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# The Cost Of Seeking Civil Justice In Canada

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# THE COST OF SEEKING CIVIL JUSTICE IN CANADA

Noel Semple\*

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*How much does it cost individual Canadians to seek civil justice? This article compiles empirical data about the monetary, temporal, and psychological costs confronting individual justice-seekers in this country. The analysis considers the hourly rates of Canadian lawyers relative to American lawyers, and the costs confronting justice-seekers in family courts relative to other civil courts, among other topics. The article suggests that analysis of private costs can improve access to justice in two ways. First, it can help public sector policy-makers reduce these costs. Second, it can help lawyers and entrepreneurs identify new, affordable ways to reduce the costs that are most onerous to individuals with different types of civil legal need.*

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*Combien le recours à la justice civile coûte-t-il aux citoyens canadiens? Le présent article collige les données empiriques sur les coûts psychologiques et financiers ainsi que les délais auxquels s'exposent les Canadiens qui cherchent à obtenir justice au Canada. Le texte évalue notamment le taux horaire des avocates et avocats canadiens par rapport à leurs homologues américains, ainsi que les coûts pour les individus qui se présentent devant le tribunal de la famille comparativement aux autres tribunaux civils. L'article laisse entendre qu'une analyse des coûts payés par les individus peut engendrer des améliorations au plan de l'accès à la justice et ce, de deux façons. D'abord, ce genre d'analyse peut aider les responsables qui élabore les politiques publiques à faire diminuer ces coûts. Ensuite, il peut amener les juristes et les entrepreneurs à trouver de nouveaux moyens abordables pour réduire les coûts qui sont des plus onéreux pour les personnes éprouvant des besoins juridiques différents en matière civile.*

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\* University of Windsor. I am grateful to Julie Macfarlane and Sue Rice, of the National Self-Represented Litigants Project, for generously sharing their data. Thanks also to the anonymous reviewers of the Canadian Bar Review.

I have no money left and have been on disability since this accident 13 years ago. The lawyers I have worked with tell me to just wait.

Q: Would you choose to represent yourself again?

A: No.

Q: What would you do differently another time?

A: Just give up. My social life and financial situation have all been affected in a very bad way. These things are very hard to deal with ...<sup>1</sup>

### *1. Introduction*

The civil law makes many promises to Canadians. To those who are owed money, it promises payment.<sup>2</sup> To those leaving intimate relationships, it promises equitable financial division and protection of the best interests of children.<sup>3</sup> To those whose human rights have been infringed, it promises remedy and recompense.<sup>4</sup> In this age of widespread legal consciousness and encyclopaedic online information, people are more aware than ever before of the promises that the law has made to them.<sup>5</sup>

Individual Canadians are struggling to obtain what the law has promised them, however. Most people experience needs and problems in their lives for which the civil law promises help.<sup>6</sup> Many (although not all)

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<sup>1</sup> Interview of anonymous Canadian self-represented litigant (40-50 years, female) [nd]. Interview conducted by the National Self-Represented Litigants Project”, online: <representingyourselfcanada.com> (NSRLS). The methodology of this study is described below in part 1 B).

<sup>2</sup> See e.g. *Rules of Civil Procedure*, RRO 1990, Reg 194, R 60.

<sup>3</sup> *Divorce Act*, RSC, 1985, c 3 (2nd Supp), ss 15.1, 15.2, 16; see also analogous provisions in provincial family law statutes.

<sup>4</sup> *Canadian Human Rights Act*, RSC, 1985, c H-6; see also analogous provincial legislation.

<sup>5</sup> Daphne Dumont, “‘Better ... or Worse’? The Satisfaction and Frustrations of the Lawyer-Client Relationship” in David L Blaikie, Thomas Cromwell and Darrel Pink, eds, *Why Good Lawyers Matter* (Toronto: Irwin Law, 2012) at 3.

<sup>6</sup> Almost half of Canadians report having experienced at least one legal problem in the past three years which they found “serious and difficult to resolve.” This was a key finding from a national legal needs survey of 3000 Canadians conducted by the Canadian Forum for Civil Justice; see Trevor Farrow *et al*, “Everyday Legal Problems and the Cost of Justice in Canada (Fact Sheet)”, online: Canadian Forum on Civil Justice <www.cfcj-fcjc.org/sites/default/files//CostofJustice\_overviewfactsheet%20.pdf> [Farrow *et al*, “Everyday Legal Problems”]. It seems fair to infer from this finding, about the previous three years in each respondent’s life, that the majority will experience such a problem at some point in life.

of them wish to use the law's help.<sup>7</sup> Nonetheless most people do not actually obtain the law's help in dealing with their justiciable needs and problems.<sup>8</sup> This access to justice dilemma has produced a plethora of new reports from the Canadian Bar Association and other professional groups, and a flurry of activity within the Canadian legal community.<sup>9</sup>

The Costs of Justice project at the Canadian Forum on Civil Justice (CFCJ) approaches the dilemma with a compelling research question: "What are the costs of pursuing the resolution of legal problems?"<sup>10</sup> These costs include *private costs* borne by the individuals experiencing the civil legal problems, in addition to public costs of the system (such as court budgets) and externalized costs borne by specific individuals or entities other than the justice-seeker.<sup>11</sup> The CFCJ's enquiry into the costs of civil justice, to which this paper seeks to contribute, builds upon theoretical and methodological work on the subject from the Hague Institute for the Internationalisation of Law (HiiL).<sup>12</sup>

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<sup>7</sup> Brent Cotter, "Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada" (2012) 63 UNB LJ 54 at 55; Herbert M Kritzer, "Examining the Real Demand for Legal Services" (2009) 37:1 Fordham Urban LJ 255.

<sup>8</sup> Ab Currie, "A National Survey Of The Civil Justice Problems Of Low And Moderate Income Canadians: Incidence And Patterns" (April 2005), online: Canadian Forum on Civil Justice <[www.cfcj-fcjc.org/sites/default/files/docs/2006/currie-en.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2006/currie-en.pdf)> [Currie, "National Survey"]; Ab Currie, "The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians" (2007), online: Government of Canada Department of Justice <[www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07\\_la1-rr07\\_aj1/rr07\\_la1.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf)>; Farrow *et al*, "Everyday Legal Problems," *supra* note 6.

<sup>9</sup> CBA A2J Committee, "Reaching Equal Justice: An Invitation To Envision And Act" (August 2013), online: <[http://www.cba.org/cba/equaljustice/secure\\_pdf/Equal-Justice-Report-eng.pdf](http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf)>; Action Committee on Access to Justice in Civil and Family Matters, "Access To Civil & Family Justice: A Roadmap for Change" (2013), online: Canadian Forum on Civil Justice <[www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)>; CBA Legal Futures Initiative, "Futures: Transforming the Delivery of Legal Services in Canada" (2014), online: <[www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf](http://www.cbafutures.org/cba/media/mediafiles/PDF/Reports/Futures-Final-eng.pdf)>; Michael Trebilcock, Anthony Duggan and Lorne Sossin, eds, *Middle Income Access To Justice* (Toronto: University of Toronto Press, 2012); Law Commission of Ontario, "Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity" (February 2013), online: <[www.lco-cdo.org/family-law-reform-final-report.pdf](http://www.lco-cdo.org/family-law-reform-final-report.pdf)>.

<sup>10</sup> Diana Lowe *et al*, "The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems (Proposal Description Submitted as SSHRC – CURA Application)" (September 2010), online: Canadian Forum on Civil Justice <[cfcj-fcjc.org/docs/2010/cost-cura-proposal-en.pdf](http://cfcj-fcjc.org/docs/2010/cost-cura-proposal-en.pdf)>.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*; Maurits Barendrecht, José Mulder and Ivo Giesen, "How to Measure the Price and Quality of Access to Justice?" (November 2006) at 12-13, online: Social Justice

The high private costs of seeking justice are among the chief reasons why the civil law's promises are not being realized by Canadians.<sup>13</sup> Some people "lump" (accept) injustice in their lives, because they perceive that justice's benefit to them is not worth the cost of seeking it.<sup>14</sup> Others persevere and obtain at least partial justice, but its net benefit is seriously diminished by the cost they paid to seek it. The litigant whose words form the epigraph of this article apparently found the costs so high that next time she will probably "just give up."<sup>15</sup>

A better understanding of the private costs of seeking civil justice is a step towards reducing such costs, and thereby making civil justice more accessible. This article will therefore pull together empirical findings about the monetary, temporal, and psychological costs confronting individuals who seek civil justice in Canada.<sup>16</sup> It also incorporates new empirical data drawn from the National Self-Represented Litigants Study (NSRLS) led by Julie Macfarlane at the University of Windsor Faculty of Law.<sup>17</sup>

Taken together, these data sources permit four general conclusions about the costs of seeking civil justice in this country. First, legal fees for civil "personal plight" disputes are very onerous for low and middle-income Canadians.<sup>18</sup> It is common for an individual to pay tens of thousands of dollars, at hourly rates exceeding \$250 per hour, for personal plight legal services. In the personal client hemisphere of legal practice, Canadian

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Research Centre <ssrn.com/abstract=949209>; Martin Gramatikov, "A Framework for Measuring the Costs of Paths to Justice" (2009) 2 J Jurisprudence 111 at 119.

<sup>13</sup> The most important other reason may be lack of legal consciousness. See Jamie Baxter, Michael Trebilcock and Albert Yoon, "The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data" in Trebilcock, Duggan and Sossin, *supra* note 9; Rebecca L Sandefur, "Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers Services" in Trebilcock, Duggan and Sossin, *supra* note 9; Noel Semple, *Legal Services Regulation at the Crossroads: Justicia's Legions* (Cheltenham: Edward Elgar, 2015) at 141-43 [Semple, *Justicia's Legions*].

<sup>14</sup> Gramatikov, *supra* note 12 at 4.

<sup>15</sup> Anonymous interview in NSRLS, *supra* note 1.

<sup>16</sup> This author conducted comprehensive searches in research databases to identify all relevant empirical data. He also consulted with other experts in the field and asked them to identify further relevant data sources. The analysis does not include consider corporations' costs of seeking civil justice, nor costs paid by individuals in criminal matters. This tripartite typology is adapted from Gramatikov's, *supra* note 12 at 30.

<sup>17</sup> See NSRLS, *supra* note 1.

<sup>18</sup> Personal plight legal needs are legal needs that are 1) experienced by individuals as opposed to corporations; and 2) arise out of disputes as opposed to transactions or efforts to comply with regulation; see John P Heinz and Edward O Laumann, "The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies" (1978) 76 Mich L Rev 1111; John P Heinz and Edward O Laumann, *Chicago Lawyers : The Social Structure of the Bar* (New York: Russell Sage Foundation and American Bar Foundation,

lawyers appear to charge higher average hourly rates than their American counterparts do.<sup>19</sup> Second, examining temporal costs, we find that Canadians' efforts to obtain civil justice can last for many months and consume many hours. Especially for self-represented litigants, seeking civil justice can be time-consuming enough to undermine employment and personal relationships. Third, psychological impacts such as stress and a sense of being overwhelmed constitute a third layer of costs, which again seems to fall most heavily on the self-represented. Fourth, there is some empirical evidence that access to justice may be more financially and emotionally draining in family disputes than it is in non-family civil disputes.

Part 1 of this article introduces the private costs of seeking civil justice, and reviews the methodology of the NSRLS. The article then focuses in turn on monetary (Part 2), temporal (Part 3), and psychological costs (Part 4) confronting individual justice-seekers.<sup>20</sup> Part 5 offers overarching analysis and conclusions, and shows how analysis of the private costs of civil justice can facilitate access to justice innovations both in public policy-making and in private legal practice.

#### *A) Private Costs of Seeking Civil Justice*

The literature has typically divided the costs of seeking civil justice into 1) public costs such as judicial salaries and court budgets; and 2) private costs paid by individuals themselves, which are the focus of this article. A third category is externalized costs borne by specific individuals or corporations connected to the justice-seeker, such as the employer which must deal with her absence on a day in court.<sup>21</sup> For most people, any effort to access civil justice occasions some private costs, regardless of whether the effort is made through a court process or through an alternative such as negotiation or mediation.<sup>22</sup> While the private costs of seeking civil justice are perhaps more difficult to quantify than public costs, they may equal or exceed public costs in the aggregate.<sup>23</sup>

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1982); Noel Semple, "Personal Plight Legal Services and Tomorrow's Lawyers" (2014) 2014 J Legal Profession 25 [Semple, "Personal Plight"].

<sup>19</sup> This issue is discussed further below.

<sup>20</sup> This tripartite typology of private costs is echoed in other fields; see e.g. Cidália Lopes and António Martins, "The Psychological Costs of Tax Compliance: Some Evidence from Portugal" (2013) 14 J Applied Bus & Econ 53.

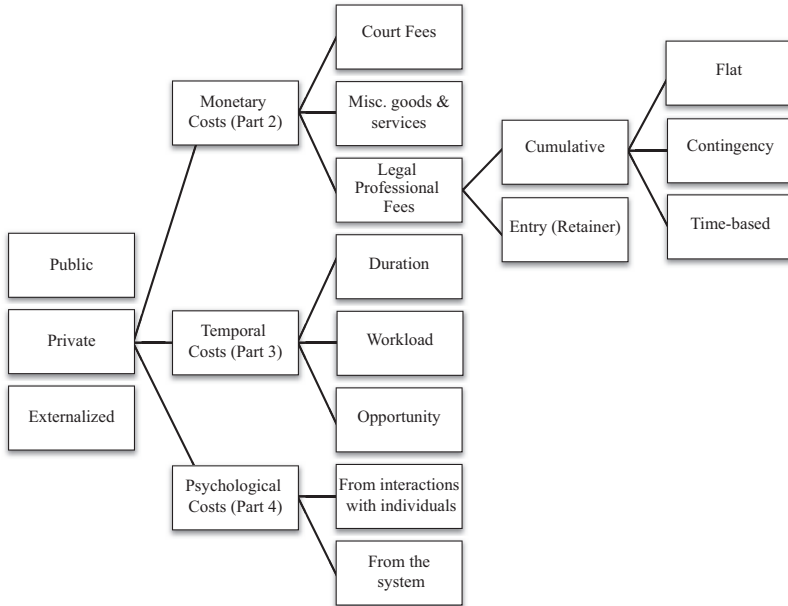
<sup>21</sup> I am grateful to an anonymous reviewer for identifying this category.

<sup>22</sup> Barendrecht, Mulder and Giesen, *supra* note 12; Gramatikov, *supra* note 12. In Canada, only 6.7% of people who reported experiencing a serious or difficult legal problem during the past three years used a formal court or tribunal process to resolve it; see Farrow *et al.*, "Everyday Legal Problems," *supra* note 6.

<sup>23</sup> Barendrecht, Mulder and Giesen, *ibid* at 11-12. See also Kim Taylor and Ksenia Svechnikova, "What does it cost to access justice in Canada? How much is 'too

A second distinction is also important: that between 1) the costs of seeking civil justice and 2) the costs or ramifications of the underlying problems that cause individuals to seek justice in the first place.<sup>24</sup> For example, in a divorce the private cost of seeking justice would include the cost of paying a lawyer or taking time off work to attend a mediation or court date. It would *not* include the effects of the underlying relationship breakdown, such as the monetary cost of establishing new homes for one or both spouses or the emotional toll of the experience. The private costs of pursuing civil justice can be categorized as follows.

**Figure 1: The Costs of Seeking Civil Justice**



much'? And how do we know? ” (2010), online: Canadian Forum on Civil Justice <cfjc-fcjc.org/docs/2010/cost-litreview-en.pdf>.

<sup>24</sup> Gramatikov, *supra* note 12. Researchers have also explored the relationship between the underlying problems themselves and the health and well-being of those who experience them. See e.g. Pascoe Pleasence *et al*, “Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems” in Pascoe Pleasence, Alexy Buck and Nigel Balmer, eds, *Transforming Lives: Law and Social Process* (Norwich: Stationery Office, 2007) 67 [Pleasence, Buck and Balmer, *Transforming Lives*]; Pascoe Pleasence, Nigel Balmer and Alexy Buck, “The Health Cost of Civil-Law Problems: Further Evidence of Links Between Civil-Law Problems and Morbidity, and the Consequential Use of Health Services” (2008) 5 J Empirical Leg Studies 351 [Pleasence, Buck and Balmer, “Health Cost”]; Ab Currie, “Civil Justice Problems and the Disability and Health Status of Canadians” in Pleasence, Buck and Balmer, *Transforming Lives, ibid*, 44; Mary Stratton and Travis Anderson, “Social, Economic and Health

*B) Methodology of the National Self-Represented Litigants Study*

Research on the costs of seeking civil justice in Canada recently took a major step forward with the NSRLS.<sup>25</sup> Under the leadership of Julie Macfarlane, the NSRLS included interviews of over 250 self-represented litigants in Ontario, British Columbia, and Alberta.<sup>26</sup> The interviewees had all represented themselves in a family court (60% of the sample), in another civil court (31%), or in an administrative tribunal (9%).<sup>27</sup> The demographic profile of the participants was reasonably representative of the Canadian population in terms of gender, education level, and income.<sup>28</sup>

Participants volunteered in response to posters in courthouse sites, and in response to media and online information about the study.<sup>29</sup> The respondents' motivations for being self-represented, their experiences of the civil process, and their ideas for improvements to the process were explored in individual interviews lasting between 45 and 90 minutes.<sup>30</sup> The study produced a research report, to which readers should refer for a comprehensive account of the research methodology.<sup>31</sup>

The study's unprecedented database illuminates not only the experience of self-represented litigants in Canada, but also that of litigants aided by lawyers. Although all of the interviewees in this study were self-represented litigants at the time of interview, 53% of them had retained private practice legal professionals at some previous point during their

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Problems Associated with a Lack of Access to the Courts" (March 2006), online: Canadian Forum on Civil Justice <[www.cfcj-fcjc.org/sites/default/files/docs/2008/cjssp-socialproblems-en.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2008/cjssp-socialproblems-en.pdf)>; Relationships Foundation, "Counting the cost of family failure" (February 2010), online: <[www.relationshipsfoundation.org/wp-content/uploads/2014/02/Briefing\\_Note\\_2.pdf](http://www.relationshipsfoundation.org/wp-content/uploads/2014/02/Briefing_Note_2.pdf)>.

<sup>25</sup> See NSRLS, *supra* note 1. Because much of the NSRLS data has not previously been published, the methodology and key findings of the study are reviewed here.

<sup>26</sup> Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (May 2013) at 130, online: National Self-Represented Litigants Project <[representingyourselfcanada.files.wordpress.com/2014/05/nsrlp-srl-research-study-final-report.pdf](http://representingyourselfcanada.files.wordpress.com/2014/05/nsrlp-srl-research-study-final-report.pdf)> [Macfarlane, "Self-Represented Litigants Project"]. The interviews were conducted during 2012, and those interviewed included 107 employees of courts and justice system agencies.

<sup>27</sup> *Ibid* at 18-19.

<sup>28</sup> *Ibid* at 8.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* at 20, 134. Ninety per cent of the respondents participated in in-depth interviews of this nature; the remaining 10% participated in focus groups; *ibid* at 8.

<sup>31</sup> *Ibid*.



cases.<sup>32</sup> They spoke in the interviews about their experiences with the lawyers they had retained, as well as their experiences of self-representation.<sup>33</sup> The author reviewed the transcripts of the NSRLS self-represented litigant interviews, and extracted data about monetary, temporal, and psychological costs.

It is worth noting that the respondents volunteered to participate in the study. Volunteer samples sometimes differ in significant ways from the populations from which they are drawn.<sup>34</sup> A litigant who encountered higher than average monetary, temporal and psychological costs in seeking civil justice might be more likely than one who had a relatively easy experience to volunteer for research of this nature. Moreover, structured information about private costs was not explicitly sought from each respondent. Participants who faced especially high lawyer bills, spent longer than average working on litigation forms, and experienced the most stress related to the litigation may have been more likely than other participants to volunteer information about their private costs. These two factors could skew the NSRLS private costs data upwards.<sup>35</sup>

## 2. *Monetary Costs of Seeking Civil Justice*

Monetary outlays are the most conceptually straightforward private costs of seeking civil justice. However, they appear in a variety of forms. Delineating the legal professional and other monetary costs encountered by civil justice-seekers is the goal of this section.

### *A) Court Fees and Miscellaneous Goods and Services*

Some civil courts and tribunals require litigants to pay filing or hearing fees, and these can amount to significant sums of money. In British Columbia, for example, the court fee for each day of a trial after the third

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<sup>32</sup> *Ibid* at 36.

<sup>33</sup> *Ibid* at 44-47. The transcripts contain some verbatim quotes from the respondents, as well as the interviewers' paraphrases in the third person which use as much of the respondents' own language as possible.

<sup>34</sup> Robert Rosenthal and Ralph L Rosnow, *Artifacts in Behavioral Research: Robert Rosenthal and Ralph L Rosnow's Classic Books* (Oxford, UK: Oxford University Press, 2009) at 671-72. Also the sample, while very large for a qualitative interview study, is smaller than the samples used in large-scale quantitative studies; see e.g. Currie, "National Survey," *supra* note 8.

<sup>35</sup> On the other hand, volunteers for research generally tend to be more intelligent, more educated, and of higher social class than non-volunteers; see Rosenthal and Rosnow, *ibid* at 724-33. Intelligence, wealth and the advantages of class might tend to give a person an *easier* than average experience using the civil justice system.

day is \$500 and this climbs to \$800 after 10 days.<sup>36</sup> The landmark Supreme Court of Canada decision in *Trial Lawyers Association of British Columbia v British Columbia* has called attention to the effect of court fees on access to justice.<sup>37</sup>

A justice-seeker's out-of-pocket expenses may also include small-ticket goods and services such as process-serving, photocopying, transportation costs to get to court, and childcare. Non-legal expert fees can be substantial in some cases. Child custody evaluations by mental health professionals in family law cases, for example, can cost as much as \$20,000.<sup>38</sup> Personal injury cases can involve very high medical expert fees. Other litigants find that they must pay for translators, or telecommunication fees in order to pursue their civil cases.<sup>39</sup>

### *B) Legal Professional Fees*

In most civil cases with represented parties, professional fees charged by lawyers dwarf other monetary costs.<sup>40</sup> The Ontario Civil Legal Needs survey found that, among respondents who reported having "problems accessing legal assistance," by far the most common reason for such

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<sup>36</sup> *Supreme Court Family Rules*, BC Reg 169/2009, Appendix C. On the other hand some Canadian courts (such the Ontario Court of Justice) have no filing or hearing fees. For more on court filing fees, see Noel Semple and Nicholas Bala, "Reforming the Family Justice System: An Evidence-Based Approach (Report commissioned by the Association of Family and Conciliation Courts, Ontario Chapter)" (2013) at 5.3, online: Social Science Research Network <[ssrn.com/abstract=2366934](http://ssrn.com/abstract=2366934)>.

<sup>37</sup> 2014 SCC 59, [2014] 3 SCR 31. At para 48, the Court ruled that a court hearing fee schedule must include an exemption that "allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court." Similar challenges to court fee regimes are being brought in other parts of the country.

<sup>38</sup> Nicholas Bala, "Mohan, Assessments & Expert Evidence: Understanding the Family Law Context" (2007) Queen's Faculty of Law Legal Studies Research Paper Series, Working Paper No. 07-02 at 36, online: Social Science Research Network <[ssrn.com/abstract=989761](http://ssrn.com/abstract=989761)>; Noel Semple, "Whose Best Interests? Custody and Access Law and Procedure" (2010) 48 Osgoode Hall LJ 287 at 322.

<sup>39</sup> Barendrecht, Mulder and Giesen, *supra* note 12 at 14; Gramatikov, *supra* note 12 at 28.

<sup>40</sup> Erik S Knutsen and Janet Walker, "What is the Cost of Litigating in Canada?" in Christopher Hodges, Stephan Vogenauer and Magdalena Tulibacka, eds, *The Costs And Funding Of Civil Litigation: A Comparative Perspective* (Hart, 2010) at I. The same was apparently true in the United States, at least in the early 1980s; see David M Trubek *et al*, "The Costs of Ordinary Litigation" (1983) 31 UCLA L Rev 72 at 91 (legal "fees and related expenses equal 88% of the median individual's costs." The remainder consisted of court fees, temporal costs, etc. An exception may be found in some personal injury cases involving very large medical expert fees, which may exceed the lawyers' fees.

problems was an inability to afford lawyer fees.<sup>41</sup> Among 105 individuals with civil justice cases interviewed by the Civil Justice System and the Public project, “almost all” mentioned legal fees as a problematic part of their experiences.<sup>42</sup> The NSRLS study report echoed this finding.<sup>43</sup>

For Canadians seeking civil justice, there are few options for defraying monetary outlays for legal professional fees. State-funded legal aid for civil matters is typically only available to very low-income people, and only for a small range of matters.<sup>44</sup> In Ontario, for example, state-funded representation by a lawyer is only available to individuals whose yearly earnings are less than \$13,250 per year (in the case of those without dependants).<sup>45</sup> This amount is substantially below the poverty line.<sup>46</sup>

In principle, a successful party in a civil suit will often be entitled to a “costs award” requiring the other party or parties to pay a portion of the successful party’s lawyer or paralegal fees.<sup>47</sup> This cost-shifting regime, however, naturally also imposes a commensurate risk of being held liable for the other side’s costs.<sup>48</sup> Even for successful litigants, cost-shifting provides at best only partial reimbursement. It provides that reimbursement long after the party would have been required to pay his or her own lawyer (unless a contingency fee or pro bono arrangement is in place). In fact, cost awards in civil litigation between individuals often go uncollected.

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41 Thirty-one per cent answered “cost/too expensive,” and 20% answered “refused/did not qualify for Legal Aid;” see Environics Research Group, “Civil Legal Needs of Lower and Middle-Income Ontarians: Quantitative Research” (October 2009) at 31-32, online: Law Society of Upper Canada <[www.lsuc.on.ca/media/may3110\\_oelnquantitative-research-report.pdf](http://www.lsuc.on.ca/media/may3110_oelnquantitative-research-report.pdf)>. The survey included only low and middle-income Ontarians (annual household incomes of less than \$70,000).

42 Stratton and Anderson, *supra* note 24.

43 Macfarlane, “Self-Represented Litigants Project,” *supra* note 26 at 39-44.

44 Knutsen and Walker, *supra* note 40.

45 Legal Aid Ontario, “Certificate Program”, online: <[legalaid.on.ca/en/getting/certificateprogram.asp](http://legalaid.on.ca/en/getting/certificateprogram.asp)>. Legal Aid Ontario states that those who earn between \$11,448 and \$13,250 may be required to contribute to the cost of their legal representation. The household income thresholds are higher for families with more members. Legal Aid Ontario and its counterparts in other provinces do make some free legal advice short of full representation available to those who do not qualify for certificate services. See e.g. Legal Aid Ontario, “Family Law”, online: <[www.legalaid.on.ca/en/getting/type\\_family.asp](http://www.legalaid.on.ca/en/getting/type_family.asp)>.

46 Statistics Canada, “Low income cut-offs (1992 base) before tax”, online: <<http://www.statcan.gc.ca/pub/75f0002m/2012002/tbl/tbl02-eng.htm>>. See also Noel Semple, “Canada: Depending on the Kindness of Strangers – Access to Civil Justice” (2013) 16 *Leg Ethics* 373 [Semple, “Kindness of Strangers”].

47 Knutsen and Walker, *supra* note 40.

48 Erik S Knutsen, “The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada” (2011) 36 *Queen’s LJ* 113.

In principle, pre-paid legal services and legal expense insurance regimes can offer other ways to defray legal professionals' fees, but such programs are very rare in Canada at this time.<sup>49</sup> Thus, as a general rule, a Canadian who wants to retain a lawyer for a civil matter must pay that lawyer from his or her own funds.<sup>50</sup>

How much do legal professionals' services for individual clients actually cost in this country? The existing data offers an impressionistic, but still useful, picture of the fee landscape for lawyers.<sup>51</sup> Legal fees come in several different forms. The fee for a transactional and uncontested legal service (such as a residential real estate transfer or drafting a will) will often be a predetermined, flat amount.<sup>52</sup> In plaintiff-side personal injury and some other tort practices, legal fees are typically assessed on a contingency basis, as a percentage of the amount recovered for the client.<sup>53</sup> In the United States a 33% rate for personal injury actions appears to be typical;<sup>54</sup> the author is not aware of any comparable Canadian data.

Time-based billing is used by most Canadian lawyers for non-tort civil personal plight matters; examples are family, employment, consumer, and debt problems.<sup>55</sup> This section reviews three types of data about Canadian time-based billing. These are 1) hourly fee data, 2) cumulative fee estimates for cases, and 3) "entry fee" data about initial consultation cost and cash retainer requirements.

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<sup>49</sup> Knutsen and Walker, *supra* note 40 at III.B; Sujit Choudhry, Michael Trebilcock and James Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance" in Trebilcock, Duggan and Sossin, *supra* note 9, 385.

<sup>50</sup> Knutsen and Walker, *ibid.* An exception is child protection proceedings and other civil matters in which state action can infringe upon an individual's constitutional rights. In these cases, courts may require the state to fund legal aid; see *New Brunswick (Minister of Health & Community Services) v G(J)*, [1999] 3 SCR 46.

<sup>51</sup> The author is not aware of any data about paralegals' fees, nor is there any in the NSRSL database.

<sup>52</sup> Michael Carabash, "Is Time Running Out on the Billable Hour?" (April 2009) at 5, online: Dynamic Legal Forums <[www.dynamiclegalforms.com/files/Is\\_Time\\_Running\\_Out\\_on\\_the\\_Billable\\_Hour.pdf](http://www.dynamiclegalforms.com/files/Is_Time_Running_Out_on_the_Billable_Hour.pdf)>. A few personal plight legal services for disputes are also sometimes calculated on this basis, for e.g. immigration/refugee disputes.

<sup>53</sup> Knutsen and Walker, *supra* note 40 at III.D.

<sup>54</sup> Herbert M Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford: Stanford University Press, 2004) at 39; Richard L Abel, *Lawyers on Trial: Understanding Ethical Misconduct* (Oxford, UK: Oxford University Press, 2011) at 448; Lester Brickman, *Lawyer Barons: What Their Contingency Fees Really Cost America* (Cambridge, UK: Cambridge University Press, 2011) at 6.

<sup>55</sup> Carabash, *supra* note 52; Knutsen and Walker, *supra* note 40 at III.A. Explaining "personal plight" as a category of legal matters, see text at note 18, *supra*. For corporate clients, non-time based billing methods have proliferated in recent years.

### 1) *Data on Canadian Lawyer Fees: Hourly Rates*

Average hourly rates for litigation lawyers serving individuals are somewhere between \$204 and \$386 per hour according to the sources reviewed in this section. This data comes from the years between 2009 and 2014. Rates are higher for more experienced practitioners, and higher in Toronto than in other parts of the country. The author is not aware of any aggregate data about paralegals' fees in Canada. In legal niches where paralegal practice is widespread, such as rental housing disputes or consumer debt issues, paralegals may offer some clients a more affordable alternative.

#### a) *Previously published data*

The best-known data source for time-based billing rates in this country is *Canadian Lawyer* magazine's annual "Going Rate" surveys.<sup>56</sup> Taking an average of the past 5 years' results, firms responding to this survey have reported that they charge median hourly rates of \$325 per hour for lawyers with 10 years' experience, \$264 per hour for lawyers with 5 years' experience, and \$204 per hour for lawyers called to the bar in the year before the survey.<sup>57</sup>

*Canadian Lawyer* reports that 3/4 of the respondents to their survey practise in firms of less than five lawyers.<sup>58</sup> Individual clients in North America are typically served by these same small firms and solo practitioners.<sup>59</sup> This suggests that the median hourly billing rates reported by *Canadian Lawyer* are reflective of the fees paid by individual clients

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<sup>56</sup> Michael McKiernan, "The Going Rate: Canadian Lawyer's 2014 Legal Fees Survey", *Canadian Lawyer Magazine* (June 2014), online: Canadian Lawyer <[www.canadianlawyermag.com/5151/The-going-rate.html](http://www.canadianlawyermag.com/5151/The-going-rate.html)>; Charlotte Santry, "The Going Rate" *Canadian Lawyer Magazine* (June 2013) 33, online: Canadian Lawyer <[www.canadianlawyermag.com/images/stories/pdfs/Surveys/2013/cljune13legalfees.pdf](http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2013/cljune13legalfees.pdf)>; Robert Todd, "The Going Rate" *Canadian Lawyer Magazine* (June 2012) 32, online: Canadian Lawyer <[www.canadianlawyermag.com/images/stories/pdfs/Surveys/2012/legalfeesurvey2012.pdf](http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2012/legalfeesurvey2012.pdf)>; Robert Todd, "The Going Rate" *Canadian Lawyer Magazine* (June 2011) 32, online: Canadian Lawyer <[www.canadianlawyermag.com/3744/June-2011-The-going-rate.html](http://www.canadianlawyermag.com/3744/June-2011-The-going-rate.html)>; Robert Todd, "The Going Rate" *Canadian Lawyer Magazine* (June 2010) 36, online: Canadian Lawyer <[www.canadianlawyermag.com/962/June-2010-The-going-rate.html](http://www.canadianlawyermag.com/962/June-2010-The-going-rate.html)>.

<sup>57</sup> These figures are weighted averages calculated from the past 5 years of *Canadian Lawyer* surveys, *ibid*. The reported sample size has varied substantially during this period, from a high of 709 firms in 2011 to a low of 179 firms in 2013. The reported average fee from each year was multiplied by the sample size for that year.

<sup>58</sup> Santry, *supra* note 56; McKiernan, *supra* note 56.

<sup>59</sup> Semple, "Personal Plight," *supra* note 18.

(the focus of this article), as opposed to the fees paid by large corporate clients of national firms.

This *Canadian Lawyer* fee data is roughly consistent with a 2009 study conducted by *Dynamic Lawyers*. This survey of 500 solo and small firm lawyers in Toronto, with an average of 19 years of experience, found an average hourly rate of \$338.<sup>60</sup> This survey also echoed *Canadian Lawyer*'s finding that price is correlated to experience, with those in their first decade of practice charging an average of \$274 and those with between 31 and 40 years of practice charging \$386 per hour.<sup>61</sup>

MySupportCalculator.ca has provided the author with very helpful data about family lawyers' billing rates. MySupportCalculator.ca is a free online child and spousal support calculator, a directory of family law professionals, and a comprehensive public information resource about Canadian family law.<sup>62</sup> Hourly billing rate information has been provided by 840 Canadian family lawyers who are members of the MySupportCalculator directory.<sup>63</sup> Across the country, the average hourly rate reported for these family lawyers was \$285.96 per hour.<sup>64</sup> This is consistent with the *Canadian Lawyer* national average figure. It is also consistent with the *Dynamic Lawyers* data, because the average for Toronto family lawyers in the MySupportCalculator sample was \$332.80.

#### *b) National Self-Represented Litigants Study*

As noted above, 53% of the NSRLS respondents had retained private practice legal services at some previous point in their cases.<sup>65</sup> Some of these individuals provided information about what they had paid as clients. These client fee reports offer a useful complement to the data sources listed above, which gathered fee information from lawyers. By searching for numerals and dollar signs within the NSRLS transcript database, the author found 185 statements from self-represented litigants about lawyer fees they encountered.

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<sup>60</sup> Carabash, *supra* note 52; only 8% of the respondents reported hourly rates of less than \$200.

<sup>61</sup> *Ibid* at 3.

<sup>62</sup> The author was a member of MySupportCalculator's initial founding team, although he is not currently involved in its day-to-day operations.

<sup>63</sup> "MySupportCalculator", online: <[www.mysupportcalculator.com](http://www.mysupportcalculator.com)> .

<sup>64</sup> Family lawyers creating directory entries were asked for a minimum fee and a maximum fee. Some reported both a minimum and a maximum; some reported only one of the two. For lawyers who reported both, the midpoint between the figures was used for this analysis. For lawyers who reported only one of the two, that figure was used.

<sup>65</sup> Macfarlane, "Self-Represented Litigants Project," *supra* note 26 at 36.

Twenty-two NSRLS respondents reported time-based lawyer fees which had been charged to them or which had been quoted to them as estimates. The reported hourly fees ranged from \$100 per hour (paid by a self-represented litigant in Prince George BC for assistance in a family law matter) to \$750 per hour (a Brampton, Ontario litigant who reported paying \$1500 for two hours of help from a lawyer). The median reported hourly fee was \$365 per hour and the mean was \$358 per hour. These amounts are consistent with the data sources on Canadian legal fees summarized above (Figure 1). The NSRLS data are towards the higher end of the range of lawyer-reported data, which may reflect respondents' increased likelihood of volunteering information about high fees as opposed to more moderate ones.<sup>66</sup>

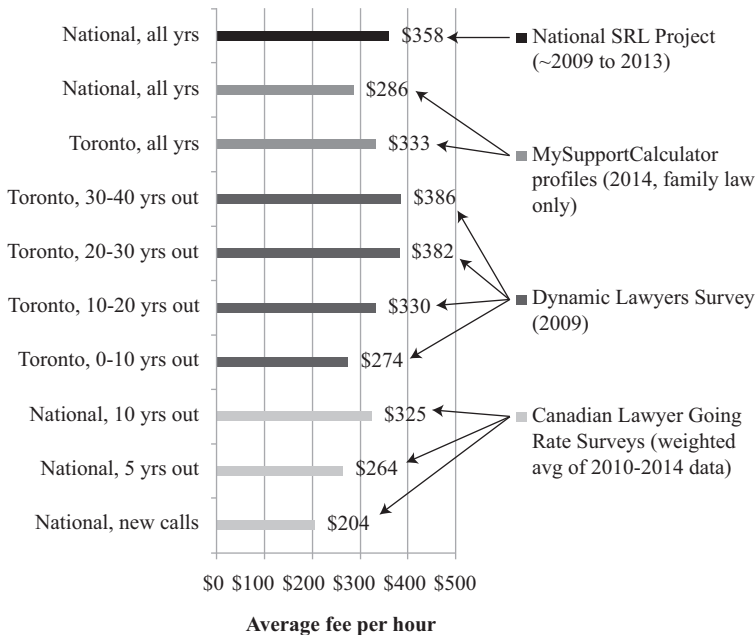
Within the NSRLS database, 58% of the respondents had family court matters as opposed to other civil or administrative ones, while 17 out of the 22 hourly fee reports (77.2%) pertained to family court matters. Given the sample size, however, it is not possible to conclude that family law NSRLS respondents were significantly more likely than non-family NSRLS respondents to report having paid hourly fees.<sup>67</sup>

The following chart aggregates mean hourly billing rates from the four data sources reviewed in this section.

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<sup>66</sup> See Part 1, *supra*.

<sup>67</sup>  $X^2(1) = 3.7$ ,  $p > 0.5$ . Fisher's test two-tailed  $p = 0.0695$ .

**Figure 2: Hourly Billing Rates for Canadian Lawyers**

### c) Higher Hourly Fees in Canada than in the United States

Hourly lawyer fees charged to individuals appear to be markedly (at least 50%) higher in Canada than they are in the United States. In a 2013 article, Paul Teich aggregated data from economic surveys administered by state bar associations in 15 American states.<sup>68</sup> He found that “in most states, the standard hourly fee charged currently by members of the private bar ranges between [USD]\$150 and [USD]\$200”<sup>69</sup> (equivalent to a range of CAD\$161 – CAD\$215).<sup>70</sup> For none of the 15 states reviewed by Teich was the most recent average or median hourly legal fee reported to be higher than US\$228 (CAD\$245) in 2007 dollars, and all states except Texas reported figures below US\$200 (CAD\$215).<sup>71</sup> These figures are well

<sup>68</sup> Paul F Teich, “Are Lawyers Truly Greedy? An Analysis of Relevant Empirical Evidence” (2013) 19 Tex Wesleyan L Rev 837.

<sup>69</sup> *Ibid* at 878.

<sup>70</sup> The currency conversions in this paragraph were performed using the average value of the American dollar in Canadian dollars over the period since 2007 (USD\$1.00 = CAD\$1.074); see Canadian Forex, “Yearly Average Rates”, online: <[www.canadianforex.ca/forex-tools/historical-rate-tools/yearly-average-rates](http://www.canadianforex.ca/forex-tools/historical-rate-tools/yearly-average-rates)>.

<sup>71</sup> Teich, *supra* note 68 at 854-61.



below all of the comparable average Canadian hourly fees summarized in Figure 2.

The Canadian and American hourly figures reviewed in this section seem to be reasonably comparable.<sup>72</sup> The evidence therefore suggests that a Canadian individual can expect to pay at least 50% more than an American would for an hour of a lawyer's time.<sup>73</sup> The cause of this price gap is a matter for further research. One plausible explanation is that there are significantly more lawyers per capita in the United States than there are in Canada and price competition is therefore stiffer south of the border.<sup>74</sup> Also possible is that the price gap is attributable to some of the same factors which make most goods more expensive in Canada than they are in the United States.<sup>75</sup>

## *B) Cumulative Legal Fees*

### *1) Civil Legal Needs and Canadian Lawyer Surveys*

A cumulative fee is a total legal fee for a case or for a specific legal task within a case. For an access-oriented research inquiry such as this, cumulative fees are perhaps more important than hourly billing rates. Most

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<sup>72</sup> The data reviewed by Teich, *ibid*, did represent a slightly earlier period (average reporting year of 2002 with figures inflation-adjusted to constant 2007 dollars.) Apart from Texas, none of the states surveyed included any of the largest 10 cities in the United States. To the extent that average hourly fees are higher in large cities with more large corporate clients, this may skew Teich's hourly figures lower. However, the four Canadian data sources reviewed above also all entirely or mostly exclude large corporate practice; see e.g. the *Canadian Lawyer Magazine* "The Going Rate" reports, *supra* note 57.

<sup>73</sup> The 50% figure is based on a comparison of Teich's "standard hourly rate" converted to CAD \$161-\$215 ( see Teich, *supra* note 68; Canadian Forex, *supra* note 70) with a Canadian range of CAD \$286-\$325. The boundaries of the Canadian range are the two values from the discussion above which seem to most closely reflect nation-wide averages for all lawyers serving individual clients; see MySupportCalculator, *supra* note 63, for data for all family lawyers and Canadian lawyer data for 10-year calls. The midpoint of the Teich range is CAD \$188, the midpoint of the Canadian range is CAD \$305.50. The Teich midpoint of CAD \$188, inflated by 5% to reflect a slightly earlier reporting period, equals CAD \$197.4. The Canadian midpoint of CAD \$305.5 is 54.7% larger than the inflation-adjusted American midpoint of CAD \$197.4.

<sup>74</sup> There were 384 lawyers per 100,000 residents of the United States in 2009. There were 302 lawyers per 100,000 residents of Canada in 2007; see Marc Galanter, "More Lawyers than People: The Global Multiplication of Legal Professionals" in Scott L Cummings, ed, *The Paradox of Professionalism : Lawyers and the Possibility of Justice* (Cambridge, UK: Cambridge University Press, 2011) 68.

<sup>75</sup> Canadian Senate, Standing Senate Committee on National Finance, "The Canada-USA Price Gap" (February 2013) (Chair: Joseph A Day), online: Parliament of Canada <[www.parl.gc.ca/content/sen/committee/411/nffn/rep/rep16feb13-e.pdf](http://www.parl.gc.ca/content/sen/committee/411/nffn/rep/rep16feb13-e.pdf)>.

people, after all, are chiefly interested in the sum of the final bill that will confront them. Most people would gladly choose a firm with a relatively high hourly rate if the firm's efficiency results in a relatively low total fee compared to the alternatives.

What do we know about the cumulative legal fees being paid by Canadians seeking civil justice? An encouraging picture is painted by the Ontario Civil Legal Needs project, which surveyed Ontarians with household incomes of less than \$75,000.<sup>76</sup> Respondents who indicated that they had sought legal assistance within the past three years for a non-criminal problem were asked how much that assistance had cost them. Of those who responded, 34% reported that they had received free services and 23% said they had paid less than \$1,000. The median reported cost in this sample was only \$2,000.<sup>77</sup> A similar survey in Alberta found that the median cost to resolve legal issues, among those who used lawyers, was \$2,564.<sup>78</sup> Such sums do not seem to be prohibitive.<sup>79</sup>

It is important, however, to note that both of these surveys include fees paid for transactional “personal business” legal services such as will-drafting and residential property transactions.<sup>80</sup> Personal business legal services usually require small and relatively predictable inputs of legal professional labour. Technological developments and intense competition (including from non-lawyer do-it-yourself services) may have actually reduced the cost of such legal services in recent years.<sup>81</sup>

The cumulative legal fee for a file can be expected to mount quickly once conflict is introduced.<sup>82</sup> The correlation between conflict and cost is illustrated by *Canadian Lawyer's* “Going Rate” survey. Family lawyers

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<sup>76</sup> Environics Research Group, *supra* note 41.

<sup>77</sup> *Ibid* at 29.

<sup>78</sup> Susan VR Billington, “Legal Service Delivery in Alberta” (PowerPoint slides, November 22, 2012), online: <http://slidegur.com/doc/3968845/law-society-of-alberta> at 18.

<sup>79</sup> Statistics Canada, “Average household food expenditure, by province” (January 2015), online: <[www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/famil132a-eng.htm](http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/famil132a-eng.htm)>. Making a similar point with American data, see Sandefur, *supra* note 13.

<sup>80</sup> The distinction between “personal business” (non-contested) and “personal plight” (contested) legal services was initially proposed by Heinz and Laumann, *supra* note 18.

<sup>81</sup> Semple, “Personal Plight,” *supra* note 18 at III.C. See also McKiernan, *supra* note 56 at 34: “Practice areas where lawyers particularly felt the squeeze included residential real estate and wills and estates.” McKiernan reports that, although profits from these services are “small or non-existent” for Canadian lawyers, many continue to offer them as loss leaders, which bring new clients in to the firm.

<sup>82</sup> Dumont, *supra* note 5 at 10.

were asked to report the average cumulative fee that they would charge for various services:

- \$1,357 was the average fee for an “uncontested divorce,” in which the parties typically agree on all issues before retaining counsel.<sup>83</sup>
- \$2,158 was the average for a “separation agreement,” which might involve the lawyer negotiating spousal support and property division terms with the other side and finding compromises between conflicting positions.
- \$2,480 was the average for a “child custody and support agreement,” which could involve somewhat more time-consuming negotiations to establish a parenting schedule.
- \$12,874 was the reported average for a “contested divorce,” which might include protracted negotiations and/or motion advocacy in court.
- \$26,591 was the average fee for a 5-day trial in a family law matter.<sup>84</sup>

## 2) *Cumulative legal fees in the NSRLS*

What does the NSRLS database tell us about cumulative legal fees? Of the 186 fee reports provided by the interviewees, 109 pertained to cumulative legal fees. It is important to note that these were *not* all reports of the total final legal bills that respondents had received from their lawyers. The “cumulative” fee reports also included 1) estimates which respondents said lawyers had provided to them regarding how much it would cost in total to provide a certain legal service or bring a case to completion, and 2) respondents’ reports of how much they had owed their lawyers at a particular point in time.

The smallest cumulative legal fee reported in the NSRLS was \$669. An Alberta woman whose civil court matter involved a dog bite reported receiving a \$669 bill from a lawyer whom she had consulted briefly, before she decided to become self-represented. The highest reported cumulative legal fee was from an Ontario family court litigant who reported that she

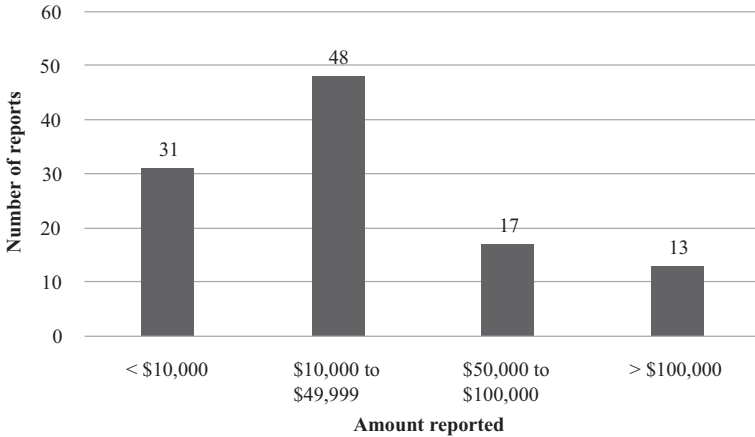
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<sup>83</sup> For data sources see the *Canadian Lawyer Magazine* “The Going Rate” surveys, *supra* note 56.

<sup>84</sup> Fee data for family law trials was only gathered in the most recent iteration of the *Canadian Lawyer* survey; see McKiernan, *supra* note 56. The 2014 survey also reported that \$12,769 was the average fee for a two-day family law trial.

and her ex-husband had spent \$1 million between them on lawyer fees. The following chart shows how many cumulative fee reports in the NSRLS fell into different categories:

Figure 3: Cumulative Fee Reports in the NSRLS



It should be borne in mind that all of the NSRLS respondents were self-represented at the time when they were interviewed. Their retainers with private lawyers had ended (often due to lack of funds). It would be misleading to calculate median or mean cumulative legal fees from this data given the variety of fee reports included in this category. However, the data makes it clear that it is not uncommon for a person to spend tens of thousands of dollars on legal fees, without actually resolving his or her legal need.

Family court litigants were more likely than other litigants to volunteer information about their cumulative legal fees. Out of the 109 cumulative legal fee reports, 79.8% (n = 87) came from family court litigants even though only 58% of all respondents had family court matters. This difference was statistically significant.<sup>85</sup> It can therefore be said that, among NSRLS respondents, those who had family law legal problems were significantly more likely than those with other types of problems to volunteer information about the cumulative legal fees that had been billed or estimated to them.

Family law clients may be especially aware of the legal fees they pay because time-based billing predominates in this niche and bills are

<sup>85</sup>  $X^2(1) = 39.5, p < 0.5$ . Fisher's test two-tailed  $p < 0.0001$ .

typically rendered periodically before the case is finished. By contrast, a contingency-billed personal injury client may not perceive so clearly how much he or she will have to pay the law firm, because the accounting occurs only once and the amount is deducted from the recovery. Unfortunately, the NSRLS data does not permit any conclusions about which types of cases produce higher or lower cumulative legal bills.

### 3) *The Price of Entry: Free Consultations and Cash Retainers*

In addition to hourly and cumulative fee data, there is another useful way to measure legal fees. “Entry fees” are the amounts that clients must pay to begin receiving legal services. Offering free initial consultations is a time-honoured and access-enhancing practice embraced by many Canadian lawyers. In the *Canadian Lawyer* surveys, between 55% and 60% of respondents said that they offer free initial consultations.<sup>86</sup> The *Dynamic Lawyers* survey of Toronto small firm and solo lawyers found 64% offering free consultations in at least some cases.<sup>87</sup> However, family lawyers may be more reluctant to provide initial meetings for free. Among the family lawyers in the MySupportCalculator database, only 34% reported offering free initial consultations.

After the initial consultation, it is customary for a time-billing lawyer to require a cash “retainer” (deposit) before beginning work on the file.<sup>88</sup> The retainer may be used for disbursements such as expert fees in addition to the lawyer’s own fees. The author is not aware of any previously published data about the retainer practices of Canadian lawyers. However 48 NSRLS respondents volunteered information about the retainers which lawyers had requested of them.<sup>89</sup> The following chart categorizes the respondents’ retainer reports by province and type of matter.

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<sup>86</sup> Santry, *supra* note 56; McKiernan, *supra* note 56.

<sup>87</sup> Carabash, *supra* note 52 at 4.

<sup>88</sup> Knutsen and Walker, *supra* note 41.

<sup>89</sup> It is important to note that this data includes cash retainers requested of, but not actually paid by, the respondent.

**Figure 4: Cash retainers requested by lawyers, according to NSRLS Respondents**

British Columbia	Alberta	Ontario
		\$200,000.00 (Fam)
	\$65,000.00 (Adm)	\$100,000.00 (SmCIm)
		\$100,000.00 (Fam)
\$35,000.00 (Fam)	\$25,000.00 (Fam)	\$35,000.00 (SmCIm)
\$33,000.00 (Fam)	\$20,000.00 (Adm)	\$20,000.00 (Fam)
\$20,000.00 (Adm)	\$6,000.00 (Fam)	\$15,000.00 (Fam)
\$15,000.00 (SmCIm)		\$10,000.00 (SmCIm)
\$15,000.00 (Fam)		\$10,000.00 (Fam)
\$13,000.00 (Civil)		\$10,000.00 (Fam)
\$8,000.00 (Fam)	\$5,000.00 (Civil)	\$3,750.00 (Fam)
\$5,000.00 (Civil)		\$3,750.00 (Fam)
\$5,000.00 (Fam)		\$3,750.00 (Fam)
\$5,000.00 (Fam)		\$3,750.00 (Fam)
\$3,000.00 (Fam)	\$3,000.00 (Fam)	\$3,000.00 (Fam)
\$2,000.00 (Adm)	\$3,000.00 (Fam)	\$3,000.00 (Fam)
\$2,000.00 (Fam)	\$3,000.00 (Fam)	\$2,500.00 (Fam)
\$1,000.00 (Fam)	\$3,000.00 (Fam)	\$1,500.00 (Fam)
\$0.00 (Fam)	\$2,500.00 (Fam)	\$1,500.00 (Fam)
	\$2,500.00 (Fam)	\$1,500.00 (Fam)
		\$1,500.00 (Fam)
		\$1,000.00 (Fam)
		\$1,000.00 (Fam)

Fam = Family Court matter	Civil = Non-family, non-small claim civil matter
SmCIm = Small Claim	Adm = Administrative Tribunal

The mean cash retainer reported by these respondents was \$17,322; the median was \$4375.<sup>90</sup> This data includes several extremely large retainer figures that may represent very unusual cases.<sup>91</sup> The median figure of \$4375 is probably closer to the cash retainer required by most Canadian lawyers working for individuals, although the provisos above about this methodology and sample reviewed should be borne in mind.<sup>92</sup> Given the small sample size no meaningful conclusions can be drawn about retainers in different types of civil cases. Hopefully future surveys of lawyers will

<sup>90</sup> The "\$0" figure came from one respondent who stated that a lawyer offered to take on his matter with no cash retainer.

<sup>91</sup> Requiring a huge retainer to continue is one way for a lawyer to bring a relationship with a difficult client to a close. It is also possible that some respondents described a sum quoted to them as a retainer when that sum was in fact a cumulative fee.

<sup>92</sup> Part 1, *supra*.

enquire about their cash retainer practices, because these “entry fees” can make legal services significantly less affordable for civil justice-seekers.<sup>93</sup>

To conclude this section, legal professional fees dominate the monetary costs of seeking civil justice in most cases.<sup>94</sup> Canadian lawyers’ hourly rates average roughly \$300 per hour – significantly higher than comparable American rates – and total costs frequently reach into five figures before a case is over. Although many lawyers offer free initial consultations, the four-figure cash retainers required to start substantive work on a file make time-billing lawyers’ services more difficult to afford.

### 3. *Temporal Costs of Seeking Civil Justice*

Temporal costs are the second major component of private costs. It takes *time* to pursue civil justice, as well as money and psychological resources.<sup>95</sup> There are three ways to think about these temporal costs:

- 1) Duration, in terms of the months (and sometimes years) over which the effort to obtain civil justice persists in a person’s life;
- 2) Workload, in terms of the hours which the effort requires while it is on-going; and
- 3) Opportunity, in terms of the opportunity costs imposed by the time requirements of seeking civil justice.

#### *A) Duration: Months (If Not Years) from Their Lives*

A civil case can remain part of a person’s life over an extended period of time.<sup>96</sup> The Ontario Civil Legal Needs survey offers some data about the lifespan of civil disputes. Respondents who had sought legal assistance for a non-criminal problem at any time in the past three years were asked how long it took to resolve the problem.<sup>97</sup> The proportion that reported that they had *not yet* resolved problems experienced over the previous three years ranged from 23% for “housing/land” problems to 55% of those with

<sup>93</sup> Semple, *Justicia’s Legions*, *supra* note 13 at 139-40.

<sup>94</sup> A possible exception is personal injury cases, which can have very high medical expert fees.

<sup>95</sup> Barendrecht, Mulder and Giesen, *supra* note 12 at 14; Gramatikov, *supra* note 12 at 15.

<sup>96</sup> Macfarlane, “Self-Represented Litigants Project,” *supra* note 26 at 54; Gramatikov, *ibid* at 16.

<sup>97</sup> Those whose problem was still unresolved at the time of the survey were asked how much time they had been working to resolve it; see Environics Research Group, *supra* note 41 at 46.

personal injury problems. Among those who reported family relationship problems, 27% said that the problem took more than a year to resolve and 44% said it had not yet been resolved at the time of the survey.<sup>98</sup> This data indicates that civil legal matters can drag on over many months or years.

*B) Workload: Hours (If Not Days) from Their Weeks*

So long as the civil matter remains unresolved, it consumes hours from the justice-seeker's life. This was vividly illustrated in some of the self-represented litigants' interview comments from Macfarlane's research:

She spent eight months at 40 hours a week preparing for a two-day discovery which took place in October 2009. She read and researched. (Female family court litigant, 50+ years. Cold Lake, Alberta)

Another challenge is the distance from her house to the registry – one hour to Vancouver and half an hour to Chilliwack. She has to drive into the court each time. (Female civil court litigant, 30-40 years. British Columbia)

Just to file a document takes two hours. (Male family court litigant, 40-50 years. Toronto)

Has spent more than 100 hours on this but is committed. (Male small claims court litigant, 50+ years. Toronto)

*C) Opportunity Cost: What they Could have Done with the Time*

Third, temporal costs create opportunity costs – activities the justice seeker must forego because he or she is spending time pursuing civil justice.<sup>99</sup> These could include, for example, time with friends and/or family, or personal recreation time that a disputant loses because he or she must spend time in court or doing legal paperwork. In the words of one self-represented litigant, "I cannot begin to imagine the number of hours that were taken away from my wife and kids, pouring [sic] over paperwork to ensure that I could [do] an adequate job of representing myself."<sup>100</sup>

In the NSRLS data, missed employment opportunities are the most consistently identified opportunity costs for self-represented litigants seeking civil justice.<sup>101</sup> Most commonly, respondents said that they had to

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<sup>98</sup> *Ibid.*

<sup>99</sup> Barendrecht, Mulder and Giesen, *supra* note 12; Gramatikov, *supra* note 12.

<sup>100</sup> Male family court litigant, 50+ years. Chatham, Ontario.

<sup>101</sup> Macfarlane, "Self-Represented Litigants Project," *supra* note 26 at 127; see also Stratton and Anderson, *supra* note 24 at 11.



take time away from work to attend court or to prepare paperwork. Some said, however, that they lost their jobs outright because of their cases. One respondent said, “I was so caught up in trying to figure out this system and keep my child I lost my job.”<sup>102</sup> Finally, several litigants said that they were unable to take up new employment opportunities because of the time demands of their cases. One such was the man who reported that he “had to pass up a job in Ft McMurray because I had to be in court today. I can’t take a job because I have to be here to rep myself.”<sup>103</sup>

#### *D) Representation Status and Temporal Costs*

It seems logical to assume that, among civil justice-seekers, completely self-represented litigants encounter the largest temporal costs. They are required to perform by themselves whatever form-filling, drafting, negotiating, and courtroom appearances their cases require. In her 2013 report, Macfarlane noted that many found that the time required to manage an on-going civil case was a source of unstable employment or job loss as well as “social and emotional isolation.”<sup>104</sup>

Those who have retained lawyers under traditional full-scope retainers can be expected to experience lower temporal costs than they otherwise would.<sup>105</sup> Lawyers typically perform the most time-consuming tasks on behalf of their clients, offering significantly reduced temporal costs (and commensurately increased monetary costs). Clients using unbundled (limited scope) legal services are in an intermediate position between the unrepresented and the traditionally-represented. These clients must do some but not all of the work themselves.

### *4. Psychological Costs of Seeking Civil Justice*

#### *A) Psychological Costs*

The effort to access civil justice imposes *psychological costs*, in addition to monetary and temporal costs, on most individuals who undertake it.<sup>106</sup> Psychological costs can be defined as the negative effects of an occurrence

<sup>102</sup> Female family court litigant. 30-40 years. Toronto.

<sup>103</sup> Male family court litigant. Lethbridge, Alberta. (Age not recorded).

<sup>104</sup> Macfarlane, “Self-Represented Litigants Project,” *supra* note 26.

<sup>105</sup> For a survey of litigants regarding the perceived consequences of having a lawyer on the time costs of family court litigation, see 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) 91 Can Bar Rev 67 at 83-84.

<sup>106</sup> Trubek, *supra* note 40 at 120; Barendrecht, Mulder and Griesen, *supra* note 12.

or process upon an individual's mental state. Quantifying psychological costs is more difficult than quantifying monetary or temporal costs.<sup>107</sup> They have no natural unit of measurement, and valuing them is subjective, if not arbitrary.<sup>108</sup>

Nevertheless, researchers in many disciplines have used the concept of psychological costs to measure non-monetary, non-temporal impacts of human experiences.<sup>109</sup> For example, Cesur *et al* assessed the psychological costs of military combat using post-traumatic stress disorder and depressive symptomatology diagnosis rates in veterans.<sup>110</sup> After analysing interviews of Polish women experiencing infertility, Dembińska developed an Inventory of Psychological Costs in Life Crisis.<sup>111</sup>

Like their colleagues in other disciplines, access to justice researchers have recognized the importance of psychological costs.<sup>112</sup> As with monetary and time costs, the focus of the analysis is on private psychological costs created by the pursuit of civil justice, as opposed to those created by the underlying problem which motivated the pursuit (such as loss of employment or the end of a spousal relationship).<sup>113</sup> Gramatikov categorizes the psychological costs (which he terms “intangible costs”) of pursuing civil justice as 1) stress, 2) damage to relationships, and 3) negative emotion.<sup>114</sup> Among the negative emotions, he identifies the five most important as frustration, anger, humiliation, disappointment, and hopelessness.<sup>115</sup>

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<sup>107</sup> Pleasence, Buck and Balmer, “Health Cost,” *supra* note 25: these authors tallied health effects of civil law problems, but their study included the life developments underlying the pursuit of civil justice (e.g. end of a marriage or loss of a job) and did not seek to isolate the cost of seeking civil justice in response to these problems.

<sup>108</sup> Gramatikov, *supra* note 12 at 20.

<sup>109</sup> Susan Hillier Parks and Marc Pilisuk, “Caregiver Burden: Gender and the Psychological Costs of Caregiving” (1991) 61 *Am J Orthopsychiatry* 501; Resul Cesur, Joseph J Sabia and Erdal Tekin, “The Psychological Costs of War: Military Combat and Mental Health” (2015) 32:1 *J Health Econ* 51; Lopes and Martins, *supra* note 20.

<sup>110</sup> Cesur, Sabia and Tekin, *ibid*. Macfarlane reports that many self-represented litigants report symptoms similar to those of PTSD; see Macfarlane, “Self-Represented Litigants Project,” *supra* note 27 at 108).

<sup>111</sup> Aleksandra Dembińska, “Psychological costs of life crisis in Polish women treated for infertility” (2014) 32 *J Reproductive & Infant Psychology* 107.

<sup>112</sup> Barendrecht, Mulder and Griesen, *supra* note 12; Gramatikov, *supra* note 12.

<sup>113</sup> Disentangling these two phenomena in any given case is challenging, but the distinction is analytically important.

<sup>114</sup> Gramatikov, *supra* note 12 at 39-40.

<sup>115</sup> *Ibid* at 38.

The psychological costs which an experience creates for a person are not necessarily proportionate to the monetary or time costs which that experience creates. Parks and Pilisuk observe that the psychological costs of caregiving for older relatives “reflec[t] a cognitive appraisal, which is itself a product of the individual’s social, historical, and psychological framework.”<sup>116</sup> Likewise, in the civil justice context, one individual might experience only modest psychological costs from an expensive and lengthy employment dispute, while another might face much higher psychological costs from a comparatively quick and cheap contested divorce.<sup>117</sup>

There is little published information about the psychological costs of seeking civil justice in Canada. One data point comes from the Ontario Civil Legal Needs Survey, which asked about respondents’ perceptions of the *fairness* of the legal system. A feeling of having been treated unfairly can be considered a type of psychological cost. Among Ontarian respondents who experienced and resolved a family relationship or employment problem, almost *half* said that the process by which they did so was either *very unfair* (33% for both categories) or *somewhat unfair* (13% for family problems; 16% for employment problems).<sup>118</sup> Perceptions of unfairness in personal injury dispute resolution processes were almost as high.<sup>119</sup> For legal needs involving wills, powers of attorney, and real estate, significantly higher proportions of the respondents felt that the process was fair.<sup>120</sup> Insofar as needs in the latter group are more likely to be transactional and undisputed, this finding supports the hypothesis that the costs of seeking justice are highest in dispute-related “personal plight” legal needs.

Good assistance from a legal professional can be expected to reduce the psychological costs of seeking civil justice. An effective lawyer or paralegal will act as an expert ally and, perhaps, a source of emotional support for the justice-seeker.<sup>121</sup> Conversely it seems reasonable to expect that psychological costs (like temporal costs but unlike monetary costs) are highest for self-represented litigants. Most self-represented litigants must acclimatize to a foreign and often overwhelming legal system.<sup>122</sup> In a

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<sup>116</sup> Parks and Pilisuk, *supra* note 109 at 503.

<sup>117</sup> Gramatikov, *supra* note 12 at 38.

<sup>118</sup> Environics Research Group, *supra* note 40 at 49.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> Dumont, *supra* note 5.

<sup>122</sup> Macfarlane, “Self-Represented Litigants Project,” *supra* note 26 at 53-55. The exception would be the small minority of self-reps who have engaged with the system on multiple occasions.

recent survey of self-represented litigants in Alberta and Ontario family courts, 67% reported that “navigating the court system was difficult or very difficult.”<sup>123</sup> Many must undertake this navigation challenge while simultaneously dealing with stress arising from the underlying source of the legal need, such as relationship breakdown or loss of employment. The NSRSLs’ final report identified stress and trauma, sometimes leading to physical health problems, among the more commonly reported consequences of the self-representation experience.<sup>124</sup>

## *B) Self-represented Litigants: How the Process Made Them Feel*

### *1) Negative Feelings (Psychological Costs)*

The NSRSLs interviews offer valuable new data about the psychological costs of seeking civil justice in Canada. Most of the respondents said something about how the overall experience of seeking civil justice, or some constituent part of that experience, made them *feel*. The author identified 665 such “sentiment reports” within the case interview records created by Macfarlane *et al.* The author sought to include only sentiment reports arising from the legal process itself, as opposed to those arising from the underlying situation or event which brought the individual into contact with the law.

For example, a Nanaimo family court litigant in her 30s described her judicial case conference as “discouraging.” She said that she felt “belittled” and “shaken” while it was on-going. Later in the interview, she described the feeling of not knowing what was going on in her case as “stressful.” Each of these four sentiment reports became a separate entry in the database,<sup>125</sup> and each sentiment report was categorized as either negative or positive. Of the interviewees’ 664 sentiment reports, 79.7% (n = 530) were negative. The negative sentiments that were reported five times or more are represented in the following word cloud. The size of each word is exactly proportional to the number of times it appeared in the database.<sup>126</sup>

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<sup>123</sup> Birnbaum, Bala and Bretrand, *supra* note 105 at 83.

<sup>124</sup> Macfarlane, “Self-Represented Litigants Project,” *supra* note 26 at 108-109.

<sup>125</sup> In each case, the words used to describe how the interviewee felt were recorded along with information about the interviewee and the type of case. If an interviewee used a certain word more than once within one interview to describe his or her experience, that sentiment was recorded only once. It is worth reiterating that approximately half of these interviewees had retained lawyers at a previous stage in the case. The sentiment reports included these periods as well as the periods of self-representation.

<sup>126</sup> This graphic was created automatically by Wordle (online: <[www.wordle.net](http://www.wordle.net)>) based on a frequency-weighted word list inputted by the author.

**Figure 5: Sentiment Reports from NSRLS Respondents**



Negative sentiments often arose from the respondents' negative experiences with individuals who they dealt with while seeking civil justice. The words "bullied" (23 occurrences), and "humiliated" (6 occurrences) reflect such experiences, along with many other words not used more than five times. The justice-seekers' interactions with their adversaries, with lawyers representing adversaries, and with judges all created psychological costs. For example one interviewee reported having being "spoken to with contempt" by the judge and another said that he felt the other side's lawyer was "talking down" to him.

However, a larger number of sentiment reports seemed to reflect psychological costs imposed by the legal *system* and its demands, as opposed to any particular individual. Feeling "overwhelmed" was the most common sentiment recorded; it appears 24 times in the NSRLS interview transcripts. The sense of being overwhelmed typically came from the forms and paperwork, from the experience of being in court, or from the cumulative experience of seeking civil justice. Many of the other largest words in the cloud above – such as "confused" and "stressed" – were also usually used to describe psychological costs imposed by the system as opposed to by particular individuals.

## 2) *Positive Sentiments (Psychological Gains)*

Pursuing civil justice can also create positive effects on an individual's mental state – psychological gains. Gramatikov identifies happiness, relief, confidence and triumph among these.<sup>127</sup> Like negative feelings, positive ones can result either from satisfactory interactions with individuals encountered during the process of seeking civil justice,<sup>128</sup> or from satisfactory experiences of the system more broadly.

Among the 665 sentiment reports identified by the author in the NSRLS database, just over a fifth (135 in total) were positive. The two most common positive adjectives used to describe the feeling of being involved in civil litigation were “confident” (27 instances in the transcripts) and “capable” (10 instances). Many of the sentiment reports coded positive were feelings of resolution or defiance. Five respondents described themselves as feeling “determined” and others said they felt “compelled to bring the issue” or something similar. For example one Vancouver civil litigant reported that, after her adversaries appealed the initial ruling, she had the feeling that she “needed to finish this.” Those with positive experiences may be under-represented in the NSRLS database due to the sampling methods.<sup>129</sup>

## 3) *Negative/Positive Sentiment Balance for Different Types of Matter*

As noted above, out of the 665 sentiment reports 79.7% were negative and the remainder were positive. However, there are statistically significant differences in the rate of positive and negative sentiment reports among different types of cases. Among those from respondents with family law problems, 83% were negative while in the administrative tribunal cases only 66% were negative. The following chart shows the proportions of NSRLS respondents' sentiments that were positive and negative, according to the type of civil legal need that they experienced:

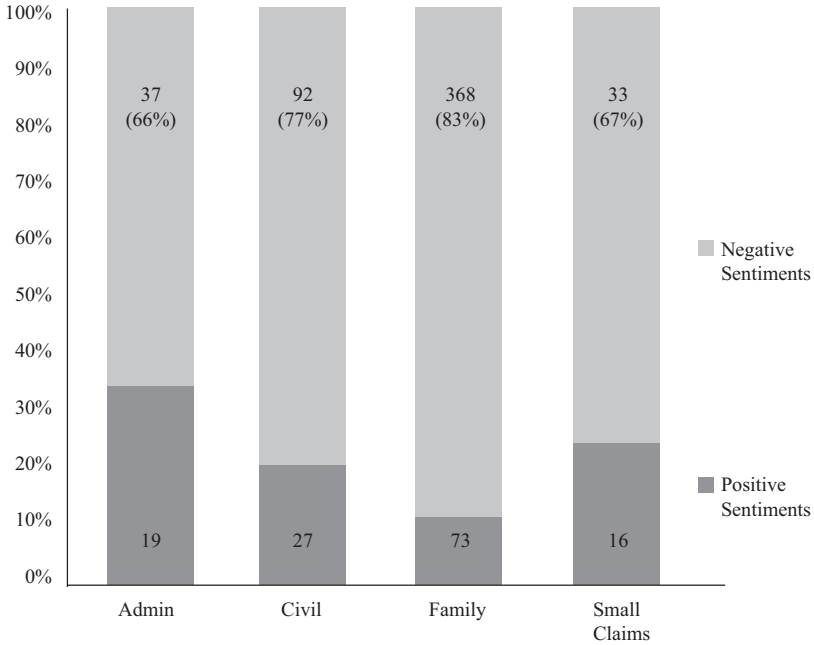
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<sup>127</sup> Gramatikov, *supra* note 12 at 40.

<sup>128</sup> See Macfarlane, “Self-Represented Litigants Project,” *supra* note 27 at 105-106 regarding self-represented litigants' positive experiences with judges.

<sup>129</sup> See Part 1, *supra*.

**Figure 6: Positive and Negative Sentiment Reports from NSRLS Respondents, according to Civil Legal Need Type**



The disproportionately negative character of sentiments expressed by NSRLS respondents with family law problems (compared to administrative and non-family civil law problems) appears to be statistically significant.<sup>130</sup> This suggests that the psychological costs of seeking civil justice may be especially high for those with family law problems.

### 5. Discussion

The goal of this article is a better understanding of the various costs confronting individuals who seek civil justice in Canada. Before summarizing the study’s findings, this section considers two important questions. First, is there evidence that accessing civil justice is especially difficult in family law matters compared to non-family civil and administrative matters? Second, how can analysis of private costs move us towards better access to justice?

<sup>130</sup>  $\chi^2(3) = 17.6, p < 0.5.$

### *A) Is Family Justice Costlier?*

Family law has repeatedly been identified as a particularly challenging part of Canada's access to justice landscape.<sup>131</sup> It was the only substantive area of civil law identified as a "priority" by the Action Committee on Access to Justice in Civil and Family Matters.<sup>132</sup> The present study offers a few hints that private costs are indeed higher – and justice is less accessible – in family law compared to other civil legal needs:

- Surveys of all Canadian lawyers have found 55-64% offering free initial consultations, but only 34% of the family lawyers in the MySupportCalculator directory said that they do so.<sup>133</sup>
- NSRLS respondents with family law problems were significantly more likely than those with other civil problems to volunteer information about having paid legal fees before becoming self-represented.<sup>134</sup> This could mean that they were more likely to have paid fees without resolving these cases, although it could also simply mean that they were more likely to volunteer such information in the interview.
- The sentiment reports offered by family law NSRLS litigants were significantly more likely to be negative rather than positive, compared to sentiment reports from non-family litigants.<sup>135</sup>

These observations lend tentative support to the hypothesis that the pursuit of civil justice really is more costly for individuals with family law problems. However, caution is warranted in reaching conclusions on the basis of this data. None of the empirical work cited here was designed to rigorously compare family against non-family civil legal needs.

### *B) Understanding Costs to Increase Access*

The private costs of civil justice are not immutable. An understanding of these costs — to which this article has hopefully contributed — can set the

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<sup>131</sup> See e.g. R Roy McMurtry et al, "Listening to Ontarians: Report of the Ontario Civil Legal Needs Project" (May 2010) at 11, online: Law Society of Upper Canada <[www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf)>; Law Commission of Ontario, *supra* note 9; Semple and Bala, *supra* note 37.

<sup>132</sup> Action Committee on Access to Justice in Civil and Family Matters, *supra* note 9.

<sup>133</sup> Part 2, *supra*.

<sup>134</sup> *Ibid*. See also note 87 and accompanying text.

<sup>135</sup> Part 4, *supra*.



stage for reducing them, and thereby make justice more accessible. There are opportunities to do so in both the public sector and the private sector, as described below.

### *1) Reducing Private Costs: Public Sector Initiatives*

There are steps that governments, court systems and regulators can take to reduce the private costs of seeking civil justice. Cutting court fees would reduce monetary costs, although the net impact would be small as court fees are dwarfed by legal professional fees.<sup>136</sup> Legal professional fees themselves might be reduced through regulatory reform: restricting fees, increasing competition, or increasing the scope of paralegal practice to give individuals lower-cost alternatives to lawyers.<sup>137</sup> Temporal costs could be eased by reducing systemic delay and minimizing the need for litigants to make in-person appearances at court.<sup>138</sup> Psychological costs can be mitigated by making the civil justice system more user-friendly and less overwhelming. This is precisely the goal of many recent reforms and much recent writing about the civil justice system in Canada.<sup>139</sup>

It is possible that an increase in court fees, generating new revenues dedicated to such purposes, would reduce *aggregate* private costs at no net cost to the taxpayer. That being said, the most significant reductions in private costs would require increased government expenditure.<sup>140</sup> However, a demonstration that an investment of  $x$  public dollars would reduce private costs by  $3x$  or  $4x$ , could make the investment more politically viable.

Even more convincing to policy-makers would be a convincing case that the investment of  $x$  dollars will actually reduce *public* costs by more than  $x$ . Some of the private costs of pursuing civil justice identified in this paper cost taxpayers money in the long run. An example is the loss of employment income identified in section 3 C), which reduces tax revenue

<sup>136</sup> Part 2, *supra*.

<sup>137</sup> All of these options have strengths and drawbacks which are beyond the scope of this paper. See Semple, *Justitia's Legions*, *supra* note 13 at c 9; Macfarlane, "Self-Represented Litigants Project," *supra* note 26 at 93-95.

<sup>138</sup> For example, by introducing online dispute resolution options such as British Columbia's Civil Resolution Tribunal; see Civil Justice Tribunal, online: <[www.civilresolutionbc.ca](http://www.civilresolutionbc.ca)>.

<sup>139</sup> See e.g. Lowe *et al*, *supra* note 10 at 4; Macfarlane, "Self-Represented Litigants Project," *supra* note 27 at 113-27; Semple and Bala, *supra* note 36; Action Committee on Access to Justice in Civil and Family Matters, *supra* note 9 at 7-17; Trebilcock, Duggan and Sossin, *supra* note 9; CBA A2J Committee, *supra* note 9.

<sup>140</sup> Regarding the distinction between the public and private costs of seeking civil justice, see note 10, *supra*, and accompanying text.

and may increase state employment insurance and welfare obligations. The “Everyday Legal Problems” research team estimates that unresolved legal problems create annual costs to Canadian governments of \$740 million per year, including \$458 million in increased employment insurance costs and \$248 in increased social assistance costs.<sup>141</sup> New investments which help the civil justice system produce more fair, fast and affordable resolutions and thereby reduce these “knock-on” public costs might pay for themselves. A solid cost-benefit argument for public investment in the civil justice system would require 1) a quantification of costs and benefits and 2) an arithmetic comparison of them.<sup>142</sup> This paper may be considered a first step toward such an analysis.

## 2) *Reducing Private Costs: Private Sector Initiatives*

Considering the private costs of seeking civil justice can also help legal professionals better understand the needs of their personal plight clients, and develop ways to cost-effectively meet those needs. Pursuing civil justice without professional help often exposes an individual to very substantial temporal and psychological costs. Under the traditional full-scope retainer model, a legal professional offers to assume most of the temporal costs, and some of the psychological costs, of the client’s pursuit of justice. However, this practice model is no longer viable for many if not most Canadians with personal plight legal needs.<sup>143</sup> Its monetary costs are unaffordable, and some people also bridle at the loss of control that the traditional full-scope retainer involves for the client.<sup>144</sup>

Understanding the private costs encountered by individuals with different types of legal problems can help legal professionals and entrepreneurs create affordable, accessible alternatives to the traditional full-scope retainer. For example, if family law disputes have relatively high psychological costs, that might suggest a market for “coaching” services. In this legal service delivery model, the litigant does all of the drafting, negotiation and courtroom appearances but the lawyer offers in-person advice and support.<sup>145</sup>

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<sup>141</sup> Farrow *et al*, “Everyday Legal Problems,” *supra* note 6. These figures include costs created by unresolved underlying legal needs, in addition to the costs of pursuing civil justice. For the difference between these two types of costs, see section 1.1, *supra*.

<sup>142</sup> Noel Semple, “Cost-Benefit Analysis of Family Service Delivery: Disease, Prevention, and Treatment” (June 2010), at 1D, online: Law Commission of Ontario <[www.lco-cdo.org/family-law-process-call-for-papers-semble.pdf](http://www.lco-cdo.org/family-law-process-call-for-papers-semble.pdf)>.

<sup>143</sup> Semple, *Justicia’s Legions*, *supra* note 13 at 275-76.

<sup>144</sup> Macfarlane, “Self-Represented Litigants Project,” *supra* note 26 at 50; Semple, “Personal Plight,” *supra* note 19 at III.D; Semple, *Justicia’s Legions*, *ibid* at 141.

<sup>145</sup> Julie Macfarlane, “Seriously? Lawyers Coaching SRLs in Self-Advocacy?” (December 2013), online: The National Self-Represented Litigants Project

Conversely, there may be other types of civil personal plight legal need in which temporal costs are more problematic than psychological costs. Consumer disputes with businesses about defective goods and services could be an example. In these niches, there might be a market for remote, internet-enabled legal services and online dispute resolution.<sup>146</sup> These models may be affordable and save clients a great deal of time. They may be impersonal or even “cold,” but this is not necessarily problematic if clients with these needs do not confront significant psychological costs.

In short, for a professional or firm focused on personal plight legal matters, understanding the private costs of seeking civil justice means understanding the market. This sets the stage for developing affordable value propositions for different types of legal needs. Developing such understanding is not only good for access to justice, but also a source of professional opportunity at a time when North American lawyers face a challenging job market.<sup>147</sup>

### C) Conclusions

The article proposed a taxonomy of the private costs of seeking civil justice.<sup>148</sup> Within this framework, it reviewed what we know about the various costs people must pay if they wish to assert their civil legal rights in this country. This article added new findings from the NSRLS interviews.

Among the *monetary costs* of seeking civil justice, legal professional fees make up the lion’s share. The data suggests that hourly lawyer rates of between \$210 and \$390 are typical for individual clients in this country.<sup>149</sup> In contested matters cumulative legal bills often mount into five figures and occasionally into six figures. Four figure cash retainers are also commonly required before a lawyer will begin work on a time-billed file. According to the available data, hourly legal fees are more than 50% higher in this country than in the United States.<sup>150</sup> Given the steep monetary costs of retaining legal professionals, the increasing prevalence

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<representingyourselfcanada.com/2013/12/14/seriously-lawyers-coaching-srls-in-self-advocacy/>; Shawna Labadie, “Coaching the Unrepresented: The Best Lesson Learned” (July 2014), online: The National Self-Represented Litigants Project <representingyourselfcanada.com/2014/07/27/coaching-the-unrepresented-the-best-lesson-learned/>.

<sup>146</sup> Jamie Baxter and Albert Yoon, “No Lawyer for a Hundred Miles? Mapping the New Geography of Access of Justice in Canada” (2014) 52:1 Osgoode Hall LJ 9.

<sup>147</sup> Semple, “Kindness of Strangers,” *supra* note 46; Semple, “Personal Plight,” *supra* note 18.

<sup>148</sup> Part 1, *supra*.

<sup>149</sup> See Figure 2, *supra*, and accompanying text.

<sup>150</sup> Part 2, *supra*.

of self-representation is not surprising. Nor is it surprising that access to civil justice in Canada is publicly perceived to depend on the affluence of the justice-seeker.<sup>151</sup>

*Temporal costs* are the second major category of private costs. It is clear that pursuing civil justice often consumes months (if not years) from a person's life as well as hours (if not days) from a person's weeks. Moreover, at least for self-represented litigants, the time cost of pursuing civil justice is often high enough to impose significant opportunity costs — especially in terms of foregone employment opportunities.

Finally, *psychological costs* also stand between people and civil justice. Defined here as negative effects on the justice-seeker's mental state, psychological costs are imposed both by interactions with specific individuals and by the demands of the system as a whole. Within the NSRLS data set, 80% of the respondents' "sentiment reports" (reports of how the experience made them feel) were negative. Feelings of being overwhelmed, stressed, bullied, frustrated and scared were most frequently reported by the respondents.

The article concluded by considering hints in the evidence about differences between family and other civil disputes. It also made the argument that a costs-based analysis can move access to justice forward in two ways. It can help public sector policy-makers identify ways to reduce costs, either with or without new funding. It can also help lawyers and entrepreneurs identify new, affordable ways to reduce the costs which are most onerous to individuals with different types of legal need. The monetary, temporal, and psychological costs of seeking civil justice in this country are high, and indeed often prohibitive for individuals. However, there is enormous potential for creative policy-making and innovative legal practice to decrease these costs, and thereby make civil justice more accessible to all Canadians.

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<sup>151</sup> Reporting on interviews with randomly selected people on the street about the meaning of access to justice, Trevor Farrow reported a common perception that "money and class are key factors when it comes to meaningful accessibility of justice;" see Trevor Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 972. According to the Ontario Civil Legal Needs survey, 79% of respondents believe that the legal system works better for the rich than it does for the poor; see Environics Research Group, *supra* note 41 at 1.