responses

Every jurisdiction in Canada seeks to respond to the concerns raised about access to justice. The Canadian Forum on Civil Justice Inventory of Reforms <http://cfcj-fcjc.org/inventory/> is an on-line database of Canadian civil justice reforms. It was created as an information sharing resource. Entries in the Inventory are described according to a standard format that includes information on the purpose, development, implementation and evaluation of the reform.

The Inventory includes implemented changes to court procedures, legal aid, and public legal education and information programs, as well as reforms proposed by law reform commissions, task force reports and the like. It does not include changes to substantive law, such as personal injury or family law. Reforms which affect only the criminal or administrative justice systems are also not included.

The initial research for the Inventory focused on selected issues relating to the cost of access to justice: proportionality, experts, point-of-entry assistance, discovery and caseload management.<sup>1</sup>

We are working to expand the collection and have received funding from the Canadian Bar Law for the Future Fund, allowing us to update and increase the information contained in the Inventory.

For this issue of *News & Views*, we have chosen to highlight only some of the reforms that are currently contained in the Inventory. Please take the time to look at the Inventory at <http://cfcj-fcjc.org/inventory/> for other initiatives.

At the moment, the Inventory records are only available in English. We are translating these records as we have funding to do so.

## Endnotes

- 1 Original funding was provided by the Canadian Judicial Council, as part of a collaboration between the Forum and the Sub-committee on Access to Justice (Trial Courts) of the Council's Administration of Justice Committee. The Council's News Release [www.cjc-ccm.gc.ca/english/news\\_en.asp?selMenu=news\\_2008\\_0626\\_en.asp](http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_2008_0626_en.asp) and *Report on Selected Reform Initiatives in Canada* [www.cjc-ccm.gc.ca/cmslib/general/2008\\_SelectedReformInitiatives\\_Report\\_final\\_EN.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/2008_SelectedReformInitiatives_Report_final_EN.pdf) are available on the Council website.



## National and Federal

2008	Sedona Canada Principles	National
2006	Canadian Judicial Council Statement of Principles on Self-represented Litigants and Accused Persons	National
2006	2006 Amendments to the Federal Court Rules - Expert Evidence	Federal
1998	Federal Case Management and Dispute Resolution Services (Part 9)	Federal



## British Columbia

2007	BC Court Services Online - e-filing	British Columbia
2007	BC Family Relations Act Review	British Columbia
2007	BC Justice Review Task Force - Case Plan Orders	British Columbia
2007	BC Justice Review Task Force - Experts	British Columbia





## Alberta

2007	Alberta Law Information Centres (LInCs)	Alberta
2007	Alberta Rules of Court Project - Expert Evidence	Alberta
2007	Alberta Rules of Court Project - Managing Litigation	Alberta
2001	Alberta Intake and Caseload Management	Alberta



## Saskatchewan

2007	Summary of Saskatchewan Expert Evidence Rules - Cost of Justice	Saskatchewan
2006	Saskatchewan Small Claims Court - Case Management Conference	Saskatchewan
2002	Saskatchewan Family Law Information Centre and Support Variation Project	Saskatchewan



## Manitoba

1996	Manitoba Case Management of Family Matters (Rule 70)	Manitoba
1996	Manitoba Expedited Actions (Rule 20A)	Manitoba



## Ontario

2007	Law Help Ontario	Ontario
2007	Ontario Civil Justice Reform Project	Ontario
2007	Ontario Courts Webcasting Pilot Project	Ontario
2007	Summary of Ontario Expert Evidence Rules - Cost of Justice	Ontario
2005	Toronto Case Management (Rule 78)	Ontario



## Québec

2003	Québec Civil Procedure Review - Discovery	Québec
2003	Québec Civil Procedure Review - Experts	Québec
2003	Québec Civil Procedure Review - Management of Litigation	Québec



## New Brunswick

1972	New Brunswick Court Social Worker Program	New Brunswick
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## Nova Scotia

2005	Nova Scotia Civil Rules Revision Project	Nova Scotia
2005	Nova Scotia Civil Rules Revision Project - Discovery and Disclosure	Nova Scotia
2005	Nova Scotia Civil Rules Revision Project - Evidence	Nova Scotia
2005	Nova Scotia Civil Rules Revision Project - Management of Litigation	Nova Scotia



## Prince Edward Island

1998	Prince Edward Island Simplified Procedure (Rule 75.1)	Prince Edward Island
1997	Prince Edward Island Case Management	Prince Edward Island



## Newfoundland and Labrador

2007	Newfoundland Unified Family Court Services - Intake Services	Newfoundland and Labrador
2005	Newfoundland and Labrador Case Management (Rule 18A)	Newfoundland and Labrador



## Nunavut

2001	Akitsiraq Law School	Nunavut
2001	Nunavut Pathfinder Project - Inuusirmut Aqqusiuqtiit	Nunavut



## Northwest Territories

1996	Northwest Territories Case Management (Part 19)	Northwest Territories
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## Yukon

2008	Rules of Court for the Supreme Court of Yukon	Yukon
2007	Yukon Family Law Information Centre	Yukon