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Access to Justice: Initiatives to Improve Access to Legal Services and Dispute Resolution

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The broad concept of access to justice centers on the ability of people to locate, understand, and afford legal services and resources to deal with legal problems. In recent years, a number of reports have identified a lack of access to justice as a serious problem in Canada. This paper provides an overview of the nature and scope of the issue in Ontario, and surveys some recent initiatives to improve access to justice in the province.

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Introduction

The broad concept of access to justice centers on the ability of people to locate, understand, and afford legal services and resources to deal with legal problems. It has been defined as “the ability of a citizen to bring about a solution to his or her legal problems that is (a) financially affordable; (b) timely; (c) easy to understand; and (d) easy to manoeuvre through.”¹ In recent years, a number of government-sponsored inquiries, academic studies, and other reports have identified a lack of access to justice as a serious problem in Canada.² These reports have identified cost, delay, and the complexity of the justice system as key issues impeding access to justice.³

This paper focuses on access to justice in civil and family law. The problems to which civil and family law apply have been described as “everyday” legal problems; they relate to issues like separation, divorce, housing, and employment.⁴ This paper will first provide an overview of the nature and scope of the access to justice problem in Canada, and in Ontario in particular. It will then survey some policy responses to the issue, with a focus on recent initiatives in Ontario.

Nature and scope of the problem

In 2013, the Action Committee on Access to Justice, chaired by Beverley McLachlin, former Chief Justice of the Supreme Court of Canada, concluded that Canada has a “serious” access to justice problem and that the civil and family justice system is “too complex, too slow and too expensive.”⁵ These conclusions echo some of the concerns identified by Justice Coulter Osborne’s 2007 review of Ontario’s civil justice system, which highlighted the issues of cost and delay as “formidable barriers that prevent average Canadians from accessing the civil justice system.”⁶ The Osborne Report made recommendations for streamlining court procedures to increase accessibility, a number of which were adopted and are discussed further below.

Notwithstanding these reforms, Ontario continues to face access to justice challenges. A recent survey showed that about four in ten Ontarians do not believe they have equal and fair access to the justice system.⁷ Affordability of legal services was cited as a major issue. A majority of respondents (62%) reported having little to no confidence in their ability to afford a lawyer or paralegal, and the prohibitive expense of a lawyer or paralegal was the largest barrier cited by those who had sought legal advice.⁸ Ontarians also reported fairly negative views of the province’s justice system with majorities describing it as “old fashioned,” “intimidating,” “inefficient,” “broken,” and “unfair.”⁹

An increasing proportion of court users in Ontario are navigating the civil and family justice system without legal representation.¹⁰ The issue of self-representation is particularly acute in Ontario’s family courts; in 2014/15, over 57 percent of litigants did not have representation in Ontario’s family courts.¹¹ In some courthouses, the proportion of self-represented litigants is estimated to be above 70 percent.¹² Many self-represented litigants report that they are self-represented because they cannot afford a lawyer and/or do not qualify for legal aid.¹³

The impact of self-representation is felt throughout the justice system, and includes additional costs and delays in the courts. In a recent survey of Ontario family lawyers, 91 percent reported that having an unrepresented party on the other side of a case increases costs for the represented party. Judges surveyed similarly stated that self-representation substantially lengthens the time required to resolve or manage a case.¹⁴ Research also suggests that self-represented parties have worse outcomes than litigants with counsel, and often suffer emotional and psychological strain as a result of self-representation.¹⁵

The administration of justice in Ontario

Under the *Constitution Act, 1867*, the Province has jurisdiction over “the administration of justice in the province,” which includes the constitution, maintenance, and organization of the Ontario Court of Justice, the Ontario Superior Court, and the Ontario Court of Appeal. The Province also has jurisdiction over the procedure governing civil matters in those courts.¹⁶ The federal government is responsible for appointing and paying judges of certain courts, including the Ontario Superior Court.¹⁷

Within the Ontario government, the Ministry of the Attorney General has primary responsibility for government justice policy, including the funding of the courts and the budget for legal aid.¹⁸ The Ministry is also responsible for the legislative framework that authorizes other actors in the justice system, such as the Law Society of Ontario, which regulates lawyers and paralegals in the province, and Legal Aid Ontario, which administers Ontario’s legal aid program.¹⁹ Within the Ministry, Tribunals Ontario is responsible for Ontario’s adjudicative (i.e., court-like) tribunals, including the Landlord and Tenant Board and the Human Rights Tribunal.²⁰

The judiciary operates as an independent branch of government, but works with the Ministry to administer the court system in accordance with the *Courts of Justice Act*.²¹

Addressing the access to justice issue in Ontario

Increasing access to affordable legal services

Legal Aid

Legal aid plays an important role in facilitating access to justice by providing legal services to low-income persons. However, in Ontario legal aid is only available for certain types of legal issues, and only where an individual meets a financial eligibility test. While the financial eligibility threshold for legal aid has risen in recent years, it remains low. For instance, as of April 2020, for a single person with no dependents to qualify for a legal aid certificate their gross income must be \$18,795 or less.²² A significant number of court users fall into income categories that exceed the financial thresholds to qualify for legal aid, but would not easily allow the payment of legal fees.²³ Expanding access to legal services to fill this gap has become a focus of much literature in this area.²⁴

For a more detailed overview of legal aid in Ontario see [A Primer on Legal Aid in Ontario](#).

Innovative Service Delivery

i. Limited-scope Retainers and Legal Coaching

Limited-scope retainers, also known as “unbundled” services, offer one potential means to increase access to private sector lawyers. In a traditional retainer, a lawyer takes on all aspects of a client’s legal issue, with the client agreeing to pay an hourly rate for work on the matter until the matter is resolved. Under a limited-scope retainer, a lawyer provides legal services for only part of a file, such as drafting court documents or attending a court appearance.²⁵ The idea is to reduce the overall cost to the client while providing legal assistance where it is most needed.²⁶

In 2011, the Law Society of Ontario amended the rules of professional conduct for lawyers and paralegals to provide guidance on unbundled services.²⁷ The amendments define “limited scope retainer,” set out requirements for communicating the scope of such a retainer to a client, and provide guidance on when limited scope retainers may be appropriate.²⁸ Notwithstanding these reforms, the 2016 *Family Law Services Review*, undertaken by Justice Annemarie Bonkalo (Bonkalo Report), found that unbundled services are not widely available in Ontario, and called on the legal profession to expand their use.²⁹

The Bonkalo Report also recommended that the legal profession support the development of legal coaching services. Legal coaching is characterized by a lawyer equipping a client to move his or her matter forward (e.g., by preparing them for a court appearance) rather than personally working for the client.³⁰ The Law Society has indicated that it will support the expanded use of unbundled services, including legal coaching, by offering referral services, continuing professional development for lawyers and paralegals, and other resources.³¹

ii. *Expanding Legal Service Providers*

The Law Society of Ontario regulates the provision of legal services in accordance with the *Law Society Act*.³² Legal services are provided where a person applies legal principles and legal judgement to the circumstances or objectives of another person.³³ Unauthorized provision of legal services is an offence under the Act.³⁴

In Ontario, the right to provide legal services is primarily limited to licenced lawyers and, in certain circumstances, paralegals.³⁵ The purpose of this rule is to ensure that the public is provided with competent legal services that protect their legal rights. However, it can create challenges for service providers (such as legal clinic workers, law clerks, and court staff) who may be able to provide certain forms of legal assistance competently and at a lower cost than a lawyer.³⁶ It may also result in lawyers performing relatively simple tasks at their full hourly rate.³⁷

The 2016 *Family Law Services Review* (which resulted in the Bonkalo Report) was mandated to identify persons other than lawyers who may be capable of providing family legal services and to recommend safeguards to ensure quality. Among other things, the Bonkalo Report recommended creating a special paralegal licence that would allow them to provide certain types of family law services without supervision by a lawyer.³⁸ Currently, paralegals are not permitted to represent people in family law matters, but can represent people in Small Claims Court, on certain minor provincial and *Criminal Code* offences, and before administrative tribunals.³⁹

The proposal to expand the scope of practice for paralegals to include family law is controversial. Large lawyer organizations and the courts have expressed considerable opposition to the idea, citing the legal complexity of family law and the vulnerability of the clients. Legal Aid Ontario expressed openness to it, but urged an incremental approach to implementation.⁴⁰ Notwithstanding these concerns, the Law Society is currently developing a licence to permit licensed paralegals and others to assist the public with certain family legal services.⁴¹

Less controversially, the Bonkalo Report also recommended that the Ministry of the Attorney General and Legal Aid Ontario continue to fund and possibly expand law school-run programs such as student legal aid clinics.⁴² The report also recommended training for court staff that would emphasize the differences between legal information (which non-licensees can provide) and legal advice (which non-licensees cannot provide), so that court staff can provide as much assistance to the public as possible within the limits of their role.⁴³

Simplifying court procedures

A common theme in the access to justice literature is proportionality. In the access to justice context, proportionality refers to the idea that the time and expense devoted to resolving a legal problem ought to be proportionate to the amount in dispute and the importance of what is at stake.⁴⁴ The 2007 Osborne Report made a number of recommendations for simplifying court procedures in Ontario's civil (non-family) justice system, based on the principle of proportionality.⁴⁵ Following the Osborne Report several changes to civil procedure were made including

- introducing proportionality as an overarching principle of interpretation of the rules of court;
- introducing mandatory mediation in Superior Court in certain jurisdictions to help parties settle their matter before trial;
- increasing the monetary limits for Small Claims Court and for using the simplified procedure for civil lawsuits in Superior Court.⁴⁶

In January 2020, the Ministry of the Attorney General raised the monetary limits for Small Claims Court and the simplified procedure again, to \$35,000 and \$200,000 respectively.⁴⁷ According to the Ministry, increasing the monetary limits of Small Claims Court will enable more people to file and respond to claims using less expensive representation, such as paralegals and law students, or through self-representation.⁴⁸ Small Claims Court is generally considered more hospitable to self-represented litigants as it uses simplified procedures and has rules written in plain language. Likewise, the Ministry has stated that having more cases under the simplified procedure should free up court time and resources, and make it more affordable for people to resolve their legal issues.⁴⁹

“Front-end” strategies and alternative dispute resolution

The 2013 Action Committee Report called for building a robust “front-end” early resolution services sector, made up of services such as public legal education, triage and referral services, and alternative dispute resolution programs. The report also called for a re-imagining of the courts as multi-disciplinary service centres that would offer a range of alternative dispute resolution services.⁵⁰

Alternative dispute resolution (ADR) refers to non-litigation processes for resolving disputes, such as negotiation, mediation, and arbitration. From an access to justice perspective, ADR processes tend to be faster and less expensive than litigation for the parties. They also offer potential cost savings for governments as they divert cases out of the court system. Further, collaborative processes such as negotiation and mediation have the potential to yield results that leave both sides more satisfied since they require the parties to come to an agreement, rather than having a solution imposed upon them.⁵¹

In the family law context, Ontario has expanded or developed a number of court-related services over the last ten years that focus on early resolution. These services include

- improved information services at courthouses;
- improved access to summary legal advice at the courts for low-income litigants (provided by Legal Aid Ontario);
- early access to court-connected mediation; and
- increased use of judicial case conferencing (wherein the parties and their lawyers, if any, speak with a judge about their case early in the process).⁵²

Despite the growth of court-connected services in Ontario, some recent academic research has shown that many people involved in family law litigation do not know what services are available, or how to access them.⁵³ The 2019 Auditor General of Ontario’s report on Family Court Services noted that the Ministry of the Attorney General has not been a strong promoter of the mediation services it funds, and found differences in uptake of mediation services at different court houses across the province.⁵⁴ The Auditor recommended that the Ministry better promote Ministry-funded mediation to help divert less complicated matters from the courts.⁵⁵

Court-connected dispute resolution processes are not as well entrenched in Ontario's civil (non-family) court system, although mediation is mandatory in Toronto, Windsor, and Ottawa in Superior Court cases before proceeding to trial.⁵⁶ Litigants in Small Claims Court and most Superior Court matters must also attend a conference with a judge before the matter can proceed to trial.⁵⁷ Some administrative tribunals, including the Landlord and Tenant Board and the Human Rights Tribunal, also operate mediation programs.⁵⁸

Public legal education and self-help resources

Freely available public legal information is an important component of facilitating access to justice. It can allow individuals to inform themselves about the legal system and their rights and responsibilities within it, as well as provide tools (such as legislation and case law) to use in a legal dispute. It may also enhance public confidence in the justice system by enhancing transparency.⁵⁹

A wealth of Ontario-focused public legal information and self-help resources are available, although some have noted that the sheer volume of information can make it difficult to access, navigate, and understand.⁶⁰ Community Legal Education Ontario (CLEO), a legal aid clinic that specializes in public legal information, has been working to improve collaboration and coordination of public legal information providers across the province as a means to improve access to justice.⁶¹

Some key online resources that may be of assistance include the following:

- [Justice Ontario](#), which is operated by the Ministry of the Attorney General and offers legal information guides on a range of topics including lawsuits and disputes, family law, wills and estates, and human rights;
- [Steps to Justice](#), which is operated by CLEO and offers step-by-step information pertaining to common legal problems;
- [Your Legal Rights](#), which is also operated by CLEO and offers a collection of legal resources from organizations across Ontario, organized by topic; and
- "[Self-represented litigant resources](#)," from the [National Self-represented Litigant Project](#) at the University of Windsor.

Conclusion

This paper has provided an overview of access to justice in Ontario, and surveyed some responses to the issue including reducing costs through innovative legal service delivery, simplifying court procedures, and building an early resolution services sector. While Ontario, like other Canadian jurisdictions, faces access to justice challenges, various justice sector actors have taken steps in recent years to make Ontario's family and civil justice system more accessible.

Notes

¹ Justice Annemarie E. Bonkalo, [Family Law Services Review](#), (Toronto, Ont.: Ministry of the Attorney General, 2016) (“Bonkalo Report”), quoting lawyer Alf Mamo.

² See, for instance, Bonkalo Report, above; Canadian Forum on Civil Justice, [Everyday Legal Problems and the Cost of Justice in Canada: Overview Report](#), 2016; Action Committee on Access to Justice in Civil and Family Matters, [Access to Civil and Family Justice: A Roadmap for Change](#), October 2013; Canadian Bar Association, [Equal Justice: Balancing the Scales](#) (Ottawa, Ontario: Canada Bar Association, 2013); and Julie Macfarlane, [The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-represented Litigants, Final Report](#), 2013.

³ Justice Coulter A. Osborne, [Civil Justice Reform Project: Summary of Findings and Recommendations](#) (Toronto: Ministry of the Attorney General, 2007) (“Osborne Report”), background section; Action Committee on Civil Justice, [Access to Civil and Family Justice: A Roadmap for Change](#), p. 1.

⁴ Michael Trebilcock, Anthony Duggan, and Lorne Sossin, “Introduction,” [Middle Income Access to Justice](#), ed. Trebilcock et al. (Toronto: University of Toronto Press, 2012), p. 27.

⁵ Action Committee on Access to Justice, [Access to Civil and Family Justice: A Roadmap for Change](#), p. 1.

⁶ Osborne Report, background section.

⁷ The Action Group on Access to Justice, [Public Perceptions of Access to Justice in Ontario](#), October 2016, p. 2. The online survey was conducted with a represented sample of 1,500 adult Ontario residents in August 2016.

⁸ *Ibid.*, pp. 2 and 4.

⁹ *Ibid.*, p. 1.

¹⁰ Osborne Report, [“Unrepresented Litigants.”](#)

¹¹ Bonkalo Report, Part 2.a.

¹² Julie Macfarlane, [The National Self-Represented Litigants Project](#), 2013, p. 31.

¹³ Rachel Birnbaum, Nicholas Bala & Lorne Bertrand, [“The Rise of Self-Representation in Canada’s Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants,”](#) *Canadian Bar Review*, 91 no. 1 (2013) p. 76; Julie Macfarlane, [The National Self-Represented Litigants Project](#), p. 39.

¹⁴ Birnbaum, Bala, and Bertrand, “The Rise of Self-representation in Canada’s Family Courts,” pp. 80 and 87.

¹⁵ Bonkalo Report, citing a study by Loom Analytics, which analyzed cases where one side was represented and the other was not, and surveys of judges who feel that self-represented parties usually have worse outcomes on economic issues and child-related outcomes in family law; Julie Macfarlane, [The National Self-Represented Litigants](#)

Project, Final Report, 2013. See pages 108-110 for a discussion of the personal toll self-representation takes on self-represented litigants.

¹⁶ [Constitution Act, 1867](#), s. 92(14); Peter W. Hogg, *Constitutional Law of Canada*, 5th Ed., (Toronto: Thomson Reuters, 2007) (looseleaf release 2019-1) at 7.1(a).

¹⁷ *Constitution Act, 1867*, ss. 92(14) and 96. The federal government also has jurisdiction over substantive criminal law, and criminal procedure under s. 91(27) of *Constitution Act, 1867*.

¹⁸ Trebilcock, Duggan, and Sossin, "Introduction," *Middle Income Access to Justice*, p. 18.

¹⁹ *Ibid.*

²⁰ Tribunals Ontario, [Annual Report 2018-19](#), "About Tribunals Ontario."

²¹ [Courts of Justice Act](#), R.S.O. 1990, c. C. 43, Part V.

²² Legal Aid Ontario (LAO), "[Details on Legal Aid Ontario's financial eligibility increase for 2020](#)," March 27, 2020; Under LAO's certificate program, LAO pays a lawyer's fees at a specified hourly rate, up to a maximum number of hours. The threshold is slightly higher for domestic abuse cases.

²³ Birnbaum, Bala, and Bertrand, "The Rise of Self-Representation in Canada's Family Courts," p. 76; See also Julie Macfarlane, *The National Self-Represented Litigants Project*, pp. 39-43.

²⁴ See, for instance, *Middle Income Access to Justice*, ed. Michael Trebilcock, Anthony Duggan, and Lorne Sossin (Toronto: University of Toronto Press, 2012) and The Honourable Justice Thomas A. Cromwell and Siena Anstis, "The Legal Services Gap: Access to Justice as a Regulatory Issue," 42, no. 1, *Queen's Law Journal* (2016), p. 1-16.

²⁵ Law Society of Ontario, "[Limited Scope Retainer](#)."

²⁶ Bonkalo Report, section 2(a), "Recommendations on the Provision of Family Legal Services – Lawyers."

²⁷ Law Society of Ontario, "Law Society provides guidance on 'unbundling' of legal services," *News Release*, September 22, 2011.

²⁸ Law Society of Ontario, [Rules of Professional Conduct](#), rules 1.1, 3.1-1, and 3.2(1A) and (1A.1) and [Paralegal Rules of Conduct](#), rules 1.02, 3.02(15), 7.02(2) .

²⁹ Bonkalo Report, Recommendations 1 and 2.

³⁰ Bonkalo Report, Recommendation 3.

³¹ Law Society of Ontario, "[Family Law Action Plan](#)."

³² [Law Society Act](#), R.S.O. 1990, c. L. 8.

³³ *Ibid.*, s. 1(5).

³⁴ *Ibid.*, ss. 26.1 and 26.2.

³⁵ *Ibid.*, s. 26.1(1) and (5); Law Society of Ontario, *By-law 4* (Licensing). Law students, paralegal students, and a small number of other individuals are permitted to provide legal services in very specific circumstances.

³⁶ See Jennifer Bond, David Wiseman, and Emily Bates, "[The Cost of Uncertainty: Navigating the Boundary Between Legal Information and Legal Services in the Access to Justice Sector](#)," *Journal of Law and Social Policy*, 25 no. 1 (2016), pp. 1-25, for a discussion of the regulatory challenges faced by a University of Ottawa program for assisting refugees.

³⁷ Cromwell and Anstis, “The Legal Services Gap: Access to Justice as a Regulatory Issue,” para. 26.

³⁸ Bonkalo Report, Recommendation 4. Justice Bonkalo also made a number of recommendations regarding paralegal training, oversight, and use in the family law system.

³⁹ Law Society of Ontario, *By-law 4*, s. 6(2).

⁴⁰ Law Society of Upper Canada, Access to Justice Committee, [Report to Convocation](#), December 1, 2017, paras. 15-17. See also Michael McKiernan, “[Paralegals in Family Law](#),” *Canadian Lawyer Magazine*, March 19, 2018.

⁴¹ *Ibid.*; Law Society of Ontario, “[Family Law Action Plan](#).”

⁴² Bonkalo Report, Recommendations 17-19.

⁴³ Bonkalo Report, Recommendation 20.

⁴⁴ Osborne Report, “[Letter of Transmittal](#).”

⁴⁵ *Ibid.*, “[Letter of Transmittal](#),” and “[List of Recommendations](#).”

⁴⁶ [Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194, rules 24.1, 75, and 76.1.

⁴⁷ Ministry of the Attorney General, “[Ontario Making It Easier, Faster for People to Resolve Claims: Government Helping People, Businesses Spend Less on Lawyers, Reduce Time in Court](#),” *News Release*, October 23, 2019; Ministry of the Attorney General, “[Ontario Making It Easier, Faster for People to Resolve Claims](#),” *Bulletin*, November 13, 2019.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Action Committee on Access to Justice, *Access to Civil and Family Justice: A Roadmap for Change*, pp. 11 and 15.

⁵¹ It should be noted that there are certain types of disputes where collaborative processes are generally not considered appropriate, such as high conflict family cases where there is a major power imbalance between the parties and/or domestic violence.

⁵² Michael Saini, Rachel Birnbaum, and Nicholas Bala, “[Access to Justice in Ontario’s Family Courts: the Parents’ Perspective](#),” *Windsor Review of Legal and Social Issues*, 27 (April 2016), p. 5.

⁵³ *Ibid.*, p. 23.

⁵⁴ Auditor General of Ontario, *2019 Annual Report*, vol. 3, ch. 4, “[Ministry of the Attorney General – Family Court Services](#),” p. 219.

⁵⁵ *Ibid.*, p. 220.

⁵⁶ Ministry of the Attorney General, “[Mandatory Mediation Program](#)”

⁵⁷ [Rules of Civil Procedure](#), r. 50.02(1); O. Reg. 258/98 (Rules of the Small Claims Court), r. 13.

⁵⁸ Landlord and Tenant Board, “[Application and Hearing Process](#),” Human Rights Tribunal of Ontario, “[Application and Hearing Process](#).”

⁵⁹ Jane Bailey, Jacquelyn Burkell, and Graham Reynolds, “[Access to Justice for All: Towards an “Expansive Vision” of Justice and Technology](#),” *Windsor Yearbook on Access to Justice*, 31 no. 2 (2013), pp. 195-96.

⁶⁰ Law Commission of Ontario, [Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity: Final Report](#), February 2013, p. 59.

⁶¹ Community Legal Education Ontario, [Public Legal Education and Information in Ontario: Learning from a Snapshot, Final Report](#), 2015.