Access to Justice in the Civil Litigation System

Janet Walker, *Essentials of Canadian Law: Civil Litigation* (Toronto: Irwin Law Inc., 2010) at 33–52.

Summary: Chapter 2 of this text discusses how costs can be used to impact access to justice. Costs are a tool that can increase or hinder access to justice. To increase access, judges have (1) awarded interim costs to public interest litigants, (2) have declined to award costs against a losing litigant where they launched public interest litigation, or (3) awarded costs to the losing party or their pro bono counsel in important cases of public interest. These factors encourage larger law firms to take on important public interest litigation. However, these deviations are the exception rather than the rule. The potential of having a large costs award levied against an unsuccessful litigant looms large, and discourages valid claims from coming forward.

- Costs are a double edged sword when considering access to justice. On the one hand, they provide a promise for a litigant to have (at least a portion of) their legal costs reimbursed. On the other hand, the prospect of having a costs award levelled against litigant (especially a self- represented litigant) can scare away meritorious claims and act as a barrier to justice.
- Where access to justice is a concern, courts are more willing to grant costs immediately following the event (i.e.: an interlocutory proceeding) rather than waiting until the end of the action. There are also reduced costs in small claims matters
- Access to justice has become a prevailing concern in awarding costs. Where people have limited funds and are seeking to enforce constitutional rights, courts have exercised their discretion to award interim costs, because it is important for ordinary citizens to have access to the legal system to resolve matters that have the potential to affect all Canadians.
- Interim costs are meant to ensure a meritorious legal claim is not prevented from going forward because of financial inability. However, awarding interim costs is relatively rare "exercise of jurisdiction is limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre- determine an issue"
- The *Okanagan* case set-out a three part test: 1. the litigant must be impecunious to the extent that litigation would not continue but for the granting of costs; 2 the claimant must establish a *prima facie* case of sufficient merit; and 3 the matter must be of sufficient public importance
- Later SCC decisions (see: *Little Sisters No. 2*) narrowed the circumstances under which interim costs would be awarded. These awards are special and exceptional and not the norm. In addition, *Little Sisters 2* stated that a party receiving interim cost relinquishes some control over the conduct of the litigation. The party does not have free reign over the money provided – it will be closely monitored.
- In cases of high public importance, even where the claim is lost, the winning party may not be entitled to costs
- Providing pro-bono lawyers with a costs award creates an incentive for lawyers to take cases on a pro-bono basis. It also, however, raises ethical questions regarding the nature of pro-bono work, and the appropriateness of awarding costs for expenses not incurred.
- In non – public interest settings, many courts have viewed as appropriate to award costs to a pro-bono lawyer. This will encourage more lawyers to take cases on a pro bono basis. This would increase access to justice. This rationale is even stronger when dealing with public-interest cases. *Charter* litigation is expensive and complex. It is often inaccessible to ordinary citizens, or forces them to rely on lawyers acting pro bono.

Michelle Flaherty, "Self Represented Litigants: A Sea Change in Adjudication" in Graham Mayeda and Peter Oliver, eds, *Principles and Pragmatism: Essays in Honour of Louise Charron* (Markham: Lexis Nexis Canada Inc., 2014) at 323.

Summary: This article argues that the increased presence of self-represented litigants in the courtroom requires judges to rethink the traditional impartiality model. Specifically, judges ought to adopt a "substantive impartiality" model that is akin to "substantive equality". In the same way that identical treatment does not foster or promote equality, neither does identical treatment create impartiality in the courtroom. The goal for judges is fairness. Fairness may require assistance for SRLs (within bounds) to allow their case to be given a fair opportunity to be heard on its merits. This assistance is appropriate for all procedural issues, and may extend to some substantive legal help as well.

- The wave of self-represented litigants (SRLs) has continued to grow as the cost of litigation increases. This article argues that we must change the way we view adjudication when dealing with SRLs.
- The growth of SRLs has already changed how the justice system is administered to some extent (for example: the role of assistance in drafting documents).Traditionally, SRLs were viewed as choosing to represent themselves, and were not entitled to accommodation on this basis. We now know that self-representation is increasingly not a choice.
- Adjudicators have a traditional approach to impartiality that is one-size-fits-all. The adjudicator acts as an umpire between two parties. This approach arose in the outdated model when generally all litigants were represented by counsel.
    - What is needed now is substantive impartiality → akin to substantive equality
    - Identical treatment is not necessarily appropriate or conducive to equality. Fairness is not necessarily about treating them the same, but about treating everyone fairly.
- True neutrality often requires a form of engagement that may seem inconsistent with traditional expectations. An impassive adjudicative approach does not address the reality that SRL's are representing themselves out of economic need and not choice.
- No level of adjudicative assistance will place an SRL on the same footing as one with a lawyer → substantive impartiality does not equal perfect parity -- but the goal is fairness.
- What type of assistance is appropriate?
    - Procedural: It is appropriate to assist SRLs to understand court procedure and in relaxing some procedural rules. Transmitting procedural information often just explains how a litigant can do what they've already decided to do. This is essential to increasing access to justice.
    - Substantive: Is it appropriate for a judge to explain the applicable law and question witnesses?
- There is not always a clear line between substance and procedure. For instance, is relaxing the rules of evidence procedural or substantive?
- The Canadian Judicial Council (CJC) has come out with a statement of principles on the assistance to give to SRLs. This goes beyond merely procedural aspects. It suggests that judges should explain the relevant law and its implications, provide information to help them assert their rights in court, and ensure that procedural and evidentiary rules are not used to hinder an SRL unjustly. Judges can also question witnesses and determine the order of evidence
- There is ambiguity around a judge's ability to help an SRL raise arguments. However, we have seen judges raise statutory defences, limitation period constitutional arguments and requests for adjournments on behalf of SRLs.
- There are limits on what can or should be done: a trial judge should not instruct a litigant on the nuances of an extremely complicated body of knowledge, nor should the trial judge be

suggesting theories or weaknesses that ought to be pursued. This is patently unfair and unduly onerous. A judge cannot be providing strategic litigation advice

- The article ends by reference to *PIPSC v. Bernard*, which (at the time of reading) had yet to be released. This decision is summarized here.

Gerald TG Seniuk and John Burrows, "The House of Justice: A Single Trial Court" in Peter Russell, ed, *Canada's Trial Courts: Two Tiers or One?* (Toronto: University of Toronto Press Incorporated, 2007) at 163- 214.

Summary: This article argues that access to justice would be advanced by abolishing the provincial/superior Court divide and creating a single court of justice. This unified court would be integrated with the community it serves, offering mediation and other services designed to take advanced of the expertise collected through unifying the court. It would be much more integrated with the community it serves, and would incorporate notions of restorative justice. In addition, a unified court procedure would provide one stop shopping and would demystify the court process.

The Canadian Bar Association, "Reaching Equal Justice: An Invitation to Envision and Act" (Ottawa: The Canadian Bar Association, November 2013) <http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf>.

Summary: This Report from the Canadian Bar Association attempts to comprehensively address the problems facing the justice system, the initiatives that are currently in place, and the future changes needed in order to rebuild the system's relationship with the Canadian public. It focuses on the needs faced by individuals (as opposed to corporations). It will likely serve as a roadmap for access to justice reforms over the next 15 years. The report sees four systemic barriers blocking efforts to reach equal justice: lack of public profile; inadequate strategy and coordination; no effective mechanisms for measuring change; and gaps in our knowledge about what works and how to achieve substantive change. It views changes as necessary because the public has lost faith in the justice system. It reports four troubling views that Canadians hold in relation to the justice system: (1) legal rights are just on paper; (2) justice systems cannot be trusted; (3) justice is person-dependent; and (4) the justice system is difficult to navigate.

1. **Legal Rights are Just on Paper**: Most people felt they could not access justice without money. The more a person was marginalized, so did their distance in being able to enforce their legal rights. Other barriers included: literacy, language, disability, racial discrimination, lack of information and lack of knowledge. Information gaps were also a significant impediment: These people did not know how to make a complaint or enforce an order once they got it.

2. **The Justice System Cannot be Trusted**: The system creates delays and is disrespect to people's times (repeated adjournments, legal aid lines etc.)Many defined justice as the right to be heard, and those people noted that they were denied the opportunity to tell their stories. Even when their story was told, they felt that the system trivialized them or did not believe them. The justice system does not understand their lived realities. Because of this, the justice system can have a spiraling effect on the pre-existing legal issue. The problems start spiraling into other areas of their lives. Often, the remedies obtained are not meaningful or trustworthy – they cannot be depended upon

3. **The Justice System is Person-Dependent**: Many feel that justice depends on whether you are dealing with a fair or compassionate individual (judge, lawyer, police officer). Without a lawyer, the marginalized community members felt as if they were floundering through the system. It was a matter of luck if you got a good or bad lawyer. Many community members felt dissatisfied

with legal aid lawyers, who they felt would not fight for them. They were also critical of the income thresholds to receive legal aid.

4. **The Justice System is Difficult to Navigate**: Members felt that ignorance of your legal rights renders them useless. Information is not readily available and there is no one to turn to. There is a lack of information and direction – people have no idea where to start. The system is discouraging and its complexity seems insurmountable. Many community members felt that they would rather give up than tackle these challenges.

- Surveys of unrepresented litigants have been conducted across Canada. They reveal disturbing trends:
    - All parties agree that unrepresented litigants fair worse in court than those who have access to lawyers. Unrepresented parties lose significantly more often.
    - Many unrepresented litigants felt their status slowed their proceeding.
    - Many represented litigants feel that judges favor unrepresented litigants.
    - The available self-help materials have limited use.
    - Self-represented litigants often feel embarrassed or humiliated by the Court
    - Staff workers at the court are placed under considerable strain when they are asked to give legal information vs. advice.
- The Barriers to Accessing Justice
    - 45% of Canadians will experience a justiciable event over a three year span. Unresolved legal issues can effect overall social welfare, economic well-being, poverty and social exclusion.
    - Vulnerable groups have more contact with the law than others: 22% percent of people have 85% of the legal problems. They are more likely to experience multiple problems, and they are less likely to take action to resolve them. Legal problems tend to cluster and disproportionately impact marginalized communities.
    - Most justiciable problems are resolved outside the formal justice system, but most money on access to justice is dedicated to serving within the justice system.
    - The main problem people identify in accessing private legal services is (real or perceived) cost.
    - Other barriers include coverage, knowledge gaps about the legal system, fear of the legal system; stress related to resolving legal problems; being intimidated by legal system, embarrassment of having a legal problem; fear of losing privacy.
- Public legal education also has an important role to play. While online resources are welcome, they cannot assist the Canadians without literacy skills to make use of the material, and it cannot replace human help.
- Equal Justice Strategies: The "soul" of access to justice is <u>equal justice</u>. The Justice system must be equally accessible to all.
    - Accomplishing equal justice requires 6 concrete commitments: (a) a focus on people's needs (vs. justice system professional's needs); (b) building people's capacities and abilities to participate in the system; (c) preventing legal problems from arising; (d) providing several paths to justice; (e) creating a personalized response to individual needs; and (f) employing evidence-based practices.
- Building a Bridge to Equal Justice has 3 components: facilitating everyday justice; reinventing service delivery, and transforming formal justice. This 3-part bridge rests on three supports: increased public participation; improved collaboration; and enhanced capacity for justice innovation
- Facilitating Everyday Justice:
    - There are many paths to justice, we should find ways to deal with a larger number of legal problems through larger range of mechanisms, and shift our attention upstream.
    - Law should be treated as a life skill. Most people seek legal information when they are in a legal bind; we should focus on developing basic legal capabilities through everyday life.
    - Lawyers can do a better job of integrating public legal information as they deliver their legal services.

    - Legal capabilities training should be integrated into public legal curriculums, offered at important life transitions, embedded into work places and other places where it can be sustained (seniors facilities, for example), lawyers integrate the legal capabilities approach into the delivery of legal services.
    - **Legal health checks**: prevention can be the best medicine → provide information on public policy initiatives (for example, no fault insurance, consumer protection schemes)
- Effective Triage and Referral to Navigate the Paths to Justice:
    - We need to be better at directing individuals onto correct paths.
    - Current plans and mapping projects to address this concern have been developed on an ad hoc basis. There is no overarching vision or plan, and corresponding to that, there has been a lack of integration among various services.
    - Perhaps the single greatest innovation needed is an effective triage system in each jurisdiction.
- Inclusive Technology Solutions
    - The justice system lags behind other sectors in integrating technology. In Canada, the online services we do have are focused on providing information only. Other jurisdictions are going further and are using website for substantive initiatives to engage the public and gather information from the public. Also, there are initiatives for online dispute resolution and increased use of technology in courts.
    - Properly employed, technology can help people in marginalized communities or rural areas especially.
- Transforming Formal Justice
    - The justice system must become an access to justice institution. This involves two components: external change of relationship between court and public and internal change to functioning of the court.
        - The committee recommends that under the new system courts should be re-centred as one of many places to resolve disputes as between people. This new court must integrate the wider context, use new information technology, distinguish between complicated and simple cases, involve the private sector and empower communities.
- Transcending the SRL phenomenon
    - We need to stop looking at unrepresented litigants as a "problem" and reform the system to include them as an integral part.
        - Court-based triage and referral services should direct people towards an appropriate path to justice. An embedded centralized triage system would be based on the tasks required of the litigant and the court.
        - Court specialization is another option
        - Courts should have the ability to solicit feedback, and put that feedback into practice.
        - Judges should be more active in providing case management, in which a judge takes responsibility for improving the efficiency of the court.
            - An expanded role for Judicial Dispute resolution would also be useful.
            - Active adjudication is another option. Judges should not be passively sitting back when dealing with unrepresented parties. Judges ought to be engaged, but remain neutral.
            - Judges may also take less direct forms of intervention, such as directing litigants to available resources.
        - Courts can also be transformed through the use of technology.
    - Re-inventing the delivery of legal services:
        - No person should go without meaningful access to justice in regards to their essential legal needs (those that arise from problems that place a person or their family in jeopardy, including liberty, personal safety and security, health, employment, housing or ability to meet the basic necessities of life).

        - One way to achieve meaningful access to justice could use limited scope retainers. The CBA suggests that provincial law societies develop guidelines for limited scope retainers.
        - Another option is team delivery of legal services. This involves joining together lawyers, and other professionals (like paralegals and social workers).
- Re-orienting the practice of law: There are three proposals for changing law to enhance equal justice: establishing sustainable people law practices, legal insurance; and enhanced regulatory approaches.
    - Sustainable people law practices: we need to develop a model that provides a more predictable measure of costs to clients.
    - Legal expense insurance: Obtaining legal expense insurance is big in Europe, but has not caught on in Canada. Legal insurance is a relationship whereby an insurer agrees to pay some or all of the legal costs arising from certain legal actions.
    - Regulation and access to Justice: Regulation of the legal industry is intended to protect the public, but it also creates barriers to access. Law societies can do more to increase access to justice by: enhancing paralegal services, permitting alternative business structures, making pro bono mandatory, become brokers of legal services, promote financial transparency by publishing lawyer remuneration.
        - Legal Aid in Canada is massively underfunded. To have an effective legal aid we need: national legal aid benchmarks, reasonable eligibility policies and effective legal service delivery. While the legal aid system is a public good, it lacks funding particularly because many people don't see themselves as having a material stake in it. The more people who have a stake in the quality of the system, the better it will be.

            Funding options would include client contribution based on ability to pay, and public insurance schemes (mandatory or opt out): there could be a non-profit legal expense insurance scheme so it avoids the for-profit sector in insurance and private law.
    - Community legal clinics have been developing. The CBA has a goal of building relationships with other social service organizations to develop more holistic delivery of services. Legal aid should create a common framework for the collection and sharing of experiences between jurisdictions.
    - Bridging the public private divide:
        - Gaps in service can be addressed through public-private collaborations. Pro Bono efforts are important in this regard. While we shouldn't lean entirely on pro bono work, we must understand the role it has to play.
        - Pro bono services are best aimed at important, but non-essential legal needs (for example, consumer protection issues).
    - Law schools have a role to play as well. While most schools do not have mandatory access to justice courses, some are implementing mandatory projects and community service into the curriculum.
- Making the equal justice vision real
    - Access to justice is a problem that is highly resistant to resolution. It is difficult to define, it co-exists with other problems, goes beyond the capacity of any one organization to understand; there is often disagreement about the causes of the problem and the solution involves changing the behavior of groups of people or all members of society.
    - Tackling such problems requires holistic thinking; innovative and flexible approaches, engaging citizens, a principle-based approach, iterative processes and continuing learning.
    - Partial solutions are incapable of addressing the access to justice gap
    - There is a need for access to justice champions – we need a super hero → someone like a Tommy Douglas and his efforts to build healthcare.

- Building public engagement: access to justice has a low public profile. There is broad support for legal aid, but no outrage at the level of support provided.
- We must build engagement by making Canadians sense that they own the justice system, that it is intended to serve them, rather than lawyers and judges. A comprehensive public engagement campaign is needed.
- We need to engage the public the public needs to know that they are not immune from legal problems, everyone is touched by the legal system at some point.
- We can learn from other public policy campaigns, such as non-smoking and drinking and driving campaigns. **Right now, Canadians think the justice system bellows to judges and lawyers and the government. This has to change. Canadians must see the justice system as belonging to them.**
- There is no coherent civil justice system in Canada – the system is fragmented by the independence of its different parts, but it also creates barriers to access.
- There are a lot of hidden hurdles to justice innovation (self-preservation, finger pointing, unwillingness to take responsibility, no reward for taking risks and a sense of entitlement, among other things).
- In the justice system, we are better at competing than collaborating, this approach needs to change.

Action Committee on Access to Justice in Civil and Family Matters, "Access to Civil & Family Justice: A Roadmap for Change" (Action Committee on Access to Justice in Civil and Family Matters, October 2013)

Summary: Similar to the Equal Justice report (above) this report seeks to comprehensively flag the barriers to the civil and family justice systems. This report is more focused on the family law experience, where most self-represented litigants are located. It deals with four priority areas: access to legal services, court processes simplification, family law prevention, and triage/referral services. It provides a plan for practical and achievable actions that will improve access to justice across Canada

- **Part 1: Access to Justice Gaps**:
  - 12 million Canadians experience one legal problem over a three year period. Poor and vulnerable groups are more prone to legal problems – and those problems multiply.
  - Access to justice ought to focus on the broad range of legal issues experienced by the public, not just the issues that arise in court.
  - The justice system should be able to avoid, manage and resolve civil disputes. It should have built in structures that prevent disputes with early management, negotiation and where necessary, courtroom assistance.
  - What is needed? A culture shift and a new way of thinking about the courts and justice. Second, we need a goal oriented action plan.
- **Part 2: Culture Shift: Guiding principles for change**:
  a) Put the public first: we need to stop assessing the system from the perspective of those who work in it. Processes that work for lawyers may not work for the public.
  b) Collaborate and coordinate: we need to collaborate across jurisdictions, but also across different factions of the justice system.
  c) Prevent and Educate: we need to focus on more than just resolving disputes – we should be working to prevent them.
  d) Simplify make coherent and proportional (sustainable) – the civil justice system is too complicated and largely incomprehensible to all but those with legal training. The current system is growing ever more disproportionate to the needs of the litigants involved
  e) We need to move beyond wise words and work to fix the implementation gap
  f) We should not be focused on fair processes alone – we have to focus on results.
- **Part 3: Innovation Goals**
  - Widen the focus from dispute resolution to education and prevention

- The motto should be: court if necessary, but not necessarily court
- This can be done with building a robust "Front end" early resolution services sector (ERSS). This will include information, education, triage and referral. It can have supported information and summary advice, also supported dispute resolution and then advocacy and legal representation. ERSS can include (For example): public legal education, pro bono, telephone and e-referral services, legal publications programs, community justice hubs; various legal aid centers and clinics, duty counsel.
- Making essential legal services available to everyone through different means, including: limited scope retainers, alternative business and delivery models, increased opportunities for paralegal services, alternative billing models, pro bono services, legal expense insurance, programs to promote rural justice services
- All people should have access to legal aid for essential life services.
- Courts must be reformed with its users centrally in mind. Just, creative and proportional processes should be available for all legal problems.
- The new system should be a "multi-door courthouse" where a range of dispute resolution services are offered within justice centers like courts (including, negotiation, conciliation, mediation, JDR). Some of it can be done only by judges, while other parts can be offered by trained court staff, duty counsel, dispute resolution offers, court based mediators etc.
- Case management should be promoted in all appropriate cases. Judges should not hesitate to use their powers to limit the number of issues to be tried and the number of witnesses to be examined.
- Family Justice Reforms – some of these are different from broader civil justice needs
    - The core values: conflict minimization, collaboration, client-focus, empowered families, integrated services, affordability, fairness and proportionality
    - Family justice ought to offer an array of dispute resolution options. Early, front end services should be expanded and highly visible. Consensual approaches should be integrated as far as possible.
    - There should be a broad advocacy for enhanced public education and understanding about the nature of collaborative values and collaborative procedures
    - All jurisdictions should consider whether a unified family law court would be advisable
- Institutional and Structural Goals: The CBA believes that there ought to be supported coordinated local access to justice implementation commissions. No one department is responsible for access to justice, and this means that it is no one's primary focus.

Working Group on Access to Legal Services of the Action Committee on Access to Justice in Civil and Family Matters and Alison MacPhail, "Report of the Access to Legal Services Working Group" (May 2012),online: < http://www.cfcj-fcjc.org/sites/default/files/docs/2012/Report%20of%20the%20Access%20to%20Legal%20Services%20Working%20Group.pdf>.

Summary: This report makes various recommendations on how to increase access to justice in civil and family law matters. Like the other reports on this issue, it seeks a more holistic service model that assists individuals before a matter reaches the point of litigation, and should litigation arise, encourages alternative dispute resolution processes.

- The National Action Committee has a vision of access to justice: A society in which the public has the knowledge, resources and services to effectively deal with civil and family law matters by prevention of disputes and early management of legal issues, through negotiation and information dispute resolution processes, and where necessary, through formal dispute resolution by tribunals and courts
- The goal is to provide a society where justice services are accessible and focused on the people it serves. Legal services are integrated with other services and the justice system supports holistic well-being. The public understands and engages with the justice system.

- Most legal problems are resolved without ever coming to court. Even in the justice system, with the exception of family law, disputes are rarely resolved before a judge.
- Critical barrier to justice is cost (for poor and middle class)
- Technological innovations seen in the rest of the world are bypassing the justice system.
- The elements of access to justice
    - Awareness of rights, entitlements, obligations and responsibilities;
    - Awareness of ways to avoid or prevent legal problems;
    - Ability to effectively participate in negotiations to achieve a just outcome; and
    - Ability to effectively utilize non-court and court dispute resolution systems
- The report recommends a national justice internet portal to simplify and coordinate access to justice information. Web-based legal information should be supported and supplemented by a variety of interactive services to provide information, referral and assistance
- Legal Services can be provided in different ways to make them more affordable. Paralegals and law students can provide legal assistance in some cases. Legal services can also be "unbundled
- Legal expense insurance: Insurance industry organizations should be encouraged to promote the distribution and sale of legal expense insurance as part of routine insurance products
- Innovative legal service delivery – there are some common problems that occur to many people. In these cases, standardized information over the computer may provide assistance.
- On-line dispute resolution – while still in its infancy, this could provide easy and accessible dispute resolution. If unsuccessful, you move on to a human mediator.

Ab Currie, Research and Statistics Division of Department of Justice Canada, *A National Survey of the Civil Justice Problems of Low and Moderate Income Canadians: Incidence and Patterns* (Ottawa: Department of Justice, 2005).

Summary: Ab Currie has done extensive research on low and moderate income Canadians, and his research forms the basis for many of the reports outlined above. For example, the figures demonstrating that nearly half of all Canadians experience a justiciable event over a three year period comes from this report. Currie's report is largely a collection of statistics that reveal the pervasiveness of law in the lives of Canadians, and the tendency for legal problems to cluster around low income or vulnerable individuals.

Graham Mayeda, "Access to Justice: The impact of Injunctions, Contempt of Court Proceedings and Costs awards on Environmental Protesters and First Nations", (2010) 6:2 McGill LJ 143.

Summary: This article examines how "SLAPP" suits (Strategic Litigation Against Public Participation) negatively impact access to justice and undermine rights of political dissent. SLAPP suits are often injunctive in nature, and deal with environmental/aboriginal protests. The current regime is not properly calibrated to separate vexatious litigants from litigation that is truly in the public interest. It does not provide incentives for public interest litigation, or disincentives for SLAPP suits.

- Is it suitable to use injunctions to stop citizens who are attempting to stimulate public debate about environmental and human rights issues through peaceful protests? Since they are not party to proceedings, protesters do not have pleadings typically, and their rights are not represented. In the civil context, protesters can face sanctions including jail time, but can further be punished by an award of costs against them
- When pursuing the government, the public interest nature of the litigation is apparent. It is less so when the government is not a party. How can a Court protect public interest litigants from adverse costs awards?: interim costs awards, principled refusal to issue costs against a public interest litigant and costs awards in favour of public interest litigants who lose on the merits
    - The article moves through the British Columbia (Minister of Forests) v Okanagan Indian Band, 2003 SCC 71 and Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), 2007 SCC 2 decisions.

- In R v Caron, 2011 SCC 5 the use of Okanagan case in quasi-criminal proceedings. Caron was issued a traffic ticket, but it was not available in French. He challenged in on the basis that it violated his rights as a Francophone .Alta CA found that an Okanagan order may be available with respect to quasi-criminal proceedings when the real issue is not guilt or innocence, but a constitutional question of public importance. SCC largely agreed, but differentiated between the advanced costs in Okanagan and interim cost award in Caron.

Mary Jane Mossman and Heather Ritchie, "Access to Civil Justice: A Review of Canadian Legal Academic Scholarship 1977 – 1987" in Allan C. Hutchinson, ed, *Access to Civil Justice* (Toronto: Carswell, 1990).

Summary: This article canvasses the existing literature on access to justice and divides the approaches into three classifications. In the author's view, there is an inordinate focus on procedure as opposed to substance. There is also too much focus on access as opposed to justice.

- There are many different ways to view the access to justice problems. It has been described as:
  (1) An issue of inefficiency for existing litigants. There is an emphasis on barriers to litigants created by excessive cost and delay. Various measures have been put in place to help reduce delay but the problems persist.
  (2) An issue of creating new opportunities for new litigants: Liberalism has spread the idea that equality and justice is for all people, not just the rich. In this situation, we have to work to make sure the justice system is actually accessible to these people. It is not enough to demonstrate that all people formally have the right to access the justice system. Access to justice is more than a formal route to the courts. Access to justice with two prongs: system is equally accessible to law AND must create results that that are individually and socially just.
  (3) Justice issue that is focused on substance rather than procedure: The justice system has an inherent bias to "repeat players" as opposed to "one shotters".Repeat players can trade off some litigation for others, they know what lawyer to approach etc. These efficiencies escape a one-time litigant.
- The three different conceptions raised are equally valid, but may come into conflict with one another. Assigning a meaning to "Access to Justice" is not a value-free exercise.
- Most writing focuses on access to justice as an efficiency issue. It recognized the need to achieve fairness and efficiency, and the inherent tension between these goals.
- There are only infrequent references to access to justice as a substantive justice issue
- Most work on access to justice comes from lawyers and/or judges. This serves to reinforce lawyers' notions about access to justice. Most of this material is from practicing lawyers (not academics and not published in formal articles)
- Finally, this information shows disproportionate focus on accessibility rather than on justice.
- The access to justice debate requires recognition of the political choices inherent in the different conceptions of access to justice.

Andrew J. Roman, "Barriers to Access: Including the Excluded" in Allan C. Hutchinson, ed,
Access to Civil Justice (Toronto: Carswell, 1990).

- **Summary**: In order to increase access to justice, there must first be a common understanding of what access to justice is. After flagging issues around locating a common definition, the author then examines the barriers to access, and dismisses the narrow view that access to counsel or courts equals access to justice. There are substantive rules of court (including standing, for example) that are barriers to access that ought to be considered. In addition, massive inefficiencies are created when poor or vulnerable Canadians use Legal Aid to fight the government. In these cases, the government is footing the bill on both sides of the equation. More importantly, losing

government entities are very slow to change their policies, so matters have to be litigated several times before change occurs. The author concludes by noting that the access to justice problems for poor or marginalized Canadians will not change without the political will to act. He provides a series of suggestions that may assist in increasing access to justice.

Final Report of the Justice Sector Constellation of the Calgary Poverty Reduction Initiative, Intervening at the Intersection of Poverty and the Legal System, March 19, 2013 <http://www.enoughforall.ca/wp-content/uploads/2013/03/Justice-Sector-Constellation-Final-Report.pdf>.

Summary: This article examines the issues that arise where poverty and access to justice meet. Sixteen Calgary organizations are working together on poverty-reduction initiatives, and in so doing, identified six access to justice barriers for low income persons. Using these key issues, it developed a list of goals and recommendations to increase access to justice.

- Legal problems occur more often in low income people, these issues tend to cluster and often can create or exacerbate other problems (See Ab Currie's research, summarized above). These people are often unable to understand the legal system or access adequate legal advice. They require a more holistic approach to their problems.
  - Barrier 1: The clustering of legal issues. Legal issues generally do not occur in isolation – other legal and social issues develop from a single legal source.
  - Barrier 2: People lack knowledge about legal issues and where to find legal information – There is a lack of public understanding about the nature of a legal problems. There is no central organization for providing legal information. There is a lack of understanding about what legal providers can do. Most legal problems do not go to court, but the services focus on court.
  - Barrier 3: Lack of confidence in the justice system: Albertans have one of the lowest levels of confidence in the justice system.
  - Barrier 4: The legal system is complex and difficult to access to some. The system has been designed to speak a specific language and work for lawyers and judges. It is very difficult for an untrained person to understand or access this system. Unrepresented litigants are thus creating real delays.
  - Barrier 5: Legal Advice is Difficult to Access for some. Only lawyers can give legal advice. Many people cannot afford lawyers, and there are not enough lawyers working in areas that focus on the poor.
  - Barrier 6: The Cost of Legal Services: Legal aid funding has been depleted. At the same time, legal fees have been increasing. Justice service providers are examining alternative options for providing legal services (unbundling, legal expense insurance etc.) are now being examined.
  - The Constellation developed a series of goals and vision statements for the justice system: Diversity and Community Integration; Education; Valuing the community; integrated community-based services; and opportunity creations.
  - The Constellation then made recommendations falling within three broad headings: Education, Service Enhancement, and systemic change.
  - With regards to education, we need to enhance public legal education, increase awareness among sectors (for example, social service providers on what legal options exist) and within the justice sector (for example, on resources available to the public).
  - With regards to service enhancement: we need to enhance form literacy, facilitate court navigation, enhance access to legal services, accommodate diverse populations, facilitate reintegration for those convicted of offences, maximize utilization of existing resources and services, and coordinate services.

- In terms of systemic change, we need to promote legal health and prevention, make the justice system more accessible, expand options available in the justice sector, expand services to those with low income, expand services to individuals with complex needs (more holistic services), expand options int eh criminal justice system and enhance program delivery.
- Common Goals among the Constellation included the development of: community supports, community assets, community cohesion, and community systems. These goals should be actualized in meaningful ways for Calgary's urban aboriginal population.
- Each of these common goals within the Constellation were then "matched" to justice service goals, which were then "matched" with potential community actors.

Richard Engler, "And Justice for All – Including the Unrepresented Poor: Revising the Roles of the Judges, Mediators, and Clerks", (1999) 67 Fordham L Rev 1987.

Summary: This article argues that the legal system is designed to prevent unrepresented litigants from receiving legal advice or being treated fairly in court. This impacts their dealings with legal insiders, and is very confusing and counterproductive. In addition, some rules that initially appear harmless can have devastating consequences for self-represented litigants when they take certain actions. In particular, the protections for impartiality and neutrality can negatively influence self- represented litigants who are entering settlement. Judges do not review the fairness of these settlements, and as a result, self-represented litigants often sign away rights they did not know they had. Judges have no uniform procedure for dealing with self-represented litigants and the quality of the treatment they receive varies considerably. This impacts the substantive result a self-represented litigant will receive at the end of the day.

- Traditional rules about the legal system were developed in the context of an adversarial system where both sides were represented by counsel. These rules have become barriers to justice for self-represented litigants (SRLs). Judges need to abandon their view that being an SRL is a choice. They must be more active in hearings with SRLs. Their goal is obtaining substantive justice.
- Court clerks should be obligated to provide certain information that tows the line between advice and information. The distinction between these two categories is completely unworkable.
- We need to review and revise the rules regarding advice and services from non-lawyers. Training and oversight should be provided to prevent poor legal advice from being offered.
- Judges, mediators and clerks currently receive little to no guidance on how to handle unrepresented litigants. Guidelines need to be developed that consider the context of the dispute. This analysis must consider the volume of cases facing the court, case complexity, adversarial nature of the proceeding, and the existence of power imbalances.
- In housing proceedings, the goal of protecting and assisting unrepresented litigants yields at every turn to the goal of docket control. This is wrong and must be redressed.

Merran Lawler, Jeff Giddings & Michael Robertson, "Opportunities and Limitations in the Provision of Self-Help Legal Resources to Citizens in Need" (2012) 30 Windsor YB Access Just 185.

Summary: This is a case study report out of Australia regarding the utility of self-help resources for unrepresented litigants. It is meant to examine the potential and limits of self-help resources. Thus far, research on self-help resources has focused on the prevalence of this material and its ability to help the smooth administration of justice. Research has not focused on the effectiveness of this material for self-represented litigants themselves. This article seeks to fill this gap.

- The report looked at all resources, support mechanisms, structures and services which are designed to assist people to work through their legal problems. Four case studies were

examined: (a) obtaining probate of an uncontested will, (b) pursuing a tenancy claim in small claims court, (c) commencing or defending a small claims contractual dispute, (d) conducting a dispute in the child protection system.

- Probate: typically non-litigious. A privately issued self-help kit was provided and used by the case study participants. For an extra fee, telephone and other support services were available with the kit.
- Tenancy Dispute: applicants and respondents both. The system expects individuals to obtain at least some self-help. Legal practitioners are generally excluded from the hearings. Self-helpers were given a written guide developed by the residential tenancies authority. This guide was supplemented by a "pre-dispute" booklet that had to be given to tenants by landlords. Most participants used the guide, while others relied on previous experience, verbal advice from the residential tenancies authority or information from community legal clinics.
- Contractual dispute: a self-help guide was available online or at the small claims office. Of the participants, less than half of them had seen the guide, and half of those had used the guide. Those who did not rely on the guide relied on a combination of sources from the small claims office to community legal centres and private lawyers. The guide was intended to be a basic but stand-alone document.
- Child Protection: Two documents exist for self-help. They are more akin to "rights and responsibilities" kits than "how to" guides.
- Three key findings arose from the case study:
    - Self-helpers are motivated to resolve the legal issue with minimal expenditures of time, money and intellectual engagement.
    - Self-help legal resource providers have different motivations (profit, alleviate pressure on other services, meet statutory requirements, or to fill gaps in the legal system). This influences the content of the materials.
    - Context and complexity significantly impacts the ability to quickly, easily and directly enter and exit the legal system.
- In probate matters, self-helpers were voluntary, but in all other contexts, the self-helpers described themselves as having no choice, based on system requirements or lack of money to afford a lawyer. All volunteers felt that participation in the legal system was "necessary" and they wanted to be rid of the matter as soon as possible.
- The volunteers reflected most favourably on resources that: broke down the process into clear steps; clearly set out the time frame to expect; assumed the user could work through the legal aspects without needing additional financial resources; did not require the user to have any knowledge of the substantive law to navigate the procedure.
- Users were critical when pamphlets focused on substantive law. The users were results oriented -- they needed to know how to reach their desired result, not how and why they were in the situation in the first place. They reflected a greater need for "know how" in working through the court.
- Users were critical of resources that provided detail that a lawyer might need to know, but which was not helpful to them. Some kits left out basic information (for example: the location of the court house).
- The most popular kit (probate kit) was developed by a private business; was updated semi-annually; and feedback was solicited from all users. It was created by a business that selected this as an area of law that typically lawyers were engaged in, but that self-helpers could do themselves. It assumed at least a basic level of understanding that a court process was involved.
- The less popular kits were typically created by government organizations who were writing the resource not only to assist helpers, but to ease some of the burden on the court system. The government kits thus contained more substantive law, were updated annually, and did not receive feedback. They were not developed with any (or with limited) input from external stakeholders.

Their utility ratings suffered from this lack of input. The inclusion of substantive information was often not clearly distinguished from the procedural information. Users were frustrated by high levels of substantive background information

- Context was important to these results: the more adversarial and emotionally involved proceedings were not able to proceed along a clear path – users were frustrated that the resources did not or could not lay out the step by step proceedings. Where processes can be laid out in a linear fashion, self-help resources were much more effective.
- Complexity also impacted results: the more complex the matter, the less helpful self-help resources were.

Julie Macfarlane "Bringing the Clinic into the 21st Century" (2009) 27 Windsor YB Access Just 35.

Summary: This article argues that the law school clinical learning setting is lagging in recent years because it is outdated. The clinics of the 1960s and 1970s were focused on bringing access to justice to underserved and marginalized groups in the community by taking their cases to trial. Very few cases go to trial anymore. To change their approach, legal clinics should ask themselves what their policy is regarding litigation and settlement, and how this may affect the broader culture and individual file management.

- Enthusiasm, funding and participation have faded in the past 10 years. Law clinics have continued to operate with outdated views on (among other things) the default to rights-based advocacy, and the role of the lawyer as "in charge" of the relationship. The approach has also failed to adjust for the fact that very few cases reach trial now. These view change to keep pace with the changing environment of legal services. It must update its goals (both in terms of education and service).
- Law schools teach law as an objective core truth that can be identified and learned (and hence, the lawyer always knows best and laws/rights are the way to advance your interests). Facts and learning are valued over lived experience and context. Theory is conflated with practice. Clients are virtually ignored in the classroom, and when mentioned, they are treated as burdens. No effort is placed in teaching students how to empathize or understand client situations. Classroom learning is placed on a hierarchy over and above experiential learning. This is not in touch with the reality of legal practice. More contemporary understandings view law as drawing its meaning from context.
- In the clinical setting, it is easy to grasp that law is a tool or a strategy to employ for solving problems. It is not the only answer to a problem. Going to court is often not the desired result, and obtaining a favorable result is not the same as having your judgment enforced.
- Legal clinics reflect the misconceptions of legal education in three ways:
    - Social Justice: There is blind faith in the power of litigation to effect social change. This is not accurate. Working for social justice can take a variety of different forms, with different contexts and degrees of success. The legal profession has remained isolated from the diversification of social justice approaches. Lawyers default to rights, a strategy that is often at odds with the needs of clients. Lawyers distort their clients' needs to litigation.
    - The lawyer / client relationship: law schools and clinics assume that lawyers have superior knowledge. Acting on a dominant rights based approach disempowers the client. The client is treated as an intrusion on effective legal decision making. Clients of the 21st century do not accept this – they are far less deferential to the lawyer in charge. Lawyers need to understand the underlying concerns and interests and think about what settlements could achieve those objectives. Student lawyers need to listed to their clients' priorities and alternatives

    - Ethical behaviors and personal values: Law clinics are an excellent environment to learn about ethical and value aligned behavior, but this opportunity is lost behind a competitive spirit and a mentality that the ends justify the means. Critical self-reflection is not a part of the mainstream experience. This can lead to personal and professional disconnects down the road.
- To change this approach, legal clinics should ask themselves what their policy is regarding litigation and settlement, and how this may affect the broader culture and individual file management. They should also ask themselves if clinic students are invited to reflect on their personal ethical choices and dilemmas. Lastly, they should consider how far the lawyer-in-charge ethos is perpetuated or challenged in the clinic.

Martin Partington, "The Relationship Between Law Reform and Access to Justice: A Case Study" (2005) 23 Windsor YB Access Just 375.

Summary: This paper argues that law reform efforts must engage the public to give people an idea that they shape the legal rules which govern them. This advances access to justice as it promotes the idea that citizen involvement in the legal system. It is articulated through an examination of housing laws in the United Kingdom.

- Access to justice has a variety of different conceptions, but at their core, these different conceptions are focused on accessibility. The early days focused on procedure, whereas now, the movement is focused on substantive justice. The process of consultation at the heart of law reform can, and should, give citizens the opportunity to articulate their own conceptions of justice in relation to the topics being investigated. Law reformers ought to think about ways their work relates to access to justice.
- The housing project in the UK is an overhaul of the laws on renting property in England and Wales. The law reform commission typically operates by reviewing case law, legislation, academic and other writing, law reports and other relevant sources of information. This is often supplemented by informal meetings with specialist groups in the legal profession, academic lawyers, and groups in specific industries. For the housing project, the team felt that additional consultation with renters and landlords was necessary. The result was a series of advisory groups. These groups were asked initially to sound their opinions on what they would like to see emerge from the law reform. This role adapted and the groups were later viewed as sounding boards for different ideas. Using this advisory group helped the law reform commission issue papers that were better informed. In addition, the people forming part of the groups were better informed and more engaged so their responses to issues raised were more authoritative.
    - In addition, public meetings were held. They included landlords and tenancies as well as specialist lawyers.
    - Outcome: A much greater engagement with the law reform consultation papers was received. The result was a law that was more flexible and focused on informing landlords and tenants of their respective rights. There was also a role for restructuring the judicial system's interaction in the case of disputes.
- The increased public engagement has helped create a system that people actually want – not a system that lawyers think people will want

Jona Goldschmidt and Loretta Stalans, "Lawyers' Perceptions of Fairness of Judicial Assistance to Self-Represented Litigants" (2012), 30 Windsor YB Access Just 139.

Summary: This article examines the degree of assistance judges give to self-represented litigants (SRLs) and how this impacts perceptions of judicial impartiality. Lawyers and SRLs can have different perceptions of what is deemed "fair" when a judge is assisting an SRL. In this article, a survey of family

law lawyers was conducted who were asked about their perception of bias in a number of hypothetical scenarios. The results are analyzed to create a broader understanding of what lawyers view as fair or unfair.

- This article reviews lawyers' perceptions of fairness in the treatment of SRLs in the context of a family law case.
- Canada recognizes a right to "reasonable" judicial assistance (Canadian Judicial Council's 2006 Statement of Principles on Self- represented Litigants and Accused Persons). In Davids v. Davids, [1999] OJ No 3930 (Ont CA), the Ontario Court of Appeal held that trial fairness requires an SRL "have a fair opportunity to present his case to the best of his ability… [and] that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case" (at para 36).
- The boundaries of permissible vs impermissible assistance are derived from cases where the reviewing court rejects a SRLs complaint of inadequate assistance. Permissible assistance includes: intervening to refocus the proceedings, prompting the SRL during their testimony to address issues raised in the pleadings; suggesting or illustrating to the SRL the type of issue which might be the subject of cross examination, and questioning the SRL to clarify their testimony.
- Impermissible assistance includes all activity where the judge is assuming the role of counsel to the SRL. This includes: rewriting the SRLs pleadings; adjourning the case for a week when SRL didn't subpoena witness; instructing an SRL on nuances and subtleties of a complicated body of knowledge.
- The Canadian Judicial Council's statement on dealing with SRLs also lays out some guidelines. SRLs should not be defeated on the basis of minor deficiencies that are easily rectified. When both parties are unrepresented, court room management may be needed to protect each sides' rights. A judge may: explain the process, inquire whether parties understand the process, refer the parties to agencies that may assist the litigant; provide information about the law and evidentiary requirements; modify the traditional order of taking evidence; question witnesses.
    - The article argues that these guidelines are still too vague and do not provide any concrete information.
- A survey was conducted of 210 family law practitioners on their perception of judicial bias and fairness in hypothetical scenarios. The survey covered not only perceptions of bias, but the helpfulness of the judge.
- Points of Interest:
    - Where the assistance of the court affects procedural issues, lawyers are more tolerant of judicial assistance and information. Where the assistance favorably affects the substance of the SRLs case (for example, for introduction of evidence and enforcement of a judgment in SRLs favor), then lawyers are opposed to this evidence.
    - Nearly one quarter of respondents thought providing bare procedural advice showed judicial bias towards an SRL
    - Almost half of the respondents felt it was appropriate to grant an adjournment on the first day of trial to allow the SRL to subpoena a witness.
    - More than half of lawyers felt it was inappropriate for a judge to approve a settlement that violated the statutory guidelines. In these cases, more judicial assistance was necessary. More than half of lawyers found that strict enforcement of complicated procedural rules were inappropriately disregarding the SRL as well.
    - Responses were split when judges suggested questions for direct and cross examination.
    - Where rules of evidence were strictly enforced, lawyers often found a ruling adverse to the SRL to be unduly harsh.

- It is not clear what role public perception ought to play in the judicial determination of impartiality.

  Public opinion polls should not determine what a judge should or should not do. However, this data could be considered to resolve complaints of bias by a represented party against a judge who is assisting an SRL.

Lucinda Vandervort, "Access to Justice and the Public Interest in the Administration of Justice" (2012) 63 UNBLJ 125.

Summary: The public interest in the administration of justice requires meaningful access to justice. This essay argues that there must be significant changes in the way judicial reasons are released in order to meet that objective. Primarily, the author argues that draft fact findings and draft reasons ought to be released by judges to counsel, and permit opposing counsel to make comments on that draft before the final reasons are released.

- In order to achieve meaningful access to justice, the parties must be heard and judges must be able to understand their case. Practice and procedure can limit or frustrate this effective communication.
- Lack of representation leads to real and apprehended inequality in the court room. It affects the legal process, legal deliberation and legal decision making. The focus of the article is locating the prerequisites for adequate decision making.
- Ways to increase access to justice in the judicial system:
    - Legal advice should be available well before an action gets filed. Preventative legal advice needs to be widely available. Planning to avoid disputes is necessary. Representation at a hearing is arguably too little too late (see: New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46)
    - Judges should release draft findings of fact to the parties so they can address the factual inaccuracies. There is no obvious reason (other than past practice) why parties and counsel should not have an opportunity to review draft findings of fact. When inaccuracies are located, the parties should be able to prepare, exchange and file written submissions on the matter. If needed, a hearing could be held to hash out disagreements.
    - Judges should also release draft reasons. Written submissions critiquing the draft reasons could be submitted to identify errors or omissions, or observations about collateral effects of the draft decision on the law. A hearing on the draft reasons may also be possible.
    - Arms-length critics could be hired by the court to assist judges and to monitor the operation and effect of the rules of court with a view to strengthening the overall quality of legal deliberation. Alternatively, there could also be an independent agency of "legitects" that acts as an intervener to critique the legal proceedings on a non-partisan basis to enhance fact finding and deliberation. This agency could possibly be retained by individuals and groups to assist with case development and litigation strategy.

Andrew Pilliar, "Law and the Business of Justice: Access to Justice and the Profession/ Business Divide" (2014) 11 Journal of Law & Equality 5.

Summary: This article argues that, to better address access to justice issues, the legal profession must pay closer attention to the "business of law" in addition to "law as a profession."

- **Definition:** The author referred to a number of definitions of access to justice. He clarified that when using the phrase "access to justice," he is referring to individuals' access to non-criminal legal services as provided through Canada's legal system.
- **Access to Justice Problem in Canada:** The author quoted the Equal Justice Report's suggestion that public confidence in the justice system is weakening (p 9). Canada has ranked

low on civil justice compared to other high-income countries (p 9). Studies of unmet legal need reveal that Aboriginal people, members of visible minority groups, persons with disabilities, and recipients of social assistance are more likely to face different types of legal problems (p 10).

- **Revisiting the Profession/ Business Dichotomy Could Improve Access to Justice:** Lawyers and law firms operate in response to business concerns. Failure to engage with their everyday business decisions is a lost opportunity to address access issues (p 21). Although business and profession are flexible terms, they are not mutually-exclusive. The author referred to a number of definitions of "business" and emphasized that only those definitions, which suggest that profit-maximization is the sole purpose of business, are inconsistent with professionalism (p 21).While the business/profession divide seems to be a false dichotomy, it is a feature that has obstructed access to justice.
- **Four Areas of Tension between professional ideals and business realities that could contribute to the debate about improving access to justice:**
    - **1. Practice Organization:** Fostering a more diverse organizational setting where private lawyers work in practices that provide access to marginalized individuals and groups may pave the way for a more effective response to access to justice demands (p 33).
    - Conventional firm structures that are geared towards increasing profits for partners is poorly designed to provide affordable legal services (p 23).
    - Development of new practice structures in the US is often connected to law school initiatives. The author referred to the "legal residency programs" where new graduates provide low-cost legal assistance while attending seminars on obtaining and billing clients, malpractice insurance, and building a law practice (p 25).
    - **2. Billing and Profit:** Time recording and billing practices are a day-to-day routine for lawyers in private practice (p 25). Lawyers who are interested in improving access to justice should be creative in how they bill their clients. Some firms use creative methods to ensure adequate funding such as: combining public grant funding with client fees, utilizing legal aid or analogous funding, and obtaining work for labour union worker legal insurance plans as a source of stable funding (p 28).The author reiterated that a deviation from billable hours and conventional approaches to revenue generation could improve access to justice while allowing lawyers to retain a commercially-viable law practice (p 28).
    - **3. Advertising:** The US Supreme Court suggested that advertising would help address unmet legal needs in the US (p 29). Although lawyer advertising may result to lower fees for some types of cases, it may also lead to a kind of practice which provides questionable types of justice (p 30).
    - **4. Legal Education:** The author argued that improving lawyers' capacity to comply with professional norms requires some attention to education about the business aspect of law (p 31). He suggested that it is worth exploring whether law school curricula can integrate both professional ideals and a deeper understanding of business models in legal practice. The aim of such integrationwould be to educate future lawyers on how they could provide legal services in ways that foster access to justice (p 31).
    - By increasing the scope of legal education to include a "critical examination" of legal work settings, law schools may help effect a cultural shift within the legal profession (p 32).

Dr. Julie MacFarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (May 2013, Treatsurer's Advisory Gropu on Access to Justice (TAG) Working Group, Final Report <http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf>.

Summary: This qualitative study sought to develop data on how self-represented litigants (SRLs) engage with and experience the justice system. It sought to fill a gap in legal knowledge – many

projects are developed to assist SRLs, yet we knew very little about their experience from their own perspective. After reviewing the trends revealed by interviewing SRLs, the report suggests reform efforts that can enhance the SRL experience and the functioning of the justice system.

- **Part 1: Details of the Study**
  - Policy has been made for the betterment of SRLs with little empirical information on SRLs and what they want or need. This study seeks to fill this gap. It wants to understand why people self-represent, what barriers they perceive and encounter, and how they interact with legal insiders like judges and lawyers.
  - Interviews were conducted with 259 SRLs who volunteered to participate in the project after hearing about it in media outlets or in signage posted at different courthouses. Almost half the participants came in from the project website.
  - Voluntary opt-in was the only feasible way to get the sample group. They were unable to create or use a control group. The subjects were interviewed and completed a survey. Some of them participated in a focus group as well.
  - The SRLs were from Alberta (38%), Ontario (30%) and British Columbia (32%). They were almost 50/50 male to female ratio. They contained a reasonable range of socio-economic and educational variables. The sample did not record race or ethnicity. Unfortunately, racial diversity may be limited (judging from the focus groups).
  - 60% of the sample group was in family court. 18% were in civil court, 13% in small claims court, and 9% were before a tribunal. Over 60% of them were the applicants or petitioners, while over 30% were defendants or respondents. In family court, more men than women were respondents and more women were applicants. 45% of the sample was over 50, 32% were between 40 and 50. 57% of SRLs had income of less than $50,000/year. 40% had income of less than $30,000/year. 6% had income over 100,000.
  - 50% of the SRLs had a university degree.
  - Over half of the SRLs had a lawyer retained for some time, but discontinued at some point in their case. 75% reported that the other side in their dispute had a lawyer.
  - 107 service providers (Court staff who are not non-legally trained – for example, court clerks) were also interviewed in completing this study.
  - In 2011, 40% of Alberta provincial court hearings on family court matters involved one or more SRLs.
- **Part 2: Making the Decision to Self-Represent**
  - <u>Cost</u>: Financial barriers overwhelmingly are the greatest influence in deciding to self-represent. This was both a lack of financial resources and an exhaustion of financial resources. There was also a general view that the discrepancy between the cost of a lawyer and the value they add was unacceptable. The growth of information online has made more people skeptical that lawyers are worth what they charge. They do not see themselves as being as good as lawyers, but that the internet makes self-representation technically possible.
    - Several SRLs attempted to hire a lawyer on an unbundled basis, without much success.
    - 53% of SRLs interviewed had originally retained a lawyer, but could not continue with counsel because of costs. This group of people were much more likely to be critical of the legal services they had received.
  - <u>Dissatisfaction with Legal Counsel</u>: Many SRLs were very dissatisfied with the legal services they had received. They did not feel they received value-for-money. Their complaints primarily fell within 5 headings:
    - Counsel was doing nothing. The SRLs did not feel that their lawyer explained to them what they were doing, and why they were not taking certain steps. Many felt that nothing was done to advance their case, and that it was exceptionally difficult to get in touch with their lawyer.

- Counsel was not interested in settling. Many felt that counsel dragged things out in order to make more money. They were upset about a lack of settlement orientation in the litigation process.
- Difficulty finding a lawyer to take their case – many SRLs shopped around for a lawyer with no success
- Counsel not listening or explaining – counsel were often accused of not listening to their client, and ignoring the priorities of the client in favor of pursuing an outcome the client was less interested in. They did not take enough time to explain what they were doing, and were not interested in explaining themselves to the client. Many people were upset that their lawyer could not give a definitive outcome.
- Counsel incompetence – some SRLs reported that their lawyers often made mistakes and were "sloppy" and that the work filed with the court was not edited
- A preference for handling matters themselves – 10% expressed confidence that they could handle the case themselves. A common rationalization was that they understood the matter much deeper than any lawyer could.

- The common experience of self-representation:
  (1) Initial confidence: initial sense of optimism that they can handle matters themselves. This was sometimes bolstered by having some prior experience that made them feel more confident. Others referred to their education and general life experience as being sources of confidence. Service providers blamed this initial confidence on an unrealistic assessment of the case. Some noticed a fundamental disconnect between public expectations and the reality of self-representation. Service providers viewed some SRLs as treating the justice system as a service facility, akin to applying for a passport of driver's license.
  (2) Initial fears – anxiety and fear of the justice system, and of the unknown
  (3) Becoming overwhelmed – SRLs felt that they were treated as a nuisance by judges and service providers. Being an SRL required much more time and effort than they anticipated. They were particularly overwhelmed with filing complexities, participating in questioning, and conducting ones case. Lastly, the effort needed to enforce an order was very disheartening and overwhelming.
  - SRLs were also surpised and overwhelmed to learn how long it took to get anything done. They have no idea what to expect, or that their expectations are inaccurate.

- **Part 3: How SRLs engage with the Justice System**
  - Court forms – to deal with and assist SRLs, the justice system has been placing more and more forms online. All the SRLs talked about their experience filling out court forms. The SRLs found these forms to be exceptionally time-consuming and difficult to use.
    - To test their complexity, a research assistant (law graduate) attempted to complete many of the forms needed to obtain a divorce in each jurisdiction. She found them excessively difficult and confusing. Specific complaints included: the use of technical language with no explanation as to meaning, lack of clarity on picking the "right" form, the complexity of the forms and information required, legal insider language and unhelpful annotations, and a complete lack of information on what to do once the form is completed.
    - SRL experiences with court forms are similarly negative. They found that the court staff regularly gave inconsistent information on what forms were required and how they were correctly completed.
    - Service providers also expressed frustration with court forms. They noted that the forms were changing constantly and were not clear. There were unclear expectations between service providers and SRLs. Many SRLs thought that the providers were there to help them fill the forms out, and were very upset to find that was not the case.
    - Online resources for SRLs have many limitations. The volume of information makes it difficult to determine what level is appropriate Most notably, the online resources failed to emphasize practical information (where to go with forms, how to appear in court, how to

address a judge etc.). It did not provide any information on how to talk to the other side of a dispute, how to propose settlement, how to enter negotiations.

- Dealings with Court staff were often impeded by parties who were attempting to navigate the legal information / legal advice distinction. This distinction is very difficult to employ in practice, and it was inconsistently applied by different court staff. Court staff members are constantly exercising personal discretion in reaching these decisions.
    - Court staff and SRLs have inconsistent relationships. Some SRLs reported that they were extremely helpful. Among court staff, there is a lack of clarity as to what their job is with SRLs. There is a generational component to this (older clerks are typically not used to dealing with SRLs, and younger clerks see it as the norm).

- SRLs had negative opinions about mediation. Many SRLs did not know about mediation, those that did found that lawyers and opposing parties did not take it seriously, that it varied substantially in quality, and that it was no use if parties did not agree to attend. Overall, there was a lack of trust with the mediation process.
- What resources are SRLs asking for?
    - SRL orientation and education – at the outset of litigation, many SRLs suggested an orientation program that would enable them to anticipate what will happen next – it could cover procedural and cultural aspects of self-representation
    - Office facilities – an area where SRLs could use the internet, print documents etc
    - Coaching – a person to help them out walking through paperwork etc

- **Part 4: SRLs, Lawyers and Judges**
    - The vast majority of SRLs sought to obtain "unbundled" services from lawyers, and largely were not successful in this endeavor
    - Most SRLs would have preferred to have legal representation, but did not have one for practical reasons (most often, they could not afford it)
    - Many SRLs had previously had a Legal Aid lawyer, but had since become disqualified. Many of these people were dissatisfied with their legal aid lawyer, and found there was a lack of communication.
    - Many SRLs had similarly poor opinions of the duty counsel and summary advice services they received. While some people found the advice was good, many people felt that it was not enough to meaningfully assist them in their case. There was a general view that these lawyers were of poorer quality from other private practice lawyers to handle their questions.
    - These comments question of much value these models provide
    - Several options may increase the value of the summary advice model: preparing SRLs ahead of time during the orientation program, provide specialized training for volunteer lawyers, build flexibility into the time limits and allow lawyers to come into court to speak for them
    - SRLs felt bullied and intimidated by opposing counsel. This lowers the esteem of the legal profession in public.
    - Many SRLs wished that they could retain a paralegal to help with organization of documents like affidavits. These SRLs, and some paralegals who were questioned, felt there was an urgent need to relax the law societies' restrictions on paralegal work.
    - Court experiences and interacting with Judges
        - Appearing in court produces extreme anxiety in SRLs. While this is to be expected, it can reach the extent where many SRLs could not function and this impacted their view of access to justice
        - Most SRLs were frustrated by "feeling like an outsider" because the legal insiders
        - speak the same language and they are left out

        - SRLs were continually frustrated with not knowing how to behave, and the toll of the emotional investment in pursuing their own case.
        - Most SRLs complained about the number of judges they had to see, the disparity in treatment depending on the particular judge they were before, bullying, ill-treatment and hostility from judges, moral judgment from judges, and generally feeling that a two-tiered system existed for lawyers and SRLs
    - Personal and Social Impact on SRLs
        - Many people described the experience as "traumatic". The anxiety caused by self-representation causes many mental and physical health issues – even proximity to "triggers" (the courthouse, computers etc) caused many people to have negative health effects long after the case was over
        - There were also many financial implications – many people had counsel originally but after losing their money, they had to pursue self-representation
        - Social isolation – the amount of time to dedicate to a court case detracted from social interaction and engagement
        - Loss of faith in the justice system – many SRLS felt that there was no effective process for holding anyone accountable and that the legal profession was an "old boys club". The complaints procedure brought against
- **Part 5: Recommendations**
    - Simplify court forms and provide more user-friendly instructions. Create some "best standards" practices to make sure the forms are SRL-friendly. SRLs should be part of this process. Court guides could be used to provide assistance when necessary. A system for reviewing court forms prior to submission could help alleviate some of the most damaging consequences from filling out forms wrong
    - Continue to develop online materials for SRLs, but take into account the difficulty they are already facing in navigating what is online. FAQ sections are very valuable in developing this material. Online support hubs (for example, facebook groups) could provide the growing number of SRLs to support each other. There could be more interactive online or phone resources to provide assistance in using forms.
    - Access to information – the services to provide help to SRLs must be more clearly labelled with signage. The distinction between legal advice and information must be re-examined – it is unworkable in practice. Court staff need clearer guidelines to determine in a clear and consistent way, what they are allowed to say. Court staff should be given more training in how to deal with SRLs, and should have access to support services to deal with the stress of the job.
    - Other support mechanisms – The justice system should do a better job of making SRLs aware of the resources that do exist. In addition, educational workshops would be attractive to many SRLs – an orientation as to what will lie ahead. It could prepare SRLs to approach settlement and mediation. Coaching could also be useful – not for legal issues and
        - procedures exactly, but communication, negotiations and presentation skills.
    - Office services should be readily available for SRLs at the courthouse. This could be offered at a reasonable cost.
    - Mentoring and supports should be encouraged among SRLs.
    - Hours of Operation – Courts could consider lengthening or altering some hours to accommodate SRLs who have to take time away from work to do their filing and appear in Court.
    - The Summary advice model should be altered to reflect the SRL experience. For example, a workshop model to answer common questions on service of documents and filing could be helped. Limits on the number of times an SRL can appear should be avoided. Meeting with a staff person ahead of time to focus their questions would also be helpful.

- Paralegals should be permitted to do more tasks without entrenching on the legal advice universe.
- Unbundled legal services should be offered.
- Lawyers need to get better about explaining costs to clients – failing to do so is bringing a bad reputation on the entire profession. The method of complaints against lawyers is also in need of re-examination, as it lacks credibility with the public. Enhanced legal education for prospective lawyers on how to deal with SRLs will also be helpful.