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INNOVATION AND ACCESS TO JUSTICE: ADDRESSING THE CHALLENGE OF A DIVERSE JUSTICE ECOSYSTEM

Nicole Aylwin & Martha E. Simmons

Despite having been a mainstay topic of conversation for many years in the fields of business, technology, public administration and other specialized service sectors such as medicine, ‘innovation’ has only recently begun to infuse conversations in the justice sector. With the widespread recognition that globalization is disrupting traditional legal roles and organizational structures, that technology is poised to radically reconfigure how legal services are delivered, and that despite best efforts, the access to justice gap continues to grow in Canada, innovation – as both a noun and a verb - has become a talisman, poised to help address the challenges pushing at the door of the legal profession.

While conversations about disruptive innovation in law seem to flow more easily when discussing legal technology or the changing nature of “big law”, the discussions around innovation have been more hesitant in dialogues on access to justice. This hesitation may be due in part to an unfortunate history of the term being equated with doing more work with less money – a situation that has often been foisted upon already stretched publically funded legal service providers (like, for example, community legal clinics, or other not-for-profit legal information sources). However, recently, a more nuanced and cross-disciplinary conversation about innovation has emerged. Legal practitioners, academics and access to justice advocates have begun to explore how the theories, methods and tools of innovation in adjacent sectors can be applied to meet the complex access to justice challenges presenting in Canada. This special edition, focused exclusively on exploring innovation through an access to justice lens, is an exciting opportunity to join a burgeoning scholarship on the topic of innovation and access to justice.

I. A ‘CRISIS’ IN ACCESS TO JUSTICE

Almost half of all adult Canadians will experience at least one civil or family justice problem over any given three-year period.¹ Unfortunately, survey research suggests that just over half of Canadians – 55% - will be able to afford to resolve these types of legal problems.² This means 45% of Canadians are regularly left with unresolved legal issues.³ This is partly because resolving a legal problem through the formal system is costly. Hourly legal fees amount to hundreds of dollars and even a relatively short court proceeding can be priced at thousands of dollars. Legal aid is not widely available. It can only be accessed by those with very low income and it is not obtainable for all types of legal problems.⁴ The result is an ever-widening gap between those that can afford to access justice and those that cannot. No

¹ Trevor C.W. Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016), online: Canadian Forum on Civil Justice: <<http://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>>.

² *Ibid.*

³ *Ibid.*

⁴ While we recognize that there is an equal need and level of discussion on the role of innovation in improving the criminal justice system, this edition focuses primarily on civil and family justice.

longer simply a ‘low-income problem’, the middle-class is now increasingly affected by the inability to access legal services and to seek justice.⁵

Faced with the reality of an increasingly inaccessible justice system that is failing to meet the needs of the public, and the pressures of delivering better services in a time of fiscal austerity, several major national policy reports have called on Canadian justice stakeholders to increase “innovation” in the justice sector as a means to address the access to justice (A2J) “crisis” in Canada.⁶

A2J has now moved beyond the “first wave” of discourse where the term A2J primarily implied access to lawyers. Its definition has morphed to a more expansive one that encompasses access to a spectrum of dispute resolution options, including dispute avoidance, containment and resolution. There is also a growing recognition that any examination of A2J must recognize that, along with legal problems, are the various life challenges that are inextricably intertwined. For example, there are many connections between legal problems and social and health-related problems.⁷

II. DEFINING INNOVATION

What are we talking about when we talk about “innovation” in the justice sector? Definitions of innovation abound. Some definitions focus on innovation as an outcome or product and others define innovation in terms of a process. Indeed, the authors included in this special edition lay out their own definitions of innovation that relate to the specific topics they consider.

It is worth noting from the outset that innovation is not synonymous with increased use of technology. While innovation can and often does involve technology, innovation is not, and should not, in our opinion, be solely defined in relationship to the development and implementation of new technological solutions. Innovation can manifest in a multitude of ways. It can include organizational change, such as new ways of conceptualizing, governing, administering, and regulating both private (e.g. law firms)⁸ and public sector institutions (e.g. courts, tribunals, etc.)⁹, policy innovation¹⁰, the

⁵ M. J. Trebilcock, Lorne Sossin & Anthony Duggan, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

⁶ Action Committee on Access to Justice in Civil and Family Matters, *A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at 5, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf>; Action Committee on Access to Justice in Civil and Family Matters, *Colloquium Report* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2014) at 3-4, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/2014/ac_colloquium_web_FINAL.pdf>; CBA Access to Justice Committee, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013) at 137-142, online: Canadian Bar Association <http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf>.

⁷ Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Justice Canada, 2009).

⁸ The introduction of alternative business structures is a prime example of this type of innovation, although it is not without debate. See, Alternative Business Structures Working Group, *Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper* (Toronto: Law Society of Upper Canada, 2014), online: Law Society of Upper Canada <<http://www.lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf>>; CBA Legal Futures Initiative, *Futures: Transforming the Delivery of Legal Services in Canada* (Ottawa: Canadian Bar Association, 2014), online: Canadian Bar Association <http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-

creation of new services that “disrupt” the market, or more sustaining innovations that improve already existing offerings.¹¹ Innovations can manifest as new ways of collaborating¹² or practicing law in ways that shift the culture of an institution or industry. Technology may play a role in innovation in these areas, but innovation is not defined by its use.

This diverse range of “innovations” comes into focus when the definition of innovation is understood more broadly than simply “disruptive” technology.¹³ Theodore Levitt, for example, classically defined innovation simply as “putting ideas to work”.¹⁴ Weiss and Legrand refine this definition, describing innovation as “applied creativity that achieves business value”.¹⁵ Both these definitions, and many other definitions, have dual components: the ideas and the execution. Together, these elements have the potential to achieve innovation. Alone, they do not. The dual aspect of innovation is also stressed by Steven Hobbs who notes, “[i]nnovation is fuelled by imagination, but is often considered, in part, the applied process of the creative impulse...the innovative process must move toward bringing into reality an idea that will [lead to value]”.¹⁶ This ‘added value’ however does not always have to manifest in the form of business or dollar value, social innovation, for example, seeks to create better social conditions

eng.pdf>; David Wiseman, “Alternative Business Structures and Access to Justice...for Whom?” (28 August 2014), *Slaw* (blog) online: <<http://www.slw.ca/2014/08/28/alternative-business-structures-and-access-to-justice-for-whom/>>.

- ⁹ Geoff Mulgan, *Ready or Not? Taking Innovation in the Public Sector Seriously* (2007), online: Nesta <http://www.nesta.org.uk/sites/default/files/ready_or_not.pdf>; Geoff Mulgan, *The Art of Public Strategy* (Oxford: Oxford University Press, 2009).
- ¹⁰ Stephen P. Osborne and Louise Brown, “Innovation, Public Policy and Public Services Delivery in the UK: the Word That Would be King?” (2011) 89: 4 *Public Administration* 1335.
- ¹¹ Clayton M. Christensen, *The Innovator’s Dilemma: When New Technologies Cause Great Firms to Fail* (Boston: Harvard Business School Press, 1997).
- ¹² In the legal field, medical-legal partnerships and intermediary partnerships are a good example of an innovation in collaboration see; Ellen Cohen et al, “Medical-Legal Partnership: Collaborating with Lawyers to Identify and Address Health Disparities” (2010) 25:2 *Journal of General Internal Medicine* 136–139; Daniel Atkins et al, “Medical-Legal Partnership and Healthy Start: Integrating Civil Legal Aid Services Into Public Health Advocacy” (2014) 35:1 195; Albert Currie, *The Halton Legal Health Check-Up*, online: Legal Health Check Up <<https://www.legalhealthcheckup.ca/bundles/legalcheck/pdf/legal-health-check-up-pilot-evaluation.pdf>>; and Albert Currie, *The Next Step: The Subregional Rollout of the Legal Health Check-Up* (2016), online: Legal Health Check Up <<https://www.legalhealthcheckup.ca/bundles/legalcheck/pdf/subregional-rollout-report.pdf>>.
- ¹³ The idea of disruptive innovation, i.e. innovations that create a new market, displacing leading firms, products or alliances, was popularized by Clayton Christensen in his foundational book, *The Innovator’s Dilemma: When new technologies cause great firms to fail* (Boston: Harvard Business School Press, 1997). While Christensen himself did directly equate innovation with technology in this incredibly influential book, Christensen’s own work on innovation has since evolved to apply the concept of disruptive innovation to the social sector, demonstrating a wide range of innovative activities that can “disrupt” the business as usual model. See: Christensen et al, “Disruptive Innovation for Social Change” *Harvard Business Review* (December 2006), online: <<https://hbr.org/2006/12/disruptive-innovation-for-social-change>>.
- ¹⁴ Theodore Levitt, “Creativity is not Enough” *Harvard Business Review* (August 2002), online: <<https://hbr.org/2002/08/creativity-is-not-enough>>.
- ¹⁵ David S. Weiss and Claude Legrand, *Innovative Intelligence: The Art and Practice of Leading Sustainable Innovation in Your Organization* (Mississauga: John Wiley & Sons Canada, 2011) at 6.
- ¹⁶ Steven H. Hobbs, “Entrepreneurship and Law: Accessing the Power of the Creative Impulse” (2009) 4(1) *Entrepreneurial Business LJ* at 10-11.

by meeting a previously unmet social need.¹⁷ Access to justice is such an unmet social need for which innovation is required.

III. OUTLINE

The authors that appear in this special edition are leaders in the field of justice innovation. Their contributions to this volume highlight the successes, challenges and opportunities that come with attempting to adapt innovation methods such as social labs (Morely & Boyle); social innovation (Ursel) and business accelerators and incubators (Ha-Redeye) to the legal field. They also demonstrate what opportunities may arise when techniques such as design thinking are applied to the public administration of justice (Sossin), when technology is fully integrated with the formal processes of the court in the form of online dispute resolution (Salter) or when the private delivery of legal service is reimagined through a lens of accessibility (Semple). In addition, pieces in this volume showcase important theoretical and practical discoveries as they dissect the impact of innovative collaboration based dispute resolution processes (Lowenburger, Keet & Anderson), and discuss how innovation in legal education must remain a central focus if change in the justice system is to be sustainable (Buhler; Leering; Simmons & Thompson). Each article is a significant contribution to this nascent field of access to justice and innovation and it is the hope of all contributors that this conversation will continue.

¹⁷ Geoff Mulgan, “The Process of Social Innovation” (2006) 1:2 *Innovations, Technology, Governance, Globalization* 145.