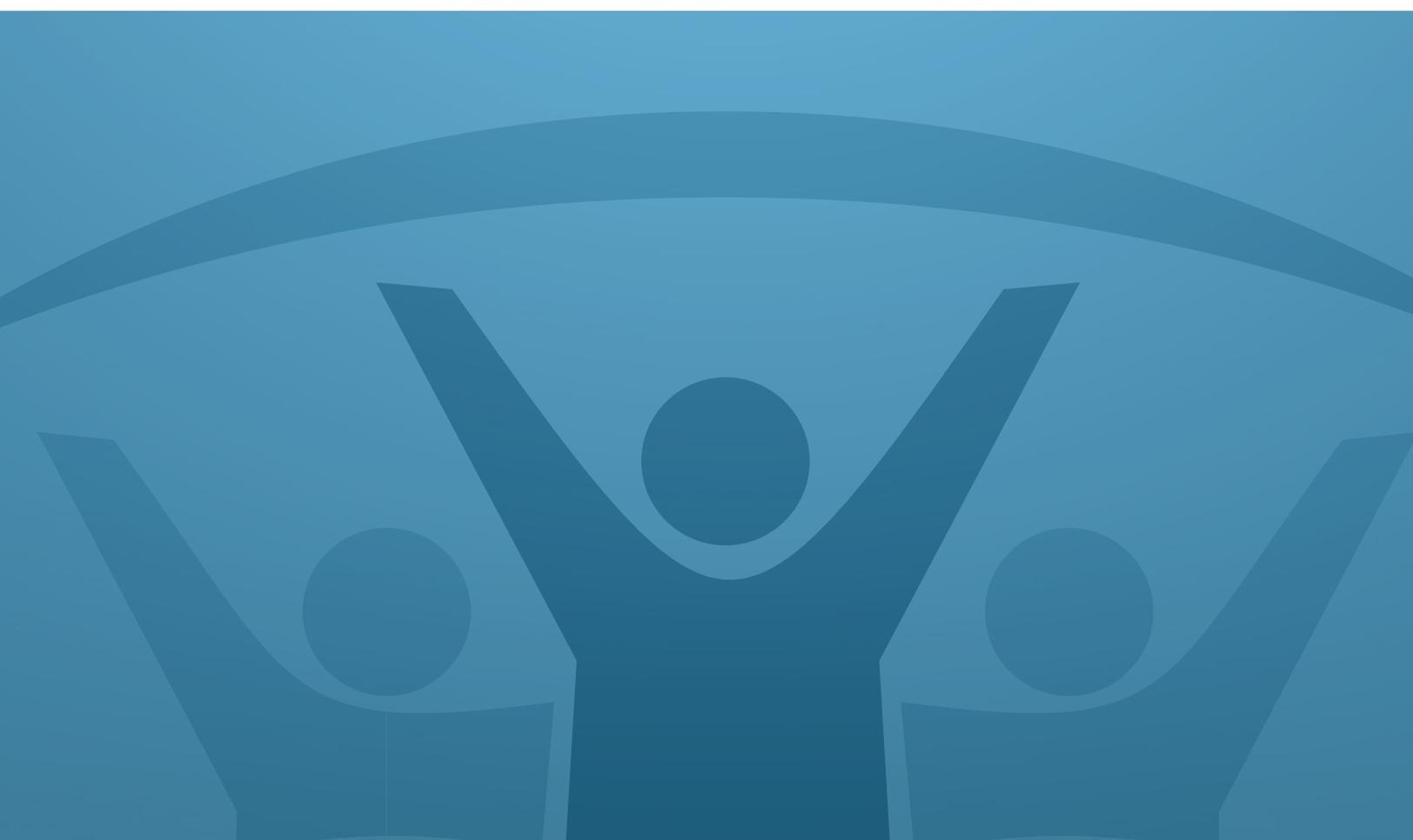


Access To Justice: The Great Gap in Canada's Justice System

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Council*

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Table of Contents

What are Legal Problems?	5
What is Access to Justice?	5
Legal Aid and Legal Information Providers	6
The Cost of Legal Problems	11
The Current State of Access to Justice in Canada	12
The Path Forward for Access to Justice	13
Community Action for Access to Justice	14
The Access to Justice Gap remains	15
BIBLIOGRAPHY	17
ABOUT THE EDMONTON SOCIAL PLANNING COUNCIL	21

Access To Justice: The Great Gap in Canada's Justice System

Maxwell Jenkins, Research Assistant

What are Legal Problems?

Unconsolidated debt, divorce proceedings and child custody, tenancy disputes. These are a few examples of the kinds of legal problems faced by Canadians every day. A legal problem is simply defined as a serious problem that a person cannot effectively solve on their own that includes some legal element that could be addressed by the justice system (Johnsen, 1999). Without assistance, legal problems can result in ballooning debt, loss of employment, overly large sentences for criminal charges, refused applications for government services, and other serious consequences. Recently, the Cost of Justice project ran the Everyday Legal Problems Survey, designed to examine the social and economic costs of Canada's justice system. According to the survey, 48.4% of Canadians will experience at least one civil or family justice problem over a three-year period. To put it another way, almost everyone will come to face a legal problem at some point in their lives. When asked about the state of their legal problems, 30% of respondents had not resolved their problems within a three year period. Of the 55% whose problems had been resolved, 46% felt the outcome had been unfair. Among those who received no outside help, 42% said they felt the outcome would have been significantly improved if they had obtained some assistance (Farrow et al, 2016). For decades now there has been a growing consensus in the legal community that most people will be functionally unable to address these problems, largely because Canada's legal system fails to ensure that citizens have "access to justice".

What is Access to Justice?

Access to Justice is defined by the United Nations Development Program as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances" (United Nations Development Programme, 2004). Put another way, adequate access to justice means that people have access to the resources and services necessary to deal with legal problems. Though Canada's justice system is considered excellent by several measures, providing affordable and effective access to justice is not one of them. In its 2016 report, the

World Justice Index gave Canada high marks in every category measuring its justice system except "civil justice". "Civil" simply refers to any non-criminal legal issue. In this measure, Canada received a 0.56 (out of 1.00) for "accessibility and affordability", a 0.53 for "no unreasonable delay", and a 0.65 for "no discrimination". In all other categories Canada was ranked highly or near the average for high income countries, reaching an overall score of 0.81 (World Justice Project, 2016). These results are not a revelation to the legal community. Calls for the need for reform have been burgeoning since the early 2000's (Currie, 2009). Legal professionals and academics alike have begun emphasizing the importance of access to justice with increasing urgency. As the former Supreme Court of Canada Justice Thomas Cromwell put it "Access to justice is the biggest challenge facing our legal system" (Cromwell, 2017).

The Canadian Forum on Civil Justice (CFCJ) identified several shortcomings in the legal system. Chief among them was the system's failure to address most of Canadian's legal needs (CFCJ, 2013). The 2011 Alberta Legal Services Mapping project found that 52% of respondents were currently dealing with a civil legal problem (Stratton, 2011). The 2010 Listening to Ontarians project found that, of the 35% who had a civil legal problem, half of the people surveyed (low and middle-income Ontarians) had not sought legal assistance, although it would have been helpful (Sossin, 2010). The 2007 Legal Problems of Everyday Life survey found that a mere 11.7% of respondents with legal problems sought legal assistance with those problems. Of those who did nothing about the problem (22.2%), nearly half stated they were either uncertain of their rights, thought nothing could be done, or did not know how to approach the problem (Currie, 2009).

The main reason respondents gave for not seeking legal assistance was the perception of cost. 42% of respondents in the Listening to Ontarians project cited perceived legal costs as the main reason for not seeking legal assistance with their problem (Sossin, 2010). The cost of full legal representation is indeed beyond the means of most Canadians, with the average cost of a 2 day civil trial being \$25,517 in 2016 (Canadian Lawyer Mag, 2016). Though legal fees were significantly lowered in re-

sponse to the great recession, they have since recovered and surpassed their peak prices in 2009, and have been steadily rising ever since (Canadian Lawyer Mag, 2017).

Legal Aid Programs (LAPs) are government funded programs that provide legal representation for certain critical legal problems for people who are unable to afford legal advice. Eligibility for the program is based on the applicant's household income, and occasionally other factors like disabilities. LAPs are present in every province and territory in Canada, though the exact range of services and income thresholds vary significantly between programs. Unfortunately, these thresholds barely meet the "Low Income Measure" (Statistics Canada's current measure for poverty) for household income. With the high cost of representation and the low income requirements of legal aid, most low to middle income Canadian households have no viable options for representation.

"Among the hardest hit are the middle class. They earn too much to qualify for legal aid, but frequently not enough to retain a lawyer for a matter of any complexity or length. When it comes to the justice system, the majority of Canadians do not have access to sufficient resources of their own, nor do they have access to the safety net programs established by the government."

Rt. Hon. Beverley McLachlin, P.C. Chief Justice of Canada (CFCJ, 2013)

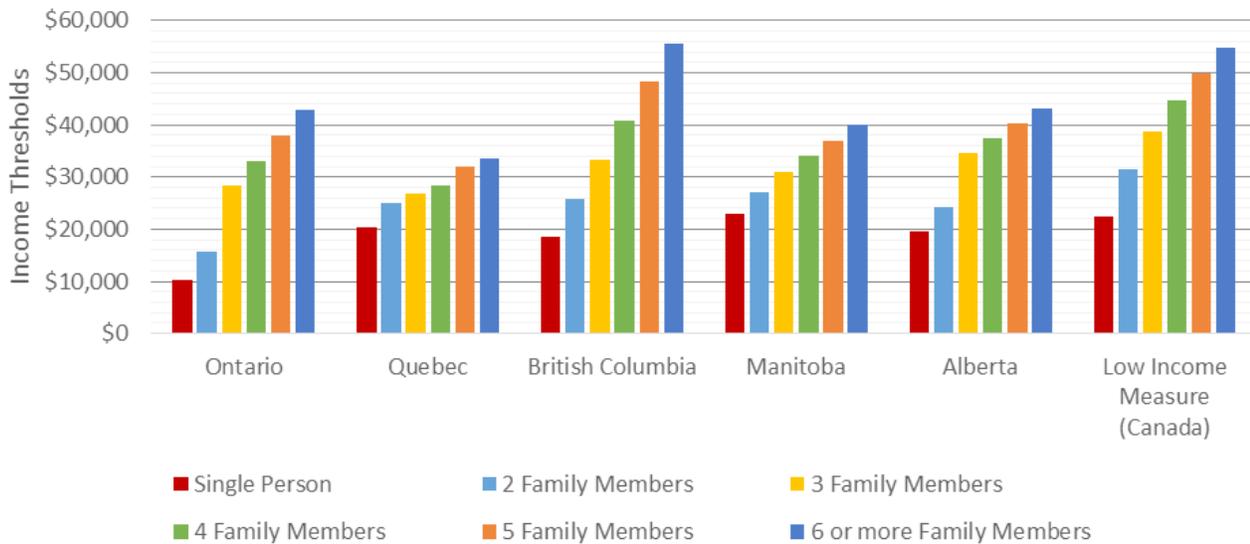
Legal Advice vs Legal Information

The terms "legal advice" and "legal information" are two distinct categories of aid. Legal information is limited to general information about the law, including definitions, information on procedures, and examples of completed legal forms. Legal advice encompasses insight and interpretations specific to a particular legal case, and can only be dispensed by a lawyer. This means, for example, that a legal information provider at a non-profit charity can demonstrate how a legal form should be filled out, or point out what is missing from an incomplete form, but they cannot directly help someone fill out that form. Most charities or non-profit organizations, and all legal clerks, only provide legal information.

Legal Aid and Legal Information Providers

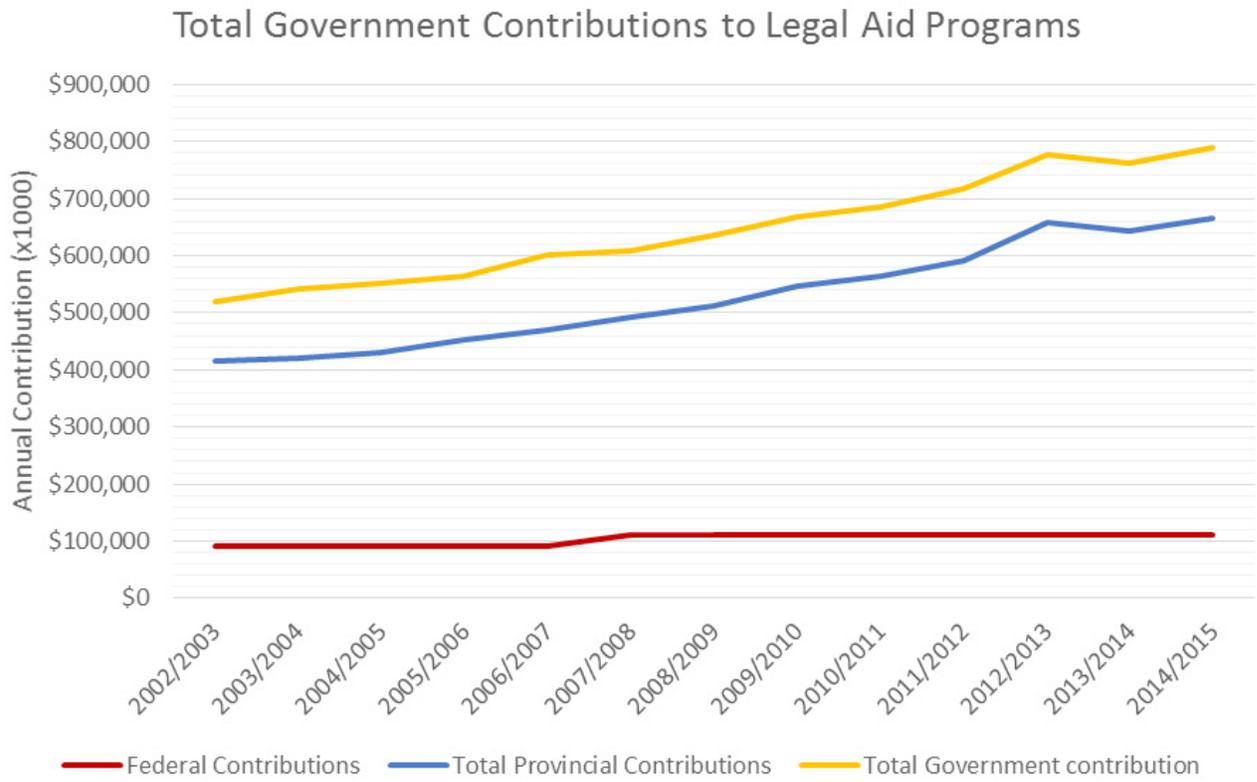
Each province and territory runs a Legal Aid Program meant to ensure legal representation for low-income people facing critical legal problems, such as criminal prosecution or the state potentially removing custody of children from the parents (Department of Justice, 2017). Legal aid programs generally also provide representation for some other legal problems, most commonly those related to family disputes or immigration. Eligibility is based on household income, though there is generally some discretion based on the specific situation of the applicant.

Legal Aid Eligibility Income Thresholds (Annual Household Income), 2017

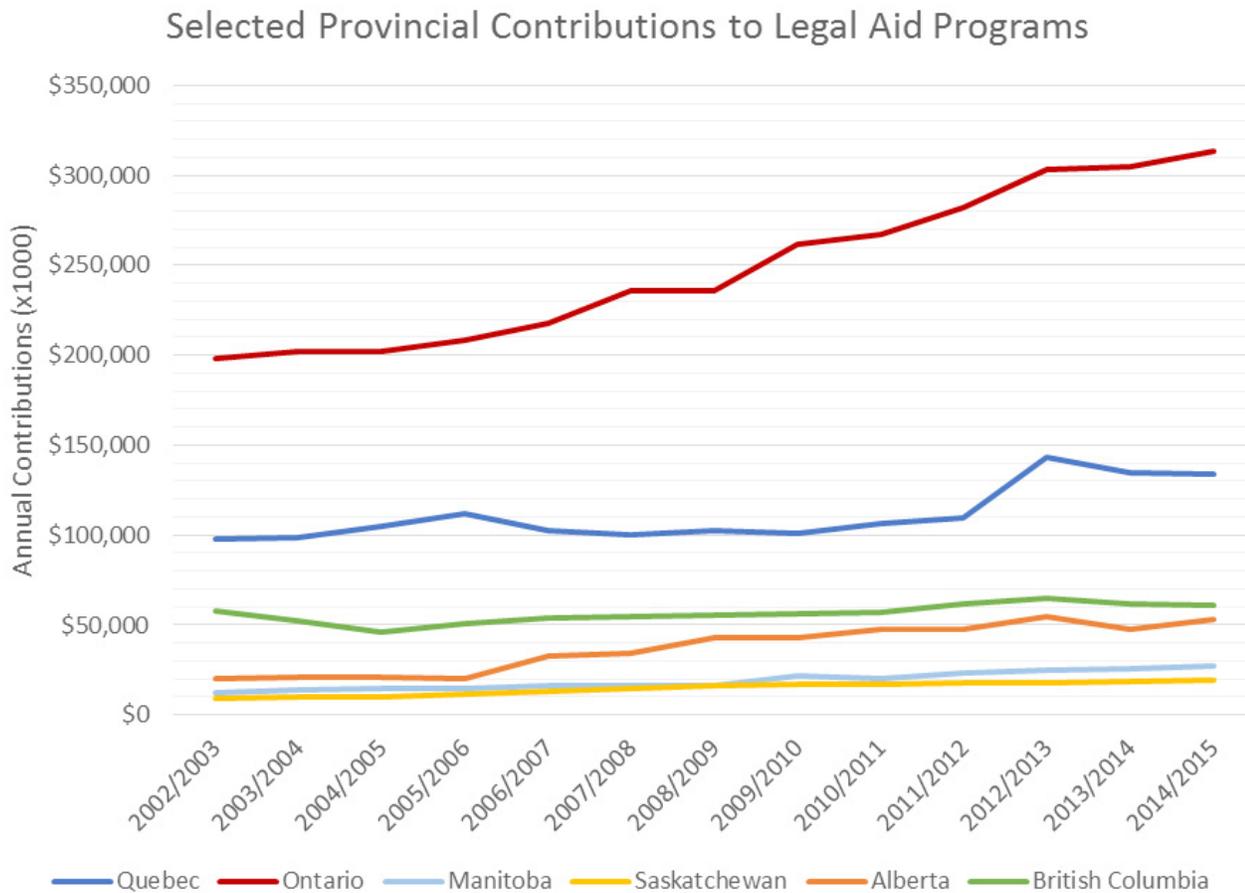


(CANSIM 206-0091, and legal aid program websites: <https://www.legalaid.on.ca/en/>; <http://www4.gouv.qc.ca/en/Portail/Citoyens/Evenements/separation-divorce/Pages/aide-juridique.aspx>; <https://www.lss.bc.ca/>; <http://www.legalaid.ab.ca/>; <http://www.legalaid.mb.ca/>)

Legal Aid subsidies by the federal and provincial governments combined was \$778,414,000 in 2015. One of the most consistent requests by reformers is that legal aid programs should expand beyond their current scope to provide a more holistic service, capable of addressing a broader range of legal needs and the other common problems (lack of employment, chronic homelessness, addictions) that accompany legal problems (CBA, 2013) (CFCJ, 2013).



(CANSIM 258-0005)



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There are also many non-profit organizations that provide legal information for a wide variety of civil and criminal legal problems. Many non-profit organizations explicitly specialize in providing legal information and related services to people in need. Edmonton is served by several such organizations:

The Edmonton Legal Community Centre is a non-for profit organization focused on providing access to justice and advocacy for low-income individuals experiencing civil and family law problems. Their in-house lawyers provide direct representation and legal advice on a broad range of civil law. The Centre also hosts a large catalogue of legal information. Student Legal Services, an organization run by the students of the University of Alberta, provides similar advocacy, advice, and legal information services. Student Legal Services extends their legal information catalogue and legal advice services for both and civil law matters.

Native Counselling Services of Alberta provides assistance to Indigenous people in navigating the justice system. Their services involve providing in person help with navigating the courts, providing assistance with legal forms and documents, and access to alternative correctional facilities and counselling. They also run BearPaw Legal Education & Resources, which produces media focused on providing practical information and guidance for dealing with legal problems.

The Centre for Public Legal Education Alberta is a non-profit corporation with the broad objective of contributing to legal knowledge and education in Canada. They are involved in a variety of projects aimed at increasing awareness of legal rights for people vulnerable to legal problems in Alberta, such as seniors, youth, employees, tenants, and many others.

A result of the inaccessibility of legal representation is the rise in the number of self-representing litigants (people who go to court without professional representation) in the legal system. The infamous complexity of the legal system makes navigating it without professional help tremendously difficult. A study found that even a law student, when tasked with filling out divorce application forms, found the forms excessively complicated and overwhelming. An independent audit of several online aides provided by Canadian courts found that the materials used “difficult and inconsistent language”, poorly explained technical terms, and that they necessitated an overly high reading level (Macfarlane, 2013, at page 66). The quantity and complexity of work involved in pursuing a legal case can easily result in financial instability, loss of employment, social isolation, and acute emotional stress (Macfarlane, 2013). There is some belief among legal professionals that self-represented litigants actually have an advantage at trial, since judges feel an obligation to help the self-represented party conform to court procedure and explain itself properly (Carson & Stangarone, 2010). However, research in the United States strongly indicates that outcomes for self-represented litigants are significantly worse on average than for those with representation (Steinberg, 2011). When surveyed, advocates and the judiciary both state that they believe that self-represented litigants clog up the court system by causing proceedings to take longer, requiring frequent and strong direction from the court to proceed, being less likely to settle, and generally failing to complete court procedures in a timely fashion (Brinbaum, 2013). Taken together, the evidence indicates that self-represented litigants face the likely prospect of unsatisfactory outcomes and a serious risk of collateral damage to other aspects of their lives. This harm carries over to everyone by taking up more court resources. Though there is a dearth of hard numbers on the subject, multiple studies indicate that there is a pervasive belief among professionals in the justice system that the number of self-represented litigants has been increasing, particularly during the last decade (Department of Justice, 2016).

Many legal problems do not require full legal representation, and can be resolved with low or trivial expenses (Currie, 2016). Non-profit organizations that either specialize in providing legal information or commonly help people with legal problems are common in Canada. The Alberta Legal Services Mapping project found that “both service providers and members of the public have generally low levels of knowledge about available legal services and related social supports” (Stratton, 2011, pg 44). For providers specifically, this manifests as staff having limited knowledge of the legal system beyond what services they immediately deliver, and a list of referrals constrained to a small number of well-known organizations. The result is that many members of the public fail to reach available services when they need them, and even when they do, they are often given incomplete or even false information. Small referral lists lead to incomplete or circular referral patterns that can fail to address a person’s specific needs, where a reference to a more specialized organization might have succeeded (Stratton, 2011).

When attempting to address these problems, the very structure of the justice system itself can become a problem. The Canadian justice system is divided up into discrete organizations, or “silos”, that have little impetus to share resources or collaborate. A common occurrence for community members seeking aid is that they are simply unsure or unaware of where to go. The multiple layers of organizational complexity result in “a justice system that is simply overwhelming, too complex, too complicated” (CBA, 2013). The different elements of the justice system lack “strategy and coordination”, which in turn leads to parties “reinventing wheels”, a tendency criticized for its inefficiency (CFCJ, 2013, pg 1).

The Cost of Legal Problems

What, then, happens to those whose legal problems go unaddressed? The most recent report using the Everyday Legal Problems Survey identified loss of employment and the manifestation of new health issues as common side effects of legal problems. The study determined that these effects, by causing increased reliance on public health services and other government transfers, cost Canada's public institutions \$800 million each year. These estimates were based on the average cost of medical care and employment insurance, and do not take into account other common consequences of legal problems like loss of housing, social isolation, and lost income due to time spent away from work. The study also found that, though most who experience legal problems end up spending relatively little to resolve them, those who paid a high amount for legal representation pushed the annual amount spent privately on legal problems to \$7.7 billion each year (Currie, 2016). Unresolved legal problems were also found to have a heavy impact on people's physical and mental health. The survey found that 65% of respondents reported experiencing a physical health problem and 47.8% said they experienced extreme stress or emotional stress as a direct cause of their first legal problem (Currie, 2016). A study done in the United States took an alternative approach to quantifying the cost of unresolved legal problems. The study compared the concentration of legal representatives (as a proxy for the availability of representation) in an area and compared it to a measure for health outcomes, and a measure of income inequality. The result was a moderately strong correlation between the availability of legal representation and worsened health outcomes. No such correlation existed between the availability of legal representation and income inequality (Pascoe, 2006).

There is strong evidence that legal problems have the greatest impact on the most vulnerable people in society. According to the 2007 Legal Problems of Everyday Life study, members of disadvantaged groups are much more likely to experience legal problems than the average person. Aboriginal people were 3.6 times more likely to experience problems with discrimination, 3.2 times more likely to have a disability benefits related problem, 2.9 times more likely to report a problem with police action or a family related problem, and 2.1 times more likely to report a relationship related problem. Visible minorities were 3.6 times more likely to report a problem related to discrimination, 3.4 times more likely to have

a police related problem (Currie, 2009). Legal problems also tend to concentrate on a small subsection of individuals, rather than being evenly distributed. The Australian Legal Australia-Wide Survey found that the number of legal problems heavily cluster. The survey found that Australians who experience 3 or more legal problems account for 21.8% of the population and 85.4% of the total legal problems experienced (Coumarelos, 2012). The Everyday Legal Problems survey followed up on respondents after a three year period, and found that having a single legal problem greatly increases the probability of experiencing subsequent legal problems (Currie, 2016, see table page 14). The increased probability carries over to subsequent legal problems, implying that legal problems carry an additive or cascading effect. This effect emphasizes the importance of early or even proactive intervention when dealing with legal problems. The end result of these effects is, as the Ontario Civil Legal Needs Project put it, that "the poorest and most vulnerable [Ontarians] experience more frequent and more complex and interrelated civil legal problems" (Sossin, 2010, pg 7).

The key insight of this research is that legal problems can and do have a serious impact on the lives of disaffected citizens. When a person experiences legal problems and lacks the personal resources to resolve them, it is all too easy for those legal problems to snowball into other areas of that person's life, causing unnecessary hardship and potentially compromising that person's ability to function.

The Current State of Access to Justice in Canada

Legal Aid spending by the federal government has remained stagnant since 2007 at \$112.386 million split among the provinces and territories. During the same time period, provincial spending on legal aid has increased by 78% on average. Alberta and Nunavut are notable exceptions, having increased legal aid spending by 159% and 175% respectively. Despite this, multiple legal aid programs have experienced shortfalls and budgeting problems in recent years. The federal government recently approved a large cash injection to prevent the British Columbia legal aid program from dropping crucial immigration and refugee services (Ghoussoub, 2017). Legal Aid Ontario was set to pursue a similar course of action, though they recently promised to uphold the refugee and immigration services that represented 40% of their total budget (Sharkey, 2017). In Alberta, the provincial government recently approved increased funding for Legal Aid Alberta, re-affirming the emergency injection of funds that was required to keep Legal Aid Alberta running the previous year (Heidenrieck, 2017). This is in addition to the provincial government hiring a total of 55 more crown prosecutors this year, in an effort to deal with the enormous backlog of criminal trials (Mertz and Bartko, 2017).

A long-standing problem with the formal justice system in Canada is the ever growing length and complexity of litigation, and that institutions of the formal justice system are too strained and under-funded to effectively meet the legal needs of the public. Court delays and the time it takes to resolve a case have grown to untenable lengths, to the point where the Supreme Court of Canada set a limit on the length of time the prosecution could delay a criminal case. Since that decision, hundreds of cases have been effectively thrown out of court (Kane, 2017). There are fears that, since more court resources are being diverted towards dealing with the backlog of criminal cases, the civil courts will begin to face increased delays to cases that were already overly prolonged (Galant, 2017).

Calls to reform Canada's justice system to be more inclusive and capable of providing remedies for all Canadians have been growing since the mid 2000's (Currie, 2004). Since then, multiple organizations have released reports, conducted studies, and organized committees in an attempt to spur action by stakeholders in the justice

system. Two of the most comprehensive reports were released in 2013 by the Canadian Bar Association (CBA) and the Canadian Forum for Civil Justice (CFCJ). Both addressed access to civil law (as opposed to criminal), though the problems in civil law can largely be extrapolated to apply to the criminal law side of the justice system as well (CBA, 2013) (CFCJ, 2013).

The reports set multiple strategic goals for civil justice system that were applicable both to the formal institutions and stakeholders in charities and the non-profit sector. Continued work on these reports produced a series of concrete national benchmarks from the CBA, and the creation of provincial level committees and an on-line national network for Access to Justice Issues, in the hopes of fostering concrete action to improve access to justice (CBA, 2013) (CFCJ, 2013).

In spite of recent increase in funding for legal aid and the efforts of organizations invested in access to justice, it is difficult to say that there has been any substantial improvement to Canada's justice system. Canada has consistently received poor ratings from the World Justice Index in the area of accessibility and affordability, discrimination, and no reasonable delay. As a result, Canada's rating in the area of civil justice has stayed significantly below its overall rating. In 2011, Canada ranked 16 of 23 in the high income group, and 9 of 12 in the EU/NA regional group, in regards to access to civil justice. In 2016, Canada ranked 19 of 36 and 12 of 24 in those two (now expanded) groups; its position essentially seeing no improvement over those 5 years (World Justice, 2016).

“A more comprehensive understanding of access to justice goes beyond the legal system to encompass efforts to assess and respond to ways in which law impedes or promotes economic or social justice, for example, recognizing the interrelationship of these systems. In short, access to justice may involve steps to diminish substantive injustice in society at large”

From the Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity report (Law Commission of Ontario, 2013).

The Path Forward for Access to Justice

The CFCJ recommended that the formal system needs to be significantly expanded in order to address the legal needs of the public. Their primary suggestion is the creation of an “Early Resolution Services Sector” (ERSS) that could address the low levels of awareness in the general public of legal problems and how to address them. The envisioned service would focus on public legal education and information, online, in-person, and over the phone contacts, and an increased focus on alternative means of resolution. The primary purpose of the ERSS would be to ensure that the nature and best means of approaching legal problems are made clear to the public, that navigating the legal system is an efficient and user-friendly process, and that there are cheaper and faster methods of dispute resolution than a full trial (CFCJ, 2013).

The Reaching Equal Justice report noted the strong academic consensus that increased spending in legal aid resulted in large returns by preventing legal problems from cascading into increased reliance on other government programs and otherwise disrupting people’s ability to contribute to the economy. The report concluded that “for each dollar spent on legal aid, there is a \$6 to \$13 return on investment” (CBA, 2013, pg 56). In spite of these findings, government spending on the justice system as a percentage of overall spending remained stagnant or decreased between 2004 and 2013. Based on the numerous cases of legal aid services being forced to contract or face bankruptcy enumerated in this report, the need for increased funding seems greater than ever. The CBA released a follow-up to the Reaching Equal Justice report

specifically setting 6 benchmarks it believes legal aid programs should reach by 2030. These include:

- Creating a nationalized Public Legal Assistance System, capable of collecting a consistent batch of data on services and client trends. The goal of this system would be to know “what works, for whom, under what conditions and at what cost”, in order to facilitate evidence-based decision making on service changes.
- Increasing the scope and quality of legal aid services to cover all essential legal needs, rather than critical criminal charges and the limited range civil and family law problems that are currently covered. These should include alternative paths to dispute resolution and culturally appropriate services.
- Broadening the range of people accepted into the legal aid program. The CBA suggests that anyone at 150% of the Low Income Measure should be allowed into the program, with greater allowances given to vulnerable populations like Indigenous people, recent immigrants and refugees, and single mothers.
- Including longer term legal care services, ensuring that people have the assistance necessary to deal with a legal problem past the initial emergency stages. This would include both a triage system prioritizing more serious legal problems, and increased coordination with non-legal service providers to address all of the client’s needs (CBA, 2016).

There have been repeated and numerous calls for a broad increase in government funding for the justice system in general. The CBA has noted that spending on the justice system by provincial and federal governments as a percentage of total expenditures remained stagnant or slowly decreased between 2004 and 2013 (CBA, 2013). Increased funding for legal aid has been identified as a necessary step if Canadians are to receive true access to justice (CBA, 2013) (CFCJ, 2013).

Community Action for Access to Justice

Barring increased funding or expansion of the legal aid system, other stakeholders in the legal community have taken action to increase access to justice. Student Legal Services, for example, runs hour long community outreach sessions at low-income shelters across Edmonton, where they provide support and access to written legal information documents. The Edmonton Community Legal Centre runs frequent legal information clinics in their highly accessible downtown location, and hosts public legal education sessions out of select Edmonton Public Library branches. These sessions have been made available online for public viewing. Efforts like these can decrease the isolation often experienced by vulnerable populations, increasing the chances that those most likely to experience legal problems will have the tools and access to services they need to resolve those problems.

A further way to improve access to justice would be to place a greater emphasis on computer based, user-oriented, and preferably automated resources. There has already been some progress on this front in Alberta. The Alberta Legal Information Society is currently in the process of constructing a “walk-around” website named LegalAve that attempts to use step-by-step questions to pinpoint the specific legal problem being faced by the user. One of the keys behind the effectiveness of such online services is that they focus on the user experience first and foremost, rather than the legal services pre-conceived notions of what information is important. Previous research on legal “self-help” resources found that the most common pitfall was that the resource contained too much information on how the legal system functions, where users were more interested in succinct, practical advice (Lawler et al, 2012).

Though access to the internet may seem ubiquitous, a large proportion of people lack either the skills or capacity to make use of online resources. The Everyday Legal Problems survey found that only 33% of respondents attempted to use the internet to solve their legal problem (Currie, 2016). Native Counselling Services of Alberta specifically addresses this problem for the Indigenous population by providing access to court workers whose role is to help clients navigate the complexities of the legal system, and by providing resources that address legal problems from a practical, plain language perspective. Efforts like this could be enhanced by further collaboration with existing legal information providers, who might

have insight into serving specific communities and making the information accessible to those who face literacy or cultural barriers (CBA, 2013).

Many courts in the United States have adopted “document assembly” programs. These are step-by-step programs, available at the court or online, that help with filling forms and courtroom documents. There is strong evidence that these programs go a long way to making the process of filling out legal forms far more efficient and less stressful for self-represented litigants (Frank, 2017). Implementation of similar systems in Alberta’s courts could significantly reduce the complexity of dealing with the formal justice system, which could speed up the resolution of cases and increase the accessibility of the courts.

One of the key barriers to progress in improving access to justice is the lack of information on the effectiveness of legal services, and an absence of tools to measure and define progress towards equal justice. A critical shortcoming in efforts to achieve better access to justice has been the dearth of information available on legal services (Buckley, 2016). Even basic statistics like the number of people who make use of a given service, or how many clients seek help with what kind of problem, are starkly lacking. The Alberta Legal Services Mapping Project noted that most legal services were unable to produce data on their services and clientele (Stratton, 2011). Similar comments were expressed in the Reaching Equal Justice report, which noted that research into the issues surrounding access to justice is at a low priority for Canadian law schools (CBA, 2013). To better address the legal issues faced by their clients, legal service providers should make a concerted effort to develop a robust and publicly available record of the usage trends in their services. Methods of data collection like those outlined in the Australian National Legal Assistance Data Standards Manual could be used as a template for such data gathering projects. Multiple legal service providers producing a consistent data set could create a powerful tool for directing resources more effectively. It could also be used to advocate for additional funding and resources from potential funding organizations (Attorney General’s Department, 2015).



The Access to Justice Gap remains

In 2013, the CBA conducted extensive consultations with the public, canvassing their opinions and feelings on the state of the justice system in Canada. The summarized sentiments were, perhaps unsurprisingly, that the legal system functionally only served the affluent and upper class of society. Most of the poor and marginalized populations surveyed felt that their legal rights were an empty promise, that the outcomes in the system were largely dependent on the whims of the judge and the lawyers involved, rather than on the strength of the case at hand. A common sentiment was the justice system was highly biased towards those with the resources to hire lawyers and the time and education to work through the overly complex system (CBA, 2013). The inaccessible and overly expensive nature of the court system, the limited scope of legal aid services, and generally low penetration of legal knowledge and information in the general public supports these sentiments. Many organizations are making serious efforts to address these problems, but progress has been slow and uneven. Without access to justice, Canadians from all walks of life will continue to slip through the gaps in the justice system, placing an unnecessary burden on their lives and on Canada's public institutions. If Canada is to become a truly equal and inclusive society, greater action must be taken towards achieving true access for justice for all Canadian citizens.

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About the Edmonton Social Planning Council

The Edmonton Social Planning Council is an independent, non-profit, non-partisan social research organization, with registered charitable status. Our focus is social research, particularly in the areas of low income and poverty. ESPC is a source of knowledge and expertise on social issues within our community.

We are dedicated to encouraging the adoption of equitable social policy, supporting the work of other organizations who are striving to improve the lives of Edmontonians, and educating the public regarding the social issues that impact them on a daily basis.

Our Vision

A community in which all people are full and valued participants.

Our Mission

Through rigorous research, detailed analysis, and community engagement, we deepen community understanding of social planning issues, influence policy, and spark collaborative actions that lead to positive social change.

Connect with us on social media!
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