



A Supreme Lack of Information

Why we know nothing about the outcomes of the majority of civil cases initiated in B.C.'s Supreme Court, and what can be done about it.

*A Follow-up Study on the 2015 Attrition Report for the
UVic Access to Justice Centre for Excellence*

March 2019



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A follow-up study on the 2015 Attrition Report for the University of Victoria, Faculty of Law,
Access to Justice Centre for Excellence

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1.0 Introduction

This study is one of six reports initiated by the University of Victoria Faculty of Law's Access to Justice Centre for Excellence (ACE) to help lay the groundwork for enhanced empirical justice research in B.C. It is a follow-up to a September 1, 2015 study for the Canadian Forum on Civil Justice (CFCJ) entitled "[Civil Non-Family Cases Filed in the Supreme Court of BC - Research Results and Lessons Learned](#)" (the "Attrition Study")¹, in which significant information gaps in court records precluded completion of the study in the manner originally envisioned.

The purpose of this current study is to:

- identify the challenges encountered in conducting the Attrition Study, and explore their importance or significance.
- consider what changes would need to be made to data collection processes in the BC Supreme Court in order to better answer the original questions and meet the research objectives in the Attrition study, and to provide a high level plan for such changes, and
- identify any legal, financial or administrative problems or complications that would be encountered in making such changes to the system.

1.2 Methodology

Interviews were conducted with administrators and staff in the Court Services Branch of the Ministry of Attorney General (Policy and Service Performance Division and Corporate Support Division), a legal policy advisor to the Judicial Access Policy Working Group, and a legal counsel with the B.C. Supreme Court. Several of these informants were also on the Judicial Access Policy Working Group. Collectively they had direct knowledge of the Civil Electronic Information System (CEIS), Court Services E-filing process, maintenance of physical court records, protocols for access to court records, and processes/implications involved in changing forms and appendices to the B.C. Supreme Court Rules.

¹ Retrieved from <http://www.cfcj-fcj.org/sites/default/files/Attrition%20Study%20Final%20Report.pdf>. The author of the current report was also a co-author of the Attrition study.

2.0 Questions Addressed and Challenges Encountered in the Attrition Study

The primary questions that the Attrition Study had originally intended to address were:

1. What proportion of cases either drop out of the BC Supreme Court Civil non-family system, are unresolved, or are subject to such long delays that the claimant's access to justice is affected?
2. What are the reasons that claimants' cases do not continue in the court system, and what factors contribute to these decisions?
3. Are cases resolved after leaving the court system and if so, how are they resolved, to what degree and in what time frame?
4. To what degree are claimants satisfied with the outcomes of their cases in court or in an out-of-court process?
5. What are the short and longer-term impacts associated with case attrition from the court system?

In essence, all of these questions are concerned with access to justice and the impacts of the pursuit of justice, and are therefore important for assessing the efficacy of the civil justice system at the Supreme Court level.

There were multiple challenges that prevented reliable answers to these questions. Although several others were identified in the report, the key ones for purpose of this follow-up document are:

1. Limited identification of case types

Based on key stakeholder recommendations at the beginning of the Attrition study, Motor Vehicle Accident (MVA) cases and General Civil Cases were chosen as the population pool. The reasoning for this choice was that these case types represented a significant volume of cases in the BC Supreme Court, were more likely to portray access to justice issues in comparison to cases like probate and bankruptcy, and involved a diverse range of cases.

However, a significant challenge was that the Court Services electronic data system had no breakdown of case types within the General Civil category. This meant that it was impossible to ascertain the types of cases within this category in advance. When the hard copy case files were reviewed, a majority were personal injury cases involving the Insurance Corporation of BC (ICBC), and only a small number related to business cases. This meant that the study lacked a significant range of case types.

2. A lack of prior information about the comprehensiveness, currency and meaning of the data fields in court records during the planning phase of the research

Prior to applying for a Court Record Access Agreement, there is no system available to researchers to ascertain the extent of client contact information in the hard copy files, nor to assess the quality, comprehensiveness and reliability of other case information that might be available. Not having access to preliminary or “mock data” made it difficult to plan the research with confidence.

3. A lack of current and comprehensive case records in the hard copy files, making it impossible to clearly identify the status of cases in the civil court system

There was a lack of documentation in the case files, and almost no files contained documents indicating whether, when or how a case had been resolved. This raised concerns about the selection of these cases for claimant interviews based on a definition of cases "without any recent activity".

The majority of files contained only a Notice of Civil Claim and, in some cases, a Response to Civil Claim. In most cases there was little other information in the case files indicating case progress or activities. Notices of Discontinuance may be used for some purposes but are not generally required by the courts and were rarely present in the files.

4. There was a lack of claimant and respondent contact information in court records that would make it possible for researchers to contact the parties in order to explore their willingness to be involved in the research

A review of the 500 cases selected for the research sample found that there was no record of claimant telephone numbers entered on the case records. In 50% of the cases there was a specific address recorded. However, in many of these cases this address was at least two years old which meant that the information was unreliable. In a majority of the cases in which the claimant had representation, only the address of the lawyer was recorded.

5. In general there was no established system whereby, at the time of filing, registry staff can explain and encourage the participation of claimants to participate in a particular research study.

Even if this option were available it would only partly mitigate the difficulty of client contact identified in point 4. Developing a research sample on the basis of consents requires that the process occur in advance of the study, whereas if there is reliable contact information in the files, it is possible to do a retroactive study. This difference has a significant impact on the planning and timing of studies.

3.0 Operational Changes Required; Anticipated Obstacles

This section describes:

1. Several contextual factors related to realistic expectations and strategies for change.
2. Changes that would need to be made to data collection processes in the B.C. Supreme Court in order to better answer the specific challenges described in section 2.0.
3. The primary legal, financial or administrative problems that would be encountered in making such changes to the system.

3.1. Framing expectations and strategies for change

Several points should be considered when developing strategies to increase the research potential of Supreme Court civil files.

Firstly, in non-family civil matters – as opposed to criminal cases - there is no compelling operational reason for the courts to monitor the trajectory of cases that are initiated but do not continue in court. When individuals or businesses decide to sue each other, filing with the court is usually a pressure tactic to force the other party to negotiate seriously, or otherwise face a court resolution at significant cost. The vast majority of such cases are played out outside the court system. The resolution or non-resolution of these matters outside of court is therefore *prima facie* not of inherent interest to the courts.

By comparison in the criminal sphere, the State has a legal obligation to protect citizens against acts defined in the Criminal Code, and there is a prosecutorial system for charging individuals and bringing them to Court. The Court has clear procedures for compelling individuals to appear, and issuing warrants if they do not appear.

The second point is that several of the challenges identified in the previous section have already been noted in a previous report, and have not resulted in significant change. In a 2009 study for the Ministry of Attorney General², the authors recommended that the name and contact number of the individuals or business representatives who are parties should be recorded in the court file (rather than just the contact address of their lawyers), and/or a system be implemented at the outset of the claim of gathering litigant consents to participate in future evaluation research.³ They also recommended that procedures be developed for determining the outcome of cases that do not continue in court (e.g. notices

² Focus Consultants. Description of Approaches, Designs and Methods Used to Evaluate Court Rule Changes in Civil Court, March 17, 2009 (unpublished). One of the authors of that study is the author of the current report.

³ In another 2009 report (again unpublished), concerning a multi-year evaluation of a Small Claims Pilot Project, Focus Consultants described the extraordinary efforts made to obtain the contact information of claimants who were represented by legal firms and whose claim did not contain the parties' contact information. The efforts to obtain this information even included a letter from the Chief Judge of the Provincial Court encouraging law firms to assist in contacting their clients, but still resulted in only a small percentage of completed claimant interviews compared with cases where the claimant's address was in the files.

of discontinuance that identify the outcome). Neither recommendation has been implemented. On the other hand, a recommendation in the report to include more detailed descriptors of case type was subsequently implemented in the form of an appendix to Form 1 in the Notice of Civil Claim, under Supreme Court Rule 3-1 (1)⁴.

Thirdly, to date most research requests involving an Application for Access to Court Record Information in B.C. have been in relation to criminal matters, and secondly to family civil research. There are far fewer civil non-family applications. This difference could be a reflection either of lesser interest and focus on civil non-family research, and/or a perception that court records are not useful for such research.

Fourthly, the predominant change related to Court record filing and maintenance over the past 10 years has been towards online and digital processes rather than hard copy files. This also includes scanning of documents as part of the digital record rather than maintenance in hard copy files. This transition directly impacts the utility of courthouse-based research. It also impacts what information is maintained in electronic files and the need for separation of parties' identity from claim and process-based information.

Finally, although from 2008 - 2011 the Court Services Branch allocated time and evaluation effort to the significant changes made to Supreme Court Rules (see section 3.1.1 below), in recent years the emphasis in terms of access to justice has been on other issues, i.e. self-represented litigants as well as the needs of Indigenous populations, LGBTQ+ individuals and persons with disabilities. More recently, the anticipated transfer in April 2019 of Motor Vehicle Act personal injury disputes under \$50,000 to the Civil Resolution Tribunal has involved significant staff attention.

All of the above points tend to reinforce the status quo in terms of the operational purposes of court records and the current priorities of the CSB. At the same time, it is legitimate to ask from the standpoint of access to justice, should it not also be an important objective of the Ministry of Attorney General and the Judiciary to support the justice sector's collective capacity to measure the experience of individuals and businesses seeking resolutions to legal problems? In this context, if correctly handled, could Supreme Court files not also be a significant source of information about this issue, especially in relation to the major group of cases that do not continue in the courts? Is it not worthwhile to allocate resources to this end?

⁴ See the appendix at the end of this report.

3.1. Specific areas of change

The following sections describe the areas of possible change, and the challenges involved in addressing them.

3.1.1 Development of the Appendix in Supreme Court Rules Form 1

Revised civil and family rules for the B.C. Supreme Court were introduced in 2010. The objective of the new civil rules is, as per Rule 1-3 (1) is to *...secure the just, speedy and inexpensive determination of every proceeding on its merits*. Rule 1-3 (2) deals with proportionality, stating: *That includes, so far as is practicable, conducting the proceedings in ways that are proportionate to (a) the amount involved in the proceeding, (b) the importance of the issues in the dispute and (c) the complexity of the proceeding*.

In the period 2009 – 2011 a framework to evaluate the rules changes was developed by Focus Consultants in consultation with the CSB. One aspect involved changes to court forms to meet the evaluation requirements. Much of the original (2010) evaluation design was based on data to be derived from CEIS. However, because CEIS is an operational data system and is not designed specifically for evaluation purposes, in 2011 the framework was revised to reduce the emphasis on CEIS as an evaluation source. In 2011 the report containing the revised framework noted that because the data was being collected on new or revised court forms, there may be issues with data completion and quality, at least in early phases.⁵

Form 1 of the Civil Court Rules contains an appendix which is shown at the end of this report. It is limited as a source of case type information for two reasons. Firstly, it was developed not as a comprehensive list of case types for more general research purposes, but of certain types of personal injury claims and of cases that reflected "complexity". It was intended that these descriptors could be used in an analysis of cases that were fast tracked or that involved case planning conferences. Secondly, completion of the appendix was optional rather than obligatory.

If Form 1 is to serve as an effective access point into research on B.C. Supreme Court Civil cases, it would be necessary to: 1) broaden the range of case type descriptors, 2) make completion of the list obligatory, 3) develop a short document to guide parties, their lawyers or support persons/services with directions for completing of the case type descriptors, and 4) have the data entered in CEIS to serve purposes described in section 3.1.2 below.

⁵ Internal report entitled "Evaluation Framework and Plan to Assess the Implementation, Impacts and Outcomes of New Supreme Court Civil and Family Rules", Focus Consultants, March, 2011.

These changes would require the collaboration of CSB staff and the Judiciary through a committee of the Supreme Court, and possibly an external evaluation advisor.

3.1.2 Providing advance information about the civil data set in CEIS to researchers

One way of lessening the problems encountered in the Attrition study would be to provide researchers with an anonymized CEIS data report for specified variables. This would be a preliminary step prior to the Application for Access to Court Record Information. In the Attrition study the application stated that CEIS data would be used as the source of information to define the population, draw a random sample, and contact the sample of respondents who initiate but do not continue a claim. Because these purposes involved access to the names of applicants, the Application for Access to Court Record Information was necessary before the researchers were able to discover the limitations in the civil data available.

A CEIS-based report received in advance of the decision to apply for permission to Access Court Records would reveal whether the required data fields existed to draw a sample in the way intended, and whether the data itself was robust enough (i.e. the data fields were populated) to carry out the study as envisioned. Even if the answers to those questions were negative, they might inform alternative research design strategies, and therefore contribute to better utilization of research resources.

aThis issue is closely connected with the issues in 3.1.1, 3.1.3 and 3.1.4. If selected fields were added to and populated in the CEIS data base, if party contact information was known to be available, and if notices of discontinuance were routinely required, more realistic decisions could be made about the feasibility of a given research approach.

3.1.3 Recording party contact information

To improve access to justice, it is important to be able to measure the pathways and experiences of individuals as they identify and seek resolution of their legal problems. Some of this measuring process can be done second hand through surveys of social or legal service providers, however more reliable and comprehensive understanding can only be achieved through engagement with the actual individuals who have the legal problem. Such measurement can be undertaken either in the form of general population surveys or targeted interviews with individuals as they engage with some component of the social-legal system.

Individuals who enter but do not continue in the formal legal system are a significant subgroup of the overall population. Without contact information for those individuals, effective measurement of their access to justice is impossible.

In B.C. Supreme Court cases the style of cause of the Notice of Claim will usually (but not always) contain the claimant's name, and an address for service of documents. However, the address for service of documents does not need to be the claimant's address; more often than not, it is that of their lawyer. The reasons are: 1) if there is a lawyer for the party, it is more convenient to use the lawyer's address, as the lawyer needs to be aware of documents pertinent to the case, 2) the lawyer's contact information may be more stable than that of the party, so there is lesser need for updates when the information changes, 3) some parties may not want the other party to know where they live, and 4) more general privacy concerns. This would not be a problem if parties' lawyers would act as intermediaries to ask their clients if they would be willing to provide their contact information for a research process, but such attempts have not been successful.⁶

Contact data is not entered into CEIS. It is entered in the Court data system to be used for communications about hearings. Other data that is entered into CEIS is extracted from the initial filing, and does not require updating.

If it were made mandatory for the parties' own contact information to be recorded on filing, the following considerations arise:

- 1) if the party had a serious concern about disclosing their address, they would need to make an application for a court order to exclude it. This would take both the Court's time, possibly that of the Registry staff to explain the requirement, and that of the party's lawyer (which would add to the party's legal expenses).
- 2) if the address were to be useful for research processes, it would have to be kept current. Filing a change of address could also result in extra costs for the party as a result of their lawyer's time. The percentage of cases that change contact information within two years is not known.
- 3) in general it is difficult to incentivize the filing of a change of contact information, and virtually impossible to do so for cases that do not continue in court.
- 4) it would take court staff time to record changes of contact information.
- 5) any use of the information for contact with a party as part of a research study would be subject to approval through the existing process of an Application for Access to Court Record Information.

From a research perspective, having access to parties' contact information would be a significant step forward for researchers undertaking a study based on interviews with

⁶ Footnote 3, supra.

parties. Even if parties failed to update their contact information, the availability of information that has not changed would likely enhance the data pool of parties who could be contacted. It is acknowledged that such a change would have cost implications for CSB and the courts. The fundamental question therefore is whether fostering the conditions for party-based research related to access to justice can be moved higher up the agenda of CSB than is presently the case.

3.1.4 Making the filing of a notice of discontinuance mandatory

At present there is no obligation on parties to file notices of discontinuance even if they are not going to continue their case in court. The main reason a notice is filed is because the parties have indicated a mutual intent to settle, and need assurance that the case will not be resumed in court by the other party. This can also be done through a consent dismissal, which is not tracked differently by the courts from a notice of discontinuance. A notice of discontinuance can also be filed by one of the parties for other reasons, e.g. to do with a credit reporting agency such as Equifax and/or to formally acknowledge payment of debt.

If it were mandatory for parties to file a notice of discontinuance when a matter was no longer going to proceed in court, there would automatically be a pool of non-continuing cases that could be identified by CEIS. From an access to justice perspective, this would be a significant aid for research on the question of whether these civil cases achieve resolution. A requirement to file such a notice could also include a checklist of whether or not the matter was settled outside of court, and if so, by what means (e.g. negotiation, mediation), or whether it was simply abandoned (e.g. for lack of funds).

The main reason a mandatory notice of discontinuance could be useful to the courts would be to increase the efficiency of scheduling, issuing of hearing notices, and allocation of judicial resources. However, while in some instances there is a scramble to re-allocate judges to different cases or court locations as a result of a last minute discontinuation, scheduling processes involve formulas to allocate resources in a way that can largely take into account such changes.

There are practical difficulties in making the filing of a notice of discontinuance mandatory. Apart from the reasons noted above, there is a disincentive for parties to file a notice of discontinuance, because the time for such filing would be reflected in their lawyer's bill. Furthermore, from the court's perspective, it would be difficult to sanction parties that do not file a notice of discontinuance. Instead of sanctions, it might be easier to use a carrot approach, e.g. through a partial refunding of fees when such a notice is filed. However, this would also involve processing costs for the court.

In the final analysis, whether the filing of notices of discontinuance is made mandatory is a reflection of the importance attached to improving metrics about civil cases that are not initiated, but not settled in court.

3.1.5 Developing a consent system in the absence of contact information

The use of informed client consents is a standard procedure for evaluations of social service projects, community legal advocacy clinics, legal aid, mediation projects and many other services. It requires the development and gathering of the consent forms well in advance of the intended evaluation. Staff need to be fully informed about the study themselves, and be given the time to explain the purpose of the study to parties. They need to be able to explain that the party's participation is not mandatory, but at the same time convey enthusiasm about the importance of the study.

The gathering of consents for court-based research would involve the same requirements, but is complicated by several factors. The first is that the logical point at which to ask for consent is when the claim or response is filed, but in Supreme Court filing is done more often than not by the parties' lawyers. As per section 3.1.3 above, the contact information is that of the law firm. Therefore, realistically, consents could only be gathered at the Registry from parties that file on their own behalf, which would severely limit the representativeness of the sample. The second is that when individuals are filing on their own behalf, there may be apprehension or fear about the court case or court procedures, so it is not the most ideal time to ask for their participation in an evaluation process. The third is that the courts tend to feel that Registry staff does not have the time to take on responsibility for collecting consents. For example, in a 2008-09 evaluation of a Small Claims Pilot Project in Vancouver that had extensive support from the Ministry of the Attorney General, the Court Services Branch and the Judiciary, an original proposal for a court user survey stated that court user consents and contact information would be gathered at the time of filing of the claim and/or reply. However, because of the perceived burden this would have put on Registry staff, the sub-committee for the evaluation decided on an alternative methodology in which lists of parties for all cases would be generated through CEIS, and the evaluator interviewers would make "cold calls" to the identified parties. This process tripled the time to make interview contacts and manage the contact database.⁷

Thus although it would be theoretically feasible to use a court-based consent gathering system for a BC Supreme Court research study, logistically it would likely prove

⁷ Focus Consultants, Evaluation of the Small Claims Court Pilot Project: Final Report, August 31, 2009. Unpublished report., see also footnote 3, supra.

impractical except for cases where the claimants/defendants file the documents, and only if sufficient time is made available to Registry staff to undertake the task.

4.0 Conclusions

One of the recommendations in the 2013 report of the Action Committee on Access to Justice in Civil and Family Matters was that ...

*Reliable and meaningful metrics and benchmarks need to be established across all levels of the system in order to evaluate the effects of reform measures. We need better information in the context of increasing demand, increasing costs and stretched fiscal realities*⁸

"All levels" means all levels, both within the court system and in the larger civil justice system. Yet, as explained in section 2.0, the Attrition Report described numerous problems in establishing even rudimentary outcome information on cases that are initiated but not concluded in the B.C. Supreme Court, a case group that represents a large majority of overall cases at this court level.

This paper has analyzed the main problem areas that prevent the establishment of an information base about these cases, and identified key ways in which procedures to enlarge research capacity could be developed.

Action to implement any of these procedures would be a significant step forward. However, if only one area were to be highlighted, it would be that described in section 3.1.3 – to record contact information of the actual parties involved in the case, rather than only that of their legal representatives. This change would enable researchers to make contact with the parties⁹, invite their participation in research, and determine their success or lack of success in achieving resolution of their civil legal problem. Other changes such as mandatory filing of a notice of discontinuance, together with a checklist of reasons (as per section 3.1.4), would provide at least a limited base of outcome information, but at greater effort and cost for the parties and the Court. Direct research contact with parties would ultimately lead to a deeper understanding of their pathways and outcomes as they attempt to resolve civil justice issues, and would contribute to the establishment of meaningful metrics and benchmarks for the civil sector as a whole.

⁸ Access to Civil and Family Justice: A Roadmap for Change. Action Committee on Access to Justice in Civil and Family Matters. October 2013, p. 23.

⁹ Such contact would of course only be permitted for a research firm whose Application for Access to Court Record Information had been approved.

Appendix to Form 1 of the B.C. Supreme Court Rules

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

[Check one box below for the case type that best describes this case.]

A personal injury arising out of:

- a motor vehicle accident
- medical malpractice
- another cause

A dispute concerning:

- contaminated sites
- construction defects
- real property (real estate)
- personal property
- the provision of goods or services or other general commercial matters
- investment losses
- the lending of money
- an employment relationship
- a will or other issues concerning the probate of an estate
- a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[Check all boxes below that apply to this case]

- a class action
- maritime law
- aboriginal law
- constitutional law
- conflict of laws
- none of the above
- do not know

Part 4:

[If an enactment is being relied on, specify. Do not list more than 3 enactments.]