

## **The Justice Crisis**

### **The Cost and Value of Accessing Law**

*Edited by Trevor C.W. Farrow  
and Lesley A. Jacobs*



UBC Press • Vancouver • Toronto

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### **Library and Archives Canada Cataloguing in Publication**

Title: The justice crisis : the cost and value of accessing law / edited by  
Trevor C.W. Farrow and Lesley A. Jacobs.

Names: Farrow, Trevor C. W., editor. | Jacobs, Lesley A., editor.

Series: Law and society series (Vancouver, B.C.)

Description: Series statement: Law & society | Includes bibliographical  
references and index.

Identifiers: Canadiana (print) 20200288083 | Canadiana (ebook) 20200288288 |

ISBN 9780774863575 (hardcover) | ISBN 9780774863599 (PDF) |

ISBN 9780774863605 (EPUB) | ISBN 9780774863612 (Kindle)

Subjects: LCSH: Costs (Law) – Canada. | LCSH: Legal aid – Canada. |

LCSH: Justice, Administration of – Canada.

Classification: LCC KE8517 .J87 2020 | LCC KF336 .J87 2020 kfm |

DDC 347/.71077—dc23

### **Canada**

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

Set in Helvetica Condensed and Minion by Artegraphica Design Co. Ltd.

Copy editor: Francis Chow

Proofreader: Kristy Hankewitz

Indexer: Margaret de Boer

Cover designer: Gerilee McBride

Cover image: Sydney Faith Photography/Creative Market

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

[www.ubcpress.ca](http://www.ubcpress.ca)



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## Foreword

### Giving Civil Justice Its Due

*The Honourable Thomas A. Cromwell, CC*

MY THESIS IS A simple one: we in the justice system – and also in society generally – undervalue civil justice both by what we do and by what we fail to do. This is not, I underline, an indictment for past offences. Indeed, as many contributors to this book have argued, many practical reforms have been made and many promising initiatives are under way. Rather, my objective is to suggest that we are not doing enough or doing it quickly enough, and as a result we are not giving civil justice its due.

Civil justice, in an admittedly quite narrow definition of the term, consists of a practical and fair outcome for civil legal problems. Access to civil justice means simply that people have access to the means – the resources, knowledge, skills, and institutions – needed for achieving those practical and fair outcomes. As Professors Trevor Farrow and Lesley Jacobs put it in their introduction to this book, meaningful access should be understood to include a long continuum of issues and options that begins with the identification of a justiciable problem. It should not focus just on the ultimate step of adjudication. Viewing the system as a continuum and committing to addressing needs earlier could have tremendous implications for reduced costs. And let us not forget that the system needs to be not only accessible but efficient and effective.

The value of civil justice, like the concept of value itself, is harder to define briefly, but it must include both qualitative and quantitative elements. The qualitative elements are concerned with the things that we generally do not value in monetary terms, even though, as Professor Michael Trebilcock notes in Chapter 1, efforts have been made to do so. The quantitative elements focus on the economic benefits of civil justice – in the sense of both value received and loss avoided.

On the qualitative side, we know that a strong civil justice system is an important part of the foundation of civil society. As Professor Gillian Hadfield has put it, a strong civil justice system is a platform on which we build everything else.<sup>1</sup>

Without it, there can be no stability or certainty in transactions, no protection

of intellectual property, and no peaceful resolution of disputes. As the British Columbia Chamber of Commerce noted in a 2014 resolution, “The ability to access the justice system to resolve issues in a timely and cost-effective manner is a foundation upon which our society is based.”<sup>2</sup>

On the quantitative side, we know how uncertainty, cost, and delay in civil justice impose transaction costs on parties. And – thanks to, among others, the Cost of Justice project of the Canadian Forum on Civil Justice (CFCJ) – we are beginning to learn about the apparently enormous social costs we are incurring because we do *not* have a sufficiently effective civil justice system (many of which are documented in various chapters in this book). Perhaps a useful slogan might be, “If you think having an effective civil justice system is expensive, try not having one.”

With those brief comments on the meaning of “civil justice” and “value,” let me turn to five different ways in which we are undervaluing civil justice and provide some suggestions about how we can better value it.

*1 We undervalue civil justice by failing to keep our civil justice system in tune with contemporary legal needs.*

I suspect that many of us have an old trophy or two on our shelves – a souvenir of some significant past achievement. From time to time, the trophy becomes tarnished. And so we take it down from the shelf, give it a good polish, and put it back on the shelf, where it sits once again as a shining reminder of past glories. But whether newly polished or tarnished, it remains a reminder of a past achievement, not a witness to current realities.

Too often, I fear that we act as if the civil justice system were an old trophy. Our civil justice system, like a trophy, is the result of important achievements in the past. Society’s capacity to resolve disputes by independent judges, the ability of parties to be represented by skilled and independent lawyers, and the institution of fair and predictable procedures are all important inheritances that we should celebrate and work hard to preserve.

Our civil justice system is not and cannot be static, however, and our reverence for the past must not blind us to current shortcomings. As the Action Committee on Access to Justice in Civil and Family Matters’ *Roadmap for Change* put it in 2013:

The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to

serve. While there are many dedicated people trying hard to make it work and there have been many reform efforts, the system continues to lack coherent leadership, institutional structures that can design and implement change, and appropriate coordination to ensure consistent and cost-effective reform. Major change is needed.<sup>3</sup>

In other words, our civil justice system, for all of its virtues, has not kept pace with contemporary needs. And while giving it a good polish as though it were an old trophy may make it look better for a while, is not enough to get our system in tune with the needs of those it is meant to serve. Thus, while we do and ought to value the past achievements that put the pillars of a sound civil justice system in place, we undervalue civil justice by not recognizing how our current system falls far short of addressing the needs of those it is meant to serve.

The research from the CFCJ's Cost of Justice Project presented in several chapters in this book shows that the public does not necessarily agree that those of us working in the justice system are even very good at the things we think we are good at. For example, the system is not overwhelmingly perceived as even being fair.<sup>4</sup> And the gap between the technology that we have available in the system and the current state of technology in society is a further example of our system not keeping pace. The key point is that we value civil justice when we keep it responsive to current needs. We undervalue it when we simply rest on the achievements of the past.

- 2 *We undervalue civil justice by failing to act urgently to address the large and growing gap between our ideal of access to civil justice and the access that currently exists.*

We want to have a civil justice system that provides the necessary institutions, knowledge, resources, and services to avoid, manage, and resolve civil problems. As we all know, however, there is a large gap between that ideal and what we have. Of course, this gap has many elements, but one of the most important is the gap between peoples' need for legal services and their ability to obtain them. I wholeheartedly endorse Professor Trebilcock's main observation that we must address the cost structures of the system – particularly the cost of legal services.<sup>5</sup> This is not about forcing lawyers to charge less. It is about finding ways to encourage the delivery of legal services in ways that make sense economically for both lawyers and clients while protecting the public interest through high-quality and ethical legal services.



We are not doing nearly enough to close the legal services gap. Broadening accessibility to legal information, advice, and representation should be the number one priority for the legal profession in Canada. While legal aid and *pro bono* services are of course part of the solution, I agree completely with Professors Trebilcock<sup>6</sup> and Hadfield<sup>7</sup> that these are not and never will be complete solutions. It is not that nothing is being done: there are many promising signs of improvement. Nor is it that the legal profession is unique in not responding as vigorously as it should to the access to justice challenge. The same claim could be made about all sectors within the justice system. The point is simply that the profession as a whole needs to redouble its efforts to improve access to legal services, and to do so with a much greater sense of urgency than shown to date.

This is particularly true of the governing bodies of the profession. The problem of inadequate access to legal services is not fundamentally one of poverty, or insufficient commitment by lawyers to *pro bono* work, or even insufficient government funding. Professor Hadfield maintains that, at its root, the problem is one of regulation.<sup>8</sup> It follows that regulatory bodies must reconsider their regulatory work and the goals driving it. In particular, this transformation will require making access to legal services one of the key goals and priorities of regulation and a driver of regulatory change. The regulators may well need legislative change to pursue this agenda. But the expansion of legal services for the public should be a primary objective and a central outcome of legal services regulatory reform.

We need a lot more action on the relationship between regulatory activity and access to justice. Some governing bodies are reluctant to recognize the relationship between professional regulation and access to professional services. Others grasp this relationship but need to develop its implications with a much greater sense of urgency and priority. It is past time, however, for us to have started giving this issue the priority it deserves. I am not sure that my optimism has yet risen to the level of “cautious,” but I am at least hopeful.

### 3 *We undervalue civil justice by not having a coherent reform strategy.*

The challenges of effecting change in the legal system have been noted in the international development literature concerning efforts to improve adherence to rule of law principles. Kirsti Samuels in her study of rule of law reform in post-conflict countries notes:

Rule of law reform has suffered from a notable lack of strategy. Given the systemic nature of the changes that are sought to be brought about in rule of law reform

and the inherently interconnected nature of elements of a legal system, it is difficult to achieve sustainable change if the elements are not approached in a coherent fashion.<sup>9</sup>

The need for an overall strategy applies not only to the measures to be proposed but also to the ways by which the people who can implement them will be convinced to do so. The general point is that when we fail to think strategically, we undervalue civil justice.

The challenges of devising a coherent civil justice reform strategy are many in Canada. Let me mention three. The first is that the problems we face are intricate systemic problems. These problems cannot be tackled by measures that are narrowly conceived or that fail to take account of their overall – and often unintended – impact on other aspects of the system. Systems thinking does not come easily to most of us in the justice system, but that is what is needed. Second, leadership of the civil justice system is diffuse, which is a polite way of saying that no one is really in charge. Important elements of that system have a large measure of independence from the other elements: the judges are independent decision makers; the lawyers are independent advocates for their clients; and the government has unique responsibilities for the expenditure of public funds. Finally, the system itself is fragmented. As the Action Committee put it, “it is hard to say that there is a system – as opposed to many systems and parts of systems.”<sup>10</sup>

There are some signs that a more strategic approach is being embraced. Following the recommendations of the Action Committee in its 2013 *Roadmap* report,<sup>11</sup> most jurisdictions have established broadly based access to justice groups. The hope is that these groups will permit a more cooperative and collaborative approach to civil justice reform and ensure that proposed solutions make sense in the overall scheme of things. I also hope that the nine Justice Development Goals set out by the Action Committee<sup>12</sup> will contribute to a more strategic approach to civil justice reform by serving as rallying points and unifying themes in civil justice reform from coast to coast to coast. The goals, I hope, provide some broad overall strategic direction and help all the actors see how their work – even work in very different areas – relates to the work of others.

#### *4 We undervalue civil justice by failing to devote adequate resources to innovation in our civil justice system.*

I am not persuaded that all of our problems in the civil justice system would be solved by an influx of funds. But I am persuaded that we are undervaluing civil

justice by failing to fund it at appropriate levels and, in particular, to devote the resources and time to encourage innovation. We do not have the luxury of closing down our civil justice system while we build something better. All of our strategizing and innovation has to take place under the daily pressure of the ongoing work of the system. This makes bringing about change very challenging.

Although it is unrealistic to expect vast additions to justice system budgets, we should not give up on getting additional resources. Governments have a way of finding resources for the things that they think are important. At the very least, we need resources targeted at innovation – an investment that recognizes that fundamental change is not possible without additional resources to permit the sort of transformations that will end up making the system more efficient.

##### *5 We undervalue civil justice by failing to engage the public with this issue.*

The final point arises out of concern that the need for systemic change in our civil justice system is not an issue of great public concern. One of the fundamental questions we asked ourselves in the Action Committee was why we have such a large gap between ideas and action. We referred to this as the “implementation gap” – the gap between the many good ideas in volumes of reports about civil justice reform and our ability to implement them. We identified a number of factors that contribute to this gap and proposed some strategies to address them. I am increasingly persuaded, however, that an important factor contributing to this implementation gap is a lack of public interest and support.

Nearly everyone now accepts the need to involve non-justice system stakeholders in the process of civil justice reform. We recognize that we cannot put the public first unless we know what needs and expectations the public has, and without involving members of the public in the design and implementation of reforms. But while involving members of the public in designing and implementing reforms is one aspect of public engagement – and an important one – I am speaking here about a much broader form of public engagement. I am speaking of the need to have broad public support for fundamental, systemic reform of the civil justice system. If there is to be the political will to bring about these changes and the resources to make it possible to do so, civil justice reform needs to have a lot more public support than it currently does.

There has been some interesting academic work on how justice reformers might learn from the social science studies of social movements.<sup>13</sup> In particular, it has been argued that social science can help us understand why some pushes for reform succeed while others fail. And if there is any validity to this thesis,

there is reason to think that at least some of the conditions for success are either present or within reach.

I would like to highlight three conditions. First, there is, I suggest, already an atmosphere ripe for change. And there is good reason to believe that we can make the case for change strongly and persuasively, although we need to do so to a much wider audience than we usually consider. Some of the research that Professors Farrow and Jacobs discuss in their introductory chapter suggests that this issue is important to a lot of people.

Second, social movements “are built on a foundation of organizers, movement organizations, and networks of communication.”<sup>14</sup> There already exist broad and deep networks of people committed to civil justice reform. They are not sufficiently connected or ready or able to act in coordinated ways. But the potential for considerable mobilization is there from coast to coast to coast. Just think of the intersecting networks involved in the work of the Action Committee. By proxy, thousands of people committed to civil justice reform are engaged in this work. It is in reality a network of networks. We should not underestimate the potential of the many intersecting networks of people committed to reform. Social movement scholarship suggests that people need a means by which they can engage in collective action. While we are not generally providing those means now, there is great potential in the broad and wide networks of people committed to civil justice throughout Canada.

Third, it is important to frame the problems in a compelling way, which will help to develop a sense of collective identity among citizens from diverse communities who want change. As one writer put it, “[O]rganized action comes about when private grievances are redefined as a community’s shared social problem.”<sup>15</sup> While I suspect that we are not doing a good job of this, we have great potential to show how the “private grievances” of those who do not have adequate access to civil justice are in fact a community’s shared problem. We can surely bring to light “tangible, ground-level instances of injustice,” which will help transform those instances into “a collective call for systemic change.”<sup>16</sup>

## Conclusion

Let me conclude with this thought. We need more than a nudge on civil justice reform. We need a civil justice movement. And while I am not suggesting that we camp out in parks or picket, I am suggesting that we need to engage the public with both the need for and the possibility of fundamental civil justice reform. This book – a collection of chapters focused on the cost and value of access to justice – provides important research and thinking that will help to inform much-needed reform efforts. It also acts as a model for future collaborative and interdisciplinary access to justice research efforts.

Ultimately, we need leadership on this issue – and those of us working within the justice system and leading social movements are the ones who ought to be providing it. We undervalue civil justice if we don't.

## Notes

- 1 Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (New York: Oxford University Press, 2016).
- 2 BC Chamber of Commerce, "Providing Certainty for Business through the Timely Administration of Justice" (2014), online: <<http://www.bcchamber.org/policies/providing-certainty-business-through-timely-administration-justice-2014>>.
- 3 Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters 2013) at 1, online: Canadian Forum on Civil Justice <[http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)> [*Roadmap*].
- 4 For comments from the public regarding perceived systemic unfairness, see, e.g., Trevor C.W. Farrow, "What Is Access to Justice?" (2014) 51 Osgoode Hall LJ 957 at 972–74.
- 5 For further comments, see Chapter 1 of this book.
- 6 *Ibid.*
- 7 See further Hadfield, *supra* note 1.
- 8 Gillian Hadfield, "The Cost of Law: Promoting Access to Justice through the (Un)corporate Practice of Law" (2014) 38 Int'l Rev L & Econ 43 at 43.
- 9 Kirsti Samuels, "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt" (October 2006) World Bank Social Development Papers – Conflict Prevention and Reconstruction Paper No 37 at 16.
- 10 Action Committee on Access to Justice in Civil and Family Matters, *Roadmap*, *supra* note 3 at 7.
- 11 *Ibid* at 20–21.
- 12 *Ibid*, pt 3. See also Action Committee on Access to Justice in Civil and Family Matters, "Canada's Justice Development Goals," online: <<http://www.justicedevelopmentgoals.ca/>>.
- 13 See, e.g., Fran Quigley, "Growing Political Will from the Grassroots: How Social Movement Principles Can Reverse the Dismal Legacy of Rule of Law Interventions" (2009) 41 Colum HRL Rev 13.
- 14 *Ibid* at 52.
- 15 *Ibid* at 59, citing Donald C. Reitzes & Dietrich C. Reitzes, "Alinsky in the 1980s: Two Contemporary Chicago Community Organizations" (1986) 28 Sociological Quarterly 265.
- 16 *Ibid.*

## Introduction

# Taking Meaningful Access to Justice in Canada Seriously

*Trevor C.W. Farrow and Lesley A. Jacobs*

ACCESS TO JUSTICE HAS long been recognized as among the most basic rights of democratic citizenship, but is also one of the least well understood in terms of its realization. This right is ordinarily framed in terms of individuals' ability to enforce their rights by going to court or accessing an alternative dispute resolution body, and to get a remedy where their rights are violated. Traditionally, the measure of access to justice was viewed principally as a matter of access to lawyers and adjudicated decisions in a timely and affordable manner. Since the early 1980s, there has been an increasingly expansive understanding of access to justice and an embrace in particular of the idea that access to civil and family justice is principally about having paths available for citizens to prevent, address, and resolve the legal challenges and problems they face in their everyday lives.

The general recognition of access to justice as a basic right of a citizenship is a reflection of the importance of law in modern democratic societies.<sup>1</sup> Law is everywhere in Canada, and everyone needs it. From consumer complaints, family breakdown, neighbour issues, and lost employment, most Canadians will experience a significant legal problem in the course of their lifetime.<sup>2</sup> Further, these problems can have major impacts – financial, physical, mental, and social.<sup>3</sup> The justice system exists to address legal problems. Yet despite the pervasive nature, impact, and importance of legal problems, many Canadians are unable to navigate or afford the justice system.<sup>4</sup> Indeed, only a small percentage of those who experience everyday legal problems actually use the justice system.<sup>5</sup>

According to former Chief Justice of Canada Beverley McLachlin, there is a “lack of adequate access to justice in Canada.”<sup>6</sup> Access to justice, in her view, “is the most important issue facing the legal system.”<sup>7</sup> For many other current and former Canadian judges, the system is “sinking”<sup>8</sup> and in “crisis.”<sup>9</sup> In 2008, in response to increasing and widespread civil and family justice challenges, McLachlin, under the leadership of the Honourable Justice Thomas Cromwell, convened the national Action Committee on Access to Justice in Civil and Family Matters, a collaborative organization made up of leading voices from

all justice sectors across Canada. In its review of the justice system, the Action Committee concluded in 2013 that there is a “serious access to justice problem in Canada.”<sup>10</sup> At the same time, former Supreme Court Justice Frank Iacobucci – in the report of his independent review of First Nations representation on juries in Ontario – stated that “the justice system generally as applied to First Nations peoples ... is quite frankly in a crisis.”<sup>11</sup> The Canadian Bar Association (CBA), in its national justice review, claimed that the state of access to justice in Canada was “abysmal” and further, that inaccessible justice “costs us all.”<sup>12</sup> In 2016, the Senate Standing Committee on Legal and Constitutional Affairs reached a similar conclusion regarding court delays affecting access to the criminal justice system.<sup>13</sup>

Canada is not alone in its difficulties in realizing access to justice as a basic right of citizenship. Similar claims are being made regularly around the world in developed and developing countries. For example, the justice system in the United Kingdom is in “crisis,” according to the Bach Commission on Access to Justice.<sup>14</sup> Likewise, the American Bar Association (ABA) recognizes “the justice gap” and the need to “make meaningful access to justice a reality for all.”<sup>15</sup> The Hague Institute for the Internationalization of Law (HiiL) has done a careful detailed inventory of access to justice challenges over the past decade in many developing countries, including Bangladesh, Kenya, Uganda, Lebanon, Tunisia, and Yemen.<sup>16</sup> Most recently, the Task Force on Justice found that “5.1 billion people – two-thirds of the world’s population – lack meaningful access to justice.”<sup>17</sup> With this shared international challenge, member states through the United Nations (UN) have agreed upon an obligation for all countries to improve access to justice as part of its Sustainable Development Goals.<sup>18</sup> In support of the UN’s development initiative, the Organisation for Economic Co-operation and Development (OECD) has also committed to making the improvement of access to justice an important part of its development initiatives.<sup>19</sup> Each of these international initiatives involves important developments for access to justice. Taken together, they provide a stark recognition of the current global access to justice problem and a promising path for future reform.

Although the access to justice crisis is now well recognized among stakeholders in the Canadian justice system, a knowledge gap continues to exist regarding the degree of inadequacy in access to justice in Canada: the nature and level of unmet legal needs in Canada and elsewhere are neither well understood nor comprehensively researched. Compared with other areas of social services, such as medicine or education, we have comparatively little empirical data about justice issues, their social or financial impacts, or how to avoid or best deal with them.<sup>20</sup> Satisfactory answers based on comprehensive empirical

data are available for few if any of these questions.<sup>21</sup> This is true in all areas of law, and it is particularly true in civil and family law, which are by far the most prevalent in daily life.<sup>22</sup> Unfortunately, these observations about a knowledge gap regarding access to justice are not new in Canada. For example, one of the main goals of the CBA's 1996 *Systems of Civil Justice Task Force Report* was to encourage collaboration and research-based policy reform within and across the civil justice system.<sup>23</sup> A decade later, the Canadian Forum on Civil Justice (CFCJ) released its *Civil Justice System and the Public* report, which was specifically designed to draw the public into civil and family justice reform efforts through collaborative, publicly engaged, and evidence-based policy-oriented research.<sup>24</sup>

A similar knowledge gap also exists in other countries. Rebecca Sandefur has observed, in an American context, that “[w]e have no idea of the actual volume of legal need and no idea of the actual volume of unmet legal need.”<sup>25</sup> Further, Elizabeth Chambliss, Renee Knake, and Robert Nelson note:

Ongoing, systematic research on civil legal needs and services is an essential component of improving the quality and availability of such services. Currently, however, we know little about the legal resource landscape – especially services for “ordinary Americans” – and our research infrastructure is underdeveloped compared to professions such as medicine.<sup>26</sup>

In a similar vein, the United Kingdom's Legal Education Foundation notes in its 2017 annual report:

Research is vital to help us understand where legal need is greatest, and prioritise resources ... historically, the legal services and legal education sectors have placed little emphasis on the importance of evidence-led approaches to the design and delivery of services. Court and other data which is vital for methodological research is not collected or made available.<sup>27</sup>

The Australian government's Productivity Commission in its 2014 report, *Access to Justice Arrangements*, also reached this conclusion, noting the absence of empirical research while emphasizing that such research is essential to improving access to justice in Australia.<sup>28</sup> Fortunately, in all of these countries, including Canada, there have been significant strides in the past five years to narrow this knowledge gap through new data collection and analysis. The chapters in this book represent some of the most recent and exciting examples of such research.



The broad purpose of this book is to report on some of the innovative empirical research on access to civil and family justice undertaken in Canada over the past five years. Most contributors are members of the Cost of Justice research project, a major access to civil and family justice collaborative research initiative housed at the Canadian Forum on Civil Justice.<sup>29</sup> This project, funded by the Social Sciences and Humanities Research Council of Canada for seven years beginning in 2011, brought together leading researchers and policy makers from Canada and around the world to examine various aspects of the current access to justice crisis in civil and family law, focusing in particular on cost and affordability.<sup>30</sup> The project has focused primarily on undertaking empirical research to address two main research questions: (1) what does it cost to deliver an effective civil justice system? and (2) what does it cost – economically and socially – if we fail to do so?<sup>31</sup> Chief Justice McLachlin has commented: “This research ... will be essential in helping us understand the true extent of the problem of cost and how it impacts on the justice system. I believe that it will prove to be of great assistance to ... identify[ing] concrete solutions to the problem of access to justice.”<sup>32</sup> Although much of the research reported here has a Canadian focus, the findings are significant for other countries, including Australia, the United Kingdom, and the United States, which are struggling to advance meaningful access to civil and family justice.

### **What Is Meaningful Access to Justice?**

What precisely is access to justice? Scholarship has gone through numerous waves of conceptualizing access to justice and thinking about access to civil and family justice within a broader societal context than just the formal justice system and service provision by lawyers.<sup>33</sup> This is reflected, for example, in greater interest during the 1990s in alternative dispute resolution mechanisms such as mediation, negotiation, and arbitration; by procedural rule reform in the 2000s; and more recently by the trend towards the professionalization of paralegals and the organization of trusted legal intermediaries. Parallel to these developments have been shifting views about the ailments and crises within the civil justice system. At one time, issues of delay in Canadian courts were seen as the principal barrier to access to justice.<sup>34</sup> Today, it is reasonable to say that the preoccupation is often with self-represented litigants, the costs for individuals and the public of civil justice, and social inclusion. These current preoccupations have resulted in significant re-engagement with access to justice as a site for innovative empirical research and policy development, especially by socio-legal scholars in Canada and elsewhere.<sup>35</sup>

Here we contrast two approaches to framing access to civil justice. The more familiar approach focuses on timely access to formal legal institutions such as the courts in order to secure redress for some wrongs.<sup>36</sup> An alternative approach, which we call meaningful access to justice, is centred instead on the idea that access to civil justice is principally concerned with people's ability to access a diverse range of information, institutions, and organizations – not just formal legal institutions such as the courts – in order to understand, prevent, meet, and resolve their legal challenges and legal problems when those problems concern civil or family justice issues. Meaningful access to justice measures access for a person not necessarily in terms of access to lawyers and adjudicated decisions but rather by how helpful the path is for addressing and resolving that person's legal problem or complaint.

In contrast, the measure of access to justice in the first approach is understood principally in terms of access to lawyers and adjudicated decisions. In the United States, this was exemplified by the *Gideon v Wainwright* case, decided by the United States Supreme Court in 1963.<sup>37</sup> In this case, the unanimous opinion of the Supreme Court was that defendants facing criminal charges have a constitutional right to be provided with a lawyer by the state if they are unable to afford one.<sup>38</sup> Indeed, arguably, even today in the United States, the idea that access to justice means access to a lawyer is the prevailing view among many legal professionals, as is evident from the resurgence of interest in establishing, for example, a right to civil counsel among the so-called Civil Gideon Movement.<sup>39</sup> In Canada, this approach is reflected in the fact that state funding for lawyers secured initially in the 1960s for programs like Legal Aid Ontario remain the highest-profile commitment by governments to supporting access to justice. Research based on this first approach to access to justice typically focuses narrowly on what happens in the courts and, to some extent, with lawyer representation.

Although the legal profession and the judiciary traditionally subscribed to the first approach, in recent years there has been widespread embrace of the second approach. Meaningful access to justice is now a term used by both the ABA and the CBA. The ABA explains its view of access to justice as follows:

Our expansive view of access to justice includes not only one's ability to access the courts and legal representation, but also one's ability to engage effectively with law enforcement officials and to make use of informal, non-state justice mechanisms. Civil society can provide important support for individuals and communities and offer an effective counterbalance to the powers of the state and of the private sector.<sup>40</sup>

The CBA has embraced a similar view:

We live in a society regulated by law. Everyone's lives are shaped by the law and everyone is likely to experience a legal problem at some point. This is not to say that everyone will engage with the formal justice system: many problems can and should be resolved in more informal ways. Still, we should know for certain that we – and those we care about – will have meaningful access to justice if and when we need it.<sup>41</sup>

The embrace of meaningful access to justice by these organizations constitutes an important milestone in public policy development and research on access to justice.<sup>42</sup>

The fundamental and distinctive feature of meaningful access to civil and family justice is that affordable and timely paths to justice are available to individuals and are well calibrated to their particular needs and situation. Much of the most important recent empirical research on access to justice, including the studies included in this book, have been undertaken through the lens of meaningful access to justice. This alternative research framework for access to justice has important pillars for framing, on the one hand, how to understand and measure access to justice and, on the other hand, how to advance access to justice.<sup>43</sup>

Four pillars are especially important for understanding and measuring meaningful access to justice. The first is that it is problem-focused in the sense that access to justice should be oriented towards addressing legal problems that arise in people's everyday lives, as opposed to, for example, the familiar resource-centred idea that access to justice is principally about affordable access to courts and lawyers.<sup>44</sup> At its core, meaningful access to justice is about assisting people with their legal problems and difficulties. We elaborate more on the nature of legal problems in the everyday lives of Canadians below.

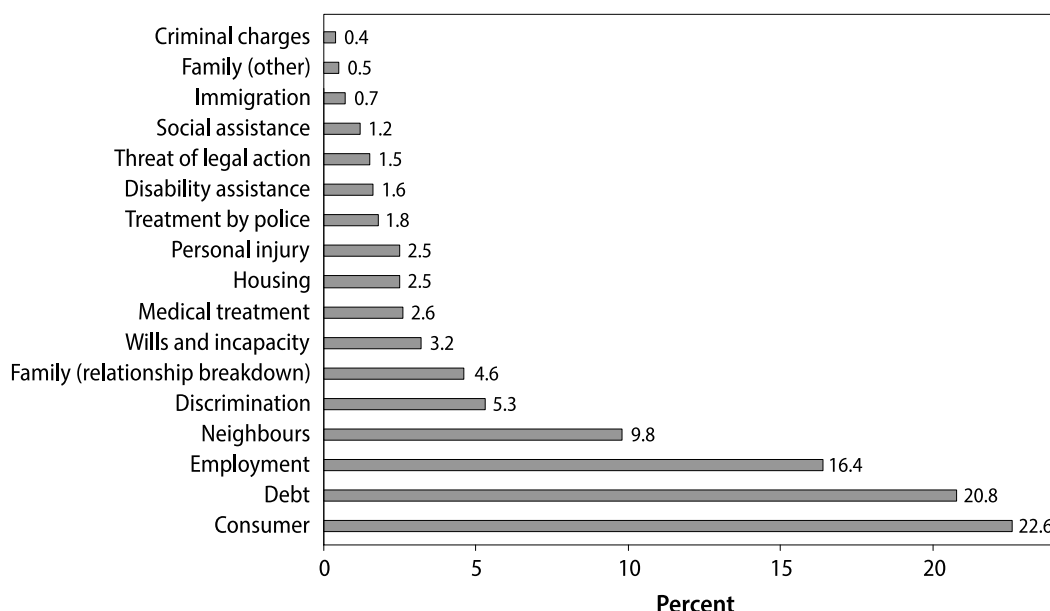
The second pillar is that it is person-centred, as opposed to service provider- or system-centred.<sup>45</sup> The point is that legal services that promote meaningful access to justice are designed to serve the person in need, not the service provider or the legal profession.<sup>46</sup> The third pillar is that how these actors understand and make sense of legal rights – their legal consciousness – is of fundamental importance to their legal mobilization.<sup>47</sup> The important idea underlying this pillar is that legal consciousness affects when and whether people recognize their problems as legal and the decisions they make about how to address those problems. The fourth pillar is an acknowledgment that the barriers to meaningful access to justice are often systemic injustices – discrimination that is made visible by patterns of behaviour, policies, and practices that are part of

the administrative structure or informal “culture” of an organization, institution, or sector that purposely or inadvertently create or perpetuate disadvantage and social exclusion based on grounds such as race, gender, immigration status, or disability.<sup>48</sup>

Three other complementary pillars are especially important for advancing meaningful access to justice. One is that few everyday legal problems are resolved within the formal court-based domestic justice system.<sup>49</sup> The point is that often the most important legal services that advance meaningful access to justice are community-based ones that operate within civil society. Another complementary pillar is that the emphasis should be on trying to get upstream on everyday legal problems (consumer, debt, employment, family) and in effect be proactive and take preventative measures. This is already a prevalent policy strategy in consumer protection and employment standards.<sup>50</sup> A further pillar is that within a problem-centred approach to access to justice, what matters for fair outcomes and fair processes are the paths to justice or legal journeys people take, and not so much (or only) the robustness of the legal services available to them. This pillar readily relates to important empirical work by Tom Tyler and others on fairness in the justice system.<sup>51</sup> As the HiiL has long emphasized, innovating in civil and family justice is at its core about “developing new ways to bring fairness between people.”<sup>52</sup> There are different ways in which access to justice might be meaningfully tied to the impact or outcome of someone’s legal problem. It might help someone resolve or address the problem, provide possibilities for compensation, or potentially have an impact in terms of legislative, policy, or social change.<sup>53</sup>

### **The Everyday Legal Problems of Canadians**

At the core of meaningful access to justice is the idea that people have everyday legal problems and that it is important for legal services to assist them in resolving those problems. This claim is a reflection of the fact that in modern democratic societies, the legal system plays a fundamental role in the ordering of many aspects of daily life.<sup>54</sup> Everyday legal problems are those that come up in people’s daily lives. They are problems that typically have both a legal element and potentially a legal solution. Consumer complaints, family breakdown, domestic violence, divorce, credit issues, discrimination, wrongful termination, unfair eviction, and neighbour disputes are some of the most frequent such problems (see Figure 0.1).<sup>55</sup> Everyday legal problems are “justiciable” in that they can be dealt with through formal legal processes, although they may in fact be dealt with – or not – through other means. In her seminal research on everyday legal problems in England and Wales, Hazel Genn describes a justiciable problem as “a matter experienced by a respondent which raised legal

**Figure 0.1** Percentage of people with one or more everyday legal problems

issues, whether or not it was recognized by the respondent as being ‘legal’ and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.”<sup>56</sup> The central finding that Genn establishes is that almost everyone takes paths to address their justiciable problems – paths to justice – but often those paths do not involve the formal justice system. Meaningful access to justice in Canada requires taking seriously how the existence of many diverse paths to justice can assist Canadians to resolve (or prevent) their everyday legal problems and how those paths can be supported through innovative public policy.

Legal need studies are designed to help with that understanding. The World Justice Project has recently stated:

The law provides a foundational framework of rights, responsibilities, and protections that impact virtually every aspect of modern life. This legal framework shapes how ordinary people navigate problems related to employment, housing, education, health, and family life, among many others. In addition to having a legal dimension, these everyday problems profoundly impact people’s health, social stability, and ability to participate in the economy. For this reason, better understanding people’s legal needs and experiences accessing justice provides vital insights for designing policies that foster economic development and inclusive growth.<sup>57</sup>

How do we better understand people's legal needs in a particular country? The prevalent research instrument are legal needs or legal problems general population surveys. These surveys enable researchers to construct a picture of the legal needs of citizens and the extent to which the justice system and other institutions are meeting those needs. Over the past twenty-five years, discrete comprehensive legal needs surveys have been undertaken in many different countries, including Canada, the United Kingdom, the Netherlands, and the United States.<sup>58</sup> In 2017, the World Justice Project completed a legal needs survey in forty-five countries.<sup>59</sup>

The 2016 national study of everyday legal problems – the Everyday Legal Problems and the Cost of Justice in Canada study – provides the most comprehensive, up-to-date picture of Canadians' legal needs and their experiences with legal problems.<sup>60</sup> The survey focused on the prevalence of everyday legal problems, the occurrence of multiple problems and problem clusters, what people do about legal problems, the extent to which people get the help they need and what happens when they do not, and the costs individuals incurred trying to get help. The findings were based on telephone interviews with 3,051 Canadians.<sup>61</sup>

In terms of the basics about everyday legal problems, we know that almost half of adult Canadians – 48.4 percent, or almost 12 million – will experience at least one legal problem over any given three-year period, amounting to essentially all of us over the course of our lifetime. Of the people surveyed for the study, 30 percent reported experiencing two or more legal problems, which – again over a three-year period – comes to over 35 million separate everyday legal problems. Put simply, these are huge numbers, showing that legal problems are pervasive in the everyday lives of Canadians.

The most common types of legal problems experienced by adult Canadians involve consumer, debt, and employment issues, followed by problems related to neighbours, discrimination, and family (relationship) issues. Other frequent problems reported include issues involving wills, medical treatment, housing, personal injury, disability, and social assistance. Criminal charges affect very few Canadians (see Figure 0.1). The range and frequency of everyday legal problems highlight why meaningful access to justice is important for and affects all Canadians.

How do adult Canadians deal with those problems? Approximately 95 percent report making some attempt to resolve their issue. However, we know from other research that approximately 65 percent of Canadians with legal problems are not certain about their rights, do not know how to manage legal problems, are afraid to access the legal system, or think nothing can be done.<sup>62</sup> Moreover,

**Table 0.1** Paths to justice for Canadians

<i>Path</i>	<i>Percentage of Canadians</i>
Courts and tribunals	7
Legal advice (private lawyers, legal aid, clinics, etc.)	19
Non-legal assistance (union, advocacy group, etc.)	28
Internet	33
Other party (negotiation, etc.)	75
Friends and relatives	61

the survey found that less than 7 percent of people report going to courts and tribunals, and less than 20 percent report seeking legal advice. This finding is consistent with other research showing that a growing number of individuals attending court are representing themselves, with limited or no legal assistance. For example, Justice Annemarie Bonkalo in her 2016 review of Family Legal Services for Ontario's Ministry of the Attorney General reported that 57 percent of litigants in family court were unrepresented in 2014–15.<sup>63</sup> The vast majority of “paths to justice” for Canadians are outside the formal justice system, including non-legal assistance, the Internet, friends and family, and informal negotiations with the other disputing party (Table 0.1).

The Everyday Legal Problems and the Cost of Justice in Canada survey found that a relatively high percentage of people – 81 percent – who obtain legal advice find it to be helpful. Among those who do not or cannot access legal services, fewer find their service options as helpful: 68 percent of those who use both non-legal assistance and friends and relatives, 58 percent of those who use the Internet, and 49 percent of those who attempt to deal with the other party in a dispute.<sup>64</sup> We know that many cases that do enter the formal justice system end up being settled (or abandoned) before a final determination by a court.<sup>65</sup> Other studies have found that at least 90 percent of civil cases settle.<sup>66</sup>

What do we know about the 5 percent who do nothing about their legal problems? A recent independent study by Trevor Farrow found that cost, time, effort, and stress are among the factors identified as to why nothing is done. Participants in that study reported:

*I have a family law situation that I can't afford to address. I have to just let it go.*

*I paid down on an apartment ... I didn't get it ... so I wanted my money back. I couldn't get my money back because the guy ... didn't give me back my cash and I didn't know how to go about it, I was new to the country ... I just checked at the tenant board ...*

*But it just looked like it was gonna be a lot stressful for me just to take that upon myself to try to figure that out. So, I was just like, whatever, leave that.*

*As far as I know, it's going to cost you ... So ... when I have issues, I just leave it.*

*I work three jobs. Am I gonna take off ... my full day to go pursue this? Probably not, so I'm just gonna let this slide.*

*Most people ... if it's not criminal ... won't pursue it. Like if it's a racial thing ... employ[ment] ... discrimination, I don't think they would pursue it.<sup>67</sup>*

These statements reinforce concerns about meaningful access to justice for all Canadians.

Although almost everyone attempts to deal with their everyday legal problems, many problems go unresolved. The Everyday Legal Problems and the Cost of Justice in Canada study found that just over half – 55 percent – of adult Canadians report resolving their legal problems during a three-year period, leaving 30 percent with unresolved problems and 15 percent with mixed results (one problem resolved and others ongoing). As for the outcome of resolved problems, almost half – 46 percent – of people indicated that the outcome for one (or more) of their problems was unfair; further, 70 percent indicated that the outcome that they did obtain did not achieve all of what they had originally anticipated.

In a detailed analysis of the paths to justice for Canadians reporting consumer problems in the Everyday Legal Problems study, Lesley Jacobs and Matthew McManus discovered that people with consumer problems reported resolving their problems in 69 percent of the cases.<sup>68</sup> This compares with just less than 50 percent for all other reported problems combined. (When consumer problems are included in the entire dataset, 54 percent reported that their problem had been resolved.) This means that 20 percent more consumer problems were resolved than other everyday legal problems, which is a very significant difference. Canada's network of consumer protection mechanisms are designed to steer Canadians with consumer problems away from lawyers and adjudicated decisions and towards consumer organizations, consumer complaint processes, and other “softer” paths to justice. A reasonable inference, drawn by Jacobs and McManus, is that the consumer protection paths to justice available to Canadians are proving to be effective when Canadians experience consumer problems.

In terms of what individual adult Canadians spend on justice issues (excluding corporate, government, or other organizational or institutional expenditures), the study shows that, of those who experienced legal problems and who



provided information on cost aspects of those problems, 43 percent indicated that they spent some money attempting to resolve their problems. Specifically, on average, adult Canadians spend approximately \$6,100 when dealing with their problems. Collectively, this amounts to approximately \$7.7 billion annually, which, if anything, is a conservative estimate.<sup>69</sup> Compared with what adult Canadians spend on average on other aspects of their life (based on annual spending figures for 2012), this amounts to almost 10 percent of annual spending on household expenditures (\$75,443); over 10 percent of spending on goods and services (\$56,279); almost half of spending on food (\$7,739); almost three times the spending on out-of-pocket healthcare expenses (\$2,285); and almost half of spending on shelter (\$15,811). As for the types of individual expenses, 22 percent of those who spend money on legal problems report spending money on legal fees;<sup>70</sup> 16 percent on transportation; 13 percent on materials, copying, and printing; 11 percent on court fees; 10 percent on other advisers and mediators; 5 percent on telephone, fax, and so on; and 5 percent on child care and other related household expenses.

There are of course other costs associated with legal problems. For example, in addition to the specific financial costs discussed above (legal fees, court fees, transportation costs, and so on), people experiencing a legal problem often spend a lot of time trying to understand the problem, identifying potential solutions, and sorting out the rules and processes for various legal options. These costs, often referred to as “searching” or “temporal” costs, typically come in the form of hours and days of time spent and, as a result, lost opportunities.<sup>71</sup> Other important costs come in the form of lost employment, stress, physical and emotional costs,<sup>72</sup> costs related to gender-based violence,<sup>73</sup> cultural costs,<sup>74</sup> productivity costs, and potentially others.

While the impact of these costs on individuals is clearly enormous, the implications for public funds is also significant. In addition to paying for the infrastructure of the legal system (judges, courts, justice departments, and so on),<sup>75</sup> inadequate access to justice results in knock-on costs to other social services in society.<sup>76</sup> For example, the survey found that other annual costs to the state include approximately \$248 million in additional social assistance payments, \$450 million in additional employment insurance payments, and \$101 million in additional healthcare costs. Besides these specific knock-on costs, the findings show that experiencing legal problems can lead to housing issues: 2.7 percent of adult Canadians (100,839) lose their housing each year as a direct result of experiencing a legal problem. Faced with homelessness, approximately 3.6 percent of those people (6,836) rely in turn on emergency shelters, many of them publicly funded. Thus, to the very real costs for individuals

associated with losing their home or shelter must be added the resulting knock-on costs carried by the state.<sup>77</sup>

Each of these costs – economic and social, individual and collective – is significant. Taken together, they are cause for significant concern. To date, these costs and other related justice system costs and value-related considerations have been significantly understudied in the world-wide access to justice literature.<sup>78</sup> This lack of focus and understanding has created a major gap in the context of evidence-based policy thinking and reform. It is this gap that the contributions to this book explore.

### **Situating the Research Contributions in This Book**

The chapters that follow, divided into four parts, are all focused on understanding why achieving timely and affordable meaningful access to civil and family justice is so challenging in Canada and elsewhere. Part 1, “Understanding the Access to Justice Crisis,” situates Canadian public funding for the justice system within the broader public policy context. In Chapter 1, Michael Trebilcock stresses the importance and value of the rule of law and corresponding justice system institutions (courts, tribunals, legal aid, judges, lawyers, and public legal information), arguing that given fiscal constraints, cost and price choices need to be made regarding legal processes and services. In Chapter 2, Moktar Lamari, Pierre Noreau, and Marylène Leduc provide a detailed overview of the metrics of the publicly funded justice system in OECD countries, enabling a comparison of Canada’s spending with those of other jurisdictions. In Chapter 3, Lisa Moore and Mitchell Perlmutter focus on the options for public spending on the justice system and the implications for access to civil and family justice.

Part 2, “Experiencing Everyday Legal Problems,” shifts the focus to the lived experiences of Canadians. In Chapter 4, Ab Currie provides a careful review of the costs of inadequate access to justice and unresolved legal problems for ordinary Canadians. In Chapter 5, Matthew Dylag examines survey data to determine the paths to justice taken by people in Ontario with everyday legal problems, and in Chapter 6, Trevor Farrow examines the problematic legal experience and related costs for First Nations communities in the course of pursuing the resolution of residential schools claims and implications for truth and reconciliation. In Chapter 7, Jennifer Koshan, Janet Mosher, and Wanda Wiegiers focus on costs for women in domestic violence cases.

Part 3, “Legal Services and Paths to Justice,” examines specific developments and innovations in the justice system from the perspective of advancing access to justice. In Chapter 8, David Wiseman argues that the licensing of paralegals by the Law Society of Ontario has been effective at improving access

to justice for landlords but has done little for tenants, who generally are unable to afford any fee-based legal assistance. In Chapter 9, Lesley Jacobs and Carolyn Carter focus on the Mandatory Information Program for applicants and respondents in the family courts in Ontario. They argue that, despite its promise, the program has significant shortcomings that need to be addressed before it can contribute to meaningful access to family justice. More optimistically, Catherine Piché shows in Chapter 10 that class actions in Quebec are proving to be quite effective in achieving significant outcomes for plaintiffs in most cases. Lorne Sossin and Devon Kapoor argue in Chapter 11 that, based on some preliminary case studies, social enterprise and social innovation are able to fill an important gap in the justice system with regard to paths to justice for some communities.

Part 4, “The Legal Profession and Meaningful Access to Justice,” considers the role of the legal profession as both an impediment and a vehicle for change on the issue of meaningful access to justice in Canada. In Chapter 12, Jerry McHale – further to some of the themes raised in the Foreword by Justice Thomas Cromwell – provides a narrative about the legal profession in Canada and its role as an impediment to improving access to justice. Herbert Kritzer argues in Chapter 13 that although legal fees are a key cost consideration in access to justice debates, it is in practice, drawing on recent experiences in the United Kingdom, very difficult to reform the structure of a country’s legal fees to make civil legal services more affordable. In Chapter 14, Michaela Keet and Heather Heavin draw on insights from behavioural economics to better understand recommendations lawyers make to their clients about paths to justice, especially regarding litigation. Chapter 15, by Noel Semple, concludes with a discussion of legal fees and their contribution to the existence of unmet legal needs in Canada.

## Conclusion

Understanding access to justice has become a priority for justice researchers, policy makers, and practitioners in Canada and elsewhere. Everyday legal research studies have helped frame the access to justice crisis and further our collective understanding about how ordinary people around the world manage and address their everyday legal problems in similar ways. Groundbreaking national policy efforts – such as the Action Committee’s *Roadmap for Change* report<sup>79</sup> and the CBA’s *Reaching Equal Justice* report<sup>80</sup> – have moved the dial significantly in terms of awareness in Canada, especially within the legal profession. Notwithstanding these important strides, however, we continue to lack an adequately informed understanding of the access to justice crisis in Canada, lessons to be learned from the global access to justice crisis, practical ways to