Action Committee on Access to Justice in Civil and Family Matters

Comité d'action sur l'accès à la justice en matière civile et familiale

Report of the Court Processes Simplification Working Group

of the

Action Committee on Access to Justice
In Civil and Family Matters

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1. Introduction

A. Access to Justice

The public court process is of vital importance to Canada. It plays a central role in how citizens govern themselves and regulate their rights and relationships in modern democracies.[2] For the system to be effective, it must operate in a way that is just, efficient and proportionate to the needs and resources of the citizens it is designed to serve. Further, the system must be accessible. According to the Chief Justice of Canada:

> *The most advanced justice system in the world is a failure if it does not provide justice to the people it is meant to serve. Access to justice is therefore critical.*[3]

As such, there can be no doubt that access to justice must form a core feature of all justice sector reform discussions. According to the former Chief Justice of Ontario, as cited by the Chief Justice of Canada, "access to justice is the most important issue facing the legal system."[4]

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[1] The CPSWG would like to thank Ms. Jennifer Leitch and the Canadian Forum on Civil Justice for assistance with the preparation of this report, as well as Alberta Justice for financial support for the preparation of this report. The CPSWG is also grateful for comments from several members of the Steering Committee, as well as from Prof. Les Jacobs, on earlier drafts of this report.

[2] For a recent discussion of the open court system as a central feature of modern democracies, see Trevor C. W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, in progress) c. 2.

[3] Rt. Hon. Beverley McLachlin, P.C., "The Challenges We Face" (remarks presented at Empire Club of Canada, Toronto, 8 March 2007), online: Supreme Court of Canada <http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp> (citation omitted).

[4] *Ibid.*

An important element of access to justice is access to legal services. And an important element of access to legal services is access to courts. Without meaningful access to courts, the justice system, again according to the Chief Justice of Canada, is a "failure".

B. Access to Justice and the Action Committee

According to the Action Committee, all stakeholders in the justice community should work toward the common goal of improving access to justice for all Canadians. Put simply, all players – including the Bench, the Bar, all levels of government, NGOs, public legal educators, the public, etc. – must actively support and participate in achieving the goal of improving access to justice in Canada.

In its early deliberations, the Action Committee developed a "vision statement" with respect to access to justice, which it titled: "Access to Justice – A Democratic Right". Several aspects of that document are set out immediately below.

> *We believe Canadians should manage their disputes as much as possible through negotiation and informal processes of dispute resolution with the assistance of the legal support they need. However, where they require the intervention of the courts or other tribunals, they need access to the knowledge and resources that will enable them to seek justice through a system they can understand and at a cost and in a period of time that is bearable and reasonably proportionate to the issues at stake.*
>
> *The Canadian civil and family justice system is a complicated one, involving ten provinces, three territories and the federal government. We believe that despite this complexity it can be substantially improved by the identification of common problems and promising solutions and by developing the will among the public, the legal and judicial communities, and governments, to make changes.*

To accomplish these reform objectives, the Action Committee has identified four main priority areas respecting the development and encouragement of access to justice initiatives in Canada. These priority areas are categorized as follows:

- access to legal services;
- court processes simplification;
- family law; and
- prevention, triage and referral.

A working group was formed to look at specific ways of improving access to justice in each of these priority areas. Further, in addition to creating working groups, the Action Committee also identified as a priority the "continual improvement in the justice system" through the "engagement of the public, the identification of needs and promising practices, and the development of standards or guidelines…."

C. Approach and Mandate of the CPSWG

The work of the CPSWG is a key element of the Action Committee's collaborative approach to improving access to justice. Access to justice requires members of the public to have the knowledge, resources and services to deal effectively with civil and family legal matters. When the services of the courts are required, they should be available as simply, effectively and proportionately as possible, while at the same time maintaining fairness and justice. Put simply, streamlined procedures and practices help reduce time and expense and typically, in turn, militate in favour of improved access to justice. The simplification of court processes has been consistently identified as one of the pillars of an effective approach to access to justice. For example, according to Richard Zorza:

> *Courts must become institutions that are easy-to-access, regardless of whether the litigant has a lawyer. This can be made possible by the reconsideration and simplification of how the court operates, and by the provision of informational access services and tools to those who must navigate its procedures.*[5]

The CPSWG has taken these statements and its mandate seriously and, in the report that follows, seeks to provide a number of general and specific, as well as current and potential, considerations for reform in the context of courts and court processes simplification. These considerations are all designed to be consistent with the Action Committee's overall objective of providing Canadians – collaboratively through the varied aspects of the justice system – with bold and innovative ideas for improving access to justice.

More specifically, the CPSWG's goal has been to identify initiatives primarily within the various levels of courts in Canada that reduce delays, minimize costs and, in general, tend to improve – or have the potential to improve – access to court services. To accomplish this goal, the CPSWG began by collecting information on programs and court procedures in place across the country primarily by way of a national survey of Chief Justices.[6] The

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[5] Richard Zorza, "Access to justice: The emerging consensus and some questions and implications" (2011) 94 Judicature 156 at 157.

[6] A summary of the court simplification processes classified by court, and a summary of the survey results by category are available on the CPSWG's online page hosted at Osgoode Hall Law School by the Canadian Forum on Civil Justice.

CPSWG also collected information on various domestic and international processes by other forms of investigation and research. With this information in hand, it then worked to summarize and discuss the information obtained, highlight some of the important initiatives, identify gaps and make recommendations to the Action Committee respecting what of these (and other) processes might be identified and promoted as potential best practices for consideration, adoption and use across the country. The CPSWG generally (although not exclusively) avoided looking at issues that would require a full reform of rules, preferring rather primarily to focus on practices and initiatives at the sub-rule level that could be implemented without significant rule reforms.

The work of the CPSWG was further divided by topic for which specific members of the CPSWG each assumed primary responsibility.[7] These general topic categories include:

- technology;
- case management;
- public legal education, information and communication;
- alternative dispute resolution and related processes;
- pro bono programs; and
- rules of court.

Members of the CPSWG prepared memos that summarize some of the very promising and effective initiatives within these areas as well as some considerations going forward.[8]

Based on the information obtained in the national survey, the review of the results within the CPSWG and the memos prepared by members of the CPSWG, the next part of this report (Part B) provides a summary of some of the most promising initiatives within each of these topics that are currently being looked at, together with recommendations for further consideration by the Action Committee. Following this discussion, the next section of the report (Part C) looks at further innovations and ideas for reform (together with some related challenges). The issues discussed in that section are not necessarily widely (or at

[7] The work of the CPSWG was primarily conducted by numerous conference calls and electronic exchanges. The full CPSWG met for a one-day meeting in Montréal on 27 January 2012 to work through the various memos and to discuss the CPSWG's recommendations. Élizabeth Corte and Trevor Farrow also met in Montréal on 10 April 2012 for a one-day meeting to work through various aspects of the CPSWG's recommendations as well as comments received from the Steering Committee of the Action Committee on a first draft of this report.

[8] Copies of the memos are available on the CPSWG's online page hosted at Osgoode Hall Law School by the Canadian Forum on Civil Justice.

all) in place in many jurisdictions, and further, are not necessarily supported by all stakeholders in the justice community (or by all members of the CPSWG). However, they are included in this report because we believe that they represent potential promising innovations, or potential ideas for further innovation, that should be considered and discussed by the Action Committee.

2. Current Initiatives and Recommendations

A. Technology

It is trite to say that technology is changing the world. While lawyers and judges are working hard to keep up, it is not very controversial to say that, as a general matter, courts and the legal profession have some work to do to catch up to the current technology movement. According to one recent report, "a growing number of judges are trying to drag the court system into the electronic age…."[9] Doing so will generally be of significant assistance with the project of making access to, and the delivery of court and legal services more efficient, fair and effective.

Catherine McKinnon summarized the state of initiatives relating to the use of technology in court processes. Based on the survey results, there are several web-based as well as electronic initiatives being used by courts across the country to provide parties with information about ongoing proceedings as well as access to electronic procedures.[10]

This report highlights three main uses of technology that seek to achieve the objectives associated with improved access to court services.

The first type of initiative involves interactive court forms. Typically these online forms contain question and answer prompts or information bubbles that an individual must answer.[11] Interactive court forms may be particularly useful for self-represented litigants who must prepare court documents without legal assistance and/or for litigants in remote areas without easy access to legal support. The use of these forms helps to ensure that matters proceed as scheduled and lessen the possibility of matters being delayed as a result of court forms being rejected at the time of filing.

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[9] Kirk Makin, "Courts turn to wired justice in push to cut costs" *The Globe and Mail* (15 May 2012) A4.

[10] These initiatives include, for example, internal web-based tracking of court files, online access to court record information, electronic storage and retrieval of court documents, interactive court forms, e-filings of court materials, online information for self-represented litigants and e-hearings whereby proceedings are entirely electronic. For further details respecting these initiatives, see the CPSWG's background materials on its online page hosted at Osgoode Hall Law School by the Canadian Forum on Civil Justice.

[11] See e.g. interactive court form initiatives in British Columbia, Ontario and Nova Scotia.

In order to ensure that interactive court forms are used to their full potential, the CPSWG recommends the expanded use of this technology, taking into account the following considerations:

- jurisdictions not presently using interactive court forms should consider adopting this technology;
- forms should be developed in plain language;
- forms should be developed using a question and answer approach (or perhaps a "tick the appropriate box" approach to provide further guidance to SRLs for example);
- information technology experts as well as legal education experts should be consulted when developing these sorts of materials;
- court staff should be trained to assist self-represented litigants, particularly those facing literacy challenges, when attempting to fill out forms or otherwise attempting to access the court system;[12] and
- jurisdictions should make sure to learn from (and potentially modify and adopt) the already existing forms and initiatives that are in place in a number of jurisdictions across the country.

Second, in conjunction with providing online access to interactive court forms, it is recommended that the development of e-filing and e-courts be encouraged in all jurisdictions and particularly where interactive court forms are used.

E-court initiatives can include basic infrastructure initiatives such as court room screens and microphones, document management systems (for discovery, disclosure documents, court forms, etc.), on-line filing and scheduling tools, the capacity to conduct hearings by remote access, and – ultimately – full dispute resolution tools. E-filings and ultimately e-courts can enhance access to justice for individuals (particularly self-represented litigants) in remote areas or for whom attendance is difficult due to work and/or family commitments. Moreover, e-filings may decrease delays and increase efficiencies within the court system, allowing court staff to focus on triage and referral work rather than clerical work. Ultimately, this use of technology could include e-filings, e-searches, e-docket and scheduling requests (see e.g. Québec), as well as the capacity to conduct motions and entire

[12] For a further – extensive – set of recommendations regarding the needs of court staff and SRLs, see Trevor C. W. Farrow *et al.*, *Addressing the Needs of Self-Represented Litigants in the Canadian Justice System*, A White Paper Prepared for the Association of Canadian Court Administrators (Canada: Association of Canadian Court Administrators, forthcoming). The CPSWG recommends that the ACCA SRL White Paper be made available to all members of the Action Committee when it becomes available.

proceedings online.[13] Presently, there are several jurisdictions that have implemented e-filing,[14] which the CPSWG views as a preliminary component of e-courts. Technology (including Skype) is also currently being used – in the context of some court proceedings – to allow for witness testimony to be done remotely.[15] Québec is also actively pursuing the use of technology – such as "testimony using videoconferencing facilities" – in the context of its new "Justice Access Plan".[16]

It is recommended that these various forms of technology be promoted taking into account the following considerations:

- jurisdictions not presently using e-filing should actively consider adopting this technology;
- jurisdictions should work toward the implementation of an e-court within an established time frame, including the ability for lawyers and litigants to request – online – motion and trial dates;
- courts that have already initiated e-courts should share information and experiences with other courts that have yet to implement e-filings and other electronic initiatives;
- special attention should be paid to the security and independence of information technology systems in order to protect confidentiality, publication bans, etc.; and
- overall, initiatives that enable lawyers and litigants to conduct as much of a proceeding as possible without the need for personal – or multiple personal – court appearances should be made possible and strongly encouraged.

Third, in keeping with developing initiatives that decrease costs and delays to litigants, particularly in remote areas, the CPSWG recommends that teleconferencing and videoconferencing also be fostered. One of the positive aspects of this initiative is that, unlike e-filing and e-courts, teleconferencing and videoconferencing is generally available throughout Canada (by phone, video, Skype, etc.). Specific opportunities for using these tools might include:

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[13] For example, B.C. Court Services Online is an electronic service that provides electronic searches of court files, online access to daily court lists and e-filing capacity. For its part, the Alberta Court of Appeal has a practice direction that supports e-appeals if both parties consent or if the court makes such an order.

[14] See e.g. the Superior Court and Court of Appeal in British Columbia, the Court of Appeal in Alberta, the Superior Court in Newfoundland and Labrador (in estate matters), and the Federal Court of Canada.

[15] See e.g. *Paiva v. Corpening*, 2012 ONCJ 88.

[16] Justice Québec, "Justice Access Plan", online: <http://www.justice.gouv.qc.ca/english/ministre/paj/index.htm> (last updated 24 April 2012).

- motions, particularly for uncontested and relatively straight forward matters:
- case managements conferences; and
- judicial dispute resolution, particularly for relatively straight forward matters involving very specific and defined issues in dispute.

While there are obvious benefits to these initiatives, including the facilitation of inter-jurisdictional proceedings and the ability to engage litigants in remote areas, the working group also notes that there are privacy concerns that must be addressed. Specifically, it will be important to ensure that teleconferencing and videoconferencing service providers do not make copies of any proceedings that could be broadcast at a later time. Further, particularly with respect to remote areas and technology, while the CPSWG recognizes the efficiencies that can be potentially gained, it is also important to recognize that remote areas need to have full access to in-person processes when necessary (in order to avoid ghettoizing the legal needs of people who live in remote areas, many of whom come from already marginalized and disadvantaged groups).

With respect to the use of technology relating to teleconferencing and videoconferencing, the CPSWG makes the following recommendations:

- jurisdictions should share lessons learned about technology and work together to promote the operability of technology between jurisdictions; and
- security measures need to be instituted to protect litigants' privacy and the fair and effective operation of various court services.

B. Case Management

Case management[17] is a tool that is being increasingly used the world over in an effort to simplify and streamline proceedings, reduce costs, and provide judges and masters with a powerful tool to assist in the overall project of improving access to justice in the context of the court system. In Canada, many courts and jurisdictions are using case management to varying degrees and with different levels of commitment and success, all with the general view toward improving court efficiency.

Juge en chef Corte and Juge Pidgeon prepared the summary on case management. While the form and associated procedures of case management vary from court to court (and in

[17] Case management is used in this document interchangeably with case conferencing (which can also have an element of judicial settlement that is discussed further below).

different areas of law), case management is generally employed in all jurisdictions in Canada.[18] In this regard, the results of the national survey indicate that judges, masters as well as case management officers widely undertake case management in Canada.[19]

In developing case management initiatives going forward, the CPSWG recommends that it would be useful to focus on when and at what stage of the proceeding case management is most effective. The current view of the CPSWG is that, as a general matter, earlier intervention is better. In this regard, case management initiated early on in a matter may promote the earlier resolution of the dispute. At the commencement of a proceeding, litigants could be invited to articulate their position; judges could settle all/many preliminary matters and motions as well as initiate mediation or settlement conferences, thus potentially reducing the length and costs of the proceeding. Beyond this initial conference, it may be important to ensure there is continued management of matters as they proceed through the court system (particularly for certain cases).

The CPSWG recommends the further development of case management initiatives that are aimed at assisting parties to resolve their claims in a fair, efficient and inexpensive manner. Particular areas of law, specifically including family law, should receive extra effort and attention in this area. In light of the integral role played by judges (and sometimes case management masters and officers) in ensuring that case management is effective, the CPSWG recommends the following:

- parties should be encouraged to talk to one another in a timely manner;
- parties should be encouraged (where possible) to agree on a common expert witness;
- parties should be encouraged to use simplified notices;
- parties should be encouraged, where appropriate, to plead orally (to reduce the cost and time of preparing legal materials);
- parties should be encouraged to respect the principle of proportionality in costs and trial length;
- parties should be encouraged to use technology including teleconferencing and online resources (as discussed in the subsection on technology);
- to the extent possible, particularly in family law, jurisdictions should consider employing one or more case management officers (typically lawyers), who can

[18] See further the CPSWG's background materials on its online page hosted at Osgoode Hall Law School by the Canadian Forum on Civil Justice.

[19] The survey responses indicate that, in addition to judges and masters, case management officers are used in Alberta, Québec and Nova Scotia. However, the duties of these officers vary from jurisdiction to jurisdiction.

assist parties in moving their cases forward as well as – where appropriate – in narrowing and resolving many issues in a proceeding;[20]

- judges should not hesitate, where appropriate, to limit the number of issues to be tried and the number of witnesses to be examined;
- scheduling procedures should be put into place to allow for fast-track trials where and when appropriate/possible;
- to the extent that specialized trial lists and tribunals are available (see *infra*), appropriate cases should be actively streamed onto these lists and into these tribunals; and
- overall, judges and masters should take a strong leadership role in actively promoting a culture shift toward high efficiency and effectiveness in the context of managing litigation files (by all players in the litigation system), recognizing, however, that justice must always be the ultimate guide by which to evaluate the efficiency and effectiveness of the judicial process.

C. Public Legal Education, Information and Communication

The CPSWG recognizes that public legal education will very likely be at least part of the focus of the report being prepared by the Prevention, Triage and Referral Working Group. Further, there are also significant connections between public legal education and technology (discussed further above). However, given the importance of this topic in connection with the simplification of court processes, the CPSWG decided to focus some attention on this important issue.

Hubert David prepared the summary on public legal education, information and communication. There are several ways in which legal information is being disseminated to members of the public and a wide range of programs that provide litigants with

[20] See e.g. Court of Queen's Bench of Alberta, Notice to the Profession, "Case Management Counsel Pilot Project", NP#2011-03 (30 September 2011), online: Alberta Courts <http://www.albertacourts.ab.ca/LinkClick.aspx?fileticket=liayJcjYAbI%3D&tabid=92&mid=704>. Anecdotal reports indicate that this project is being met with significant support and enthusiasm from judges, lawyers and the public.

information and instructions about legal issues and court procedures.[21] Given that many of the educational guides and information services are being made available online, it is important that the development of initiatives in public legal education and information services be linked to the development of technology initiatives relating to court processes.

Within the field of public legal education and information initiatives, it will be important to focus on initiatives that assist the growing number of self-represented litigants who require legal information that is accurate, easy to understand and allows them to manage their own proceedings without legal representation. Various provinces have instituted programs to address the needs of self-represented litigants. These programs include instructional guides and videos,[22] information sessions for family law litigants,[23] web-based materials,[24] and volunteer lawyers who educate self-represented litigants about their duties in litigation.[25] In addition, information centres provide individuals with legal information, particularly as it pertains to court processes.

With respect to the development of public legal education initiatives, the CPSWG recommends the following:

- all of the legal service providers, including non-governmental agencies, courts, departments of justice and various institutional partners, should collaborate on this issue in order to make use of limited resources and contribute in accordance with their mission and responsibilities;
- information provided must be accessible, in plain language, neutral and accurate;

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[21] For example, in Québec, the Montréal Bar has prepared a best practices guide for litigation that assists individuals with different aspects of litigation. In Newfoundland and Labrador, there are various booklets available both at the courts and in the Public Legal Information Association's office on a range of legal topics. In Ontario, the Ministry of the Attorney General has created several self-help guides that clarify procedures under the family court rules. Additionally, LawHelp Ontario (a pro bono Ontario project) provides various information booklets and how-to manuals for self-represented litigants that assist in preparing court documents and participating in certain court processes such as motions and appeals. These represent a sampling of the types of programs available. For further examples, see the CPSWG's background materials on its online page hosted at Osgoode Hall Law School by the Canadian Forum on Civil Justice.

[22] For example, the Court of Appeal in British Columbia is developing a plan to expand instructional guides and videos for self-represented litigants online.

[23] For example, in conjunction with the Canadian Legal Information Association, the Superior Court in Prince Edward Island provides information sessions twice monthly whereby litigants are informed about the legal processes and the services available to them.

[24] See e.g. Clicklaw in B.C., Family Law Resources in Ontario, etc.

[25] For example, the Small Claims Court in Nova Scotia uses adjudicators (practicing lawyers) to meet with potential litigants in off hours to advise litigants with respect to their legal duties and responsibilities.

- specific focus should be placed on the needs of self-represented litigants such that initiatives are developed to meet the needs associated with individuals participating in a proceeding without legal representation – in this regard, initiatives need to be developed that protect self-represented litigants' rights and reduce the negative impact of self-represented litigants on the court system;
- information should be tailored to meet the needs of individual litigants;
- as such, information should be available in a number of different forms including in person (through Law Information Centres26), online (through websites), in printed guides (at courts and other centres) and available in various forums and in videos (e.g. for individuals who face literacy challenges, etc.);
- as far as possible, the multitude of resources should be catalogued and linked, to avoid what is becoming a vast sea of diverse information (some of which is very helpful, some of which is less than helpful, and regarding all of which it is sometimes difficult to tell what is up-to-date, authoritative, useful, etc.); and
- notwithstanding the last point, it will also be important – from the perspective of users – to make the access points to the various types of information user-friendly, accessible and intuitive, which will likely mean having multiple access points, including both central points as well as topic specific points of entry (through, for example, "know your rights" type materials for labour, housing, consumer protection, family, etc.).

With respect to communication efforts, it is generally felt that members of the justice system need to improve communication with the general public, the system's users and the lawyers engaged with the justice system.[27] The CPSWG recommends the following be incorporated within any initiatives that are aimed at improving communication efforts:

- the public's understanding of the court system needs to be improved by ensuring that there are court staff members who are specifically trained to answer questions from the public;28
- opportunities to engage in the use of social media should be explored while maintaining impartiality and independence of the courts;29

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[26] In Alberta, for example, Law Information Centres provide information about general court procedures and Family Law Information Centres employ staff members who provide advice regarding family law procedures.

[27] For example, the Superior Court in Nova Scotia employs a communications director to answer questions from the general public and the media.

[28] See the forthcoming ACCA SRL White Paper mentioned above.

[29] The Supreme Court of Canada, for example, is now on Twitter. See Supreme Court of Canada, online: <http://twitter.com/#!/scc_csc>.

- court staff should be encouraged to be familiar with all of the services and information available to users of the court system;
- public legal information should be readily available to court system users at registry offices and on court websites, etc.;
- guides and manuals should be developed (perhaps in partnership with other public legal education providers) regarding best practices and procedures for court staff and lawyers;
- court staff should be provided with as much information as possible on what the public actually knows about the courts and the justice system (to help them better understand the questions that are being asked); and
- training programs should be developed that train both court staff and lawyers on specific clientele needs such as child protection proceedings, etc.

D. Alternative Dispute Resolution and Related Processes

As indicated earlier in this report, a key feature of the Action Committee's "vision statement" is the role that various forms of alternative dispute resolution[30] can play in making the court system more efficient, proportionate and accessible (while maintaining fairness and justice).

Trevor Farrow prepared the CPSWG's summary on alternative dispute resolution initiatives in Canada. The provincial Rules of Court in place across the country and the results obtained by the CPSWG's national survey indicate that there are several different alternative dispute resolution programs and procedures being employed in courts across the country. These programs include mediation,[31] judicial dispute resolution,[32] judicial

[30] The term "alternative dispute resolution" is being used here as a general term, which can include a number of different forms of dispute resolution, including mediation (private and/or court annexed), judicial facilitation, judicial dispute resolution, etc. The term "appropriate dispute resolution" will also be used from time to time, which includes the same processes. For a further brief discussion of some of these terms, see Trevor C. W. Farrow, "Thinking About Dispute Resolution", Review Essay (2003) 41:2 Alta. L. Rev. 559.

[31] For the purposes of this report, mediation will refer to private mediation outside of the court system, which may be mandatory (as in certain provinces) or court-ordered pursuant to a pre-trial or case management conference.

[32] See e.g. the initiatives in Alberta and Québec.

settlement conferences,[33] case management procedures and court-expedited arbitrations.[34] Certain jurisdictions throughout Canada have also initiated mandatory mediation as a step that the parties must take in the course of litigation.[35] A brief review of some of the jurisdiction-specific programs and procedures is contained below.

In British Columbia, recent revisions to the rules of court encourage the parties to make offers to settle and further offer parties the opportunity to participate in private settlement conferences by judges or masters. As noted above, judicial settlement conferences are offered in specific courts such as the Court of Appeal. The British Columbia provincial court administers an expedited arbitration program in which senior civil litigators or arbitration lawyers hear arbitrations.

Alberta has adopted a series of programs that provide alternative dispute mechanisms for litigants. The courts in Alberta administer a judicial dispute resolution program that provides litigants with an opportunity to schedule a confidential dispute resolution session with a Superior Court or Court of Appeal judge.[36] Research undertaken in respect of the efficacy of this program suggests that approximately 90% of the cases subject to judicial dispute resolution in Alberta settle in whole or part.[37] As a result, this program has become

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[33] A review of all of the provincial rules of court indicates that settlement conferences are generally in use across the country. For example, British Columbia's Court of Appeal offers judicial settlement conferences (see British Columbia Court of Appeal Practice Directive, "Judicial Settlement Conferences"); the Queen's Bench Rules in Saskatchewan contemplate judges assisting with settlement (see rr. 1-3(1)-(4), 4-7(1)(e)); judges hearing a case management conference in the Northwest Territories can facilitate settlement and as a means of doing so, assist with settlement discussions or even hold a mini-trial in which he or she can provide a "non-binding advisory opinion" (see *Rules of the Supreme Court of the Northwest Territories*, R-010-96, pt. 19, r. 292); a judge-assisted settlement conference process, which was recently expanded, has been in place in Québec for a number of years now (see *Code of Civil Procedure*, R.S.Q., c. C-25); Nova Scotia, Newfoundland and Labrador and New Brunswick also have judicial settlement conference regimes (see respectively *Civil Procedure Rules of Nova Scotia*, pt. 4, rr. 10.11-10.16; *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sched. D, as amended at rr. 39; and *Rules of Court,* N.B. Reg. 82-73, rr. 50.07-50.15). For further details regarding the nature of the settlement conference procedures in place across the country, some of which are discussed further below, see the CPSWG's background materials on its online page hosted at Osgoode Hall Law School by the Canadian Forum on Civil Justice. For a more general discussion of these – and related – initiatives, see Trevor C. W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, in progress) at c. 3.

[34] For example, in British Columbia, cases involving sums of up to $5,000 can be arbitrated before senior civil or arbitration lawyers.

[35] For example, Saskatchewan's mediation provisions are contained in the *Queen's Bench Act*, *1998*, S.S. 1998, c. Q. 1.01, pt. vii; and the requirement that parties in litigation in Ontario participate in mandatory mediation is contained in r. 24.1 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, as amended.

[36] See e.g. Alberta Court of Appeal, "Guidelines for Judicial Dispute Resolution (JDR)".

[37] See e.g. Hon. John D. Rooke, "The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen's Bench" (LL.M. Thesis, University of Alberta, 2010), online: CFCJ <http://cfcj-fcjc.org/clearinghouse/hosted22471-multidoor_courthouse.pdf>.

quite popular and successful in Alberta. Additionally, Alberta has also initiated civil mediation that does not involve judges but does provide private, user-pay mediation. Further, a more recent pilot project involves case management counsel in Edmonton and Calgary (see further above). One of the roles of these officers is to canvas and encourage settlement.

Saskatchewan has initiated mandatory mediation in respect of most civil non-family cases. Additionally, recent revisions to Saskatchewan's rules of court contemplate parties attempting to resolve their claims at the earliest possible stage and further contemplate judicial case management provisions in which judges can assist with settlement. Manitoba's rules of court also contemplate judicial dispute resolution, which members of the Manitoba judiciary have noted has significantly reduced the number of civil cases proceeding to trial in that province. The Northwest Territories, Yukon and Nunavut have adopted rules of court that contemplate judicially facilitated settlement conferences as part of their case management regime.

Ontario's rules of court include a requirement that most actions commenced in Toronto, Ottawa and Essex County be subject to mandatory mediation. More recent revisions to the rules of court have expanded the scope of pre-trial conferences to include explicit reference to discussions about settlement and the role of the judiciary in facilitating negotiation. Moreover, the case management provisions that can apply to certain types of cases in several regions in Ontario further contemplate the judge's role in resolving matters in the context of case management meetings.

Like many of the other provincial jurisdictions, Québec's rules of court include reference to judicial settlement provisions that contemplate a flexible and confidential approach to the resolution of claims. As in Alberta and Manitoba, the response to this initiative has been very positive. Given the success of this program, the Court of Québec has also initiated several pilot programs that are aimed at enhancing judicial settlement conference regimes such as telephone hearings and single expert appraisals.

The Maritime Provinces have also adopted various judicial settlement conference regimes that provide for flexible and confidential dispute resolution procedures. In some instances, this regime is part of the pre-trial process.[38] Newfoundland and Labrador maintains a program of judicially assisted settlement conferences and court-ordered mediation as well as mediation in the provincial court system.

[38] See e.g. *Rules of Court*, N.B. Reg. 82-73 at rr. 50.07-50.15.

The information gathered from courts across the country indicates that, in addition to private dispute resolution mechanisms such as mediation and arbitration, there is an increased role for the judiciary in facilitating settlement between the parties in litigation. The expansion of the judiciary's settlement role is also highlighted in the context of the discussion on case management. This brief sampling of the various initiatives across the country suggests that many courts at both the trial and appellate levels have incorporated judicial settlement conferences in which judges assist the parties in resolving all or parts of their disputes. In some jurisdictions, there is evidence that these initiatives have resulted in significant reductions in the number of cases proceeding to trial. Moreover, litigants and their lawyers have expressed satisfaction with the judicial dispute resolution process.

While it is important to acknowledge the success of the judicial dispute resolution programs, it is also important to ensure that as these programs are developed, they do not conflict with the judge's role in adjudicating claims that should proceed to trial. Because of the nature of some disputes, the issues at stake, the identity of the parties, or the importance of the area of law in terms of its need for development, it is critical to remember that some cases should proceed to trial.[39] Further, dispute resolution reforms must be consistent with the principles of efficiency, proportionality and fairness that guide the justice system. Also, it is important to at least keep track of, and minimize where possible, any unintended or negative consequences that come with an increased use of ADR in the courts. Examples of such negative consequences might include:

- extra paper work for lawyers and litigants in relation to their use of court-annexed ADR; or
- scheduling challenges created by the increased popularity and use of judicial dispute resolution.

Based on the above review, it is the recommendation of the CPSWG that the use of alternative dispute resolution programs (including mediation, judicial dispute resolution programs, etc.) be further developed and supported in all jurisdictions across the country (where appropriate). Specifically:

- judges should play an active leadership role in the promotion of appropriate dispute resolution processes at all levels of courts in Canada;

[39] For a recent discussion of the importance of the open court system, particularly in terms of the role of courts in democracies, see Trevor C. W. Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, in progress).

- judicial dispute resolution and/or mediation should be considered and available where appropriate at all levels of courts (recognizing, however, that – depending on the nature of the case and the will of the parties – some cases should proceed to an open trial);
- while there is some difference of opinion as to the optimal timing of mediation (and judicial dispute resolution), it is the CPSWG's view that early intervention is typically beneficial (with a view to avoiding, where appropriate, discovery and other costs that mount as cases progress);
- ideally multiple forms of dispute resolution (mediation, judicial dispute resolution, etc.) should all be available at various times during the life of a dispute (to accommodate the various needs of different cases and disputes);
- parties, their lawyers and judges all need to be properly educated about the various dispute resolution options that are available;
- the important principles of judicial independence and impartiality, properly understood, should not be seen to prevent judges from engaging in and promoting meaningful settlement discussions in the form of judicial dispute resolution; and
- overall, a culture of promotion of the principles and ideals of appropriate dispute resolution should be promoted throughout the justice system.

E. Pro Bono Programs in Courts

Justice Joel Fichaud prepared a summary that discusses the development of pro bono lawyer centres in courts. The goal of pro bono programs in courts is to ensure that there is a roster of pro bono lawyers available to assist parties in every court. Similar to the development of legal aid over the past 50 years, pro bono centres should over time become a standard feature of the court process. Programs of this nature include the creation of a roster of volunteer lawyers who would be available to assist litigants that come to court without legal representation. Presently, there are examples of this type of initiative in several courts across the country.[40]

Volunteer lawyers would not be forced to act in any particular case and would have the flexibility to make specific arrangements with an unrepresented litigant on a case-by-case basis; however, all of the volunteer lawyers would be committed to providing volunteer services as required. While there would be instances where full representation was

[40] For example, volunteer lawyers from LawHelp Ontario assist self-represented litigants appearing on motions at the Superior Court of Justice in Toronto. LawHelp is soon to embark on a similar program at the Court of Appeal. Volunteer lawyers may obtain copies of motion materials in advance of a hearing and are present to assist self-represented litigants on the day of a hearing.

required due to the nature of the proceeding and/or client, it may also be that the court in which a lawyer volunteers shapes the type of role played by the volunteer lawyer. For example, lawyers volunteering to assist parties at the appellate level may provide assistance with factum drafting and oral argument, whereas lawyers involved with trial level matters may focus their assistance on providing parties with information on outcomes that ultimately lead to settlement.

One of the important components of the development of this type of initiative would be the engagement of both the profession and its professional regulatory bodies. With respect to the professional regulators, it will be important to engage the provincial law societies in the administration of the programs in order to protect the integrity of the court system and independence of the judiciary and the bar. Moreover, the participation of the professional bodies is consistent with their public interest mandates.

The creation of pro bono centres in every court requires a commitment from the legal profession that lawyers will volunteer to be added to the rosters. While lawyers may be resistant to any perceived restriction on their freedom to bill at chosen hourly rates, the CPSWG does not believe that, as a general matter, the legal profession is resistant to providing pro bono services. Practically speaking, the provision of volunteer legal services by junior lawyers (subject to appropriate supervision) will provide junior lawyers with much needed experience in the courtroom and with clients. From the law firms' perspectives, lawyers' involvement provides the dual opportunity to demonstrate that law firm lawyers are committed to improving access to justice in accordance with the profession's public interest responsibilities and respond to the common criticisms regarding some hourly rates.

It is the recommendation of the CPSWG that a target date be set by which there will be a cell of volunteer lawyers in as many courts as possible across the country. An important element of this target date will be securing commitment from both the profession and its professional regulatory bodies regarding participation in and the administration of the programs.[41]

Notwithstanding the clear connection of this discussion to the work of courts and the issue of court simplification, there is also a significant connection with other aspects of the Action Committee's work (e.g. access to legal services). As such, the Steering Committee of the Action Committee may want to consider this discussion in the context of the work of one or more of the other working groups as well.

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[41] The CPSWG recognizes that some ethical and professional issues may arise that need further consideration, including questions about the ability of lawyers to turn pro bono clients into paying clients, conflicts of interest, competence and service quality, etc.

F. Rules of Court

Justice John Richard prepared the summary regarding the role of rules of court in promoting just, expeditious and inexpensive determinations of court proceedings, all of which is consistent with improved access to justice. The goal of the legal profession engaged in trial and appellate work should be the prompt, efficient, ethical and fair disposition of all cases, taking into account clients' legitimate interests. The CPSWG notes that initiatives involving rules of court are likely to be linked to other recommendations discussed in this report including alternative dispute resolution regimes, the use of technology in the court system and case management. The CPSWG also recognizes its limited ability directly to influence the reform of rules of court, which is typically within the jurisdiction of provincial rules committees.

Over the past decade, rules of court have generally been amended and expanded to provide for the more expeditious resolution of actions, applications and appeals. Examples of these changes and initiatives include the development of case management and case conferencing, enhanced pre-trial powers (including settlement), revisions to summary judgment and summary trial procedures, limits on documentary and oral discovery, joint experts, shortened and/or early trials, and an overall move to encourage efficiency and proportionality throughout the litigation process.[42] The CPSWG is generally of the view that all of these initiatives are positive and should be encouraged throughout Canada where possible (both through rules reforms and, where possible, through practice directions). In addition, both registry offices and courts have undertaken technology-related initiatives that facilitate remote conferencing and the conduct of hearings (see further above). All of these revisions are geared toward reducing the length of trials and the costs of litigation. In light of these continued efforts to improve upon the prompt and inexpensive resolution of claims, the goal going forward regarding rules of court must involve the continued scrutiny of existing provisions in accordance with the above goals, namely the reduction of trial length and associated costs, and the examination of potential modifications that better promote access to justice.

Given the benefits associated with revisions to the rules of court that shorten proceedings while maintaining a fair and just process, it is the CPSWG's recommendation that any further modifications to rules of court should be achieved in the context of broad

[42] There are many examples of such changes. For example, changes have been made to the discovery process in Ontario based on the principle of proportionality, as well as summary judgment proceedings. In Newfoundland and Labrador and Québec, there are procedures in place to fast track certain types of trials and in Québec specifically, courts can authorize that a defence be made orally. For further examples of recent changes to the rules of court across the country, see the CPSWG's background materials on its online page hosted at Osgoode Hall Law School by the Canadian Forum on Civil Justice.

consultation with the various stakeholders and within a framework that respects the independence of the judiciary and the integrity of court procedures. Further, no new rules of court should be contemplated that do not contribute to the simplification of court procedures and the overall improvement of access to justice.

G. Overall

This section has included a number of significant procedures that are currently being used and/or experimented with. They include a number of important and promising ideas. Having said that, we cannot help but notice that there is not an overwhelming number of cutting edge reform initiatives that are currently being experimented with. And even those that are present are not being tried in all courts in all jurisdictions. Put simply, more is needed if we are going to move ahead dramatically in terms of improving the overall simplicity and accessibility of courts and court services.

We are therefore including, in the next section of this report, a number of further – forward looking – ideas that should at least be strongly considered in the context of a comprehensive look at the overall simplification of court processes in Canada.

3. Pushing Forward: Further Innovations and Challenges for Reform

This section of the report includes a number of further ideas and initiatives designed to push our collective thinking in terms of current and future possibilities for court simplification and reform. As mentioned at the outset of this report, the ideas set out in this section are not necessarily being adopted in many (or any) Canadian jurisdictions, nor are they necessarily supported by all members of the CPSWG.

A. Overall Judicial Leadership

A "culture" shift is required at all levels of the court system. As Louis Gerstner, IBM's former CEO is reported to have said, "I came to see … that culture isn't just one aspect of the game – it is the game."[43] There are a number of aspects to the notion of a culture shift within the context of courts, which are set out below.

- All court service providers, specifically including judges and court administrators, must take a leadership role in terms of enhancing the quality of the administration of justice.

[43] Louis Gerstner, quoted in Brian Ostrom, Roger Hanson and Judge Kevin Burke, "Becoming a High Performance Court" (2012) 26:4 The Court Manager 36 at 40.

- Although all of those who work in and use the justice system are important, the primary focus of the system needs to fundamentally shift away from those that deliver justice and toward those who consume it. This shift in focus is occurring in several sectors in society. See, for example, the relatively recent increased focus in the medical field toward the needs of patients (as opposed to the convenience and interests of doctors); or the shift in focus at universities toward how adult students think and learn (as opposed to the convenience and interests of professors). Put simply, we need to focus more on those who use the system and less on those who work within it. Only then can we really understand and address the needs of the citizens (particularly vulnerable citizens) for which the court system was designed in the first place.[44]

Specific examples of leadership initiatives and contexts could include those set out below.

- Judges and court staff should actively work together to find ways of improving communication to deal with specific problem areas or issues that are in need of reform (scheduling, trial management, document management, etc.).
- Positive examples of public engagement and public education by judges (and court staff) should be encouraged in order to "speak out for justice" (including at new judge ceremonies, opening of the court ceremonies, at schools, colleges and universities, etc.).
- Internal initiatives, potentially including annual awards and/or other forms of recognition for staff ideas in the area of improving court performance, should be considered and welcomed.
- Access to justice committees should be created in each court to promote the principles and practices set out in this report. Further, those committees should be encouraged to collaborate and share best practices, perhaps through the CJC, ACCA, annual conferences, the use of general web-based clearinghouses (like the clearinghouse operated by the Canadian Forum on Civil Justice), etc.
- Vision and mission statements may be helpful – particularly for court administration offices.
- Judges should see themselves not only as neutral adjudicators but also as engaged problem solvers (through judicial dispute resolution, judicial mediation, etc.), which includes a willingness to be open to and trained in these processes (the same culture shift is occurring, and needs to continue to occur, at law schools and the Bar).
- The challenges faced by SRLs, and by courts dealing with SRLs, are increasing and are likely here to stay – at least for some time. Judges and court staff need to be

[44] For a discussion of this recommendation, in the context of court administration, see the forthcoming ACCA SRL White Paper (referred to above).

open to providing focused and creative assistance to these litigants. Doing so should not be seen as offending against obligations of independence, impartiality or fairness. Rather, given the inequities that currently face many of these litigants, treating them with respect and fairness requires constant vigilance on the part of judges and court staff to ensure just treatment as equals. Doing so means recognizing the difference between the capacities and resources of these litigants and those who are more well-resourced and/or represented.

- To the extent that rules of court require interpretation and/or simplification, courts should be encouraged to develop practice directions that promote a reading and use of those rules in ways that are entirely consistent with the animating principles of proportionality, efficiency, accessibility, justice and fairness that are set out in this report.

Overall, all judges need to be engaged at the front end of these collaborative leadership efforts.

B. Collaboration

- All justice system stakeholders – including judges, court administrators, lawyers and paralegals, academics, public legal educators, NGOs, the public, etc. – have a collaborative role to play in making justice more accessible through improved court efficiencies and simplification.
- Judges should take an active role in sharing best practices across jurisdictions (opportunities for doing so include annual conferences, speeches, reform projects, etc. – see further below).
- The notion of "reinventing the wheel" should be avoided. Promoting and supporting a central organization – likely, for example, the Canadian Forum on Civil Justice (and/or ACCA) – to keep track of, research and promote reforms should be strongly encouraged.

C. Research and Setting Standards

- Courts should be challenged to self reflect in terms of their overall justice delivery performance. Performance should be considered broadly, not narrowly, including ensuring that courts are operating with a high degree of efficiency, timeliness, proportionality, fairness and justice.
- Courts should be encouraged to set guidelines and performance standards. Further, targets and annual evaluations should be considered. While it is recognized that a one-size-fits-all approach will likely not be possible (or desirable), standards and performance indicators should be encouraged. They need also to be meaningful to

judges, staff as well to policy makers and the public. Put simply, courts should not be fully immune from the language of "deliverables" that is sweeping across the policy making world. Having said that, the CPSWG recognizes that justice – being the ultimate animating principle of the court system – must always be kept front and centre in any kind of evaluation discussion. Further, notwithstanding efforts to enhance performance, judicial independence must always be respected and protected.

- A good first step (and a useful public communications tool) in terms of reporting is a comprehensive annual report for all courts.
- Additionally, regular meetings – for example in the form of annual conferences (perhaps hosted by the Canadian Forum on Civil Justice, ACCA, the CIAJ and/or the NJI) – should be held to deliberate about court processes simplification and reform.
- Further research in the area of court simplification should be encouraged and supported where possible. Research questions in the area of court simplification could include: What is working and not working? How much do the processes cost vis-à-vis the benefits they offer? What else could be done? What are other jurisdictions doing? Is the public benefitting from the various initiatives, and if so, based on what evidence? Etc.[45]
- A visioning initiative should be considered for the Canadian court system in which both the overall structure and the individual elements of a fully accessible future justice system could be articulated. For example, the exercise could proceed to specify the particular attributes of an accessible system as follows: "A perfectly accessible justice system, in 2020, would have the following features: fully automated filing and document access, optional electronic hearings in all contested and non-contested matters, pro bono programs in all courts…" and so forth.

D. Other Future Initiatives

We also feel that, in the spirit of the overall progressive mandate of the Action Committee, an open mind is required in terms of potential future initiatives (many of which may come from within Canada, and many of which may come from looking abroad). Some of these initiatives might include:

- making court-annexed ADR (mediation, JDR, etc.) mandatory in all (and certainly most) cases;
- promoting the increased use of inquisitorial judging styles;

[45] A good, leading edge example of this kind of research is the "Cost of Justice" SSHRC CURA project currently being conducted by the Canadian Forum on Civil Justice (Trevor Farrow is the principle investigator for that project team). See Canadian Forum on Civil Justice, "Forum research on the cost of justice awarded $1 million" (20 September 2011), online: CFCJ <http://cfcj-fcjc.org/news/>.

- further promoting the development of specialist judges;
- increasing the use of case management essentially in all civil and family cases;
- increasing the availability of "duty" judges for ongoing case management matters and early and quick rulings on procedural matters;
- increasing the flexibility of hours of operation of court houses – particularly including court administration and front desk hours (but perhaps also including at least some court room hours, perhaps including motions court as well as heavily used judicial dispute resolution facilities) – in order to accommodate litigants for whom it is difficult to be at court during typical working hours (single and working parents, shift workers, etc.);
- increasing the limits of small claims courts, while at the same time maintaining courts that provide a process that is just, speedy, inexpensive and simple;
- developing simplified procedures for all smaller actions that are for amounts in excess of the jurisdiction of small claims courts:
- developing streams of specialized case lists for specific types of cases, or perhaps specialized case tribunals (see e.g. the Commercial List of Ontario's Superior Court of Justice in Toronto);
- making more full time duty counsel available in all courts;
- considering the development of full on-line dispute resolution capability in the context of court technology reforms;
- developing pre-action protocols that require lawyers and litigants to articulate and respond to the core issues early in a dispute;
- encouraging judges to make full use of sanctions – including costs awards – in cases in which parties (and their counsel) are acting in ways that militate against the effective operation of court proceedings; and
- involving judges – or other court officers – in meetings with parties to discuss pre-action protocols before proceedings are commenced (with a view to settling cases at a very early stage of the formal dispute).

E. Challenges and Lessons Learned

Challenges and lessons learned need to be examined and shared. For example, unintended consequences in the context of various reforms should be avoided where possible – all in-line with the goal of avoiding what is sometimes referred to as "process creep".

Examples include potential scheduling challenges and increased brief writing obligations in the context of ADR and JDR (discussed above). Another good example of a reform that was not universally supported or successful was the former case management rule in Ontario

(which resulted in the drafting of the former Ontario rule 78, which has now been revised and collapsed into Ontario's new rule 77).

F. Best Practice Guide (Checklist)

The Action Committee should, once this report is reviewed and adopted, create a Best Practice Guide for all courts. This guide – or checklist – could include very specific and concrete initiatives that should be considered by all courts across the country.

4. Conclusion

Improving access to justice in Canada is the responsibility of all players in the justice system, including judges, lawyers, all levels of government, paralegals, academics, NGOs, public legal educators and the public. The effective operation of court services, as discussed earlier in this report, is a key part of making justice as accessible as possible for those who use the public court system. Based on the work of the CPSWG, it is clear that several important and innovative initiatives are in place in various jurisdictions across the country, which are designed to improve the efficiency of courts. It is the view of the CPSWG that those initiatives should be supported and encouraged. Further, it is also clear – again through the research done in preparation for this report – that there is significant room for further work and innovation in the context of court processes simplification.

While there continues to be some debate as to the extent to which court processes should be reformed, there is no doubt that efforts should be made to consider all initiatives that have the potential to simplify the operation of courts with a view to making those courts more accessible to the litigants they are designed to serve. Clearly not all initiatives are appropriate for all courts and all cases. And further, it is also important not to forget that the full public court process has an extremely important role to play – through the development of the common law system – in how citizens regulate themselves in modern democracies. But within the context of these important principles, it is the view of the CPSWG that more needs to be done to promote a robust culture of reform and progressiveness. Only with this kind of forward-looking, creative and – at times – courageous sensibility will courts truly embrace the possibility of significant change. Doing so should not entail putting justice in jeopardy. Quite the opposite: if reform is done well, a huge degree of progress can be made while still respecting the core values of openness, fairness, independence, efficiency, proportionality, accessibility and justice that must animate a robust modern public court system.