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Ab Currie

Canadian Forum on Civil Justice, abcurrie@sympatico.ca

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LET'S PICK UP WHERE WE LEFT OFF 25 YEARS AGO TO EXPAND ACCESS TO CIVIL JUSTICE IN CANADA

Ab Currie, Ph.D.
Senior Research Fellow
Canadian Forum on Civil Justice

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Let's Pick Up Where We Left off 25 Years Ago to Expand Access to Civil Justice in Canada

Ab Currie, Ph.D.
Senior Research Fellow
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The 2020 World Justice Project (WJP) Rule of Law Index ranks Canada 9th overall out of 128 countries on a composite rule of law index made up of 8 factors.¹ In this latest version of the WJP Rule of Law Index Canada ranks 9th on constraints on government powers, 9th on absence of corruption, 9th on open government, 9th on respect for fundamental rights, 9th on order and security, 11th on regulatory enforcement, 10th on criminal justice and, much lower than the other rule of law indicators, 19th globally on civil justice. Canada's overall score is 0.81 out of 1.00. Denmark, Norway, Finland, Sweden, Netherlands, rank 1st to 5th respectively. Germany, New Zealand and Austria, in that order, also rank higher than Canada on the global index. Canada has ranked 9th globally for the past 3 years and the pattern among the components has been the same.² In fact, Canada has scored consistently well over the past 10 years compared with other countries on all of the measures but one - access to civil justice. The methodology for the WJP Index is an on-line survey of 1,000 individuals in Montreal, Toronto and Vancouver plus interviews with 18 justice specialists and other anonymous contributors.

The overall score on the civil justice factor is 0.70 out of 1.00. The civil justice factor is made up of 7 component scores: accessibility and affordability - 0.58, absence of discrimination - 0.57, absence of corruption - 0.90, absence of improper government interference - 0.89, absence of unreasonable delays - 0.47, effective enforcement - 0.75 and effective ADR - 0.77. Our civil justice system is admirable by global standards, characterized by an absence of corruption and improper government interference. However, civil justice in Canada is ranked low on lack of accessibility and affordability, absence of discrimination and absence of unreasonable delay.

By comparison to Canada's 9th place global rank on most factors, Japan is the country that ranks 9th on civil justice globally. Based on the combination of rule of law factors, Japan ranks 15th overall on the 2020 Rule of Law Index.

¹ World Justice Project, *World Justice Project: Rule of Law Index 2020*, online: <<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>>.

² World Justice Project, *Previous Editions: WJP Rule of Law Index*, online: <<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>>.

Japan scores comparatively well on accessibility and affordability with a score of 0.71 compared with 0.58 for Canada, 0.81 on absence of discrimination compared with Canada's score of 0.57 and 0.72 on absence of unreasonable delays compared with 0.47 for Canada. Japan is culturally different from Canada and the Japanese justice system is different. Teasing out useful suggestions for improving access to civil justice in Canada from the Japanese experience might be unproductive.

Australia might be a better place to look. Australia is very similar to Canada with respect to form of government, the federal political structure, organization of the justice system and general culture. Also, Australia has similar problems such as the delivery of justice services to large remote regions and providing culturally appropriate and effective services to a historically disadvantaged Indigenous population. Australia ranks 14th globally on the civil justice factor, scoring 0.69 on absence of discrimination compared with 0.57 for Canada and 0.68 on absence of unreasonable delays compared with 0.47 for Canada. Without delving into the complexities of civil justice in the Australian states and the Northern Territory, there is one aspect of civil justice in Australia worthy of consideration in a search for ideas that might lead to improving civil justice in Canada.

In Australia, the Commonwealth (federal) government has developed partnership arrangements with the states and territorial legal aid commissions, community legal services and the Aboriginal and Torres Strait Islander Legal Services for the provision of civil legal aid.³ The agreement is a funding program designed to address legal needs based on the results of socio-legal research on the nature and extent of unmet legal needs. In Australia civil legal matters are the responsibility of the national government while criminal law is the responsibility of the states and territory. This is the reverse of the Canadian system. However, the brief historical account of funding for civil legal aid in Canada presented below suggests that this difference might be a less important than one might initially expect.

In Canada after the federal government began the criminal legal aid cost-sharing program administered by the Department of Justice to support criminal legal aid in the provinces and territories in 1971-72 (later restructured as a contribution program), discussions were held with the provinces concerning the funding of civil legal aid. These discussions failed to reach an agreement about the funding formula and the federal government, provinces and territories subsequently negotiated a long-term agreement for funding

³ Australian Government Attorney-General's Department, *Legal Assistance Services*, online: <<https://www.ag.gov.au/legal-system/legal-assistance-services>>.

criminal legal aid. The Department of National Health and Welfare (now Health Canada) had a long-standing interest in legal aid, having funded a number of university legal aid clinics. In 1980 the Department defined civil legal aid as an “item of special need” under the Canada Assistance Plan (CAP) and began negotiating funding agreements for civil legal aid with the provinces under CAP. CAP was a very large contribution program through which the federal government contributed to health and social services programs in the provinces and territories that were not within federal jurisdiction as defined under Sections 91 and 92 of the Constitution. By 1985 nine provinces were receiving funding for civil legal aid under CAP. The federal contribution for civil legal aid reached \$60.1 million by 1995-96. This does not include an unclaimed entitlement of \$41.4 million from one province that would have increased the total amount of the federal contribution for civil legal aid to \$101.5 million. The federal contribution for criminal legal administered by the Department of Justice amounted to \$88.3 million in the same year. In 1996 the Canada Assistance plan, along with funding for civil legal aid, was absorbed into the Canada Health and Social Transfer (later renamed the Canada Social Transfer), a large block funding program. The elimination of CAP was part of a larger federal government effort to control the federal budget in the wake of a recession that occurred in the early 1990’s. This ended the national program of dedicated funding for civil legal aid.

There were no national program standards for meeting civil legal needs under CAP funding for civil legal aid. Financial eligibility was consistent with the social services eligibility guidelines in effect in each province rather than legal aid eligibility guidelines. This contrasts with the current Partnership Agreements in Australia that are built on empirically-based policy designed to meet the legal needs of the public. Within this broad needs-based framework legal aid providers are encouraged to develop approaches to delivering legal aid that best serve their client groups.

Recently, there has been a global resurgence of the access to justice movement organized around United Nations Sustainable Development Goals (SDGs). In particular, SDG 16 promotes peaceful and inclusive societies for sustainable development, the provision of access to justice for all and building effective, accountable and inclusive institutions at all levels. Target 16.3 under SDG 16 is to promote the rule of law at national and international levels and inclusive access to justice for all. Building on SDG 16, a global *Justice for All* movement has emerged in which major international organizations including the United Nations, the New York-based Pathfinders for Peaceful, Just and Inclusive Societies, the Organization for Economic Co-operation and Development and the World Bank have become actively involved in

promoting access to justice.⁴ Canada is significantly involved in this resurgence of the access to justice movement beginning in the second decade of the 2000's. The federal Department of Justice has become an active and important partner in the global Justice for All movement. The International Development Research Centre has contributed funding and support for projects that expand access to justice. The Canadian Forum on Civil Justice, a national organization that has conducted Canada's most recent national legal needs study, continues to conduct research on unmet legal need in Canada and to advocate for civil justice reform.⁵

After having stumbled in 1996 on the road to equal justice as a result of measures taken to control the growth of the federal budget following the economic recession of the 1990's, is it not time to reconsider a national civil legal aid funding program? This time around, a program should be constructed firmly on empirically-based knowledge about meeting the legal needs of Canadians. Judging from what was possible during the 1980's and 1990's under CAP, any constraints imposed by the division of powers under the Constitution would seem flexible enough to accommodate jurisdictional issues. Along with a national funding program, we also need to undertake research building toward policy and program responses on ways to develop people-centered access to justice, both in the courts and for the many people who deal with everyday legal problems in the shadow of the formal justice system. We need to develop reliable empirical evidence on why we appear to have failed, according to the Rule of Law Index, to provide Canadians with civil justice that can achieve comparative standards of accessibility and affordability, free of unreasonable delay and of discrimination. However, something large in scale and of bold intent is needed. The global resurgence in the access to justice movement challenges justice policy makers in Canada. Now is the time. Canada should adopt a national approach to meeting the civil legal needs of the public with the broad scope of the Justice for All movement and with the vision and bold intent of the access to justice movement in Canada in the 1970's and 1980's in which the national funding programs for legal aid were implemented. The Australian Partnership Agreement provides a model for a successful national program for funding access to civil justice in a federal state. The idea of looking to the Australian

⁴ Task Force on Justice, *Justice for All – Final Report* (New York: Center on International Cooperation, 2019) online: <https://bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/90b3d6_746fc8e4f9404abeb994928d3fe85c9e.pdf>.

⁵ Canadian Forum on Civil Justice, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: CFCJ, 2016) online: <<http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>>.

model is not new. A 2016 report recommending a national framework for meeting legal needs by the Canadian Bar Association identified the Australian model as an approach that might hold lessons for Canada.⁶ The momentum that is building with United Nations SDG 16, with the global Justice for All movement and with the work currently being done in Canada makes the case that Canada should, at this juncture, pick up where we failed in the mid-1990's to provide access to civil justice to Canadians. A national funding program should go beyond a traditional focus on legal aid that is mainly a transactional financial transfer between the federal government and the provinces and territories and limited by narrow financial eligibility guidelines and coverage provisions to one that is needs-based and people-centered and seeks to expand access to civil justice.

Cost is always an issue. How much justice can we afford? How much can we afford at this moment in time as governments spend large sums to support people and businesses in response to the COVID-19 pandemic? The growing body of empirical evidence suggests that greater access to justice will pay for itself. In recent years there have been a growing number of cost-benefit studies demonstrating that spending on legal aid has a multiplier effect. Every dollar spent on legal aid will yield several dollars in return in social benefits or in savings to the courts. There has been other research carried out in the wake of budget cuts to legal aid showing that the knock-on costs to other government programs are far greater than the savings achieved by cuts to legal aid funding. Government is either a fool to cut legal aid or a fool not to invest in it. Lisa Moore and Trevor Farrow at the Canadian Forum on Civil Justice have produced a comprehensive and up-to-date review of this growing body of literature supporting the idea that increased access to legal assistance is an investment in social development and economic growth⁷.

Currently the federal and provincial governments are spending vast sums of money to cushion individuals and businesses from the economic consequences of the pandemic and to accelerate the recovery. As part of the overall effort to address the conditions created by the pandemic, access to justice programs may become more important in protecting people from falling into social and economic disadvantage as the economic consequences

⁶ Melina Buckley, *A National Framework for Meeting Legal Needs: Proposed National Benchmarks for Public Legal Assistance Services* (Canada: Canadian Bar Association, August 2016) online: <https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/LLR/A-National-Framework-for-Meeting-Legal-Needs_Proposed-National-Benchmarks.pdf>.

⁷ Lisa Moore and Trevor C.W. Farrow, *Investing in Justice: A Literature Review in Support of Improved Access* (Toronto: Canadian Forum on Civil Justice, August 2019) online: CFCJ <<https://cfcj-fcjc.org/wp-content/uploads/Investing-in-Justice-A-Literature-Review-in-Support-of-the-Case-for-Improved-Access-by-Lisa-Moore-and-Trevor-C-W-Farrow.pdf>>.

of the pandemic play out in the coming years. Expanded access to justice might potentially be an important part of the recovery and in building a more equitable society in the longer term.

The low scores on some aspects of access to justice in Canada in the WJP Rule of Law Index suggests that even the increased amount of money being spent on legal aid in Canada may not be sufficient to assure access to justice in Canada.⁸ Importantly, the rule of law indicators apply primarily to access to the courts. The ubiquitous nature of legal problems and the large numbers of people who might better resolve their legal problems by means of pathways to justice outside the formal justice system suggest that a national strategy to expand access to justice should have a broad remit. A good metaphor for the access problem is an iceberg. The one tenth that is visible above the water line represents the civil court system. We have made great strides in recent years learning about the nine tenths below the water line: about the large numbers of people who experience problems but do not seek legal help at least until the situation is desperate, about outreach strategies to identify people experiencing problems and about developing community-based and people-centered approaches to this large part of the access to justice terrain.⁹ The courts have enormous symbolic importance for the public's respect for the rule of law and confidence in the justice system. Problems that limit access to the courts need to be fixed. However, the courts are only part of a much larger terrain and that is why we need a national access to justice strategy with the bold vision of justice for all that is now part of the global discourse and was at the core of the recommendations in the Action Committee on Civil and Family Justice report *A Roadmap for Change* that signaled the need to expand access to justice in Canada seven years ago.¹⁰

⁸ According to Department of Justice data from in the annual Legal Aid in Canada report expenditures on civil legal aid in Canada not including immigration and refugee legal aid have increased by 7% over the past three years from \$406.6 million in 2016-17 to \$434.8 million in 2018-19. See Department of Justice, "Legal Aid in Canada, 2016-17" (date modified: 21 November, 2018) online: <<https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/index.html>>and Department of Justice, "Legal Aid in Canada, 2018-19" (date modified: 30 June, 2020) online: <<https://www.justice.gc.ca/eng/rp-pr/jr/aid-aide/1819/1819.pdf>>.

⁹ Lisa Moore and Mitchell Perlmutter, "Public Spending on Access to Justice" in Trevor C.W. Farrow and Lesley A. Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 78.

¹⁰ Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change, Final Report* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013), online: <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>.