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Depending on the Kindness of Strangers: Access to Civil Justice in Canada

By Noel Semple¹

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"Abysmal" was the word used to describe the accessibility of Canadian civil justice in a recent major report.² Access to justice is simultaneously a social problem, a professional obligation for the legal profession, and a market opportunity for law firms. Are there any signs of significant progress on any of these fronts? This report will review recent Canadian efforts to connect people of modest means with the expert legal services which they urgently need.

Legal needs arise – and go unmet -- in many contexts of modern life. However, unmet legal needs are especially clear among people who become involved in litigation. A recent renaissance of Canadian empirical research about self-represented litigants (SRLs) has brought the access to justice problem into sharp focus.³ The new studies confirm and respond to the fact that SRLs are now a majority in family courts, and a growing minority in other civil courts.⁴ Inability to pay for lawyers is by far the most important reason why people end up in court without counsel.⁵ Average hourly rates for Canadian lawyers range from \$229 per hour for the most junior to \$408 per hour for those with 20 years'

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² Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice: An Invitation To Envision And Act*. (Ottawa: CBA, 2013), online: CBA <http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf> at 1.

³ Nick Bala and Rachel Birnbaum led a series of surveys of litigants, lawyers, judges about self-representation in Canadian family courts: Rachel Birnbaum and Nicholas Bala, "Views of Ontario Lawyers on Family Litigants without Representation" (2012) 63 *University of New Brunswick Law Journal* 99; Rachel Birnbaum, Nicholas Bala and Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants" (2013) *Canadian Bar Review* 67. Julie MacFarlane interviewed 283 SRLs and over 100 civil servants who deal with them on a regular basis: Julie MacFarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*. (Kingsville, Ontario: Representing Yourself in a Legal Process, 2013), online: RYLP <<http://www.representing-yourself.com/doc/report.pdf>>. For other recent empirical data, see R. Roy McMurtry *et al.*, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project*. (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf>. The Canadian Forum on Civil Justice has launched a major research initiative into the costs of justice for low- and middle-income Canadians: <http://www.cfcj-fcjc.org/cost-of-justice>.

⁴ Bala & Birnbaum, "The Rise of Self-Representation," *ibid* at 71; MacFarlane, *ibid* at 15.

⁵ Bala & Birnbaum, "The Rise of Self-Representation," *supra* note 3 at 76; MacFarlane, *supra* note 3 at 39.

experience.⁶ This is roughly ten times as much as the hourly wage earned by the average Canadian: \$24.01 per hour.⁷

The Erosion of Civil Legal Aid

Those who cannot afford such sums must generally go without lawyers, because state-funded legal aid is seldom available in civil matters. In Canada's largest province (Ontario), a single person who earns more than \$208 per week is considered too wealthy to qualify for a legal aid certificate.⁸ UK readers interested in the long-run consequences of legal aid cutbacks may see Canada's current access to justice situation as an indication of the future. Canadian state expenditures in this category fell from \$11.37 per capita in 1995 to \$7.89 per capita in 2008, rebounding only modestly to \$8.96 in 2012.⁹

Courts have declined to compel the government to fund legal aid in matters where constitutional interests are not at stake.¹⁰ Any reinvestment in this area is therefore at the discretion of politicians, and the voters who elect them. The Canadian access to justice community eagerly welcomed the 2013 platform of British Columbia's New Democratic Party (NDP). Unlike almost any other party platform in recent memory, this one promised to substantially increase the legal aid budget.¹¹

However, despite a large early polling lead the NDP lost to the Liberal incumbents. The Liberal pitch to voters had emphasized jobs and the economy, as opposed to legal aid or any other spending program. Politicians may interpret this electoral result as further evidence that voters do not much value, and are not prepared to pay taxes for legal aid programs. Lawyers and their clients are not naturally sympathetic candidates for state assistance, and most Canadians do not anticipate ever personally needing legal aid. In the words of the Canadian Bar Association's *Reaching Equal Justice* report, "civil justice is a low priority for the Canadian public and hence a low political priority."¹²

⁶ Robert Todd, "The Going Rate. (First published in Canadian Lawyer Magazine, Vol. 35, No. 32, June 2012)," online:

<<http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2012/legalfeessurvey2012.pdf>>

⁷ <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/labr69a-eng.htm>

⁸ Legal Aid Ontario, "Certificate services," online:

<<http://www.legalaid.on.ca/en/getting/certificateservices.asp>>.

⁹ Ab Currie, *The State of Civil Legal Aid in Canada: By the Numbers in 2011-2012*. (Toronto: CFCJ, 2013), online: CFCJ <<http://www.cfcj-fcj.org/commentary/the-state-of-civil-legal-aid-in-canada-by-the-numbers-in-2011-2012>>. The proportion of legal aid spending borne by the federal government has also declined from 50% in 1995 to 20-30% today: Canadian Bar Association Access to Justice Committee, *supra* note 2.

¹⁰ *British Columbia (Attorney General) v Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21.

¹¹ *Change for the Better: Practical Steps*. (Victoria: New Democratic Party of British Columbia, 2013), online: BC NDP <<http://www.bcndp.ca/files/BCNDP-Platform-2013-Web.pdf>> at 15 and 53.

¹² Canadian Bar Association Access to Justice Committee, *supra* note 2 at 34.

The Market Opportunity

However another key message from the new studies of SRLs is that many of them want and are prepared to pay for expert legal services. Those who have lawyers are generally quite satisfied with the services they receive.¹³ Those without lawyers are often middle-class people who would be willing and able to pay something for expert legal services. One need not be destitute to recoil from five-figure sums like the \$15,570 average legal bill for a contested divorce in Canada, or the \$34,225 average fee for a civil action culminating in a five-day trial.¹⁴ The new data shows that many are especially interested in flat rate services and "unbundled" services which let them rely on a lawyer for certain tasks without committing to full representation.¹⁵

Creating accessible legal service delivery models is therefore an economic opportunity, as well as an ethical obligation, for the Canadian legal profession. Is any advantage being taken of this opportunity? A few firms have started to offer unbundled services, a few simple transactional legal services can be obtained online, and technological innovations such as 24 hour telephone lines have gained some traction.¹⁶ However, the innovative consumer-focused business models and fixed fees offered by UK and Australian firms like Co-Operative Legal Services and Slater & Gordon are almost non-existent in Canada. The *Reaching Equal Justice* report argues that access to justice requires legal services to be "reinvented," through "sustainable people-centred law practices" and more teamwork between lawyers and others.¹⁷

Some argue that the inaccessibility of justice and lack of innovation can be blamed on a hidebound regulatory environment.¹⁸ The Canadian regime still includes bans on external investment in firms and near-total prohibition of non-lawyer practice, things

¹³ Bala & Birnbaum, "The Rise of Self-Representation," *supra* note 3 at 77; McMurtry, *supra* note 3 at 18. Studies in other jurisdictions have reached similar conclusions about client satisfaction with lawyers: e.g. Rosemary Hunter, *Legal Services in Family Law*. (Sydney: Justice Research Centre (Australia), 2000), online: Law Foundation of New South Wales <[http://www.lawfoundation.net.au/ljf/site/templates/reports/\\$file/lslf_rep.pdf](http://www.lawfoundation.net.au/ljf/site/templates/reports/$file/lslf_rep.pdf)> at 289.

¹⁴ Bala & Birnbaum, "The Rise of Self-Representation," *supra* note 3 at 77; MacFarlane, *supra* note 3 at 28.

¹⁵ MacFarlane, *supra* note 3 at 92.

¹⁶ A list of family law firms offering unbundled services can be found in the Professional Directory at "MySupportCalculator," online: <www.mysupportcalculator.com>. See also "MacLean Law Group," online: <<http://www.bcfamilylaw.ca/about-us/fees/>>.

¹⁷ Canadian Bar Association Access to Justice Committee, *supra* note 2 at 26-7.

¹⁸ Clifford Winston, Robert W. Crandall and Vikram Maheshri, *First Thing We Do, Let's Deregulate All the Lawyers* (Washington: Brookings Institution Press, 2011); Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law" (2012) [Forthcoming]; Noel Semple, *Access to Justice: Is Regulation Blocking the Path?* (Working Paper: July 31, 2013). (Toronto: SSRN, 2013), online: SSRN <<http://ssrn.com/abstract=2303987>>.

which other common law jurisdictions have abandoned over the past 30 years.¹⁹ There is some indication of ferment in Canada's Law Societies. Ontario and British Columbia have made modest moves to expand paralegal practice, and Ontario's regulator is studying alternative business structures.²⁰

However, the enduring reality is that Canadians seeking access to civil justice, like Tennessee Williams' Blanche Dubois, are still largely dependent upon the kindness of strangers. *Pro bono* programs encouraging lawyers to work for free remain a centrepiece of the Law Societies' access to justice agenda. Three non-lawyer entrepreneurs are seeking funding for JustAccess, which proposes a crowdsourcing platform for civil legal expenses.²¹ Their concept is that litigants will write up their stories and post them on the site. The "crowd" will donate funds to support the litigation, and JustAccess will disburse those funds for legitimate legal expenses.²²

Indeed, it was only the kindness of strangers which saved Dale Fotsch's house. Readers of *Legal Ethics* will recall Ms. Fotsch's story from Amy Salyzyn's Correspondent Report in the first issue of Vol. 16.²³ Having successfully defended a claim against her home at the British Columbia Court of Appeal, Ms. Fotsch was in late 2012 threatened with foreclosure on that same property. She owed \$180,000 in unpaid fees to her lawyer, and had granted him a mortgage on the house to secure payment several years before. Fotsch's predicament received extensive media coverage, and a website appealing for funds was launched at www.helpdale.ca. In February of 2013, the site announced that "Dale has been able to sign a mortgage with a generous individual," allowing her to pay her lawyer's bill and remain in her house.

The most conspicuous access to justice efforts in Canada today are intellectual and hortatory in nature. It is unlikely that they are having any noticeable benefits for the Dale Fotsches of this country. Nevertheless, it cannot be said that nothing is being done and no attention is being paid to Canada's access to civil justice problem. If the recent intellectual

¹⁹ See e.g. *Law Society Act (Ontario)* R.S.O. 1990, c. L.8, s. 61.0.1(4); Adam M. Dodek *et al.*, check assessment/taxation AND lay benchers in Canadian legal practice : a guide for the 21st century (Markham, Ont.: LexisNexis Canada, 2009) *Canadian Legal Practice*, ss. 14.3 to 14.7

²⁰ The Law Society of British Columbia, "Practice Support and Resources: Paralegals," online: <<http://www.lawsociety.bc.ca/page.cfm?cid=2582>>; Law Society of Upper Canada, "By-Law 4: Licensing. Adopted by Convocation on May 1, 2007; most recently amended June 23, 2011" (2007), ss. 5-6; Alternative Business Structures Working Group, First Report to Convocation (June 27, 2013). (Toronto: Law Society of Upper Canada, 2013), online: LSUC <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147495044>>.

²¹ JustAccess, "JustAccess: Crowdfunding for Justice," online: <getjustaccess.com>.

²² Simon Fodden, "JustAccess Seeks Crowdfunding to Launch Venture to Crowdfund Legal Disputes (July 23rd, 2013)," online: <<http://www.slaw.ca/2013/07/23/justaccess-seeks-crowdfunding-to-launch-venture-to-crowdfund-legal-disputes/>>.

²³ Amy Salyzyn, "Canada: Foreclosures, Freeman, Foreign Law Schools and the Continuing Search for Meaningful Access to Justice" (2013) 16 *Legal Ethics* 223.

ferment on this topic inspires substantive progress on the ground, then some day access to civil justice in Canada may no longer depend on the kindness of strangers.