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What does it Cost to Access Justice in Canada? How Much is “Too Much”? And How do we Know? Literature Review

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What does it cost to access justice in Canada? How much is “too much”? And how do we know?

Literature Review

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1. INTRODUCTION

Barriers to accessing justice are a serious social concern. It is widely understood among those who work within the justice system, litigants and the general public, that cost is a barrier to accessing justice. Cost was raised as a concern by every litigant who participated in the *Civil Justice System and the Public* project.¹

While scholars have long recognized an essential tension between costs and civil justice, there is a lack of data to empirically address the question “how much does the civil justice system cost?” The Rand Institute of Civil Justice noted the absence of any hard data on costs of justice and pointed out that most information is anecdotal and that “no impartial institution has undertaken the laborious task of collecting, standardizing and comparing available cost and workload data to evolve overall estimates with some claim to statistical validity” (Kakalik & Robyn, 1982, p.iii). Fourteen years later the Ministry of the Attorney General of Ontario again deplored the lack of information on civil justice costs, noting that “on such an important issue, one would expect to find a wealth of research. Surprisingly, there is little analysis or hard data available. This is true not only for Ontario but for most jurisdictions around the world” (Civil Justice Review Task Force, 1995, p.3). The Task Force on the Systems of Civil Justice (1996) identified cost as one of three major issues plaguing the civil justice system in Canada, and also decried the lack of empirical data on the subject (p.15). A recent and highly detailed review of costs undertaken in England still continues to point out the unacceptable lack of empirical data on the issues surrounding the costs of litigation and the costs of access to justice (Lord Justice Jackson, 2009).² Recent work by Hadfield (2009, p. 2) echoes the same concern in the U.S. stating that “we have little systematic data, for example, on legal costs and essentially none showing the relationship between expenditure and results.”

The Canadian Forum on Civil Justice (the ‘Forum’) has accordingly identified the need to increase our understanding of the costs associated with accessing civil justice as our top research priority.

2. PURPOSE OF THIS LITERATURE REVIEW

The purpose of this literature review is to investigate how issues related to the costs of civil justice are reported. Most especially to identify any previous empirical research and see how such costs are measured.

¹ The *Civil Justice System and the Public* research was funded by the Alberta Law Foundation and a SSHRC-CURA grant. For details of this project and related publications see <http://cfjc-fcjc.org/research/cjsp-en.php>

² The phrases ‘costs of civil justice’, ‘cost of the civil justice system’, ‘cost of access to justice’ are often used interchangeably and this statement by Lord Justice Jackson is one of the few that explicitly suggests different concepts are present. The formal civil justice court system is one small part of litigation and in turn, litigation is only one possible path to accessing justice, defined as dealing with a legal matter. Furthermore, in Canada, accessing justice would encompass issues under administrative as well as civil and family areas of law.

Initial informal inquiry by the Forum suggested that there were few facts and figures about where costs actually accrue in access to justice. Statistics capable of generating reliable management information about court process are not consistently maintained in Canada or elsewhere. Costs of legal advice and representation are typically calculated by the 'billable hour' and at variable rates according to legal matter and related expertise. Additionally, 'access to justice' entails an array of alternative services, about which there is minimal empirical information relating to costs and effectiveness.

Working from this apparent lack of existing knowledge, the Forum Research Committee therefore generated four primary research questions, with associated components, that need to be answered:³

1. What are the costs of pursuing the resolution of legal problems? This question has two key aspects:
 - a) What are the costs of resolving disputes in the courts? This will include:
 - the private costs of pursuing resolution in the courts; including legal fees; expert fee; time; and personal health, economic and social well-being.
 - the public cost of the court system, including infrastructure, court staff and the judiciary.
 - b) What are the costs of pursuing resolution of legal problems outside the courts? This will include:
 - the private cost of retaining legal advice; time involved to seek out information, advice, and negotiate a resolution; personal health, economic and social stresses.
 - the public cost of providing visible and accessible legal services and information resources.
2. What are the costs of not achieving resolution? There are three key aspects to this question:
 - a) The tendency of unresolved legal problems to cluster.
 - b) Personal health, economic and social costs associated with unresolved disputes.
 - c) Public health, economic and social costs associated with unresolved disputes.
3. Is the cost of achieving resolution economically and socially warranted? This will be a cost benefit analysis, involving a balancing of the costs of an accessible civil

³ As the Forum develops proposals and methodology for this research, our research questions are refined and evolved. The questions presented in this version of the report are updated from those originally included in the August 2009 version of this Review.

justice system (question #1) against the socio-economic costs of not providing access (question #2).

4. What can be done to effectively prevent disputes, and at what cost? We will explore methods for limiting or eliminating the need for legal services, through consumer protection, licensing, standard setting and pro-active regulation, and other innovations identified by the research. Attention will be paid to preventing recurring problems for low and middle income Canadians, with a particular focus on the most vulnerable. The cost-benefit of these social investments will be analyzed.
5. What changes are recommended on the evidence? It is too early to know yet what action should flow from the evidence, but it is anticipated that this may include:
 - a) Reforms to the formal procedures in civil and family courts. We will create model(s) for the ongoing monitoring and evaluation of new and existing processes and programs. These models will identify areas in which systemic changes to legal rules and processes can improve efficiency, access and cost effectiveness.
 - b) Reforms to the larger civil justice system, including frontline entry and information points for the public. We will create models for evaluating the effectiveness of recently established entry points into the civil justice system.
 - c) Models of legal practice. In collaboration with the practicing Bar and experts from the Faculty of Business and the Department of Computer Science, we will develop and pilot new models of legal practice designed to increase access to legal information, advice and representation at an affordable cost. The evaluation of these models will be included in the design.
 - d) Changes to investment in the justice system. While it is widely believed that the cost of justice is too high, the evidence gained through this research will provide the first real opportunity to consider the full cost of providing access to justice, and to assess public and private investment in the civil justice system.
 - e) Changes in legal and judicial culture. We will consider the influence of the adversarial system; the growing recognition of an ethical responsibility of proportionality; and the potential for reaching students through the teaching of professional responsibility.
 - f) Involvement of other key sectors including health care, the business community and social services. These sectors are impacted by the health, economic and social costs of civil justice, and will benefit from changes which reduce cost.
 - g) Involvement of the public. Effective public involvement will ensure that reforms to the civil justice system achieve improvements which benefit users.

Conducting a review of existing research and literature is an important first step in assessing existing knowledge related to answering these questions. A literature review provides an overview of research that has already been conducted. An overview is gained of the questions other researchers are asking and the methodologies they have employed in seeking answers to those questions. This information provides perspective on the issues under review and is informative in designing further methodology useful to researching the costs of litigation.

3. THE SOCIAL COSTS OF NOT ACCESSING JUSTICE

While a lack of empirical knowledge is anticipated concerning the actual costs of *accessing* justice, there is substantial recent Canadian and international research on the social cost of *failing* to do so (Currie, 2006, 2007a, 2007b, 2009; Pleasence et al, 2007, 2008a, 2008b; Stratton & Anderson, 2008). This research primarily consists of periodically repeated cross-sectional international studies that consistently demonstrate that a failure to resolve legal problems results in the clustering of additional legal problems along with economic, health and other social costs.

Because of the clarity, consistency and on-going nature of this area of research it is already established as relevant to the questions posed above. It is not, therefore, included in the scope of this review.⁴ The researchers concerned have expressed interest in evidence-based research to find out the actual cost of accessing legal resolutions and are committed to collaborating on research to that end. Understanding costs of the legal process is essential to making comparisons among access to justice pathways and conducting associated cost-benefit analyses. Without these, sound economic judgments cannot be made concerning the degree of financial investment warranted to ensure that citizens can effectively resolve legal problems.

4. THE SCOPE AND APPROACH OF THIS REVIEW

The issue of ‘cost’ in accessing justice via lawyers and the court process has received considerable attention in policy reviews, the mass and justice media, and to some extent related academic journals. As our proposed research questions demonstrate there are also varying paths to justice, which may or may not include litigation. The current view is that high costs accrue when litigation is pursued. Therefore, this review focused primarily on that pathway.

Three broad search terms were initially employed to identify sources of potential interest: “the cost of litigation”; “litigation cost”; “legal cost.”

Literature was identified in the following ways:

⁴ Cohen (2000), concerned with cost-benefit analysis of criminal justice is included in this because it has direct relevance to methodology designed to estimate the social or external costs associated with justice programs and processes.

- a) Forum Clearinghouse entries were reviewed for relevant items;
- b) available journal databases in French and English were searched
- c) e-mail alerts were requested from the publishers of major academic journals in Canada, the US, Australia and the UK. (See appendix A for the List of Journals);
- d) the Forum Librarian monitored justice and mass media for articles concerning “cost of justice”;
- e) Forum justice community partners (Canadian and international) provided us with new reports of importance.

Via the above methods, 1500 journal publications, studies, reports, websites and media articles were identified as having potential relevance. A first level of review was then applied to distinguish sources that might be of importance for in-depth review. Many sources could be immediately determined as purely anecdotal, and these were eliminated. Abstracts and keyword descriptions identified 702 sources of possible value to this review.⁵

A second level of review was then applied to identify empirical studies, applicable quantitative research, evaluations and methodologies relative to studying the cost of justice. Eighty-six items promised at least some information that would address the research questions. Of these articles 27 were in French and the remainder were in English.

Of the 86 sources that were fully reviewed, many offered valuable theoretical insights, however only a few actually offered concrete examples of how and where costs accrued, or suggestions for developing a viable methodology for assessing the cost of justice.

4.1. Review of French Literature

The separately conducted review of French language literature underlined the trend to a theoretical rather than evidence-based focus on costs of justice issues. Appendix B provides an annotated list and detailed notes of this review.

The reviewer identified three key points to sum up the content of the French language sources:

Key-point #1: issues surrounding costs of justice are often framed in terms of access to justice, fairness, equality and efficiency. Efficiency and costs issues are rarely seen as ends in themselves but rather as instruments in the service of less quantifiable values.

⁵ Only sources directly cited are referenced at the end of this review. Annotations are provided for sources that are critically reviewed. The bibliographic resource created as background to the review includes many more sources, annotations and/or summaries.

Key-point #2: *when discussing costs, legal experts and researchers tend to contrast the English and the American models, where the costs are differently assumed by the losing party. The underlying issue here is to determine which system is more efficient or fair, and which assures the best access to justice. This is consistent with the first observation, in key-point #1.*

Key-point #3: *the role of the judge, in particular the level of control s/he has on the proceedings, his/her involvement in case management, are seen as positive factors in improving the justice system's efficiency and speediness. Reforms pushing towards a more active role of the judge (through changes in regulation but also through changes in culture) are advocated for other resources as well.*

4.2 Review of the English literature

The key points identified from the review of French language sources applied equally well to the content of the majority of the English language material. The detailed review and summary of English language literature of costs of justice, therefore concentrated on the relatively few sources discerned as of most valuable in developing a cost of civil justice.⁶ Primary sources are as follows:

- Six large-scale empirical inquiries into the costs of civil justice (Genn, 1996; Kakalik & Pace, 1986; Kritzer & Anderson, 1983; Trubek, Sarat, Felstiner, Kritzer & Grossman, 1983; Williams, Williams, Goldsmith & Browne, 1992; Worthington & Baker, 1993).
- Two reviews of previous research on costs of civil justice (Silver, 2007; Stipanowich, 2004).
- Three small-scale surveys of lawyers' fees and fee arrangements in Canada (Carabash, 2009; Harris, 2009; McMahan, 2008) that provided information on how much lawyers charge but not on how much it costs to resolve a dispute.
- Four sources providing information that can be used in designing an inquiry into costs (Barendrecht, Mulder, and Giesen, 2006; Gramatikov, 2007; Kritzer, 1984; Kritzer, 1987).
- Two reviews discussing cost-benefit research in criminal justice that offer methodological insights of potential value (Cohen, 2000; Swaray, Bowles & Pradiptyo, 2005).

⁶ The Reference Section of this Review includes annotations summarizing the key articles that inform the subsequent discussion. Appendix C provides a summary of additional key points related to costs that were noted by the reviewer.

5. DISCUSSION OF RELEVANT LITERATURE

This discussion is divided into five sections organized by the following questions raised within the relevant literature:

- How much does litigation cost?
- How much does litigation cost in relation to how much it pays?
- What factors influence costs?
- Costs of court litigation versus alternative dispute resolution (ADR)?
- What methodological models are available for researching litigation costs?

The limitations of the reviewed literature are many:

- The reviewed studies vary in the ways that they approach, define and measure costs of civil justice (e.g., private vs. public costs, lawyers' production costs vs. litigants' expenses; ADR).
- The main research studies are gleaned from three countries (none of which are Canada)
- The data are between 15-30 years old – a very significant problem for understanding current relationship to costs in 2010.
- Published articles tend to provide only 'snippets' of the overall methodology and findings of the large-scale projects making it difficult to fully understand either the strengths or weaknesses in research that was, at the time, significant and groundbreaking.

5.1. "How much does litigation cost?"

The Civil Litigation Research Project (CLRP) was conducted in the US in the very early 1980s. A substantial amount of the useful literature identified was generated from analyses of data from that project (Kritzer, 1984, 1987; Kritzer & Anderson, 1983; Trubek, et al 1983).⁷ Trubek et al. (1983) focused on what they called "the middle range" of civil disputes claiming that "the CLRP data represent the bulk of what is going on in the courts" with "middle range" civil disputes that mostly involve "routine legal business," such as standard tort and contract suits (p. 8).

The sample of 1,649 civil lawsuits was drawn from the records of state and federal courts on a random basis in five federal judicial districts of the USA. Disputes in which the initial claim was under \$1,000 were excluded (p.7). It is not clear what informed this decision or the assertion that this is the beginning of "middle range" litigation. On completion of the sampling, the researchers dropped several "megacases" (what constitutes a "megacase" was not defined, but presumably these were where claims were unusually high and would adversely affect calculations).

⁷ It should be noted that references contained within the reviewed articles on the CLRP indicate that even more detail on the study design is available in publications, which should probably be pursued in further developing the current project.

The data on costs were generated from telephone interviews with the attorneys who worked on the cases selected from the CLRP. Findings were that in 46% of the total number of lawsuits (comprising state and federal cases), legal fees were under \$1,000 (59 % of state lawsuits and 34 % of federal lawsuits). The researchers can justifiably claim that the original CLRP sample is representative of “what is going on in civil state and federal courts.” However, data or statistics that would reliably extend this claim to the selected sub-sample are not provided.

Trubek et al. (1983) do not report costs data in terms of median fees (the most typical fee) and mean fees (the average fee), but conclude that “legal fees in the world of ordinary litigation are modest” (p. 92).⁸

A decade later an Australian study (Worthington & Baker, 1993) also addressed the question “How much does litigation cost?” This study used a sample of finalized civil matters which were conducted in the District/County Court and the Supreme Court of New South Wales and Victoria. The courts provided the researchers with information on “firms currently listed as using the court.” The researchers then selected the 25 firms most frequently appearing for defendants and the 25 firms most frequently appearing for plaintiffs in each of the four participating courts. The 100 selected firms were contacted and asked to provide information on the 20 matters most recently completed and billed by that firm. The final sample comprised 259 cases (as only a fraction of lawyers agreed to participate).

Using the data provided by the participating lawyers, the researchers calculated the median and mean costs of litigation for plaintiffs and defendants. For plaintiffs the median legal fee was \$4,700 and the mean was \$7,500 in New South Wales. In Victoria the median was \$6,000 with a mean of \$10,650.

Defendants’ fees tended to be higher than those of plaintiffs. Defendants’ median fees in the two states were \$4,200, New South Wales and \$8,000 in Victoria. The defendants’ mean fees were \$9,000, New South Wales and \$11,450 Victoria. The researchers also analyzed data on disbursements. The findings on disbursements fell in the same pattern as the findings on legal fees (though the amounts were smaller).

The researchers present these numbers as benchmark data against which to assess developments in costs of civil litigation in state and district courts of New South Wales and Victoria. The strength of the study is that the costs were analyzed separately for plaintiffs and defendants resulting in an important finding that as far as legal fees are concerned, civil litigation is costlier for defendants than plaintiffs. The ability to generalize a sampling method based on the criterion of 25 “most active firms” might, however, be questioned.

⁸ Given the scope of the CLRP and the many related publications, these numbers are almost certainly available. It is difficult to know what meaning this would have today, but knowing what proportion of fees was considered reasonable for claims that parallel current small claims limits might be useful.

Trubek et al (1983) and Worthington & Baker (1993) were concerned exclusively with private costs of litigation, (i.e. how much it costs to litigants). Kakalik & Pace (1986), however, targeted the public costs of litigation along with private costs in a study conducted by the US Institute of Civil Justice that aimed to produce a nationwide picture of civil tort litigation. These researchers were interested in how much tort litigation costs courts, defendants, plaintiffs, and insurance companies nationwide. Not all of the statistical data necessary to calculate the national tort litigation bill was available, however, and the researchers resorted to estimations.

Kakalik & Pace (1986) produced estimates using two different methods. A top-down approach was used “starting with insurance industry aggregate data on direct losses and expenses paid in 1985, adding self-insurance, and then separating out payments for claims that were not lawsuits” (p. 3). The second estimate was made “from the bottom up, starting with data from surveys of individual tort lawsuits, appropriately adjusting the numbers to 1985, and then multiplying by the number of tort lawsuits terminated” (p. 3). Resulting calculations indicated that in 1985, the United States spent \$0.5 billion in court expenditures. Tort litigation defendants spent between \$8 and \$10 billion in total costs. Plaintiffs’ total costs were lower than those of defendants at between \$7 to \$8.7 billion. Costs were calculated as including: legal fees and related expenses; insurance company costs for processing claims in suit; the value of non-lawyer time and other expenses (some of these amounts were also estimated rather than actual figures).

As a ‘best’ estimate based on available data rather than hard statistics, the reliability of the findings must be considered with caution; however, in terms of the costs to defendants being greater than those for plaintiffs, these findings are consistent with the previously discussed Australian study by Worthington & Baker (1993). The calculation of court expenditure is also noteworthy. Although \$0.5 billion is a very significant public expenditure it accounts for only a small fraction of the costs to the private parties in tort litigation.

5.2. “How much does litigation cost in relation to how much it pays?”

Another way of asking about the costs of litigation is to conceptualize the process as a potential investment asking if it ‘pays off’ for the litigants. Trubek et al (1983) question the CLRP data in this way. The monetary costs, for both plaintiffs and defendants, were represented by three indicators: lawyers’ fees, expenses, and the value of the litigants’ time spent in litigation. Monetary benefits, for plaintiffs were represented by the gross amount recovered. For defendants, the monetary benefits were the difference between what was paid to the plaintiff compared to what might have been paid as estimated by the defendant’s lawyer. To measure the monetary “return” of litigation, the ratio of costs to benefits was calculated. The results on the “return” are reported in terms of prevalence of costs to benefits ratios greater than 1 (indicating the economic gain), rather than actual ratios of costs to benefits. Lawyers’ fees were used as the primary indicator of costs. The article did not report the magnitudes of cost to benefits ratios for litigants.

The analysis for plaintiffs showed that they secured net benefits in 89% of the cases. The analysis for defendants demonstrated that litigation paid off for around 24% of cases. Trubek et al (1983) provide an innovative method for measuring the economic return on defendants' litigation investment, however, because it is based on estimates it is clearly less reliable than the hard figures used to calculate plaintiffs' costs and benefits.

Also in the U.S. since 1985, Tilinghast-Towers Perrin (2003) have produced reports on tort costs (for insurance companies). These reports are socially controversial and are much-debated in the media. Academics such as Herbert Kritzer have also criticized the methods and lack of peer review.⁹ Concerns appear to primarily focus on the application of findings (how numbers are added, what is/is not counted) and extrapolations and assertions that stem from this. An historical comparison of costs in the U.S. has little value to a consideration of Canadian litigation costs, nevertheless some of the basic approaches to measurement (such as data sources and comparisons to GDP) may still have a contribution to make in developing new methodology to assess justice costs.

Worthington & Baker (1993) also included a cost-benefit analysis of litigation from a litigant's perspective. The researchers looked at legal costs in terms of lawyers' fees and disbursements incurred by plaintiffs and defendants and compared these to amounts recovered by plaintiffs. Findings reported plaintiffs' costs at just over a quarter of the amounts they recovered (mean of 29 %; median of 26 %). Another important finding was that litigants who recovered higher amounts of money also tended to incur higher costs. However, when proportions were calculated, the higher the amount recovered, the smaller the relative cost. These results are consistent with Trubek et al (1983) in terms of benefits to plaintiffs. It is however difficult to see how comparing defendants' costs to the amounts recovered by plaintiffs provides useful information about whether litigation "pays" for defendants.

Kakalik and Pace (1986) explored whether litigation pays off for plaintiffs. They estimated that in 1985, the value of compensation to plaintiffs nationwide was between \$21 to \$25 billion whereas plaintiffs' costs totalled between \$7 to \$8.7 billion (a costs to benefits ratio of approximately 30 %). This result is very close to those reported by Worthington & Baker (1993).

Findings from these three studies suggest that litigation pays off for plaintiffs and that costs can be viewed as a reasonable investment – at least in some types of cases.¹⁰ The picture regarding defendants is far less clear. It must also be noted, defendants are not the initiators of litigation. Once named in a suit they have no choice but to be involved. Their concern must be (as Trubek et al (1983) attempted to measure) with

⁹ See for example the Economic Policy Institute (2006) and American Association of Justice. http://www.epi.org/publications/entry/policy_ttp_response/ ; <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/5458.htm>

¹⁰ Qualitative data from the *Civil Justice System and the Public* project suggests that type of case is one of many factors influencing direct monetary and indirect costs (Stratton & Anderson, 2008). See also Section 5.3 of this review, "What influences costs?"

reducing inevitable costs. Thus, of interest would be if it is less costly to settle early rather than later (especially via court proceedings) against them. Based on the methodologies discussed above, it would seem that calculating cost-benefit ratios for defendants is far more challenging, however.

5.3. “What factors influence costs?”

Williams et al (1992) report on the same large-scale Australian Institute of Judicial Administration Research as Worthington and Baker (1993) focusing on factors that influenced costs. The study was designed to investigate the costs of the procedures available to resolve disputes within the broad range of \$20,000 to \$100,000. This amount was defined as “ordinary litigation” considered to “reflect the magnitude of many civil disputes in which ordinary citizens were involved, such as personal injury, disputes over goods and services, and building disputes” (p. 3).¹¹ The term “cost” was defined in a strict economist sense as “the value of resources used in the process of production” (p. 2)

In Australia, civil disputes in this range are dealt with by state intermediate courts, which the authors indicate had “been surprisingly neglected” by Australian and international researchers (p. 3). Cases were drawn from courts at this level but the research was concerned not with “the price paid by the client but only the cost to the solicitor of providing the service” (p. 2). Private costs of litigation are said to be “made up largely of legal professional expenses and various charges associated with the collection of evidence” (p. 3).

Official lists of 1990-completed state intermediate court cases were used to generate a list of law firms that dealt with court cases completed in 1990 in Victoria and Queensland. For this component of the project, the researchers analyzed this list in terms of the proportion of smaller (fewer than 5 practitioners) versus larger law firms (more than 5 practitioners). A stratified random sample of law firms was selected so that the proportions of smaller versus larger law firms reflected those proportions in the overall population. Selected firms were then contacted and asked to provide for analysis their 10 most recently completed cases. In this fashion, in each state, a sample of around 50 firms and 500 cases was obtained. The cases in the lists obtained from the court authorities in the two states were analyzed in terms of case categories and their proportions. Both Victoria and Queensland samples were found to be representative of the respective populations of these cases.

The key category used by the researchers to examine the costs of litigation was resources consumed during the litigation process. The resources were conceptualized as a combination of firm costs, disbursements, expert witnesses, and counsel. The data

¹¹ It is interesting to note that a decade earlier, Trubek et al (1983) defined “ordinary litigation” as anything over \$1,000. However, the earlier study was in the US. There is a difference in the values of the currency to be considered as well as the time lapse. Nevertheless, full details on methodologies and findings from these studies could be helpful in developing better current conceptualizations.

collected from the lawyers regarding firm costs were originally recorded in hours. The researchers then converted these data into monetary values using the information on remuneration levels provided by the lawyers themselves. In cases where this information was not provided the researchers used estimations. The total costs, per case, incurred by a law firm were obtained by adding firm costs, disbursements, expert witnesses, and counsel. The variables thought to be related to costs included the stage of disposition; experience of the firm (measured by the representations before the County Court); the length of the case; the party represented (plaintiff or defendant); and type/subtype of the case (e.g., a motor vehicle injury case as a subtype of a personal injury case).

Researchers analysed and reported results by categories of matters, providing a multitude of fine-grained results beyond the scope of this review to describe, but potentially worthy of further examination in developing methodological details for a future project. Major findings with regard to total costs were: 1) the stage of disposition was a significant determinant of total costs in Victoria, but not in Queensland and 2) plaintiff cases consumed more resources than defendants' cases across all categories of matters in Victoria and in personal injury matters in Queensland.

The finding that the state appears as a significant influence on costs is interesting and puzzling as the researchers could not identify why stage of disposition influences costs in Victoria, but not in Queensland.

The findings that plaintiffs' cases consume more resources (therefore cost more) than those of defendants also sits uneasily (but not impossibly) with the findings of other studies reviewed that benefit ratios for plaintiffs are much higher than those for defendants.

The article by Worthington & Baker (1993) reports on whether the stage of disposal and the duration of a case influenced the cost of litigation in legal fees and disbursements as incurred by litigants. The correlation analysis of the data showed that: 1) costs were lower for matters that reached settlement than for matters that went to verdict; and 2) costs were not related to the duration of matters.

It is intuitive that the stage of disposition should affect costs – it could be expected that it would be less costly to settle as reported by Williams et al.'s (1992) for Victoria (suggesting the anomaly lay with Queensland). However, it would also be intuitive to expect settlement versus verdict to correlate with duration, and it is therefore surprising that duration should have no effect on costs.¹²

A UK study (Genn, 1996) also inquired into factors influencing costs. The data for this research were provided by the Supreme Court Taxing Office (SCTO), which deals with

¹² These articles report on the same study but comparisons between Worthington & Baker (1993) and Williams et al. (1992) are difficult because the relationship between these two cost measures is unclear. Publications tend to yield a fragmented picture of methodology and a full understanding of the methods employed would be helpful.

cases heard in the High Court and the Court of Appeal. Cases are submitted by “losing parties (responsible for the costs of the winning party under the costs rules) who wish to challenge winning parties’ costs” (p. 2). The data used were limited to contested cases that proceeded to a hearing. Uncontested cases were not considered because these involve claims brought by lawyers seeking to have their bills paid.

The sample was constructed by “selecting every case adjudicated by the taxing office starting from March 1995 and working backwards until information was available for approximately 200 cases in 10 different categories of case type as follows: medical negligence, personal injury, professional negligence, official referees', breach of contract, judicial review, Chancery, Queen's Bench other, commercial, and bankruptcy/companies court” (Genn, 1996, p. 6).

The information on the cases provided by the SCTO was used to construct the following variables: costs (conceptualized as the litigation costs allowed by the SCTO rather than the costs claimed); value of claim (i.e. the amount recovered); weight of case (i.e. the complexity of a case assessed by the SCTO officer) ranging from category A, heaviest to category E, lightest; use of legal aid; stage of proceedings; means of concluding a case; and duration of case. Case type (comprising 10 different types of cases) was used as a nominal control variable.

Regression analysis was employed to find out which of the variables account for cost variations within a given case type. Factors that emerged as influences on costs were the complexity of a case (for all case types) and the total duration of a case (all case types, except medical negligence and judicial review).

The finding that case duration does influence cost contrasts with results reported by Worthington & Baker(1993) but is more in line with what might be expected. However, the relationship still does not appear straightforward, especially as medical negligence cases tend to be complex.

That understanding costs is very complicated is further indicated by other findings from Genn (1996) who reports that neither the stage reached in proceedings nor the method of case conclusion had a significant effect on cost in any of the 10 case types analyzed. Again, this result does not fit comfortably with those of Worthington & Baker (1993) where costs were found to be lower for matters reaching settlement rather than those that went to verdict.

As with all of the research discussed in this review, the data available to Genn (1996) had limitations. As Genn acknowledges, her data do not reflect the full picture of civil litigation as the taxed bills data represent a) the costs of the winning party only (to be paid by the losing party); b) have a higher value, and c) contain a higher proportion of very contentious cases which are associated with higher costs. The author expressed a concern that if uncontested civil litigation cases had been included in the study, the results could have been different.

Elements of the CLRP reported by Trubek et al (1983) are also relevant to the question of determinants of costs. The study explored what factors determine a lawyer's input of time in a case rather than lawyers' fees and other expenses. This study deliberately chose to take lawyers' time investment rather than legal charges believing it to be more useful to making comparisons across jurisdictions concerning the value of lawyer's effort. Cost of "legal production" was calculated by multiplying the number of hours by the lawyer's fee. A theoretical model was constructed and tested against the data to explain variation in lawyers' time investment. The model consisted of one dependant variable (lawyers' hours on a case) and 29 independent variables, grouped into five major factors for testing using regression analysis:

- a) characteristics of the "case" itself (stakes, complexity and duration);
- b) the procedural events which occur (e.g. discovery);
- c) characteristics of the participants (for litigants, individuals vs. organizations, and for lawyers, specialization, law school performance, amount of general experience, litigation experience, personal capacity, and craftsmanship);
- d) the goals of the litigants (for plaintiffs, to recover the most vs. "a fair amount" and for defendants, to pay the least vs. "a fair amount") and the goals of the lawyers (challenge, public service, professional visibility, making money, and service to a regular client);
- e) certain strategic choices made in case processing and management emanating from the court, state vs. federal, and emanating from the lawyer, i.e. standard operating procedures vs. plans vs. client control.

Results showed that the model worked differently for lawyers billing by the hour and those taking contingency cases. For lawyers billing by the hour the determinants of time spent on a case included: the number of events (the number of motions); the stakes (though to a smaller extent than the researchers had expected); and court type (lawyers spent more hours on federal cases compared to state cases). Contrary to the researchers' expectations, the time investment of hourly lawyers was not related to the duration of a case, or client control and participation in a case. For contingency lawyers, only case characteristics and events determined their input of hours. This latter finding is reasonable given that such cases are taken based on a prediction of success and receiving a percentage of costs that will be awarded.

Assuming that the time investment of lawyers billing by the hour is in fact proportional to what is charged, the findings from Trubek et al (1983) can be extrapolated to approximate legal fees (although somewhat low as expenses and other process charges would not be included). However, no inferences about non-hourly lawyers' fees can be made using the findings on their time investment. Once again, it is surprising that duration of case is apparently not related to other case characteristics, and is not an influence on costs.

Taken together, results from the major research studies reviewed are unclear and inconsistent. They do serve to underline the difficulty of obtaining suitable data, devising sufficiently robust measures of costs, and formulating appropriate analytic models. The

data from the CLRP data (utilized by Trubek et al, 1983 and Kritzer, 1984, 1986) is of particular interest in terms of providing guidance in developing methodology. Multiple regression is a complex statistical process. Sometimes a variable is so interrelated with others that it fails to show an independent affect, although it is a real world factor. This may well be what lies behind the puzzling results related to case duration.¹³ Regression modelling and analysis programs have developed considerably since 1983. It would be well worth taking a closer look at the models used in the CLRP.

5.4. Costs of court litigation versus Alternative Dispute Resolutions (ADR)

Studies that compare litigation in court to alternative dispute resolution (ADR) options contribute another body of literature on the costs of civil justice. There are a variety of ADR options, however, which complicates consistency and comparison of research findings. Options may include court-annexed mediation, private mediation, judicial dispute resolution, arbitration and other variations on these themes. Once again the CLRP data (Kritzer & Anderson, 1983) provide an important empirical study. Because of the variability and small scale of most research in this area, the other most valuable contributions are provided by previous meta-reviews by Stipanowich, 2004 and Silver, 2007.

Kritzer & Anderson (1983) compared the CLRP data from over 1,500 court cases with data on 147 ADR cases from the American Arbitration Association (AAA). The AAA was the only ADR organization whose cases covered all five judicial districts included in the CLRP. Cases included in this analysis involved “a monetary claim of at least \$1,000 or a significant nonmonetary issue” (p. 8). As the majority of AAA cases were either torts or contracts, the original pool of court cases was reduced to retain only those types of cases for matching purposes. The AAA cases were also matched with similar cases at state and federal court levels in each court judicial district.

The analysis controlled for the level of stakes (value of the case), with a four-category variable (under \$5K, \$5K – 10K, \$10K – 20K, and over \$20K).¹⁴ Costs varied greatly by state and federal court versus AAA cases, and also across different stake levels. For instance, the AAA was the least expensive option for small cases, but the most expensive option for large cases. Kritzer & Anderson concluded that overall “if anything, the AAA may be a little more expensive” (1983, p. 17).

¹³ Alternatively, a factor may have such an overriding effect on everything else it will ‘drive’ the model having such a high degree of predictive ability as to be rather unhelpful. An easily understood example of this is that previous educational attainment is the major predictor of future attainment. This would be expected and tells us nothing about the factors involved in the original attainment. We might expect duration of case to have a similar effect on legal costs, especially where a ‘billable hour’ is involved. That this does not appear to be the case is intriguing, both methodologically and in terms of legal process.

¹⁴ The authors do report the categories in this way. However, an earlier graph in the paper (and also Kritzer 1994) show that the variable was in fact discrete with the second components beginning at \$5001 and so on. Original data appears to have been collected by actual case amounts optimizing categorical options for subsequent analyses.

Results reported by Kritzer & Anderson (1983) on the costs of arbitration versus courts seem to be complicated and inconclusive. The article does not report the magnitude of differences between federal courts, state courts, and the AAA. Nor is any statistical significance documented. Discussion of what the findings might mean for litigants is not offered and the next step of analyzing the costs in relation to amounts recovered would be required before any conclusions on the relative cost effectiveness of court litigation vs. ADR could be drawn. Once again, however, the potential power of the CLRP data as a model for further research is evident.

Stipanowich (2004) and Silver (2007) offer quite comprehensive reviews of more current research on cost of ADR versus court resolutions, but add little clarity via their conclusions.

Stipanowich (2004) looks at the effect of federal and state court-annexed mediation on costs as incurred by disputants, concluding that mediation has a positive impact on costs along with other benefits such as settlement rate, overall satisfaction with the process or its results, perceptions of fairness, speed of resolution, continuing relations between family members or other participants, compliance, and collection of restitution in victim-offender scenarios (p. 861).

However, the examination of methodologies employed in the studies reviewed by Stipanowich (2004) leads to questions about conclusions on the cost effectiveness of “mediated” litigation in comparison to “unmediated” litigation. In most of the studies there appeared to be a mismatch between what the researchers wanted to know and who they actually included as respondents. In particular, the reviewed studies often intended to find out whether mediation offers cost savings to litigants, but only had information about whether lawyers perceived savings to their clients. In these studies, the empirical evidence therefore tells us more about lawyers’ perceptions of mediation than about the actual costs of ADR.

Silver’s (2007) overview of research on the cost effects of court-annexed mediation offers conclusions that are contrary to those of Stipanowich (2004), stating that empirical studies have uncovered no major effects of ADR on time and costs. In particular, Silver provides compelling citations from other researchers in the field:

Our past research at RAND, subsequently replicated by many other researchers, shows that a very popular form of court-annexed ADR – court-annexed arbitration – had little effect on time to disposition or costs [Hensler, 1995, cited in Silver, 2007, p. 35].

There is no conclusive evidence that [court-annexed arbitration] programs reduce either the private or social cost of disputing. [Bernstein, 1993 cited in Silver, 2007, p. 35].

The brief evaluations of other sources initially identified by this literature review concur with the above conclusions.

5.5 What methodological models are there for researching litigation costs?

As already noted, the Civil Litigation Research Project (CLRP) research was a foundational work which, despite its age, has a great deal to contribute to the development of a new large-scale study of civil justice costs.

Kritzer (1984) summarizes major findings and shares the experience of the CLRP team including the following methodological insights:

- “overcomplication” [in the choice and classification of organizations to study] should be avoided so that one does not have to simplify the design afterwards;
- a pilot study should be undertaken prior to the main study;
- lawyers are extremely cooperative (the CLRP response rate for lawyers was 83%);
- the organizational memory of the types of disputes that CLRP focused on (modest disputes) was short - “case files may be hard to find and even if they can be found, they may contain little information on the way the case was processed (they probably contain primarily factual information about the dispute)” (p. 34);
- individual disputants (who are one-shot players) are difficult to locate due to their geographical mobility;
- In questionnaires and in coding, the formal terminology of civil justice should be used very carefully as it can be a source of ambiguity in its interpretations. An example of avoiding ambiguity in a questionnaire is as follows: “...instead of asking about whether a ‘trial’ occurred, we could have asked whether a decision by a judge or other court officer served to resolve the major issue in a dispute” (p. 35).

These methodological comments are helpful to consider when beginning to design project methodology. The difficulty of obtaining suitable, robust data is clear from the preceding discussion and a pilot study is always advisable wherever possible. The other points are indicators of a need for careful consideration and debate. For example, Kritzer appears to define “overcomplication” of data as the inclusion of as many details on the object of observation as possible. Usually, when research is exploratory, this is advantageous as it allows the elimination or re-coding of broader categories later whereas missed details cannot be added in. While the point about care with legal language is well made, the example quoted appears to add rather than reduce possible ambiguity. It must also be pointed out that Worthington & Baker (1993) did not gain a high rate of participation from the lawyers they approached.

Other publications on the CLRP (such as Kritzer, 1987) do offer additional insights and a next step in developing methodology for a new study should involve gaining a more complete overall picture of the methodology employed by the CLRP. Similarly, a complete understanding of the methodology employed by Genn (1996) and in the study

from the Australian Institute of Judicial Administration would likely make useful contributions.

In addition, two other recent studies were reviewed as having potential to inform methodological approaches (Barendrecht, Mulder, and Giesen, 2006; Gramatikov, 2007).

Barendrecht et al (2006) report on research by the Study Group Access to Justice, an inter-disciplinary group of researchers affiliated with the University of Tilburg, in the Netherlands. The authors present a methodological framework for measuring the price and quality of access to justice, defined as “the methods by which individuals are able to get legal information and legal services and to resolve disputes” (p. 3). It is recommended that researchers assume the principle of the average, which in practice would mean adhering to cases “where the claimant encounters an average defendant in this type of situation, gets the help of an average lawyer, and sees his case dealt with by average judges, court administrators and other officials” (p. 10).

The authors make several other interesting differentiations. They suggest that both cooperative paths and non-cooperative paths (based on whether a defendant is cooperative or not) should be measured, anticipating an associated difference in costs. They further argue for differentiation among: 1) the disputants who incur real economic costs; 2) the neutrals (lawyers, judges, mediators) who pass their costs to the users of the system and/or the state; and 3) witnesses, members of the jury, pro bono lawyers, and volunteer mediators who can only recover part of their costs.

Barendrecht et al (2006) take the position that research on costs of access to justice should focus on disputants as the primary cost bearers, and especially on plaintiffs arguing that:

Compared to defendants’ costs, claimants’ costs are probably a more urgent problem Having been treated unfairly, they need to take action to induce others to compensate them, or to improve their position in any other way that is in accordance with their rights. If the paths they have access to are too burdensome, their rights will not be enforced. (p. 12)

Following from the above Barendrecht et al (2006) develop further details of their framework with the focus on the claimant.

The types of costs proposed to be measured include “out-of pocket expenses”, “time spent by claimant and other persons addressed by him”, “costs of delay”, and “emotional costs”. Another approach suggested by the authors is to categorize the costs by stages comprising a path to justice. The authors believe that it would be informative to compare the costs of access to justice incurred by a participant to his/her income.

The framework proposed by Barendrecht et al (2006) draws on ideas from earlier research reviewed here. For instance the proposed ‘principle of the average’ seems to

expand the “ordinary litigation” concept used by Trubek et al (1983) and Williams et al (1992). Given the measurement difficulties encountered by these earlier studies it is very difficult to see how the proposed ‘law of averages’ could be operationalized. What characterises an ‘average’ litigant, lawyer, case, judge etc.? Even if these could be defined, how would they be empirically measured? Equally difficult measurement issues attach to the proposed variable of “emotional costs” and the value of time spent in dispute resolution (which are conceptual as well as measurement minefields).

Another serious conceptual issue attaches to the argument to give preference/priority to plaintiff’s costs. An *a priori* assumption is made that claimants are always rational and reasonable whereas defendants have always done something to deserve the law suit. Of course, any lawyer or judge (or perusal of case decisions) would point out that this is not the case. Nevertheless, the article by Barendrecht et al (2006) raises points and suggestions worth considering in the development of methodology to measure civil justice costs.

Gramatikov (2007) is part of the Netherlands access to justice research group, but focuses on the challenges of measuring the cost and quality of access to justice. The Measuring Access to Justice (MA2J) project, which was still at the planning stage at the time of publication, focuses on costs (out of pocket expenses, the costs of time spent, costs of delay, and emotional costs), outcome quality and procedural quality in access to justice and is clearly intended to find ways to measure the conceptual ideas advanced in Barendrecht et al (2006).

The MA2J “aim[s] to build a measurement framework which is valid, reliable and efficient enough to allow implementation at global scale” (Gramatikov, 2007, p. 3). The aspects of such a measurement framework covered in the paper include approaches to the study of litigation (supply vs. demand), the choice of units of analysis and measurement, the choice of sources of data and data collection methods.

According to the author, the first decision is to choose between the supply and demand perspectives of justice. “The supply side research reveals in detail how the legal institutions practice and interpret the concept of access to justice but does not tell us what is the broader picture of access to justice” (p. 7). “On the demand side of the axis, access to justice is measured from the perspective of potential users of justice ... [which] tries to estimate the needs (demand) of the potential clients for dispute-resolution services.” In keeping with the arguments of Barendrecht et al (2006), the MA2J adopts the latter approach and takes a ‘path to justice’ approach defined as “the commonly used procedures through which users of the legal system proceed in order to obtain an outcome” (p. 12).

At this point any attempt to measure actual monetary costs appears to be abandoned. Gramatikov (2007) admits that demand-oriented studies of access to justice require the use of subjective data, that is, “information on the perceptions, preferences and values” as these are expressed by users or potential users (p. 8). He argues that the use of objective data (e.g. laws, case law, official statistics) is of limited value to projects such

as the MA2J. In the same line, official statistics (e.g., court records) are not useful in identifying the population of interest since the population of interest for the MA2J is potential users of justice along with actual users, whereas the court records would not have information on potential users. Gramatikov reasons that “even if there is comprehensive data to make inferences on monetary expressed costs, only the user will know the non-monetary costs. “The same is valid for the perceived quality of outcomes and procedures” (p. 15). This point might seem more compelling if the “comprehensive data to make inferences on monetary expressed costs” were in fact available!

Despite this divergence from a framework that originally intended to measure “price and quality” (Barendrecht et al 2006), some conceptualizations around “path to justice” have possible utility in developing actual costs methodology that follows a pathway approach. For example, Gramatikov (2007) emphasizes the importance of defining the beginning and the end of a ‘path to justice’ with the potential starting point variably being “when the legal need emerges, when the person decides to take action, when information to resolve the problem is sought, when the professional is contacted for advice or when action to resolve the problem is taken” (p. 14). As to the end of a path to justice, one could conceptualize it as “any final outcome on the merits that results from any procedure or the moment when a person decides to give up the issue” (p. 14). The unit of measurement adopted for the MA2J is “natural persons” (anyone who might potentially have a legal problem) rather than “legal persons” (who are somehow already involved in the legal process). This approach is compatible with the research on the social costs of not accessing justice mentioned briefly in Section 2 of this review. Therefore, if it were possible to design a costs project that followed this pathway (or some part of it) it would potentially allow some very useful comparisons. Many of the methodological considerations discussed by Gramatikov (2007) might also become relevant to measurements of monetary cost.

There is a further prospective problem of conceptualization, however. A “path to justice” suggests the idea of an alternative, or a route, e.g. litigation vs. arbitration vs. informal negotiation, etc. and how people with legal problems find their way into and through these alternatives (Genn, 1999) This is in keeping with a study that wishes to compile and compare the comparative costs of those options. Gramatikov’s (2007) definition of a path to justice could be interpreted as in keeping with this: “the commonly used procedures through which users of the legal system proceed in order to obtain an outcome” (p. 12). However, the application is ambiguous and at times Gramatikov appears to conceptualize a path to justice as a specific type of problem (e.g. divorce, consumer problem and employee dismissal) that can lead to a dispute. Other pathway research refers to these as areas/types of legal problems, which may follow the same or different pathway options (Genn, 1999). It must be remembered, however, that this article was reporting on the MA2J while it was still being developed. More recent reports on this work would be useful.

Although the focus of this review was on costs of civil justice, some sources concerned with criminal justice were brought to the attention of the reviewers.¹⁵ These resources (Swaray, Bowles & Pradiptyo, 2005; Cohen, 2000) identify an equal amount of data and measurement challenges related to research on the costs of criminal justice. Canadian reviewers Swaray et al (2005) state:

Public policy makers and practitioners have become increasingly reliant on economic analysis to provide valuable insights into decision making. However, answers from economic analyses are only as good as the quality of the analyses themselves ... a literature review of the application of economic analysis to criminal justice interventions ... started with 748 relevant bibliographic records after two consecutive screenings of 9,919 records. Ten studies, out of a total of 154 studies reviewed, were judged to encapsulate rigorous applications of economic analysis to criminal justice interventions. These findings reveal the general shortage of sound applications of economic analysis to criminal justice interventions.... 10 studies [were] selected. With very few exceptions, the [other] studies reviewed were based on less rigorous study designs.

Cohen (2000) is no less direct about the difficulties of measuring costs of criminal justice and is also concerned with the misapplication of methods and associated conclusions. As a methodological specialist in the field, he does, however, believe in the value of rigorous costs research to informing policy decisions. Although few variables can be directly applied to research on civil justice, Cohen provides a number of conceptual and measurement considerations of equal (sometimes potentially greater) relevance to designing costs-benefits methodology focused on access to justice. Useful conceptual distinctions are made between direct costs (of service delivery) and external costs (social considerations, imposed or associated costs such as loss of economic contribution, health care costs, etc). Very specific measurement advice is offered, but summed up as, “quantify as much as possible and ... identify and list those that cannot be quantified, along with a qualitative description of their relative severity and importance” (p.306).

6. CONCLUSIONS

The amount of literature devoted to discussions of costs of civil justice leaves no doubt that this is an issue of considerable interest and concern to the justice community, litigants and society at large. Examination of the content of this wide array of sources underlines, however, the current lack of systematic methodological approaches to empirical investigation of when, how and why costs accrue throughout the legal process.

The duration and scope of this review was necessarily limited but our partners and their associates (who now include many of the researchers involved in the major studies

¹⁵ We would like to thank Dr. Roy Suddaby of the School of Business, University of Alberta for directing us to these sources and for other input into the development of this review.

reviewed here) are assisting in the identification of useful studies, especially those of a recent nature.

As it stands, the most comprehensive research we have identified occurred between 1980-1996. While the methodology can offer insight and guidance, actual costs will only be useful when there are current figures against which to compare them. Even at that point this review has noted some substantial limitations in relation to the data and methodology from these previous studies –not the least of which is that none of the research is Canadian. The problems can be summarized as follows:

- ***The enormity of the task*** of tracking costs across all possible aspects of the litigation process. When the concept is access to justice broadened to look at all pathways, it is far beyond the ability of any one study to achieve.
- ***Inadequacy of available data***. Obtaining consistent, reliable data for any aspect of the litigation process appeared to be challenging for all of the reviewed researchers. The US CLRP stands out as having the most robust data among the studies identified. Unfortunately, this standard of data are not currently collected in Canada. Any current project will be forced to incorporate estimates and other innovations with the many attached limitations to those approaches.
- ***Lack of generalizability***. Available examples of research are gleaned from several countries, and multiple jurisdictions within these. They span more than a decade and are mostly too old to have monetary relevance in 2010. There are contradictory findings among (and sometimes within) the reviewed studies.
- ***Validity issues***. Inevitably the data problems and inconsistent findings point to validity problems. Difficulty with data availability forced less than optimum decisions concerning the types of cases included or excluded and the participants involved. These drawbacks alone lead to serious measurement issues, which were at times also compounded by questionable conceptualizations.

The inevitable conclusion is that there is currently no methodological models for systematic measurement of Canadian costs of access to justice. Such international research as is available offers some help in beginning to develop designs and measurements, but is dated and may have limited applicability in a Canadian context. More recent Canadian and US research on costs for criminal justice may provide methodological ideas, but is encountering similar data and measurement challenges. Renewed international interest in finding better ways to assess and understand access to justice costs is beginning to produce in-depth reviews of past research, documentation of available data and critical assessments of research methodologies.

To move costs of justice research forward it will be necessary to develop innovative models that measure discrete paths to justice options and begin to build the capacity to compare costs. A broad, interdisciplinary, international collaboration that

unites technical research expertise with justice system knowledge in identifying viable and shared concepts will be important to success. Fortunately there is much national and international interest in advancing this area of research. During the period in which this review was conducted, the Forum was able to develop project partners, which now include some of the key researchers from the major studies covered in this review. This partnership will work to address the glaring need for empirical data on civil justice in the Canadian context.

To begin we propose the development of the following:

- a practical business model for a new way of practicing law which ensures that the cost of legal services are proportionate to the case;
- a model that follows the costs of litigation through the court process;
- a model that tracks private Bar costs/charges for legal matters resolved outside of formal justice system processes;
- a model that tracks cost for an ADR approach (mediation, collaborative law).

References

Annotations are provided for the sources that are discussed as part of the critical literature review.

Barendrecht, M, Mulder, J. and Giesen, I. (2006). *How to measure the price and quality of access to justice?* Posted to the Social Science Research Network (SSRN). <http://ssrn.com/abstract=949209>

The authors from the Study Group Access to Justice, Netherlands, present a methodological framework to measure the “price and quality” of accessing justice. Access to justice is defined broadly as “methods by which individuals are able to get legal information and legal services and to resolve disputes” (p.3).

Carabash, M. (2009). *Is time running out on the billable hour?* Toronto: Dynamic Lawyers. http://www.dynamiclawyers.com/files/Is_Time_Running_Out_on_the_Billable_Hour.pdf

This article reports the results of a survey of 500 solo/small firm Toronto lawyers with regard to their use of the billable hour as a valuation method. The survey was conducted by Michael Carabash, an individual practicing lawyer who is the founder/president of a website that offers free legal consultations (www.DynamicLawyers.com). The specific questions addressed by the survey include: 1) How prevalent is the billable hour?; 2) What was the average hourly rate?; 3) How does that rate change based on experience and primary legal area practiced?; 4) What was their average initial consultation fee?; 5) How many provided a free initial consultation in some form?; 6) What was the average legal fee for certain basic services?; 7) What alternatives to hourly billing do they offer?

Civil Justice Review Task Force (1995). *Ontario civil justice review first report.* Toronto: Ontario Ministry of the Attorney General. <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/overview.asp>

Cohen, M. (2000). Measuring the costs and benefits of crime and justice. *Measurement and Analysis of Crime and Justice*, 4, 263-315. http://www.ncjrs.gov/criminal_justice2000/vol_4/04f.pdf

Although focused on criminal justice, this article provides a helpful overview of the many unresolved theory and application issues concerning measurement of justice cost-benefits. Very accessible and providing pertinent examples and suggestions.

Currie, A. (2006). A national survey of the civil justice problems of low- and moderate-income Canadians: incidence and patterns. *International Journal of the Legal Profession*, 13 (3), 217-242.

Currie, A. (2007a). *The legal problems of everyday life: The nature, extent and consequences of justiciable problems experienced by Canadians.* Ottawa: Department of Justice Canada. http://www.justice.gc.ca/eng/pi/rs/rep-rap/2007/rr07_la1-rr07_a1/rr07_la1.pdf

Currie, A. (2007b). Civil Justice problems and the disability and health status of Canadians. *Journal of Law and Social Policy*, 21, 31-38.

Currie, A. (2009). The legal problems of everyday life. In R. L. Sandefur (Ed.), *Sociology of Crime, Law and Deviance, Volume 12*, 1-41. Bingley, UK: Emerald.

Genn, H. (1999). *Paths to justice: What people think about going to law*. Oxford: Hart Publishing.

Genn, H. (1996). Survey of litigation costs. In *Access to Justice: Research Conducted for the Final Report to the Lord Chancellor, July 1996*. London: Woolf Inquiry.

The study is a survey of the costs and duration of High Court [civil] litigation in the UK. It is part of Lord Chancellor's inquiry into access to civil justice in the UK launched in 1995 (the Woolf Report). Apart from costs, the study presents data pertaining to interlocutory activity, case duration and delay. With regard to costs, the study had a two-fold focus: the description of costs, and the identification of predictors of costs. The data for the study were provided by the Supreme Court Taxing Office (SCTO), which deals with cases heard in the High Court and the Court of Appeal submitted by losing parties responsible for and wishing to challenge the costs of the winning party.

Gramatikov, M. (2007). Methodological challenges in measuring cost and quality of access to justice. *TISCO Working Paper Series on Civil Law and Conflict Resolution Systems No. 002/2008*, Published by Social Science Research Network. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099392

This paper follows Barendrecht et al (2006). This Netherlands group, "aim to build a measurement framework which is valid, reliable and efficient enough to allow implementation at a global scale" (p.3). This paper considers some of the potentials and challenges in such a design and associated measurements. These reflections are useful to methodological development but fall well short of the goal of a globally applicable model. A 'path to justice' approach is taken which proposes to follow the user through commonly used procedures to obtain an outcome. Attempts to measure actual monetary costs is abandoned in favour of "perceptions, preferences, and values" as expressed by users and potential users (p.8).

Hadfield, G. (2009). Higher demand, lower supply? A comparative assessment of the legal resource landscape for ordinary Americans. Unpublished Manuscript, University of Southern California.

Harris, K. (2009). The going rate. *Canadian Lawyer*, 33(6), 32-39. <http://74.125.47.132/search?q=cache:A38Kqpt97nYJ:www.canadianlawyermag.com/The-going-rate-2009.htm>

The second of two online surveys with Canadian lawyers (the other is McMahon, 2008). Respondents were asked about their "average fee", "minimum fee", and "a maximum fee" for over 25 legal matters in various areas of law (namely civil litigation, corporate, criminal,

family, immigration, intellectual property, real estate, and wills and estates), and about their hourly rate.

Jackson, R. Lord Justice (2009). *Review of civil litigation costs: Preliminary report*. London: Judiciary of England and Wales.
http://www.judiciary.gov.uk/about_judiciary/cost-review/index.htm

A report on the development of a fundamental review of the rules and principles governing the costs of civil litigation in the UK led by Lord Justice Jackson. The report was found to contain only raw data on cost awards.

Kakalik, J. & Nicholas M. Pace, N. (1986). *Costs and compensation paid in tort litigation*. Santa Monica: The Rand Corporation.

The study was executed by the Institute of Civil Justice, established in 1979 within the RAND corporation with the mandate to perform "independent, objective policy analysis and research on the American Civil Justice System" (Kakalik & Pace, 1986, p. i.). RAND is "a private, nonprofit institution incorporated in 1948, which engages in non-partisan research and analysis on problems of national security and the public welfare" (Kakalik & Pace, 1986, p. i.). The researchers used data from insurance companies and from courts to estimate the nationwide costs involved in tort litigation in the US which include plaintiffs' costs, defendants' costs, plaintiffs' compensation, and court expenditure.

J.S. Kakalik & A.E. Robyn. (1982), *Costs of the civil justice system: Court expenditures for various types of civil cases*, R-2985-ICJ pg iii. Santa Monica: Rand Institute for Civil Justice.

Undertaken by the RAND corporation this study draws on four sources of data: the University of Wisconsin Civil Litigation Research Project, state and federal court case filings, the AIRAC Automobile Accident Study, and insurance industry data to answer the following questions:

- *What was the total expenditure nationwide for tort litigation terminated in state and federal courts of general jurisdiction in 1985?*
- *How much of the total was spent for the various costs of the tort litigation system: plaintiffs' and defendants' legal fees and other litigation expenses, the value of litigants' time spent on the lawsuits, the value of time spent by insurance personnel, and the costs of operating the courts?*
- *How much of the total was net compensation to plaintiffs?*
- *How do litigation costs and compensation paid differ for torts involving motor vehicles and for all other torts?*
- *How fast is the tort system growing?*

Kritzer, H. & Anderson, J. (1983). The arbitration alternative: A comparative analysis of case processing time, disposition mode, and cost in the American Arbitration Association and the courts. *The Justice System Journal*, 8(6), 6-19.

The purpose of the study was to compare civil litigation in state and federal courts to arbitration (provided at the American Arbitration Association) with regard to pace of case processing, mode of termination, and cost. The data for the study were collected within the

Civil Litigation Research Project (CLRP). The data on court cases (over 1,500 cases) were obtained from federal and state courts in five judicial districts of the USA. The data on alternative dispute resolution were limited to the activity of the American Arbitration Association in those five judicial districts.

Kritzer, H. (1984). The civil litigation research project: Lessons for studying the civil justice system. In Alan Gelfand (Ed.), *Proceedings of the second workshop on law and justice statistics* (pp. 30-36). Washington: U.S. Department of Justice, Bureau of Justice Statistics.

Major findings of the Civil Litigation Research Project (CLRP) pertaining to the courts are summarized. Methodological insights and suggestions for further research are provided.

Kritzer, H. (1987). Fee arrangements and negotiation. *Law and Society Review*, 21(2), 341-348.

Based on the Civil Litigation Research Project (CLRP), this article reports on the relationship between lawyers' fee arrangements and their negotiation efforts in civil litigation. As such,

McMahon, K. (2008). The going rate. *Canadian Lawyer*, 32(7), 38-45.

<http://74.125.47.132/search?q=cache:a18tvyQKU8wJ:www.canadianlawyermag.com/The-going+rate.html>

The first of two online surveys with Canadian lawyers (the other is Harris, 2008). Respondents were asked about their "average fee", "minimum fee", and "a maximum fee" for over 25 legal matters in various areas of law (namely civil litigation, corporate, criminal, family, immigration, intellectual property, real estate, and wills and estates), and about their hourly rate.

Pleasence, P., Balmer, N.J., Buck, A., Smith, M., & Patel, A. (2007). "Mounting problems: Further evidence of the social, economic and health consequences of civil justice problems." In Pleasence, P., Buck, A., & Balmer, N. (Eds.), *Transforming lives: Law and social process* (pp. 67-92). London: Legal Services Commission

Pleasence, P., Balmer, N., & Buck, A. (2008a). The health cost of civil-law problems: Further evidence of links between civil-law problems and morbidity, and the consequential use of health services. *Journal of Empirical Legal Studies*, 5, 351-373.

Pleasence, P., Balmer, N.J., Tam, T., Buck, A., Smith, M. and Patel, A. (2008b) *Civil justice in England and Wales: Report of the 2007 English and Welsh civil and social justice survey*. Research Paper No. 22. London: Legal Services Commission.

Swaray, R. Bowles, R. & Pradiptyo, R. (2005). The application of economic analysis to criminal justice interventions: A review of the literature. *Criminal Justice Policy Review*, 16(2), 141-163.

Silver, C. (2007). *Does civil justice cost too much?* Public Law and Legal Theory Research paper No. 037, University of Texas School of Law. Published by Social Science Research Network. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=314964

Silver discusses empirical studies on civil discovery, tort litigation, and ADR in the process of arguing that civil court procedures are adequate and not accountable for the allegedly high costs of civil litigation.

Stipanowich, T. (2004). ADR and the “vanishing trial”: The growth and impact of “alternative dispute resolution”. *Journal of Empirical Legal Studies* 1(3), 843–912.

A review of studies on ADR in federal and state U.S. courts in the business sector. An inclusive view of ADR is taken. Court-annexed and private forms of ADR are considered along with tribunal arbitration, corporate conflict management and online dispute resolution (ODR).

Stratton, M., & Anderson, T. (2008). *Social, economic and health problems associated with a lack of access to the courts*. Edmonton: Canadian Forum on Civil Justice. <http://cfcj-fcjc.org/docs/2008/cjsp-socialproblems-en.pdf>

Task Force on Systems of Civil Justice. (1996). *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*. Ottawa, CA: Canadian Bar Association. http://www.cba.org/cba/pubs/pdf/systemscivil_tfreport.pdf.

Tillinghast-Towers Perrin (2003). U.S. tort costs: 2003 update – trends and findings on the cost of the U.S. tort system. New York: Author.

The of a series of controversial, ongoing reports to the insurance industry on U.S. tort costs which are available from
http://www.towersperrin.com/tp/search?site=tp_towersperrincom&client=tp_fe_global&proxy_stylesheet=tp_fe_global&output=xml_no_dtd&ie=utf8&oe=utf8&q=torts

Trubek, D., Sarat A., Felstiner, W., Kritzer H., & Grossman, J. (1983). The cost of ordinary litigation. *UCLA Law Review*, Rev.31(72), 72-127. <http://users.polisci.wisc.edu/kritzer/research/CLRP/clrp.htm>

A report of some of the principal findings of the Civil Litigation Research Project (CLRP) conducted at the University of Wisconsin and the University of Southern California. The CLRP originated from the Federal Justice Research Program, US Department of Justice. The focus was on dispute processing behavior in the courts, in alternative dispute processing institutions, and in “bilateral-dispute processing”. The database of the project consisted of disputes drawn from five federal judicial districts of the US (Eastern Wisconsin, Eastern Pennsylvania, South Carolina, New Mexico, and Central California). The questions that the researchers aimed to answer in that study are: 1) “What determines the amount of

time and money invested in a case”; and 2) “How “productive” are the investments which clients make in litigation.

Williams, P., Williams, R., Goldsmith, A., & Browne, P. (1992). *The cost of civil litigation before intermediate courts in Australia*. Victoria, Australia: Australian Institute of Judicial Administration.

This study was conducted by the Australian Institute of Judicial Administration with the purpose of collecting empirical data with regard to “the accessibility, in real terms, i.e., the price” of litigating before intermediate courts in Australia, and developing recommendations for ways to reduce those costs. Data were collected from intermediate courts in the states of South Wales and Victoria, Australia. The study examines lawyers’ costs of litigation, where costs are understood as “the value of resources used in the process of production” (p. 2). The two key questions are: 1) What is the magnitude of litigation costs?; and 2) What determines those costs?

Worthington, D. and Baker, J. (1993). *The costs of civil litigation: Current charging practices*. Sydney, N.S.W.: Law Foundation of New South Wales on behalf of the Civil Justice Research Centre.

Also reporting on the study conducted by the Australian Institute of Judicial Administration (see Williams et al, 1992), this article is descriptive for the most part reporting on findings of mean and median costs of litigation in the intermediate courts in the states of South Wales and Victoria, Australia. Relationships between some variables are of interest.

Appendix A - List of Journals

Accord Canada Dispute Resolution Group
American Journal of Political Science
Australian Dispute Resolution Journal
Australian Economic Papers
Australian Institute of Judicial Administration
British Journal of Industrial Relations
Canadian Journal of Economics
Civil Justice Quarterly
Conflict Resolution Quarterly
Dispute Resolution Journal
Family Court Review
Fordham Law Review
Fulbright Reports on Cost of Litigation
Harvard Negotiation Law Review
International and Comparative Law Quarterly
International Political Sociology
Journal of Empirical Legal Studies
Journal of Law and Economics
Journal of Law And Society
Journal of Legal Ethics
Journal of Legal Medicine
Journal of Legal Studies Education
Journal of Public Administration Research and Theory
Law & Contemporary Problems
Law & Policy
Law & Society Review
Law and Social Inquiry
Law Commission of Canada
Legal Ethics
Mediation Quarterly
Negotiation Journal
Policy Study
Political Studies
RAND Journal of Economics
Regulation & Governance
Review of Law and Economics
Review of Policy Research
Statistica Neerlandica
The Berkeley Electronic Press
The Economic Journal
The Modern Law Review Limited
The Review of Litigation
The World Economy
World Trade Review
Revue Économique
Revue Internationale de Droit Éconoique
Revue Internationale de Droit Compare
Analyse économique du droit

**APPENDIX B
ANNOTATIONS AND SUMMARY DISCUSSION
FRENCH LANGUAGE LITERATURE**

A. French Language Resources on the Costs of Litigation

1. Internet sites/pages

1.1

<http://www.cyber-avocat.com/rubriques/tribunaux/honoraires.php>

Jurisdiction: FRANCE

Audience: GENERAL PUBLIC, POTENTIAL LITIGANTS

Source: LAWYERS (PRIVATE)

Type of document: Basic Web Page

This site, set up by a law firm, aims at giving information to potential clients on their rights and diverse legal issues, in particular on real estate/rentals and family law. The page selected explains the diverse types of cost involved in a litigation.

honoraires/ frais/ dépens

The page also explains the roles of diverse professionals involved in a litigation.

1.2

<http://www.admiroutes.asso.fr/action/theme/justice/procedur.htm>

Jurisdiction: FRANCE

Audience: GENERAL PUBLIC

Source: ASSOCIATIVE

Type of document: Basic Web Page

This site is set up by a collective concerned by the role Internet can play in administration. This particular page deals with the use of Internet in the justice system, and the benefits it may bring in terms of costs and time. Their diagnosis is that the French civil justice system fails to answer properly the needs of the litigants. For the author, the system is too slow, complex and costly in comparison to its European counterparts.

1.3

<http://europa.eu/scadplus/leg/fr/lvb/l32031.htm>

Jurisdiction: EU

Audience: POLICY

Source: EUROPEAN COMMISSION

Type of document: Recommendation of the Commission

This document deals with alternative dispute resolution in the domain of conflicts relating to consumption and European legislation in these matters. In the synthesis section of the recommendation however, barriers impeding access to justice for consumers are mentioned: slowness, costs and psychological obstacles. Delays and costs are disproportionate in comparison to the small amounts often involved in the conflicts.

http://ec.europa.eu/consumers/redress_cons/docs/index_fr.htm

similar document

1.4

http://www.klekoon.com/JOCE/JOCE_3_Detail.asp?ID_joce=697172

<http://www.welcomeurope.com/default.asp?id=1600&idtender=2706&MyPays=fr>

Jurisdiction: EU

Audience: ACADEMIC / RESEARCHERS

Source: EUROPEAN COMMISSION

Type of document: Call for research.

Title:

Study of the transparency of the costs of civil litigations in the European Unions.

This is a call for research published in 2007. I am guessing a research team obtained the funding on this project and is now pursuing it. However, I could not find any other information on this.

Cf. aussi:

http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm

1.5

<http://www.taximpact.org/survey/index.php?sid=61>

Jurisdiction: EU
Audience: COURT INTERPRETERS
Source: PRIVATE RESEARCH TEAM

Type of document: Questionnaire

This (obscure) document is a questionnaire about the costs of civil justice procedures in the European Union. I am guessing this is link to a broader research project but could not find further information or context.

1.6

<http://www.avocat.qc.ca/public/iimarc-public.html>

Jurisdiction: QUÉBEC
Audience: GENERAL PUBLIC, POTENTIAL LITIGANTS
Source: LAWYERS (PRIVATE)

Type of document: Authored Web Page
Author: Yves Le May
Title: "Alternative methods for dispute resolution"

This documents explains the diverse methods available to avoid litigation, methods of prevention and solutions to conflicts.
Useful for the French vocabulary used for Alternative Dispute Resolutions.

1.7

<http://www.attorneygeneral.jus.gov.on.ca/french/about/pubs/cjr/suppreport/default.asp>

Table of contents.

<http://www.attorneygeneral.jus.gov.on.ca/french/about/pubs/cjr/suppreport/ch8a.asp>

Chapter 8 on the costs of civil justice.

This document is available in English.

Jurisdiction: ONTARIO
Audience: GENERAL PUBLIC, GVT
Source: GVT

Type of document: Final Report
Author: Ministry of the Attorney General

1.8

<http://dossier.univ-st-etienne.fr/cercriid/www/rapports/cout-duree-proces.htm>

Jurisdiction: FRANCE
Audience: ACADEMIC
Source: ACADEMIC / GVT PUBLIC RESEARCH MISSION

Type of document: Summary of research project.
Full report is available through the institution.

ANCEL (P) et BEROUJON (C) (sous la direction de), Le coût de la durée du procès civil, Convention de recherche avec le Ministère de la justice GIP Droit et justice n° 96.05.080.00210.75.01, avec le concours de P. SOUSTELLE, P. SERVANT, C. GONON-MASLAK, M. COTTIN, O. GOUT - rapport intermédiaire rendu en juillet 1997; rapport final rendu en Février 1999

Title: Cost of the duration of civil litigation. Research Convention with the Ministry of Justice. Research Mission Law and Justice.

“GIP Droit et Justice” is a major research group in the area of justice (maybe the most important). It is far reaching, funded by the CNRS (the institution in charge of public research in France) and the Ministry of Justice.

Costs of justice appears to be one of their privileged area of research.

Homepage: <http://www.gip-recherche-justice.fr/>

See also 4.7 for academic articles referred to in the report.

1.9

http://larevue.hammonds.fr/Maitrise-du-temps-et-des-couts-dans-l-arbitrage_a107.html

Jurisdiction: FRANCE
Audience: POTENTIAL LITIGANTS
Source: LAWYERS (PRIVATE FIRM)

This document, written by Christian Hammonds, concerns time management and costs in arbitration. This is published in the journal of the firm Hammonds-Hausmann.

1.10

<http://calenda.revues.org/nouvelle7871.html>

Jurisdiction: FRANCE
Audience: ACADEMIC / RESEARCHERS
Source: ACADEMIC

Type of document: Call for research.

The research mission *Droit et Justice* issued a call for research in March 2007.
The topic: non-recourse to (avoidance of) the justice system.
Description of the research project on the web page.

1.11

<http://www.justice.gouv.qc.ca/francais/publications/rapports/crpc-rap2.htm>

Jurisdiction: QUÉBEC
Audience: GENERAL PUBLIC / GVT
Source: GVT

Author: Québec Justice, Civil Procedure Review Committee
Type of document: Report and associated documents

The Québec Justice website makes available to the public several documents on the reform of the civil procedure. This web page contains the table of contents.

In particular, Chapter 1, Observations, section 2 on the cost of justice as an obstacle to accessibility, section 3 on the complexity of the system as a deterrent effect, and section 5 on the delays.

The full report is available online in French as a pdf.
The summary of Report of the Civil Procedure Review Committee: A new judicial culture is available online in English as a pdf.

Note: Québec Justice also has on its website the list of judicial fees.
<http://www.justice.gouv.qc.ca/francais/publications/generale/tarifs.htm>
This list is useful for technical terminology in Canada.

Lists of publications for the following institutions/associations have been checked on their websites as well. Nothing relevant was found.

www.legiscompare.com

Barreau du Québec
<http://www.barreau.qc.ca/>

École Nationale d'Administration Publique
<http://www.enap.quebec.ca/>

McGill Law

<http://www.mcgill.ca/law/research/>

Société Québécoise d'information juridique

<http://www.soquij.qc.ca/>

Centre de recherche en droit public (Université de Montréal)

<http://www.crdp.umontreal.ca/fr/>

2. PDFs

2.1

http://www.hawkesburyscandal.ca/documents/20060105_lapresse_scj.pdf

document saved under CFCJ doc3.pdf

Jurisdiction: QUÉBEC

Audience: GENERAL PUBLIC

Source: NEWSPAPER

This document assembles all the articles from La Presse, which had a series of articles on the costs of justice in January 2006, issues dealt with include financial costs, delays, lack of confidence and possible solutions to those problems.

Related resources:

<http://ajbm.qc.ca/pub/divers/ajbm-lapresse-accessibilitejustice.pdf>

is a response to these reportages from La Presse by the Young Bar Association of Montreal / Association du Jeune Barreau de Montréal (AJBM).

http://www.droit-inc.com/tiki-read_article.php?articleId=674

article published on Nov 18 2007

« La justice à moindre coût » Justice at a lesser cost.

2.2

Full document

http://www.chairejlb.ca/pdf/tradition_civiliste.pdf

document saved under CFCJdoc1.pdf

Highlights

<http://www.institut-idef.org/LE-RAPPORT-DOING-BUSINESS-DE-LA.html>

Jurisdiction: MULTIPLES

Audience: JUSTICE PROFESSIONALS

Source: ASSOCIATIVE

Author: Collective, Association Henri Capitant des Amis de la Culture Juridique Française. Association Henri Capitant of the Friends of French Judicial Culture.

Title: Les Droits de la tradition civiliste en question.
Laws (justice systems) of the civil tradition in question.

This document is a response to the reports of the World Bank, Doing Business.
Check in particular section 5 p. 105. "C-Economy"

2.3

http://www.themis.umontreal.ca/pdf/mayrand/8e_mayrand.pdf

document saved under CDCJdoc5.pdf

Jurisdiction: CANADA

Audience: ACADEMIC / JUSTICE PROFESSIONALS

Source: PROFESIONAL

Author: L'honorable Louise Otis

Title: La transformation de notre rapport au droit par la médiation judiciaire

Originally a communication published then by the Edition Themis.

2.4

http://www.grdp.uqam.ca/pdf/colloque_programme_2004.pdf

document saved under CFCJdoc2.pdf

Jurisdiction: MULTIPLES

Audience: ACADEMIC / JUSTICE PROFESSIONALS

Source: ACADEMIC

Type of document: Schedule of a Conference. 2004

The presentations included in the 4th theme "Dire le droit: pour qui et à quel prix?" ("Saying" the law: for who and at what price?).

3. Books

3.1

Divorcer sans se ruiner : Coûts, procédures et procédés

de Séverine Andrieu (Auteur), Christiane Ivanetz (Auteur), Jean-Philippe Verstraete (Auteur), Arnaud Franel (Auteur)

Jurisdiction: FRANCE

Audience: GENERAL PUBLIC, POTENTIAL LITIGANTS

Source: SELF-HELP PUBLISHING

Reference found on Amazon.fr

On divorce in particular. Self-help guide to minimize the costs of litigation.

3.2

also listed as 4.5 in academic sources.

Modes alternatifs de résolution de conflits (1998)

Pelletier, J. École des Hautes Études Commerciales. (HEC) Montréal, Canada.

Jurisdiction: CANADA

Audience: ACADEMIC

Source: ACADEMIC

Abstract : Economic exchanges are the occasion for unavoidable conflicts that the business partners must resolve as rapidly and effectively as possible in order to safeguard their business relations. A conflict arising while a contract is executed does not mean necessarily the end of relationships: everything depends on the way it is approached. Methods for alternative dispute resolution (ADR) seem to be an interesting option in order to avoid the flaws characteristics to the classical judicial process: flexibility, rapidity, confidentiality, and reasonable costs are all attributes often associated with these methods.

3.3

<http://www.eyrolles.com/Droit/Livre/9782130566397/livre-economie-des-actions-collectives.php>

Economie des actions collectives (2008)

Bruno Deffains, Myriam Doriat-Duban , Eric Langlais

Jurisdiction: MULTIPLES

Audience: ACADEMIC / PROFESSIONAL

Source: ACADEMIC

This works studies the economic aspects of class action suits: foster access to justice and thus the reparation of victims even the weakest ones, allows for savings in terms of costs for litigants and the justice system, dissuades risky behaviours, modify the power relationships between consumers and producers...

Bruno Deffains seems to be a specialist of the economic aspects of justice.

Articles he authored are also mentioned. See 4.1 and 4.2.

He is also published in English.

3.4

Analyse économique du droit (2008)

de de Mackaay Ejan et Stéphane Rousseau (Auteur)

Jurisdiction: FRANCE

Audience: ACADEMIC / PROFESSIONAL

Source: ACADEMIC

Discipline: ECONOMY

Reference found on Amazon.fr

Description (translated from French): has the economic analysis of law something to bring to civil jurists? The answer proposed here is resolutely affirmative. The book shows that the economic analysis of law supports traditional knowledge of the civil jurist and allows to deepen this knowledge.

4. Academic sources

Full texts not available online and not read.

4.1

Revue Economique Vol. 58 2007/6

Économie des procédures judiciaires

Bruno Deffains Dominique Demougin Claude Fluet

Jurisdiction: FRANCE

Audience: ACADEMIC

Source: ACADEMIC / PEER-REVIEWED JOURNAL

Discipline: ECONOMY

Abstract:

We debate the contribution of the economic analysis of legal procedures, with a special regard for the debate between inquisitorial and accusatory systems and the judge's role in the course of the procedure. The article proposes a presentation of the literature and develops specific models concerning penal as well as civil procedures. In the two cases, the demonstration is brought that the judge's role is susceptible to be determinant in the research of the efficiency of the judicial system. The paper takes the opposite of numerous previous analyses that generally concludes to the superiority –in terms of economic efficiency– of the common law system characterized by a more “passive” role of the judge.

In particular : one section is devoted to social costs of judicial procedures.

There might also be some interesting references listed.

Journal available in print at the UofA libraries.

4.2

Revue Economique Vol 52 no 5 Sept 2001 pp, 949-974
Équilibre et régulation du marché de la justice: Délais versus prix
Bruno Deffains and Myriam Doriat Duban

Article available online and saved under CFCJdoc2.pdf

Jurisdiction: FRANCE
Audience: ACADEMIC
Source: ACADEMIC / PEER-REVIEWED JOURNAL
Discipline: ECONOMY

Abstract:

EQUILIBRIUM AND REGULATION OF JUSTICE MARKET: DELAYS VERSUS PRICES

Matching supply with demand in justice is made possible via the variations in delays between the moment the case enters into the phase of deliberation and the moment of the judgment. The question is to know whether this rationing by waiting periods is efficient. The answer is no because the increase in waiting lists shows that the parties must wait increasingly longer to obtain a verdict from the courts. Identifying the different factors determining the demand for justice enables us to envisage other ways of controlling the flow of litigation which may decrease the time necessary to obtain a judgment. This consists in acting upon the time period allocated to the exchange of documents and to the open debate so as to reduce the length of the trial. However, there is the risk that this reduction in the duration of proceedings may well increase the demand for justice, so that the deliberating period will lengthen whilst the supply of justice remains fixed. The second idea consists in increasing the supply of justice. The failure of policies aimed at controlling through time and the presence of costs in the demand for justice will lead us to explore methods of control via proceedings costs. Two possibilities can be imagined: increasing the cost of access to justice and a redistribution of trial costs between the parties. In both cases, the aim is to encourage the parties to prefer a settlement rather than a judgment.

Databases consulted

Repère	terms searched	
	couts + procédures	couts + justice (2)
	couts + litige	economie + justice
	economie + procédures	

4.3

« La justice coûte trop cher » par Vailles, Francis.
Affaires , Vol. 67, no 26, 15 juill. 1995 pp. 2-3

Jurisdiction: QUÉBEC
Audience: GENERAL PUBLIC / BUSINESS PROFESSIONALS
Source: MAGAZINE
Discipline: BUSINESS

Description: A few solutions to reduce the costs of the Québec judicial system; the abuses on the system which lead to an increase of the costs.
(translated from French)

4.4

« L'appareil judiciaire canadien » par Roberge, Robert.
Tendances Sociales Canadiennes, no 25, été 1992 pp. 2-6

Jurisdiction: CANADA
Audience: GENERAL PUBLIC
Source: MAGAZINE
Discipline: SOCIETY

Description: Structure of the judicial system; increase in the number of judges and Crown attorneys; raise of the costs of justice; public and private law; a few changes proposed by the reform of courts in Canada.
(translated from French)

CSA platform All social sciences databases.

Last Search Query: DE="systeme juridique" and DE="financement"

4.5 (From FRANCIS)

Jurisdiction: FRANCE
Audience: ACADEMIC / GVT
Source: GVT
Author: French Ministry of Justice 1995
Type of document: Official report

Title: Bilan des trois premières années d'application de la loi relative à l'aide juridique (loi n 91-650 du 10 juillet 1991, décret n 91-1266 du 19 décembre 1991) [Assessment of the three first years of the enforcement of juridical aid law]

From the abstract (translated from French)

Since one of the goals of this law was to foster high-quality representation (defence), the issue of lawyers and paralegals retributions, as well as the management by the Bars of the funds dedicated to juridical aid are considered. Finally, in order to control the evolution of the system, mechanisms for evaluation, costs control and fund allocations are described.

CSA platform All social sciences databases.
Last Search Query: AB=cost and litigation and france

4.6 (From FRANCIS)
See 3.2 in Books.

Other databases consulted:

Droit Francophone, might have some resources but is difficult to search through. A more systematic search might be required.

LEGIFRANCE provides a list of legal resources in French. A more systematic search might be required.

Other databases searched yielding no results:
Social Sciences and PAIS indexes.

4.7
Jurisdiction: FRANCE
Audience: ACADEMIC
Source : ACADEMIC

Pascal ANCEL, Marianne COTTIN : Le coût de la durée du procès pour les parties : les intérêts de retard dans le procès civil .- in Revue Internationale de Droit Économique : numéro spécial : De l'économie de la justice .- 1999/2, p. 239 à 252.

translation of title: "the cost of the length of trial for the parties: late interests in the civil trial"

special issue of Revue Internationale de Droit Economique: "the economy of justice"

Journal does not seem to be available at the UofA libraries.

4.8
Jurisdiction: FRANCE
Audience: ACADEMIC
Source : ACADEMIC

L'accès à la justice: la situation en France
Jules-Marc Baudel in Revue Internationale de Droit Comparé #2 (2006)

translation of the title: "access to justice: the situation in France."

Abstract not available.
Journal available in print at the UofA libraries.

B. Summary Discussion of French Language Resources

This summary presents the French language literature searched, retrieved and studied, on the costs of litigation. The summary of findings is organized according to the type of documents under study firstly and according to jurisdiction secondly.

The most useful documents to prepare a further study of the costs of litigation in Canada are, on one hand, reports (from government agencies or research teams on contract with government agencies) and, on the other hand, academic publications (articles and chapters in books). These two types of documents will be considered first. It will be important to distinguish as well between jurisdictions and to devote particular attention to comparative studies.

Media and various Internet resources will be discussed afterwards, in a specific section.

A. Academic resources:

At this stage of the literature search, it seems that academic resources relating to the cost of justice can be broadly classified in two main categories:

- first, specialized legal literature, dealing in particular with the diverse rules relating to the *attribution of (litigation) costs*, their rationales and their effects on the justice system;
- second, literature pertaining to a particular field of research: the ‘economy of justice,’ concerned on one hand, with the impact of justice systems on the economy and on the other hand, with the economic aspects of justice systems, courts and trials.

A1 ***Specialized literature on tariffs and attribution of costs in jurisprudence***

One document is exemplary here: “le sort des honoraires extrajudiciaires” by Adrian Popovici, published in *la Revue du Barreau* #62 in 2002.

This lengthy article (124 pages) deals with the *extra-judicial fees* in Québec jurisprudence, in particular, the author is critical of a particular trend which consists in granting extra-judicial fees to the winning party outside of *abuses of the process of the court*. This practice, according to the author, cannot be founded on legal principles but is based in equity, and, as such, denounces a flaw within the current system of the administration of justice. The article is organized in three sections. The first section explains the vocabulary linked to cost and fees and the rules applying to them. The second section studies recent judicial decisions in Québec and the way extra-judicial fees have been dealt with in these cases. The third section looks at alternative practices in English Canada, UK, USA and France.

In comparative discussions of cost, two models are often contrasted: the American one and the English one. The French system (and similarly, the Québec system) is considered as an intermediary model.

“The system of the French *New Code of Civil Procedure* has found a sort of *via media* with the article 700 which allows a trial to condemn the losing party to an extra amount of money, besides costs—of the type of a compensation: this is the condemnation to irrecoverable costs (or the French paradox)—a *via media* between the English system, on one hand, where the

distinction between judicial fees and extra-judicial fees does not exist (the loser being obliged to reimburse almost the full amount of lawyers fees) and the American system for which the lawyers fees are to the entire charge of each party to the trial.” (107)

Popovici is representative of the more generalized literature, in that he considers the cost of justice and their attribution as “an element of extreme importance” in the administration of justice. It is linked to issues of equity and access to justice, and to the fostering of a just society more generally: cost may prevent an action ever being brought, render a victory Pyrrhic, may prevent a meritorious appeal... Costs are always a factor in the risk of litigation and thus contribute to the place of justice in society. (108)

Key-point #1: *Issues surrounding costs of justice are often framed in terms of access to justice, fairness, equality and efficiency. Efficiency and costs issues are rarely seen as ends in themselves but rather as instruments in the service of less quantifiable values.*

A2 Comparative analysis / Theory

The economic analysis of justice systems studies the relationships between *juridical/judicial processes* and economic life. Such relationships must be separated into two categories according to the direction of the relationship studied:

1. the influence of juridical systems on economic life, and in particular economic development and growth;¹⁶
2. the costs (financial and others) of the justice system itself, its analysis in terms of efficiency; in other terms, the economic nature of the justice system (the way economy and economic-type of reasoning influence the justice system).

The two directions of the relationships are included in this area of research. However, authors tend to focus on one or the other. The second area of research, also referred to as “*économie des procédures judiciaires*” (*economics of legal procedures*), may be more relevant to the Forum research project.

Just as in the economic analysis of judicial systems, several models are contrasted, the reference there being the English model where the victorious party can recover almost all of his/her lawyer expenses on one side and the American model where the victorious party cannot even recover judicial fees (*honoraires judiciaires*) on the other side.

Bruno Deffains and his collaborators provide exemplary work, in this area for the literature in French. Works consulted include:

- Deffains, B. (2007/6) “introduction à l’analyse économique des systèmes juridiques” in *Revue Economique*, 58: 1149-1162. (Deffains 1)
- Deffains, B., Demougin D., & Fluet C. (2007/6) “économie des procédures judiciaires” in *Revue Economique*, 58: 1265-1290. (Deffains 2)
- Deffains, B. & Duban, Myriam Doriat (2001) in *Revue Economique*, 52(5): 949-974. (Deffains 3)
- Deffains, B. & Ferey, Samuel (2007) in *Droits*, 45: 223-254. (Deffains 4)

¹⁶ The famous reports of the World Bank, *Doing Business*, provide good examples of this perspective. An important topic of research for the ‘economists of justice’ is indeed the role of justice systems and institutions in development.

Their conclusions should be noted:

Conclusions regarding the discipline.

Deffains 1

- “The economy of law is characterized today by a certain methodological and theoretical pluralism, with for instance neo-institutional analyses and behavioural analyses (game theory).” The most notable trend is the apparition of a “macroeconomic” analysis of law. (1161)
- Macroeconomic analyses of law “contribute to new ideas in the domain of legal thinking” and “moreover, impact studies show why the rules do not lead to the expected result by highlighting (undesirable) effects.” (1161)

Conclusions on the regulation of the justice market through delays and costs.

Deffains 2

- under the French rule of condemnation to costs/dépens, an augmentation of the trial costs increases the probability of out of court settlements. (964)
- the probability of trial under the French rule is less likely than the probability of trial under the English rule, but is more likely than the probability of trial under the American rule.
- the regulation of the demand of justice by trial costs and delays seems complex to implement and presents considerable difficulties. (969)
- a combination of policies is seen as potentially more efficient, for instance, acting simultaneously on the supply of justice and on the trial costs. (969)
“The advantage of this combined action is thus to satisfy a higher demand for trials while reducing deliberation time and the number of cases on the waiting list.” (969)

Remark: What this combined action means is raising the costs of justice to compensate for the incentive created by a rise in the justice services offered and their speediness. This flaw is noted: “Raising the cost of access to justice would risk penalizing the poorest justice system users and would be contrary to the principle of equality before the law.” (958) This major issue is however dealt with unsatisfactorily, I think: “It is important to note that such a policy [raising costs of justice] preserves access to justice for citizens, because parties wishing to go to court, keep this possibility (including the poorest), because the increase of the trial costs will be partially compensated by a shortening of the delays between the moment judgment is ‘reserved’ and the final decision.” (958-959) This supposes that time and money are equivalent, and this leads to the contradictory conclusion that in order to have a better justice system more efficient and hence more accessible) we need to make it less accessible first.

- one must question the notion of delays perceived as negative. Cases, to be dealt with correctly, require preparation and study time. Reducing delays might thus increase the uncertainty of decisions and hence limit the recourse to conciliation and agreements.

Conclusions on the superiority—in terms of economic efficiency—of the Common Law system.

Deffains 3

- The role of the judge is decisive in the search for effectiveness in the judicial system. (from abstract)

- The article goes against previous analyses which generally conclude on the superiority of the Common Law system, where the judge is more passive. (from abstract)

Key-point #2: *when discussing costs, legal experts and researchers tend to contrast the English and the American model, where the costs are differently assumed by the losing party. The underlying issue here is to determine which system is more efficient or fairer, and which assures the best access to justice. This is consistent with the first observation in key-point #1.*

Key-point #3: *the role of the judge, in particular the level of control s/he has on the proceedings and his/her involvement in case management, are seen as positive factors in improving the justice system's efficiency and speediness. Reforms pushing towards a more active role of the judge (through changes in regulation but also through changes in culture) are advocated for in other resources as well.*

Discussion: The limits of such economic analysis should be underlined.

The authors in Deffains 2 note themselves that they have not considered sufficiently the impact of third parties, conciliators or mediators, while considering mediation and its diverting effect. This failure to consider these roles is indicative of the flaws in such analyses:

- a complete disregard for aspects of human psychology which are not predictable or rational,
- a schematization of processes at the aggregate level without questioning the relationship between macro and micro.

We can see that the authors are very careful not to bring in any other values in their models and studies: the goal for them is to study the justice system, purely in terms of efficiency. However, their circumstantial comments show how hard it is to hold such a position and avoid normative positions when discussing something as highly invested with morals and norms as the justice system. The very idea to approach justice in terms of economic efficiency *only* might, for some, mean the very negation of justice itself.

Other problems inherent to rational theory analyses should be mentioned:

- Never is it considered in those studies that plaintiffs may sue for other reasons than their (financial) interests. Yet, the stories provided in media articles seem to indicate that in many cases, the parties start a judicial procedure for symbolical or emotional reasons: proving publicly you're right or that you did nothing wrong, reputation, or on the contrary, malevolence and desire to hurt someone.
- Never is a distinction made between corporations as justice system users vs. relatively uninformed and resource-limited individual citizens.
- Finally, one factor common in rational choice theory, is not taken into account (it is mentioned but not included as a variable) – the propensity to risks, that is individuals' personal preferences for risk, what if the plaintiff and/or the defendant is a risk-taker or is safe-player? This obviously plays a role in deciding to sue, and afterwards arbitrating between full trial and ADR solutions. The only factors considered in this choice are uncertainty of decision and information of the parties.

Despite these limits, these articles remain useful and bring a fresh look at justice issues. In particular, they challenge common sense positions about what it means for justice to be

efficient; they suggest that low costs and reduced delays might not be always “good” and that policies aimed at increasing access to justice may be in the end be counter-productive.

B. Reports and large-scale studies

B1 Québec:

Two major reports are available for the jurisdiction of Québec, covering the provincial justice system and the federal courts.

The first report entitled “Rapport du Comité de Révision de la Procédure Civile” (Report of the Committee on the Reform of the Civil Procedure), was completed in 2001 and, as the title indicates, is part of a major reform project.

The mandate of the committee was dealing directly with costs issues:

“The committee of revision of civil procedure was set up by the Ministry of Justice, on June 4th, 1998. As its name indicates, its mandate was to proceed to the revision of the civil procedure and to propose measures facilitating “the implementation of a justice system more rapid and efficient, less stressful and less costly in time, energy, and money for the user as well as the system itself.” (1)

Many of the findings of the committee concern the cost of justice:

- the second finding, entitled cost of justice:
“To judicial costs, generally paid by the losing party, must be added extra-judicial costs which a party may have to incur when engaging a pursuit. The Committee underlines that important social and human costs, such as worry, uncertainty and anxiety can also arise from confrontation in court.” (2)
- the third finding, entitled complexity of procedures:
“According to the Committee, the multiplicity of rules as well as the technical language, hard to understand, used in this matter, contributes to give an image of the justice system as complex and hermetic.” (2)

Seven key-themes were identified by the Committee:

- a) the values of justice, overarching principles and general rules
- b) competence/powers and organization of courts
This section includes a discussion of conciliation and private mediation.
- c) introduction and development of the case
New, shortened, procedures are proposed.
- d) administration of proof
This section includes a discussion of expert fees and the treatment of witnesses.
- e) decision, costs and ways of contesting the decision
This section includes a discussion of *dépens* (retrievable costs)
- f) particular matters
Some of the issues included here are small claims, class actions, private international law.
- g) enforcement of decisions

The second report, commissioned by the Montreal Bar (Barreau de Montréal), partly in response to the reform of the civil justice system, is entitled:

“Les modifications requises aux régimes de l’attribution des coûts de litiges, des dommages exemplaires, de l’incitation aux règlements raisonnables et expéditifs, et de financement de litiges.”

(translated title: Required modifications to the attribution rules for litigation costs, exemplary damages, incitation to reasonable and rapid resolutions and litigation financing.)

This report is more targeted on the issue of costs than the one previously mentioned and for this reason, I anticipate, will be more useful for the Forum’s project.

Summary:

The key problem identified by the committee, as early as pp. 4-5 of the mandate description, is that of the ordinary rule for the attribution of litigation costs (règle ordinaire d’attribution des coûts des litiges) which leads to a considerable disadvantage for the deserving parties. Examples are mentioned where a successful plaintiff suffers considerable financial loss: the costs of litigation exceeding considerably the damages obtained.

A second related problem identified by the committee is that of a system not discouraging sufficiently superfluous or vexing procedures. Simultaneously, the present system is considered as discouraging public interest cases.

To sum up, for the committee, the negative consequences of high costs are denounced and justify the need for reform of the present system. The committee’s recommendations and the solutions envisioned are both of a judicial and legislative nature. (6)

These conclusions are organized in four headings and include:

1. attribution of litigation costs,
 - the adoption by the legislator and the courts of the ‘principe de la succombance’ (the losing party supports expenses)
 - the focus on proportionality and possible anticipation of costs
 - the inclusion of expert fees in the costs
2. broader application of the possibility of resorting to exemplary damages;
3. implementation of inciting mechanisms towards rapid and reasonable resolutions;
4. confirmation, clarification, and homogenization of rules allowing for the financing of deserving litigations.

Sections of potential interest for the Forum include (non-exhaustively):

- ch. III section 3B, on tariffs, judicial and extra-judicial fees of lawyers, special fees and other costs.
This section provides a typology of costs and fees (and is useful vocabulary-wise).
- ch. III section 3F, on expert fees, and the distinction between costs and damages
- ch. III section 4, on the costs situation in Québec, the ordinary regime and its exceptions
- ch. III section 5E, on litigation insurance
- ch. III section 6, explaining why the current system is unfair and inefficient, in particular the following points:
 - a system discouraging fair and rapid resolutions (G)
 - a system failing to discourage frivolous cases and procedures (H)
 - a system favoring wealthier parties and government (I)
 - a system contributing to rising costs of administration (L)
 - a system transferring costs to citizenry (M)

- a system reducing access to justice (N)
- a system hurting the good reputation of courts and lawyers (O)
- ch. III section 7, comparing the situation in Québec with that of other provinces
- ch. III section 8, proposing an international comparison
- ch. III sections 12 and 13 proposing judicial and legislative solutions
- ch. VI section 1 on the attribution of 'real' costs of litigation

B2 European Union

The main resource is a final report published in 2008 (almost 400 pages), the result of a research project commissioned by the European Commission. The title is (translated in English) "Study on the Transparency of Costs of Civil Legal Procedures in the European Union."¹⁷

I am including here a quick summary of selected sections of the report. However, it should be noted that the full report seems relevant and deserves complete reading and study. [See detailed table of contents]

- the general presentation of the project
 - Costs as an issue of access to justice (considered as a fundamental right in the European Union)
 - Problems of trans-border litigation and its dissuasive costs
 - Not only costs themselves (financial and in terms of time) but also their transparency is assessed
 - Dissuasion of litigation and dissuasion of commercial activity abroad
 - More general goal of improving the efficiency of the judicial system (while the number of cases is growing)
- the introduction of the synthesis part

Five types of costs are identified and briefly discussed:

1. Frais de procédures / court costs/costs of procedures
2. Honoraires d'avocats / Lawyers' costs
3. Frais d'huissier ou frais d'exécution du jugement / Bailiff's costs or costs of enforcement of a judgement.
4. Frais d'expertise / Expert fees
5. Frais de traduction / Translation fees-costs

Detailed analysis for each type of costs/fees follows (pp. 61-296).

Evaluation:

This synthesis shows the limits of comparison at the European level. As noted by the authors themselves, the typology of costs, the diverse professions involved, the regulation of fees and procedures vary greatly from one country to the other, making it difficult to identify any general trend or conclusion.

¹⁷ It is mentioned in the report that an English version exists however it could not be found online. An e-mail request has been sent, however we have not received a reply.

This report contains information about each EU country, an exhaustive estimated list of costs and significant analysis. It may have value if estimates are used in developing a methodological model, or if it can provide a framework for collecting actual costs.

Conclusions on this section:

For the three reports under study, issues surrounding the costs of justice are of utmost importance, because they are key-elements to a fair and efficient judicial system.

Key-point #1: *Issues surrounding costs of justice are often framed in terms of access to justice, fairness, equality and efficiency. Efficiency and costs issues are rarely seen as ends in themselves but rather as instruments in the service of less quantifiable values.*

C. Media

The daily press, under the example of *La Presse*'s special series on the costs of justice, focuses on the public perceptions of the justice system and isolated cases seen as exemplary of dysfunctions in the justice system. Almost half the articles are devoted to the presentation of individual stories of justice users and justice professionals:

- in "An Exhausted Millionaire" the case of Dolia Ivanov, a relatively wealthy defender in a lengthy case (more than 15-years long) and victim of malevolence from her lawyer and of *procedural abuse*. The case was relating to a failed business partnership in the field of construction. Her fortune vanished in fees and other costs although she was successful in the lower courts but the appeal is still not concluded. The underlying idea here is that justice is even unreasonably costly for wealthy citizens.
- in "More than 1 million in *procedural fees*, even before the trial started" the story of the Nadeau sisters, plaintiffs in an inheritance case, is told. What they foresaw as a \$20 000 case is already more than \$1 million case, and the hearings have not even started. The family has used all of their savings, jeopardizing their retirement, and has contracted very heavy debts. The underlying idea here is that citizens are not armed equally when facing companies and that companies/corporation have an unacceptable advantage in the justice system.
- in "Saved by good Samaritans" we read about François Héту's story, suing the municipality of Notre Dame de Lourdes for illegal discharge. He ended winning his case and got attributed "provision pour frais" (advance on fees) by the court of appeal before the resolution of the case. This story aims at introducing possible court practices, involving their competence in 'equity' which aims at re-establishing a form of evenness in financial means.
- "Un juriste gratuit, ça existe" explains how Mrs. Finney has been helped by Alexander De Zordo, a lawyer in a big Montreal law firm, for free.
This story explains and gives an example of pro bono work.

Other articles deal with related issues but do not focus on one particular individual story:

"Près de la moitié des Québécois ne font pas confiance aux tribunaux"

- public perception of justice, trust, access to justice

"Quand une cause traîne, tu y penses tous les jours"

- delays, slowness of the justice system (disadvantages), psychological cost

"On peut aussi aller trop vite"

- delays, slowness of the justice system (advantages)

"Le cri d'alarme des juristes"

- justice professionals (their concern for the state of the justice system), [raising] costs, [raising] delays, [raising] complexity,
 - dissuasion, [decreasing] number of cases,
 - companies (advantage over individual citizens)
- “Les avocats sont-ils trop gourmands?”
- lawyers’ fees, over-zealous lawyers, modes of billing and payment, procedural culture, (fee) abuses
- “Des maîtres économes”
- lawyers’ fees, lawyers paid only if their client wins
 - new technologies (as a way of saving time and thus lowering fees)
- “Qui faire payer?”
- attribution of costs, rules applying to ‘dépens’ [Note: the information does not seem very accurate here], dissuasion
- “Place à la conciliation”
- conciliation (led by the judge), success-story
- “Une seule journée pour effacer 15 ans de litige”
- conciliation (led by the judge), success-story
- “Des procès plus courts”
- Code of Civil Procedure, reform of; reform of civil justice, role of the judge (change), *gestion d’instance* (proceedings management)
- “La justice par la télé”
- consumer advocacy, consumer representation, tv shows.
- “Petit recours deviendra grand”
- class action.
- A key reference used in the articles by the journalist is the report by the Montréal Bar, already discussed in the previous section.

Evaluation:

Although some of the information presented seems inaccurate or unclear, interesting and contradictory positions on the cost of justice are presented. This special series is quite exhaustive, it seems, and covers many of the issues associated with the cost of justice. Therefore, I consider it a useful source to build a list of problems and potential solutions associated with the cost of justice.

The series also includes a list of websites and resources available to the population (for free or almost for free), which will help them in judicial matters.

The problems/issues/solutions pointed out by the journalists and their interviewees are listed below:

1. The distrust Quebecois have for the courts and the justice system in general. Costs and delays (as well as the complexity of the system) play an important role in this negative view of the justice system. Lawyers are a particular target: they are accused by many of unduly lengthening procedures, and their fees are seen as dissuasive, as even a winning party may find very little surplus once fees are paid.

This distrust is linked to high expectations (maybe unrealistic expectations) in the population, especially among less educated persons who seem to have a more moral conception of law and justice. (Pierre Noreau quoted by M.C. Malboeuf). According to the author, polls show similarly that immigrants, who tend to have lesser expectations from institutions, are usually more satisfied by the justice system.

2. Unreasonable delays are also identified as a major problem within the Québec justice system. This is especially serious because it seems to get worse. The article lists increases in delays (over the last decades or over the last few years). These unreasonable delays are seen as dissuasive for the plaintiffs. (Pierre Noreau) [indirectly confirming the hypotheses of the economic analysis of legal procedures mentioned above.]

A shortage of judges is anticipated so it seems delays will increase in the future as well. Another factor at play is the complexity of cases, which is also increasing. The more complex a litigation, the longer it takes to resolve it. Hence delays seem bound to increase.

However, the reader is reminded as well that a slow judicial process may also be an advantage or a necessity. It allows for the parties to prepare their case correctly and it also augments the opportunity to find and set up alternative forms of resolution. The example of the negative impact of a recent reform shortening deadlines (for the presentation of a case) is given—in the area of medical responsibility. It seems that these shorter deadlines to submit documents and present the case to the courts does not end up shortening the process as a whole, does not leave enough time to find a settlement, and finally, increases the financial burden for the client (by shortening the time span over which to pay diverse fees and costs). (Me Jean-Pierre Ménard)

3. Another recurrent issue arising in the articles, and in particular, in the articles retelling the story of a user of the justice system, is that of the ‘strategic/abusive use of the justice system’ and of the pressure (in terms of time, money but also stress and fear) it exerts on its users. The system is seen as divertible by the most well-off or powerful party, which can malevolently push the weaker party to exhaustion (financial, physical or psychological) and thus avoid adjudication. This flaw is seen as particularly serious (it is mentioned in several stories) because it leads to a complete denial of justice for the individuals involved but also for society as a whole.

This issue of pushing one party to exhaustion might be particularly interesting for the Forum’s projects, dealing here with less recognizable costs--social and psychological especially.

The series of articles not only focuses on public perceptions but also on the justice professionals’ own relationship with their environment. The picture presented is somber in this case as well.

4. Overall the dissuasive effects of the current system are highlighted by this series of articles. One article mentions a significant drop in cases presented to tribunals, and this might be the symptom of a judicial system in a perilous state. (Judge Michael Sheehan and Me Jannick Desforges)
5. Another way the costs of justice seem to hinder and jeopardize actual justice is stressed through several articles: the way the justice system would be favorable to big companies. This is considered especially worrying as the justice system remains a public service, receiving tax payers money for its functioning. Justice Louise Otis, for instance, is quoted: “Because the middle class finances the justice system with its taxes but has no longer access to it, how can we accept that businesses have an unlimited access? Shouldn’t we better redistribute resources? We should think about this.” (19)

6. Potential solutions are suggested and commented upon:
- conciliation (dealt with in the two articles) seen by the journalist and the interviewees as remarkably positive. It may save time and money and alleviate the burden of cases faced by the justice system.
 - conciliation may be considered as part of a whole set of new practices for the judges, including being more active in the proceedings (by proceedings management for instance) or by using more extensively the “provision pour frais” (advance for fees) or their competence in terms of equity.
 - reform of the 2003 Code of Civil Procedure is also discussed. The past reform is seen as inefficient, if not counter-productive. Only the clauses allowing the judge to ‘accelerate the rhythm’ are seen as potentially positive.
 - displacing the financial burden of the administration of justice from the citizens to the corporations + developing alternative mechanisms for corporations to avoid their excessive use of the justice system.

D. General conclusions

➤ CCL1

It seems that for many, especially within the general public, the quality of the administration justice is linked to its speediness and affordability. However, as noted in academic resources and newspaper articles, the relationship between the quality of justice and its speediness is not self-evident. Economists of justice build mathematical models of this relationship and try to find the best equilibrium (the most efficient and least costly manner to administer justice without jeopardizing the actual justice/quality of the decisions). Professionals point out the need to devote enough time and effort to the preparation and consideration of a case so that the decision rendered is indeed as just as possible.

➤ CCL2

It seems that the literature on the costs of justice focuses primarily on the quantifiable costs (primarily money and time) and there is little direct consideration of other costs, social and psychological for instance. These aspects are discussed often indirectly: they are not considered directly as a cost, but as areas in which the costs of litigation have an influence: for instance, justice professionals and academics show concern in their writings for the effects the distribution of costs has on dissuading/encouraging litigants to use the justice system and for which type of cases: does it favour frivolous cases? does it favour well-off litigants? does it favour public interest or civil rights cases? etc.

Appendix C

Summary of Additional key points in the English Language Literature

Specific findings additional to the Main Literature review discussion

Private costs of civil litigation:

Litigants' costs

- Eastern Wisconsin, Eastern Pennsylvania, Central California, South Carolina and New Mexico, USA: **in 46% of lawsuits, legal fees were under \$1,000** ("The Costs of Ordinary Litigation", Trubek et al, 1983, USA).
- New South Wales and Victoria, Australia: **most plaintiffs paid \$4,700/\$6,000 and most defendants paid \$4,200/\$8,000 in legal fees** ("The Costs of Civil Litigation: Current Charging Practices", Worthington & Baker, 1993, Australia).
- USA: in tort litigation that was finalized by 1985 **nationwide, tort plaintiffs and tort defendants spent the estimated \$7/\$8.7 and \$8/\$10 billion in total costs of litigation** ("Costs and Compensation Paid in Tort Litigation", Kakalik & Pace, 1986, USA).

Litigators' costs

- Queensland and Victoria, Australia: **plaintiffs' cases cost lawyers more than defendants' cases** ("The Cost of Civil Litigation Before Intermediate Courts in Australia", Williams et al., 1992).

Public costs of civil litigation

- USA: **tort litigation that was finalized by 1985 nationwide consumed \$0.5 billion in court expenditure (compare with plaintiffs' \$7/\$8.7 and defendants' \$8/\$10 billion in total costs of litigation)** ("Costs and Compensation Paid in Tort Litigation", Kakalik & Pace, 1986).

Costs to benefits in civil litigation (the compensation ratio):

- Eastern Wisconsin, Eastern Pennsylvania, Central California, South Carolina and New Mexico, USA: **for 89% of plaintiffs and the estimated 24% of defendants, litigation "paid off" in monetary terms** ("The Costs of Ordinary Litigation", Trubek et al, 1983, USA).
- New South Wales and Victoria, Australia: **plaintiffs' costs were a median of 26% and a mean of 29% of the amounts they recovered** ("The Costs of Civil Litigation: Current Charging Practices", Worthington & Baker, 1993, Australia).
- USA: **in tort litigation that was finalized by 1985 nationwide, the costs incurred by plaintiffs accounted for approximately 30% of the amount recovered** ("Costs and Compensation Paid in Tort Litigation", Kakalik & Pace, 1986, USA).

Factors influencing costs of civil litigation

- Victoria and New South Wales, Australia, Victoria, Australia: **the stage of disposition was a determinant of costs** ("The Cost of Civil Litigation Before Intermediate Courts in Australia", Williams et al., 1992; "The Costs of Civil Litigation: Current Charging Practices", Worthington & Baker, 1993, Australia).
- Queensland, Australia, and UK: **the stage of disposition was not a determinant of total costs** ("The Cost of Civil Litigation Before Intermediate Courts in Australia", Williams et al., 1992; "Survey of litigation costs", Genn, 1996, UK).

- Victoria and New South, Australia, and Eastern Wisconsin, Eastern Pennsylvania, Central California, South Carolina and New Mexico, USA: ***the duration of the case was not a determinant of costs*** (“The Costs of Civil Litigation: Current Charging Practices”, Worthington & Baker, 1993, Australia; “The Costs of Ordinary Litigation”, Trubek et al, 1983, USA).
- UK: ***the duration of a case was a determinant of costs*** (“Survey of litigation costs”, Genn, 1996, UK).
- UK: ***the complexity of a case was a determinant of costs*** (“Survey of litigation costs”, Genn, 1996, UK).
- Eastern Wisconsin, Eastern Pennsylvania, Central California, South Carolina and New Mexico, USA: ***the number of events was a determinant of costs*** (“The Costs of Ordinary Litigation”, Trubek et al, 1983, USA).
- Eastern Wisconsin, Eastern Pennsylvania, Central California, South Carolina and New Mexico, USA: ***the stakes were a determinant of costs*** (“The Costs of Ordinary Litigation”, Trubek et al, 1983, USA).