

# DEFINING ACCESS TO JUSTICE IN NOVA SCOTIA

A Literature Review

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**ACCESS TO JUSTICE & LAW REFORM INSTITUTE OF NOVA SCOTIA**

ACCESS TO JUSTICE  
& LAW REFORM  
INSTITUTE  
OF  
NOVA SCOTIA



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# What is Access to Justice?

## Establishing an Operational Definition for Nova Scotia

### Introduction to the Access to Justice Movement

Access to justice is a widely researched topic in the legal and academic communities. Despite the extensive work that has taken place over the past several decades, there is still debate regarding what the term “access to justice” means in a practical sense. While the concept of access to justice is simple to comprehend, it is not easily defined because it manifests itself in different ways across society and the legal system.<sup>1</sup> Without a standardized definition in place, it is difficult to determine how to measure, prevent, and combat the economic, social, political, and legal challenges that Canadians, particularly those belonging to vulnerable or marginalized communities, face on a daily basis.

In a narrow sense, access to justice has “referred to a range of institutional arrangements to assure that people who lack the resources or other capacities to protect their legal rights and to solve their law-related problems have access to the justice system.”<sup>2</sup> Broadly speaking, access to justice “engages the wider social context of our court system, and the systematic barriers faced by different members of the community.”<sup>3</sup> In a country such as Canada, which is composed of vastly diverse communities, concepts of justice, equality, and rights vary across jurisdictions. Ideologies are informed by variables such as cultural histories, previous experiences interacting with the government or court systems, education, health, and socioeconomics. The challenges related to these variables change over time and as a result, definitions of the term “access to justice” have not remained static.

For researchers working within the diverse Canadian justice landscape, Roderick A. Macdonald suggests that the “first step in assessing the current state of access to justice in Canada is to frame the problem of scope, scale, and ambition.”<sup>4</sup> Within this framework, definitions of the term “access to justice” can point toward one central question: “What should be the aims of an access to justice strategy today?”<sup>5</sup>

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<sup>1</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004).

<sup>2</sup> *Ibid*, 1 at 1

<sup>3</sup> Alberta Civil Liberties Research Centre, “What is Access to Justice?”, n.d., available at <http://www.aclrc.com/what-is-access-to-justice>

<sup>4</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005) 1 at 19.

<sup>5</sup> *Ibid*, 1 at 19.

## A Brief Introduction to Access to Justice in Canada

Justice Thomas Cromwell of the Supreme Court of Canada stated that by “nearly any standard, our current situation falls short of providing access to knowledge, resources and services that allow people to deal effectively with civil and family legal matters.”<sup>6</sup> To understand how Canadians are impacted by the current landscape, it is important to quantify access to justice.

To define the scope of the issue, researchers suggests that within a given three-year period, 12 million Canadians will experience at least one legal problem<sup>7</sup> but few will have the required resources – finances, legal information, or access to courts – to resolve their problem. The legal issues experienced by this group will be represented across civil, family, or criminal courts and can relate to challenges like divorce, custody hearings, disputes with landlords, wrongful dismissals or withheld benefits. Researchers also suggest that individuals who experience one kind of legal problem will most likely encounter additional related legal issues, as well as social, economic and health related challenges. Together, all of these issues will place additional strain on the State.<sup>8</sup>

It is estimated that 65% of Canadian citizens and residents are “uncertain of their rights, do not know how to handle legal problems, are afraid to use the legal system, think nothing can be done, or believe that seeking justice will cost too much money or take too much time.”<sup>9</sup> A current reality is that legal assistance is too costly for many Canadians. While those with incomes below the poverty line certainly encounter economic barriers in the legal system, the financial burden is also felt heavily by the middle class, as these individuals “typically earn too much to qualify for legal aid, but frequently not enough to retain a lawyer for a matter of any complexity or length.”<sup>10</sup> As a result, many legal problems go unresolved and legal needs are unmet.

## Access to Justice and the Legal System

As access to justice began as a movement within the judicial system to provide legal services to those who could not otherwise afford them, there are a variety of opinions regarding the role of lawyers and the courts going forward. For some, the future success of access to justice involves the judicial system, but also reaches beyond the courts to include collaborations with external organizations, government departments, and the public. For instance, during a symposium hosted by the Department of Justice Canada, participants discussed what access to

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<sup>6</sup> Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall Law Journal 957 at 962.

<sup>7</sup> Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013); Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000).

<sup>8</sup> Ibid

<sup>9</sup> Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall Law Journal 957 at 964.

<sup>10</sup> Ibid

justice means in the 21<sup>st</sup> century and how challenges may or may not be addressed within the scope of the legal system. Beverly McLaughlin stated:

*For nearly three decades, access to justice has been a central policy issue within the Department of Justice. The early programs, developed during the 1970s, provided information about the law and how the justice system works, or assured representation in court for people who could not afford legal assistance. Looking back, though, we can see that these programs took for granted a traditional form of justice that was largely formal and technical. Access was improved, but the problems that brought people into contact with the law were generally defined in narrow legal terms to be resolved only in court.*

*But justice means more than simply applying the law without regard to the underlying social, economic, and psychological factors, as we have become increasingly aware in recent years. New ideas have entered the discourse, widening the scope of the concept and affecting the way we think of justice – and of access to justice. It is not enough to treat access as solely a matter of courts and formal legal proceedings.*

*Moreover, the public is coming to expect a more solution-oriented and participatory form of justice. This new approach may go by different names – restorative, therapeutic, or holistic justice, for instance – but all reflect a common concern: that the formal justice system is ill-equipped on its own to deal effectively with the problems thrown on its doorstep.*

*Justice is complex and multidimensional, and the justice process must provide more than formal, adversarial proceedings designed to find guilt or innocence, and winners and losers. In a sense, justice is no longer the exclusive preserve of the traditional justice system. If Canadian society is to develop effective and durable solutions to the problems that face us, our justice system will have to develop partnerships with communities and across disciplines and institutions.<sup>11</sup>*

At the same time, a number of stakeholders argue the opposite perspective: searching for justice beyond the boundaries of the legal system is unrealistic and will not result in practical solutions that can be applied to real life cases. They argue that “practitioners working with members of systemically disadvantaged groups rely on the structure of the law to advance the interests of the people they represent. Indeed, it may be that the most effective way to concretize a normative

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<sup>11</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000) i at i.



conception of justice, or any normative value for that matter, is to create a structure in the form of rights, remedies, procedures and practices.”<sup>12</sup>

Scholars have found that individuals can be disempowered when their experiences are translated into legal language, but “such criticisms often under-appreciate the opportunities afforded by more inclusive, bottom-up models of lawyering that can subvert the traditional divide between lawyers, experts and ‘the law’ on the one hand, and needy beneficiaries with real-life experiences and ‘non-law’ claims on the other.”<sup>13</sup> Although the relationship between the judicial system and access to justice is not perfect, the law is the backbone of justice in society and the two cannot be separated. Ultimately, “while the formal justice system may not deliver perfect justice in every instance, it offers the hope of realizing some aspiration of piecemeal and even systematic justice through the entrenchment of rights and effective remedial enforcement. What is left to sort out are the intertwined institutional responsibilities of courts, legislatures and society to implement measures that enhance access to justice.”<sup>14</sup>

The abovementioned examples demonstrate that as a concept, access to justice is straightforward and results from honoring human rights, equality, and experiences. However, in a practical sense, access to justice is composed of dynamic variables that change over time and impact diverse communities in different ways. As a result, it is a challenging concept to define, and even more complex to apply in practical situations. From the initial review of literature covering high-level discussions, the most efficient way to define “access to justice” within a jurisdiction is to examine the evolution of the term over time, document what it means today, and identify trends or ideologies that will shape its meaning tomorrow.

### Origins: Placing the Access to Justice Movement in a Canadian Context

Answers to present questions are often found by studying the past. Examining the trends and perspectives that shaped the access to justice movement in Canada serves as a basis for the identification of current values that will carry it into the future.

Access to justice has its origins in liberal 18<sup>th</sup> and 19<sup>th</sup> century states and referred to an individual’s right to “have your day in court.”<sup>15</sup> In a modern sense, access to justice is tied to “the rise of the welfare state, out of which the access to justice movement arose as a major element.”<sup>16</sup> Since the 1960s, ideologies surrounding access to justice have evolved in response to a number of significant developments in the legal system, government, and society. Roderick A.

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<sup>12</sup> Faisal Bhabha, “Institutionalizing Access to Justice: Judicial, Legislative and Grassroots Dimensions” (2007) 33:139 Queen’s LJ 1 at 3.

<sup>13</sup> Ibid

<sup>14</sup> Ibid

<sup>15</sup> Alberta Civil Liberties Research Centre, “What is Access to Justice?”, n.d., available at <http://www.aclrc.com/what-is-access-to-justice>

<sup>16</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004) 1 at 1.

Macdonald organized the transitions that took place between 1960 and the present day into five waves.<sup>17</sup> His framework forms the basis of the historical examination of access to justice within this literature review.

#### Access to Lawyers and Courts (1960s – 70s)

Beginning in the 1960s, the central concerns related to access to justice involved the costs, complexity, and delays in the legal system.<sup>18</sup> Access to justice was viewed primarily as providing equal access to the courts, legal advice, and legal representation.<sup>19</sup> The focus was on opportunities for the economically disadvantaged to have existing problems resolved through the legal system. Their problems were defined in legalistic terms and it was assumed that most services would be provided by lawyers.<sup>20</sup>

The central goal during this period was to “provide legal representation to impoverished individuals who could not otherwise afford legal advice,”<sup>21</sup> which formed the basis for legal aid. Across the country, legal aid programs, such as community clinics and public defender offices, permitted the poor to access services provided by lawyers. In many cases, these programs were used to receive representation in criminal cases, and before government welfare, housing, and employment agencies.<sup>22</sup>

#### Institutional Redesign (1970s – 80s)

Legal aid expanded in the 1970s. Federal funding prompted the development of legal aid programs in every province and territory. It is estimated that government funding for these initiatives grew from \$15 million in the mid 1970s to \$215 million by the end of the 1990s.<sup>23</sup>

At the same time, reformers and the government began to address the problems linked to bureaucracy, such as delays. To combat these barriers, groups developed systems of mass

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<sup>17</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005).

<sup>18</sup> *Ibid*

<sup>19</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004); Alberta Civil Liberties Research Centre, “What is Access to Justice?”, n.d., available at <http://www.aclrc.com/what-is-access-to-justice>

<sup>20</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004).

<sup>21</sup> Alberta Civil Liberties Research Centre, “What is Access to Justice?”, n.d., available at <http://www.aclrc.com/what-is-access-to-justice>

<sup>22</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005).

<sup>23</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004).

adjudication, which allowed non-judicial institutions to examine civil claims.<sup>24</sup> These were also active years for the creation of Ombudsman Offices and Privacy and Access to Information Commissions.

As non-judicial institutions developed, scholars began to examine inadequacies within the legal system and legal aid programs, as they were not solving all challenges related to access to justice. Researchers widened the scope of inquiry to examine issues related to procedures, organization, and the general performance of courts.<sup>25</sup>

#### Demystification of Law (1980s – 90s)

The concept of access to justice continued to evolve and was viewed as a problem of equality. The passage of the *Canadian Charter of Rights and Freedoms* in 1982 created the idea that equality was not confined to the capacity and opportunity to litigate, but equally linked to the concept of equality of outcomes.<sup>26</sup> The *Charter* also impacted legal aid in two ways. First, it more clearly defined who should receive legal aid and second, it put upward pressure on the cost of legal aid.<sup>27</sup>

During the 1980s, there was an increased recognition of diversity, the unique needs of disadvantaged individuals, and the ways marginalized communities require protection. Focus shifted from simply providing legal aid to an emphasis on group and collective rights.<sup>28</sup> Essentially, the idea of equality in the sense of “identical treatment for all regardless of their personal attributes was rejective in favor of...substantive equality of opportunity to demonstrate one’s potential without being impeded by barriers based on diversity attributes.”<sup>29</sup> The idea of restorative justice also emerged in tandem to these discussions.

To demystify the law for larger segments of society, the plain language movement moved to the center stage. The Alternative Dispute Resolution (ADR) movement also developed from attempts to demystify the law and resulted in services like court-annexed mandatory mediation, consensual arbitration in contract claims, reference to experts in construction disputes.<sup>30</sup>

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<sup>24</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005).

<sup>25</sup> *Ibid*

<sup>26</sup> *Ibid*

<sup>27</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004).

<sup>28</sup> *Ibid*

<sup>29</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000) i at 12.

<sup>30</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005).

#### Preventative Law (1990 – 2000)

The concept of access to justice continued to evolve and “reflected the recognition that true access to justice had to encompass multiple non-dispute-resolution dimensions.”<sup>31</sup> In this period, ADR was viewed as a means to allow citizens to prevent problems or work through conflicts before they escalated to the point of legal problems. The access to justice movement shifted away from legal professionals and towards organizations located in the community. Store-front clinics, neighborhood justice centers, and dispute avoidance organizations were reinvigorated.<sup>32</sup> At this time, governments also sought “to enhance citizen participation in Parliamentary committees and the rule-making hearings of administrative bodies. Public policy consultations with funded interveners from non-governmental organizations (NGOs)”<sup>33</sup> became the norm.

#### Proactive Access to Justice (2000 – Beyond)

The current period of access to justice is characterized by two ideas: 1) justice involves variables that are present in every facet of the social life of citizens, and 2) greater focus on the rights of individuals who are denied the benefits of equal justice.<sup>34</sup> There is also a greater emphasis on enhancing access to “official and unofficial institutions where law is made and administered.”<sup>35</sup>

The concept of holistic justice has also entered discussions in the legal and academic communities. The central idea is that the access to justice movement has “focused too much on access *to* justice and too little on the *quality* of justice itself.”<sup>36</sup> Holistic justice implies participatory roles for affected parties, non-traditional roles for judges and lawyers, and examines new standards and avenues for achieving justice. The approach to access to justice proposes “mechanisms for problem-solving and negotiation that replace both the traditional concepts of justice and the formal mechanisms to attain access to justice.”<sup>37</sup>

In the current age, one significant challenge is the fact that different spheres of justice evolve at different rates. For instance, the concept of justice in civil courts has received significant focus and undergone substantial change. Modes of “resolving disputes have progressively moved out of the courts and into a variety of forms of alternative dispute resolution.”<sup>38</sup> Criminal justice has

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<sup>31</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005) 1 at 22.

<sup>32</sup> *Ibid*

<sup>33</sup> *Ibid*, 1 at 22.

<sup>34</sup> Department of Justice, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004).

<sup>35</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005) 1 at 23.

<sup>36</sup> Department of Justice, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004) 1 at 11.

<sup>37</sup> *Ibid*, 1 at 11.

<sup>38</sup> *Ibid*, 1 at 2.

not evolved at the same rate, in large part because the justice system is not equipped to address the complex social and economic factors that are often involved in many cases.

## Conclusion

The concept and meaning assigned to the term “access to justice” has evolved over the past fifty years. It began with the notion of access to courts and legal services but has grown to include the quality of outcomes of legal services. It is interesting to note that while the scope and scale of access to justice has expanded significantly (i.e. from an exclusive focus on the legal system to a holistic view of social, economic, and legal challenges), the focus of access to justice has narrowed (i.e. focus on society to emphasis on the individual).

In spite of the progress that has been made over the last several decades, there is still a long way to go. Researchers have documented significant “advances on the substantive side of the ledger, both in the recognition of diversity interests and the meaning of justice and equality for members of diversity groups. However, those advances on the substantive side have not been met with corresponding advances in terms of delivery mechanisms and procedures necessary to achieve access to justice.”<sup>39</sup> To date, there has been “little success in developing delivery mechanisms to meet the promise of substantive growth in the right to equality. The reasons for this failure are many: they include flawed implementation and evaluation measures and reporting mechanisms and the lack of adequate resources.”<sup>40</sup>

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<sup>39</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000) i at 12.

<sup>40</sup> *Ibid*, i at 12.

## Access to Justice Today: Present Concepts, Perspectives and Challenges

After an examination of the term “access to justice” over time, it is clear that access to justice is a multi-dimensional problem that is not confined within the boundaries of the legal system. It also involves an individual’s level of social power, ability to access information, legal literacy levels, and prevailing feelings of disempowerment or disengagement.

Within this context, defining “access to justice” is a challenge because it is difficult to determine when justice has been achieved. Complex legal problems that involve economics, social factors, politics, experience and cultural history, create a situation in which one person’s justice may be someone else’s injustice.<sup>41</sup> In this landscape, it is tempting to craft definitions that sit at a high level and reflect social values such as equality or freedom of expression, knowing that “the content of these values can be the subject of continuous debate.”<sup>42</sup>

At the heart of this examination is a question of how justice should be centrally understood. Is it the end product of policies that reduce fees, delays, or the complexity of litigation? Or is it a system that facilitates preventative law and outlines what a legal system in a democratic society should accomplish?<sup>43</sup> Roderick A. Macdonald stated that the answers to these questions must address the lack of recognition and respect that is felt by citizens, particularly marginalize groups. At its core, access to justice should seek to re-engage citizens with law, including its values, processes and outcomes.<sup>44</sup>

At the Department of Justice Canada, access to justice is a fundamental value of the Canadian justice system and is linked to the concept of “rule of law”, meaning that the entire government must play a role.<sup>45</sup> This involves participation from those who create legislation as well as those who interpret and enforce it. Within this context, the Department of Justice Canada lists a number of factors that must be considered when speaking about access to justice today. They include the following points:

- Canadians are dissatisfied with the law and the procedural justice it provides; the system does not help most people get to court to address their claims;
- the *Charter* created an expectation that the law can deliver both procedural and substantive justice;

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<sup>41</sup> Patricia Hughes, “Defining Access to Justice: The Charter and the Courts (and the Law Commission of Ontario)”, (2011) 29:119 *National Journal of Constitutional Law*.

<sup>42</sup> *Ibid*, 1 at 4.

<sup>43</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005).

<sup>44</sup> *Ibid*

<sup>45</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000).

- the multicultural composition of Canada creates a situation in which there is no public consensus on the meaning of justice due to vastly divergent experiences;
- Canada has become a ‘rights based’ society;
- Canadians have become consumers of services without taking responsibility;
- discussions of community involvement occur at a time when government is cutting social programs and discussions about community involvement are seen as euphemisms for government resource reduction;
- the current legal and justice system has a conflict-based construct in which there are “winners and losers”;
- relationships are broken instead of repaired; and
- the costs of legal services do not have a correlation to outcomes or benefits delivered.<sup>46</sup>

In conclusion, the challenges listed above can be summarized into the following four themes:

- maintaining a legal system that meets the current demands of society requires a great amount of administration, but the public is less and less willing to pay for a system that they view as increasingly dysfunctional;
- current frameworks must be reconstructed to integrate communities and overcome conflict caused by jurisdictional confines;
- a one-size-fits-all scenario is not possible in the current landscape; focus must turn towards rebuilding bridges between jurisdictional responsibility and sustaining community-based projects; and
- across the country, many pilot programs have addressed access to justice challenges; research should examine these cases and understand the successes and limitations.<sup>47</sup>

Existing definitions of the term “access to justice” address many of the challenges listed above. By examining current definitions, researchers may analyze how the concept of access to justice is put into practice in real life situations.

#### Establishing an Operational Definition of the Term “Access to Justice”

Creating an operational definition of the term “access to justice”, particularly in a country that is characterized by diversity, involves a variety of criteria working together in unison. Today, access to justice is about more than the ability to afford legal services; it means “generating options for public problem-solving mechanisms”<sup>48</sup> The resolution of challenges rests on partnerships and may include market-based solutions, including contingency fees or legal expense insurance,

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<sup>46</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000) i at 10.

<sup>47</sup> *Ibid*

<sup>48</sup> Erik S. Knutsen, “Middle Income Access to Justice, by Michael Trebilcock, Anthony Duggan, and Lorne Sossin” (2013) 50:4 *Osgoode Hall Law Journal* 1063 at 1064.

public programs, such as ombudspersons or streamlined court procedures, or programs that have not yet been developed.

The Community and Social Services Council in Newfoundland and Labrador stated that the access to justice movement requires significantly more “horizontal dialogue, planning and policy design that will help achieve greater policy and program coherence.”<sup>49</sup> At the current time, the legal and academic communities recognize the need for dialogue across sectors, but “policy, programs and resources are not [working] in tandem.”<sup>50</sup> In Canada, planning must be done to actively advance the access to justice debate, and more importantly, determine how to overcome barriers between all levels of government and diverse populations.<sup>51</sup>

In order to advance the access to justice debate and promote horizontal partnerships, stakeholders must have an understanding of the pre-conditions that result in “access” and “justice”. Research suggests that each word relates to different concepts; when combined, they represent the complete process of dispute resolution. The term “access” is associated with the ability to physically access courts and legal services, locate information about the legal system, and cover the cost of legal representation.<sup>52</sup> The term “justice” describes the outcome of “access”. It can include the quality of justice, the degree of respect for the culture and experiences of an individual or community, or accountability for actions.<sup>53</sup>

Depending on the perspective that an organization takes, operational definitions of access to justice relies on different criteria. For instance, a definition that centers on pre-conditions to *accessing* justice may include the following points:

- ability to enter the courthouse;
- ability to understand proceedings in one’s primary language;
- being addressed by name according to ethnic customs;
- respect for religious requirements; and
- ability to be present at hearings or not having to take breaks due to medical conditions.<sup>54</sup>

When the focus of “access to justice” rests more heavily on “justice”, pre-conditions often reflect one’s *ability* to use the legal system *in a meaningful way*. Pre-conditions to justice include the

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<sup>49</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000) i at 19.

<sup>50</sup> *Ibid*

<sup>51</sup> *Ibid*

<sup>52</sup> Patricia Hughes, “Defining Access to Justice: The Charter and the Courts (and the Law Commission of Ontario)”, (2011) 29:119 *National Journal of Constitutional Law*.

<sup>53</sup> *Ibid*

<sup>54</sup> Patricia Hughes, “Defining Access to Justice: The Charter and the Courts (and the Law Commission of Ontario)”, (2011) 29:119 *National Journal of Constitutional Law* 1 at 2.



following points:

- low income does not result in inferior justice;
- clients have sufficient information to make decisions about how to file claims or defend themselves;
- clients have the ability to instruct a lawyer or decide to represent themselves;
- individuals have the information and knowledge of the legal system required to select the most appropriate forum for their circumstance; and
- individuals have their rights determined in a fair, understandable and timely fashion.<sup>55</sup>

Knowledge of the pre-conditions of “access” and “justice” allow researchers to analyze existing definitions and use them as starting points. From there, it is possible to develop definitions that support horizontal partnerships, policy development, legislative amendments and community-based programs.

#### Current Operational Definitions of the term “Access to Justice”

At the Department of Justice Canada, access to justice is considered a fundamental value of the Canadian justice system. The definition aligns with the “Rule of Law”, which refers to “a principle of governance in which all persons, institutions and entities, public and private...are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”<sup>56</sup>

The following four principles drive the Rule of Law:

- all are equal under the law;
- transparency of law;
- independent judiciary; and
- accessible legal remedy.<sup>57</sup>

Within the context of the Rule of Law, the Department of Justice Canada defines “access to justice” as the ability of “Canadians to obtain the information and assistance they need to help prevent legal issues from arising and help them to resolve such issues efficiently, affordably, and fairly, either through informal mechanisms, where possible, or the formal justice system, when necessary.”<sup>58</sup>

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<sup>55</sup> Patricia Hughes, “Defining Access to Justice: The Charter and the Courts (and the Law Commission of Ontario)”, (2011) 29:119 *National Journal of Constitutional Law* 1 at 3.

<sup>56</sup> LexisNexis Canada, “Rule of Law”, 2019, available at <https://www.lexisnexis.ca/en-ca/about-us/rule-of-law.page>

<sup>57</sup> Ibid

<sup>58</sup> Department of Justice Canada, *Development of an Access to Justice Index for Federal Administrative Bodies*, by Susan McDonald, (Ottawa: Department of Justice Canada, 2017) 1 at 9.

Under this definition, access to justice underscores that

- the justice system extends beyond courts and tribunals to include an extensive informal system (e.g., information sources, self-help strategies, and other dispute resolution options);
- increasing access to justice through the use of formal or informal systems is key to achieving fair and just outcome thereby increasing cost-savings for the government and the whole of the justice system through better resource distribution/allocation;
- there is a need to develop Canadians’ understanding and literacy of, and capability to navigate, the legal system, through a range of measures (e.g., providing all Canadians with basic legal training) necessary to enable individuals to better manage their justiciable problems; and
- access to justice issues are often intensified by other components and conditions, including socio-economic, health factors, and/or policy decisions taken in other areas of responsibility.<sup>59</sup>

When comparing this definition of “access to justice” against pre-conditions of “access” or “justice”, the Department of Justice Canada appears to focus on “access”. It seeks to prevent legal problems, promote access through formal or informal systems, and promote an individual’s ability to navigate the legal system. Pre-conditions related to “justice”, or an individual’s ability to obtain meaningful interactions with the legal system, are left at a high level.

In comparison, the definition of “access to justice” at the National Action Committee on Access to Justice in Civil and Family matters leans toward the “justice” approach. The pre-conditions align more heavily with an individual’s *ability* to access justice and arrive at *meaningful interactions* with the legal system.<sup>60</sup>

The National Action Committee on Access to Justice in Civil and Family defines its vision of access to justice as “a society in which the public has the knowledge, resources and services to effectively deal with civil and family law matters: by prevention of disputes and early management of legal issues; through negotiation and informal dispute resolution processes; through formal dispute resolution by tribunals and court.”<sup>61</sup> Under this definition, access to justice services means that

- justice services are accessible, responsive and citizen focused;
- services are integrated across justice, health, social and education sectors;

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<sup>59</sup> Ibid

<sup>60</sup> Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013).

<sup>61</sup> Action Committee on Access to Justice in Civil and Family Matters, *Report on Access to Legal Services Working Group*, by Alison MacPhail, (2012) 1 at 1.

- the justice system supports the health, economic and social well-being of all participants;
- the public is active and engaged with, understands and has confidence in the justice system and has the knowledge and attitudes needed to enable citizens to proactively prevent and resolve their legal disputes; and
- there is respect for justice and the rule of law.<sup>62</sup>

Because the issues of “access” and “justice” are intertwined and dependent upon each other, many organizations adopt definitions that embody hybrids between the two terms. These definitions tend to incorporate the practicalities of *access* to the legal system and the abstract values that are tied to equal *justice*. For instance, the Alberta Civil Liberties Research Centre states that “access to justice” is

- the right to appear in court;
- advocacy for those who cannot afford legal services;
- reforming the justice system;
- equality of outcomes; and
- the future of access to justice.”<sup>63</sup>

The Access to Legal Services Working Group Action Committee defines “access to justice” in a similar way. They state that the four fundamental elements of access to justice are as follows:

- awareness of rights, entitlements, obligations and responsibilities;
- awareness of ways to avoid or prevent legal problems;
- ability to effectively participate in negotiations to achieve a just outcome; and,
- ability to effectively utilize non-court and court dispute resolution systems.<sup>64</sup>

By examining how the term “access to justice” is defined by a variety of stakeholders, it is clear that definitions are influenced by the perspectives, scope, and scale of organizations working towards access to justice. For instance, at a national level it is appropriate to focus on “access to justice” as a means to provide access to the legal system, promote prevention of legal problems, and provide a framework that can balance the requirements of the law with human rights. On the communal level, definitions of “access to justice” have more flexibility and may address access to the legal system alongside the diverse needs of individuals who seek meaningful justice.

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<sup>62</sup> Ibid,1 at 2.

<sup>63</sup> Alberta Civil Liberties Research Centre, “ACLRC Maps Access to Justice”, n.d., available at <http://www.aclrc.com/research-on-access-to-justice/>

<sup>64</sup> Action Committee on Access to Justice in Civil and Family Matters, *Report on Access to Legal Services Working Group*, by Alison MacPhail, (2012) 1 at 4.

In conclusion, successful definitions of “access to justice” rest on an understanding of the pre-conditions of “access and “justice”. The next piece of the puzzle is to understand the community requiring access to justice. By examining the demographics of a jurisdiction or community, understanding barriers that exist, and identifying horizontal partnerships, organizations may develop definitions of “access to justice” that describe the scope, scale, and ambition of their work.

## The Future of Access to Justice: Examining Trends and Challenges

The origins of the access to justice movement focused on access to courts and legal services. At the present time, access to justice has expanded to include an individual's ability to obtain meaningful interactions with the legal system and secure equality of justice. This process involves horizontal partnerships between agencies and sectors, considerations of socio-economics, and the rights of citizens and residents of Canada.

While the definition of "access to justice" has expanded considerably since the 1960s, there is still a prevailing sense within the legal and research community that the perspective and focus of work remains top-down. For instance, Canada was a pioneer in the development of restorative justice programs, but today that country remains in a state of "top-down political and legal mobilization and institutionalization of restorative justice than measurable bottom-up actualization of restorative justice."<sup>65</sup> Moving into the future, Canadians are challenged to consider programs and services from the perspective of those in society who require access to justice. Trevor Farrow states, "the public, which uses the system, needs to be at the center of how we think about, understand and reform the system."<sup>66</sup>

Researchers state that the future of access to justice rests on a client-centric approach that focuses on the needs of those who use the system, as opposed to focusing exclusively on groups who provide services.<sup>67</sup> This focus requires researchers to shift their focus towards understanding what the law means and what it does not mean in the context of problems in citizens' everyday lives.<sup>68</sup>

The Department of Justice Canada stated that the future of access to justice rests on providing citizens with the responsibility to determine what kind of justice they will have. It stated:

*we need forms of public engagement that promote conscientious participation in, informed decisions about, and enlightened reflection on the meaning of justice as it is played out in real life situation. We must strive for an inclusive notion of justice, one that draws from the richness of the diversity of Canadians' experiences. Moving forward on this means finding ways of engaging everyone in meaningful contemplation of the most fundamental issue we confront as a civilization.*<sup>69</sup>

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<sup>65</sup> Trevor C.W. Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall Law Journal 957 at 961.

<sup>66</sup> Ibid, 957 at 961.

<sup>67</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005); Trevor C.W. Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall Law Journal.

<sup>68</sup> Bryant G. Garth, "Comment: A Revival of Access to Justice Research?" in Rebecca Sandefur ed, *Sociology of Crime Law and Deviance*, Volume 12 (Bradford, GBR: Emerald Group Publishing Ltd., 2009) at 258.

<sup>69</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000) i at 11.

The achievement of this goal rests on the balance of creativity, bottom-up approaches, and a commitment to justice from government agencies. The Department of Justice Canada went on to state:

*new visions of justice are only possible if we are prepared to abandon the familiar for a moment and entertain alternatives...we've experimented with a variety of alternatives to our mainstream legal system in the forms of alternative dispute resolution, voluntary compliance, diversion from the criminal justice system or creative processes for sentencing officers. We have had much success with these efforts. They embolden us to move even further away from the centrifugal force of the legal system.*<sup>70</sup>

However, the Department of Justice Canada cautions against “passing the buck” down the line to external organizations. A successful vision of access to justice involves partnerships and accountability from all levels of society. At this time in history, governments cannot simply download and outsource justice to communities without providing resources in a variety of forms.<sup>71</sup> This may also mean shifting resources away from conventional legal systems and services.<sup>72</sup>

While the Department of Justice Canada captures the need for effective partnerships based around a client-centric view of justice, researchers must wade through the complexity of variables that constitute justice on an individual level. As stated earlier in this literature review, what is considered just for one individual may be unjust for another. In this landscape, how do researchers create a vision for access to justice that is flexible enough to accommodate diverse needs yet provides a structure for programs and services?

#### Strategies to Capture the Public View

Perhaps the framework for future definitions of access to justice can be summed up with one statement published by the Canadian Bar Association: think systemically, act locally.<sup>73</sup>

A number of committee reports, including *Access to Civil and Family Justice: A Roadmap for Change* and the *Report of the Access to Legal Services Working Group* state that assessing needs should involve an examination of “a broad range of legal problems experience by the public – not just those adjudicated by courts.”<sup>74</sup> The results of this examination should be the provision of

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<sup>70</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000) i at 11.

<sup>71</sup> Ibid

<sup>72</sup> Ibid

<sup>73</sup> The Canadian Bar Association, *Equal Justice: Balancing the Scales, Report of the CBA Access to Justice Committee*, (2013) 1 at 9.

<sup>74</sup> Action Committee on Access to Justice in Civil and Family Matters, *Report on Access to Legal Services Working Group*, by Alison MacPhail, (2012) 1 at 2.

institutions, knowledge, resources and services that prevent, manage, and resolve disputes.<sup>75</sup> The report also states that resolution should be sought in courts and tribunals when necessary, but focus should also be placed on preventing disputes, negotiation, and informal dispute resolution services.<sup>76</sup> In the current legal landscape, one strategy is to examine problems that citizens generally face, whether they involve the legal system or outside organizations – and understand how problems are frequently resolved. Based on this understanding, “opportunities can be sought to strengthen people’s abilities to find a fair and reasonable solution.”<sup>77</sup>

Roderick A. Macdonald states that the access to justice movement over the past several decades has focused on the features of an accessible dispute-resolution system, which is different from an accessible *justice* system. Moving forward, the vision for access to justice strategies should be organized around two themes. First, strategies must be multi-dimensional in nature, meaning they acknowledge that not all citizens are similarly situated and have different legal needs.<sup>78</sup> Macdonald states that four central variables guide this investigation: geography, socio-demography, concepts of justice, and diversity of perception (e.g. legal problems are experienced in different ways by different individuals).<sup>79</sup>

Second, access to justice strategies must be pluralistic, meaning that they acknowledge the importance of dispute resolution, preventative law, law-making, law-application, and law-learning.<sup>80</sup> Macdonald also challenges researchers to consider the following question: should access to justice only focus on the official law of legislature, course, and public officials?

In order to create a multi-dimensional and pluralistic strategy, it is important to first document the needs of individuals using the legal system. This ties back to the concept of a user-centric approach. An example of documenting public perception is a study conducted by Trevor Farrow in 2014. The goal of the study was to capture the voice of the public and put it at the center of how researchers think about access to justice reforms.<sup>81</sup>

Over an eight-month period, a team of three research students approached individuals in public spaces around the Greater Toronto Area. Participants were asked to answer open-ended

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<sup>75</sup> Action Committee on Access to Justice in Civil and Family Matters, *Report on Access to Legal Services Working Group*, by Alison MacPhail, (2012); Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013).

<sup>76</sup> *Ibid*

<sup>77</sup> Action Committee on Access to Justice in Civil and Family Matters, *Report on Access to Legal Services Working Group*, by Alison MacPhail, (2012) 1 at 3.

<sup>78</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005).

<sup>79</sup> *Ibid*

<sup>80</sup> *Ibid*

<sup>81</sup> Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall Law Journal.

questions about definitions of justice, barriers that exist in the justice system, and how governments should promote justice for Canadians.<sup>82</sup> Based on the results, Farrow identified the following ten themes that are important for the future of access to justice reform:

- justice is fairness, equality, morality, and active societal participation;
- justice is not a passive concept; it should engage and reflect those who it is meant to serve;
- procedural justice and substantive justice are both important;
- idea that justice is class-based; it is not available to everyone, only the rich;
- people feel alienated by the system;
- justice is a fundamental right and all people should have access to it;
- more government support should be provided;
- justice should be made simpler, cheaper, and faster;
- education, prevention, and understanding are important aspects of justice; and
- the cost of not making justice accessible needs to be further considered.”<sup>83</sup>

From these themes, Farrow stated that the findings are “part of a modern trend, not unlike modern health care initiatives, to enable citizens to take hold of their legal issues, to understand them, and ultimately to prevent and resolve them.”<sup>84</sup>

In order to accurately capture access to justice needs in a community, Farrow concluded that researchers must understand what kind of life people would like to have and what kind of communities they would like to live in. He states:

*access to justice is for the most part understood as access to the kind of life—and the kinds of communities in which—people would like to live. It is about accessing equality, understanding, education, food, housing, security, happiness, et cetera. It is about the good life; that is ultimately the point. The more researchers, policy-makers, and practitioners understand this, the more their efforts to reform access to justice will yield fruit. Good laws, rules, judges, educators, lawyers, and courtrooms are all important. However, these are not ends in themselves, but rather steps along the path to justice and access to it.*<sup>85</sup>

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<sup>82</sup> Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall Law Journal 957 at 964.

<sup>83</sup> Ibid, 957 at 970.

<sup>84</sup> Ibid, 957 at 970.

<sup>85</sup> Ibid, 957 at 983.



Based on the results of the study, Farrow found that until the “voice of the public becomes an increasingly central feature of all access to justice reform efforts, alienation and exclusion will continue to follow.”<sup>86</sup>

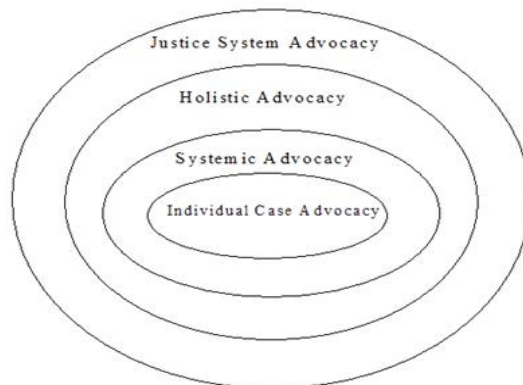
#### Frameworks that Support the Exploration of Future Definitions of Access to Justice

In order to develop future definitions of the term “access to justice” that account for the multi-dimensional and pluralistic needs of communities, frameworks that inform investigations must exist on multiple levels as well.

Albert Currie, Principal Researcher for Access to Justice and Legal Aid at the Government of Canada, proposed an access to justice framework that could be applied to criminal legal aid.<sup>87</sup> The components that he discusses address many of the challenges addressed by Macdonald, Farrow, Roach and others.

When examining criminal legal aid, Currie states that the progressive waves of access to justice do not replace each other; they add to and complement one another.<sup>88</sup> Based on this idea, Currie created an access to justice model for analyzing legal aid. It begins with “legal aid as the historical starting point for access to criminal justice. It is a way of representing a discussion about meeting a broader access to justice agenda through legal aid.”<sup>89</sup>

**Figure 1 - An Access to Justice Model of Criminal Legal Aid** <sup>90</sup>



Currie states that a central consideration in access to justice is the fact that legal aid cannot be expected to do everything, as the criminal justice system as a whole has limitations. Echoing

<sup>86</sup> Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall Law Journal 957 at 983.

<sup>87</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004).

<sup>88</sup> *Ibid*

<sup>89</sup> *Ibid*, 1 at 15.

<sup>90</sup> *Ibid*, 1 at 15.

Macdonald, Currie also states that scholarship has focused “too much on access *to* justice and too little on the quality of justice itself.”<sup>91</sup> He argues that holistic approaches to justice propose new standards of justice as well as new ways of achieving justice. Holistic justice also implies participatory roles for accused persons, victims, and other affected parties, as well as non-traditional roles for judges and lawyers. As Currie states:

*evolving concepts of access to justice do not involve the development of mechanisms to provide access to official and formal law...Rather holistic approaches to access to justice propose mechanisms for problem-solving and negotiation that replace both the traditional concepts of justice and the formal mechanisms to attain access to justice.*<sup>92</sup>

A great deal of holistic justice approaches, such as restorative justice, occur outside of the legal system. However, when individuals are charged with offenses or in the case of civil and family courts, experience legal problems, the question of legal representation arises. At this point, individuals enter the center of the circle (see Figure 1) at the point of individual case advocacy, which also represents the first wave of the access to justice movement: the need for legal representation.

Next, a new range of services are added through systemic advocacy, which relates to the *Charter of Rights and Freedoms*, and define the right to publicly funded legal aid.<sup>93</sup>

At the level of holistic advocacy, individuals access services such as restorative approaches. As stated before, much of this work happens outside of the justice system and involves the protection of rights and examination of problems that brought and individual into conflict with the law.<sup>94</sup>

Finally, at the level of justice system advocacy, legal aid plans play a form of “brokerage role in securing for its clients the restorative, therapeutic, and diversion services and options that are most appropriate.”<sup>95</sup> Currie goes on to state that to make use of these options, “a healthy range of community-based programs must be available.”<sup>96</sup>

In conclusion, Currie argues that the future of legal aid may be bleak if it “fails to actively pursue holistic forms of justice that would transform criminal defense into a broader concept of access to justice, as it may be unattractive in the competition for

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<sup>91</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004) 1 at 11.

<sup>92</sup> *Ibid*, 1 at 11.

<sup>93</sup> *Ibid*

<sup>94</sup> *Ibid*

<sup>95</sup> *Ibid*, 1 at 18.

<sup>96</sup> *Ibid*, 1 at 18.

scarce [government] resources.”<sup>97</sup> Moving into the future, legal aid should assume a “more proactive role, along with the judiciary and the prosecutorial function, in sharing a more innovative and effective form of justice.”<sup>98</sup>

### Conclusion

The future will move towards a user-centric understanding of access to justice. It will be essential for researchers working in this field to document the landscape and work directly with the public to discuss needs, rights, and experiences using the legal system.

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<sup>97</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004) 1 at 21.

<sup>98</sup> *Ibid.*, 1 at 21.

## Access to Justice Across Canada: Examining the Operational Definitions Across Jurisdictions

In Canada, legal services are provided to the public using a single hierarchical partnership business model: lawyers “work on client issues in units of time, tailoring their research and analysis to the circumstances of a particular client.”<sup>99</sup> The client’s information is protected through confidentiality, legal advice is provided through solicitor-client privilege, and disputes are resolved through the court system. Law firms “have been built on this model and the continued success of many in the profession is perceived to be dependent upon the practice of law remaining by and large the same.”<sup>100</sup>

At the same time, it has come to light that certain aspects of the established business model do not provide accessible legal services to all citizens. For example,

*most middle- and low-income members of the public are priced out of the current legal market and are forced to either ...represent their own interests within a system designed for trained professionals or forgo their legal rights altogether.*<sup>101</sup>

Although citizens in the lowest income brackets may access services or representation through legal aid, many middle-class individuals do not qualify for this type of assistance. Essentially, their income bracket is too high to qualify for legal aid services, but they do not have the resources to cover the legal costs associated with representation in court. As a result, many citizens are left without professional guidance to resolve their legal issues or navigate the court system. This issue is problematic because

*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. 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.*<sup>102</sup>

A significant percentage of the public falls into the gap between legal aid eligibility and the individuals in society who can cover the costs of legal fees independently. The individuals who “fall through the cracks” are not served under the existing legal business model. The service gap

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<sup>99</sup> University of Saskatchewan College of Law, *Justice Innovation and the Culture of Legal Practice*, by The Dean’s Forum on Dispute Resolution and Access to Justice (Saskatoon: University of Saskatchewan College of Law, 13 March 2014) 1 at 1.

<sup>100</sup> Ibid

<sup>101</sup> Ibid

<sup>102</sup> Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) 1 at 1.

points to areas in legal services that “need adjustment or overhaul, or it can be perceived as an opportunity to make room for alternative ways of delivering legal services.”<sup>103</sup>

The Action Committee on Access to Justice in Civil and Family Matters stated that all stakeholders in the justice community, including the Bench, the Bar, all levels of government, NGOs and the public, must work together to achieve the goal of improving access to justice for all Canadians.<sup>104</sup> To this end, it developed a vision statement that states:

*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.”<sup>105</sup>*

Based on this statement, access to justice for all Canadians involves the following: the ability to manage and resolve disputes; access to legal support and services, including the courts; access to information that is comprehensible and informative; legal services that are affordable; and decisions without undue delays.

### The Canadian Charter of Rights and Freedoms

On April 17, 1982, Queen Elizabeth II signed the *Canada Act*, a piece of legislation that gave “Canada control over its Constitution and guaranteed the rights and freedoms in the *Charter of Rights and Freedoms* as the supreme law of the nation.”<sup>106</sup> At this moment, the concept of access to justice expanded from the “equality of opportunity for underprivileged or underrepresented litigants” to the achievement of “equality of outcomes by addressing the barriers faced by those

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<sup>103</sup> University of Saskatchewan College of Law, *Justice Innovation and the Culture of Legal Practice*, by The Dean’s Forum on Dispute Resolution and Access to Justice (Saskatoon: University of Saskatchewan College of Law, 13 March 2014) 1 at 2.

<sup>104</sup> Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) 1 at 1.

<sup>105</sup> *Ibid*, 1 at 2.

<sup>106</sup> Department of Justice Canada, “Learn About the Charter”, 2018, available at <https://www.justice.gc.ca/eng/csjsjc/rfc-dlc/ccrf-ccdl/learn-apprend.html>

trying to access the judicial system.”<sup>107</sup> The latter approach suggests that access to justice “must be considered in light of social variables which have historically had a negative impact on the ability of certain individuals or groups’ ability to access justice.”<sup>108</sup> Variables can include racism, gender, disabilities, social class, sexual identity, and so on.

Access to justice discussions typically involve Section 7 and Section 15(1) of the *Charter*. The sections state:

*Section 7: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”*<sup>109</sup>

*Section 15(1): “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”*<sup>110</sup>

Section 7 and Section 15(1) discuss legal rights and equality rights, specifically in terms of life, liberty, and security of persons. They also provide a basis for substantive equality, the objective of which is to “assist disadvantaged groups in overcoming inequality, by providing protections against discriminatory attitudes, practices and rules.”<sup>111</sup>

While the phrase “access to justice” does not appear in the *Charter*, it is seen as a concept that encompasses the purpose of the *Charter*, as well as some of its provisions.<sup>112</sup> Research suggests that in respect to the *Charter*, access to justice is akin to human dignity, the concept that underlies almost every right guaranteed by the *Charter*.<sup>113</sup> Much like access to justice, human dignity has never been recognized as an independent right, but an expression of rights such as equality, privacy or protection from state compulsion.<sup>114</sup> Access to justice can be viewed as an expression of Section 7 and Section 15 of the *Charter*.

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<sup>107</sup> Alberta Civil Liberties Research Centre. “ACLRC Maps Access to Justice: The Access to Justice Project”, n.d., available at <http://www.aclrc.com/research-on-access-to-justice/>

<sup>108</sup> Ibid

<sup>109</sup> *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>110</sup> Ibid

<sup>111</sup> Alberta Civil Liberties Research Centre. “Access to Justice as a Right?”, n.d., available at <http://www.aclrc.com/new-page#whatdoyoumean>

<sup>112</sup> Patricia Hughes, “Defining Access to Justice: The Charter and the Courts (and the Law Commission of Ontario)” (2011) 29:119 *National Journal of Constitutional Law*.

<sup>113</sup> Ibid

<sup>114</sup> Ibid

Despite the promise of equality discussed in these sections, there are differing perspectives on the *Charter's* overall effectiveness at promoting social change and access to justice. Some researchers suggests that access to justice is a way of describing a major goal of the legal system, but that not all *Charter* decisions have met the highest standards of access to justice.<sup>115</sup> This discrepancy may result from a lack of unanimity around the meaning of the term “access to justice”. At the same time, “there is a complex relationship between law and social change. It is not binary: law facilitates and inhibits social change. It is also important to acknowledge the change sometimes happens incrementally.”<sup>116</sup>

An example of the relationship between law and society is the impact the *Charter* had on criminal legal aid. The *Charter* protects citizens by describing the “right to be secure against unreasonable search and seizure, rights upon arrest, protection against arbitrary detention, and the rights of persons charged with an offence.”<sup>117</sup> However, the *Charter* has also had a dramatic impact on criminal legal aid by “driving up costs by making the law more complex and by introducing constitutional bases for legal arguments.”<sup>118</sup> There is also increased pressure placed on the legal system due to rising expectations: Bar societies have raised standards of excellence in advocacy, Bar discipline committees aggressively pursue complaints, disgruntled clients can more easily drop lawyers and replace them, and there are an increasing number of extraordinary high cost legal aid cases.<sup>119</sup>

Essentially, the relationship between law and society represents the difficult balance between “the values of access to justice and substantive equality and the values of efficiency and the market.”<sup>120</sup> Research suggests that there has been a failure to

*develop appropriate delivery mechanisms for access to justice. These shortcomings include: a failure to find acceptable and effective mechanisms for the imposition of employment equity measures on a system-wide basis for most Canadians; a failure to provide adequate resources for effective mechanisms to handle individual discrimination complaints under traditional human rights regimes; and a trend towards privatization and collectivization of processes for resolving individual Charter and human rights complaints.*<sup>121</sup>

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<sup>115</sup> Patricia Hughes, “Defining Access to Justice: The Charter and the Courts (and the Law Commission of Ontario)” (2011) 29:119 National Journal of Constitutional Law.

<sup>116</sup> Mary Jane Mossman, “The Charter and Access to Justice in Canada” in David Schneiderman and Kate Sutherland, eds, *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) at 271.

<sup>117</sup> Department of Justice Canada, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework*, by Albert Currie (Ottawa: Department of Justice, 15 June 2004) 1 at 1.

<sup>118</sup> Ibid

<sup>119</sup> Ibid

<sup>120</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000) 1 at 12.

<sup>121</sup> Ibid

The development of appropriate delivery mechanisms requires

*nothing less than a recommitment to the values of access to justice for the protection of diversity interests and a search for new resources and public mechanisms for delivery that will allow us to close the gap between promise and experience. But we must be careful in considering alternative delivery mechanisms to focus more on their effectiveness in protecting diversity interests than their efficiency in clearing caseloads.<sup>122</sup>*

How does one establish an operational definition in this climate? It was suggested by Patricia Hughes at the Law Commission of Ontario (LCO), that the legal system and society approach access to justice and the *Charter* in the following way:

*Even though “access to justice” has not been given the imprimatur bestowed on “human dignity” by the Supreme Court of Canada, it does not prevent our assessing the development of “access to justice” through the way the courts enforce the Charter rights and freedoms that represent “access to justice”... The question, put somewhat ironically, is whether the LCO (for example) should conform to the Charter's concept of access to justice, as determined by the courts, recognizing that the constitution is the measure of our society's highest commitment to a value, or whether it should establish its own standard which may be higher than reflected in judicial decisions?*

*My answer is that the LCO, as should any agency, should establish its own standard that must at least meet that developed under the Charter, but that it might make recommendations that appear to go beyond that required by the Charter at any particular time. While Charter decisions are determinative, they do not establish a minimum requirement and, furthermore, they also evolve and the interpretation given the Charter today may be changed in the future. Furthermore, while the LCO's recommendations must be practical and feasible (even if innovative and far-reaching); yet it would be unreasonable to assume that a government would choose to be limited by the interpretation given to access to justice under the Charter if persuaded that it would be appropriate to advance that interpretation.”<sup>123</sup>*

Essentially, jurisdictions should consider the unique needs of citizens and develop access to justice definitions that address observed barriers and challenges. In this way, provinces

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<sup>122</sup> Department of Justice Canada, *Expanding Horizons: Rethinking Access to Justice in Canada* (Ottawa: Department of Justice Canada, 2000) 1 at 12.

<sup>123</sup> Patricia Hughes, “Defining Access to Justice: The Charter and the Courts (and the Law Commission of Ontario)”, (2011) 29:119 *National Journal of Constitutional Law* 1 at 2.



uphold the values of the Charter, but also account for the practical realities of the legal system that residents navigate to resolve disputes.

#### Access to Justice Perspectives at the Provincial Level

Canada is a large and diverse country. The needs of citizens vary across jurisdictions based on the demographics, economic, political, and social conditions in each province. As a result, justice systems have “developed independently in each province and territory as well as federally. Each system tends to operate as if the matters of law with which it deals are discrete and contained.”<sup>124</sup> Researchers suggest that Canada’s “justice systems must be more responsive to the interrelated way that legal problems actually occur in people’s lives.”<sup>125</sup>

Two seminal reports on access to justice entitled *Access to Civil and Family Justice: A Roadmap for Change 2013* and *Reaching Equal Justice* call upon each province and territory to create mechanisms, structures, or institutions to improve access to justice across Canada. The access to justice goals outlined in the former report include the following concepts:

- address everyday legal problems;
- meet legal needs;
- make courts work better; and
- improve family justice.<sup>126</sup>

The latter report, created by the Canadian Bar Association, identified the following access to justice goals:

- ensuring substantive and procedural fairness;
- satisfying disputants’ substantive interests;
- satisfying disputants with the dispute resolution process itself;
- reducing risks related to disputes; and
- reducing harm to disputants and others, including society generally.<sup>127</sup>

Below is a summary of how provinces across Canada have responded to this call, with a focus on how access to justice is defined in each jurisdiction.

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<sup>124</sup> Mary Stratton, “Creating Access to Justice in Nunavut” (2008) LawNow 1 at 1.

<sup>125</sup> Ibid, 1 at 1.

<sup>126</sup> Access to Justice BC, “Access to Justice Measurement Framework”, (n.d.) 1 at 3. available at [https://icclr.law.ubc.ca/wp-content/uploads/2017/10/Access-to-Justice-Measurement-Framework\\_Final\\_2017.pdf](https://icclr.law.ubc.ca/wp-content/uploads/2017/10/Access-to-Justice-Measurement-Framework_Final_2017.pdf)

<sup>127</sup> Ibid

## British Columbia

British Columbia is in the process of defining its vision of the term “access to justice.”<sup>128</sup>

However, current work is based upon the goals outlined in the reports *Access to Civil and Family Justice: A Roadmap for Change* and *Reaching Equal Justice*. For the time being, Access to Justice BC states: “access to justice means enabling people to avoid, manage, and resolve civil and family legal problems and disputes.”<sup>129</sup>

When put into practice, this definition takes an expansive view of family and civil legal systems including access to courts as well as all services, institutions, and organizations that “support people in getting the skills, knowledge, resources and services they need to manage their legal problems.”<sup>130</sup> Essentially, in British Columbia “access to justice includes providing people with the information they need to understand the law or supporting them to resolve their own disputes without having to go to court.”<sup>131</sup>

To evaluate and monitor access to justice in British Columbia, Access to Justice BC adapted the Triple Aim approach that was originally developed in the health sector. It is based on the idea that “action is simultaneously required at different levels and that it is therefore difficult to isolate the respective impact of various initiatives on the overall goal of improved access to justice in British Columbia.”<sup>132</sup> Because of the complex nature of access to justice, the Triple Aim notion sets “high-level indicators of access to justice at the populations and sub-population levels, as well as a flexible measurement framework to monitor and evaluate the impacts of innovative ideas and initiatives to improve various aspects of access to justice.”<sup>133</sup> The resulting framework is based on the following three elements:

- improving population access to justice outcomes (e.g. equality among sub-populations);
- improving user experience (e.g. quality of services users receive); and
- improving costs.<sup>134</sup>

Over time, the province will examine further efforts in other sectors, including public legal education and information, to develop standardized access to justice indicators.

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<sup>128</sup> Access to Justice BC, “Access to Justice Measurement Framework”, (n.d.) 1 at 3. Available at [https://icclr.law.ubc.ca/wp-content/uploads/2017/10/Access-to-Justice-Measurement-Framework\\_Final\\_2017.pdf](https://icclr.law.ubc.ca/wp-content/uploads/2017/10/Access-to-Justice-Measurement-Framework_Final_2017.pdf)

<sup>129</sup> Access to Justice BC, “Find out about A2JBC”, 2019, available at <https://accesstojusticebc.ca/about/what-is-access-to-justice/>

<sup>130</sup> Ibid

<sup>131</sup> Ibid

<sup>132</sup> Access to Justice BC, “Access to Justice Measurement Framework”, (n.d.) 1 at 5. Available at [https://icclr.law.ubc.ca/wp-content/uploads/2017/10/Access-to-Justice-Measurement-Framework\\_Final\\_2017.pdf](https://icclr.law.ubc.ca/wp-content/uploads/2017/10/Access-to-Justice-Measurement-Framework_Final_2017.pdf)

<sup>133</sup> Ibid

<sup>134</sup> Ibid

## Alberta

The Alberta Civil Liberties Research Centre (ACLRC) is a research organization in Alberta that drives access to justice research efforts and promotes respect for civil liberties and human rights throughout the province. The organization defines the term “access to justice” in the following way:

*in its narrowest sense, [access to justice] represents only the formal ability to appear in court. Broadly speaking, it engages the wider social context of our court system, and the systemic barriers faced by different members of the community.*<sup>135</sup>

ACLRC goes on to state that there are five components that support access to justice including 1) the right to appear in court; 2) advocacy for those who cannot afford it; 3) reforming the justice system; 4) equality of outcomes, and 5) monitoring trends that impact the future of access to justice.<sup>136</sup>

## Saskatchewan

The Saskatchewan Access to Justice Working Group (SAJWG) was formed in 2016 as a response to the call to improve access to justice across Canada, as outlined in the report *Access to Civil and Family Justice: A Roadmap for Change 2013*. The mandate is to “identify areas in need of reform, and to provide advice and feedback about initiatives related to improving access to justice on a sustained and ongoing basis across the province.”<sup>137</sup>

SAJWG has identified six guiding principles for change, again based on the abovementioned report. They are as follows:

- put the public first;
- collaborate and coordinate;
- prevent and educate;
- simplify, make coherent, proportional and sustainable;
- take action; and
- focus on outcomes.<sup>138</sup>

In addition, SAJWG has also adapted the Triple Aim notion developed by British Columbia. It utilizes the same framework to monitor and evaluate the impacts of ideas and initiatives to

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<sup>135</sup> Alberta Civil Liberties Research Centre. “What is Access to Justice?”, n.d., available at <http://www.aclrc.com/what-is-access-to-justice>

<sup>136</sup> Ibid

<sup>137</sup> Saskatchewan Access to Justice Working Group, “About the Working Group”, (2016) available at <https://law.usask.ca/research/research-centres-and-initiatives/saskatchewan-access-to-justice-working-group.php#AbouttheWorkingGroup>

<sup>138</sup> Ibid

improve various aspects of access to justice within the province. This framework, combined with the needs or residents of Saskatchewan, help to inform the following six objectives of SAJWG:

- to encourage the coordination of initiatives that make justice more accessible for Saskatchewan residents;
- to learn about the problems of inadequate access to justice;
- to provide leadership and action on improving access to justice;
- to foster engagement, communication, and collaboration with a diverse group of partners;
- to foster a “public first” approach to all justice processes and services; and
- to focus on results and to facilitate consultation, coordination, planning, program design, implementation and monitoring of change within the justice system.<sup>139</sup>

#### Manitoba

In 2017, the Canadian Centre for Policy Alternatives Manitoba Office published a report entitled *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba*. It examines what the concept “access to justice” means to Manitoba’s population. The report states:

*access to justice is achieved through fair processes and fair outcomes. A fair process means a justice system that is transparent, affordable, and as easy to navigate as possible. A fair outcome results from a person having the opportunity to be heard in a meaningful way. A fair outcome includes timely decisions based on the facts and the law.*<sup>140</sup>

The report defines what the term “access to justice” means on a systemic level. Essentially, it provides individuals with a meaningful opportunity to participate in the development and reform of the law and legal processes.<sup>141</sup>

Within the province, there are several key principles that are used to determine whether an individual has access to justice from an information, services, and system perspective. These include the following indicators:

- Availability: whether the necessary information or services exist or not;
- Accessibility: whether a person can access the necessary information, services, or system;

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<sup>139</sup> Saskatchewan Access to Justice Working Group, “About the Working Group”, (2016) available at <https://law.usask.ca/research/research-centres-and-initiatives/saskatchewan-access-to-justice-working-group.php#AbouttheWorkingGroup>

<sup>140</sup> Canadian Centre for Policy Alternatives Manitoba, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba*, by Allison Fenske and Beverly Froese, (Winnipeg: Canadian Centre for Policy Alternatives, November 2017) 1 at 2.

<sup>141</sup> Ibid

- Acceptability: whether the system is set up and information and services are delivered in a way that is needs-based and culturally appropriate; and
- Adequacy: whether the information and services are delivered and a person experiences the system in a way that is meaningful and sufficient.<sup>142</sup>

These principles embody the idea that “people need to be aware of, understand, and access the legal system as well as the supports and services available in navigating that system.”<sup>143</sup>

#### Ontario

The Law Commission of Ontario states that access to justice has been defined as “an equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied.”<sup>144</sup> It is also considered to be an “integral part of the rule of law in constitutional democracies.”<sup>145</sup>

Although these statements describe access to justice in a broad way, they do not provide insight into the content of access to justice. The Law Commission of Ontario states:

*increasing access to justice may mean ensuring physical accessibility to the courthouse, simplifying procedural rules, using plain language in a statute, explaining what the law means on the internet, provision of translation, dispute resolution other than through the courts, legal aid and similar steps to removing barriers of various kinds. A more comprehensive understanding of access to justice goes beyond the legal system to encompass efforts to assess and respond to ways in which law impedes or promotes economic or social justice, for example, recognizing the interrelationship of these systems. In short, access to justice may involve steps to diminish substantive injustice in society at large.<sup>146</sup>*

For instance, when considering family law, access to justice can involve “having sufficient information and assistance to enable family members involved in family disputes to make determinations about whether they want to enter the family legal system and if so, to take subsequent steps through the process.”<sup>147</sup>

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<sup>142</sup> Canadian Centre for Policy Alternatives Manitoba, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba*, by Allison Fenske and Beverly Froese, (Winnipeg: Canadian Centre for Policy Alternatives, November 2017).

<sup>143</sup> Ibid, 1 at 2.

<sup>144</sup> Law Commission of Ontario, “Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity”, February 2013, available at <https://www.lco-cdo.org/en/our-current-projects/family-law-reform/increasing-access-to-family-justice-through-comprehensive-entry-points-and-inclusivity-final-report-february-2013/part-i-section-i-what-we-mean-by-access-to-justice/>

<sup>145</sup> Ibid

<sup>146</sup> Ibid

<sup>147</sup> Ibid

This concept of access to justice links procedural understanding with substantive justice; the legal system is affected by but also affects all other aspects of society, as is seen through the interdisciplinary nature of many legal cases. Thus, the definition of the term “access to justice” is also linked to advancing substantive equality in society.<sup>148</sup>

#### Quebec

On April 5, 2012, the National Assembly passed Bill 29, an Act to establish the Access to Justice Fund. The purpose of the fund is to “support actions that enhance the public’s knowledge and understanding of Quebec law and Quebec’s legal system and help the public to better navigate the system.”<sup>149</sup> The Act defines associated activities under Section 32.0.2:

- knowledge and understanding of the law, particularly legislation applicable in Québec;
- knowledge of Québec’s network of courts of justice and administrative tribunals, and a better understanding of how it works and of legal and administrative proceedings;
- the use of various means of preventing or resolving disputes and of more easily obtaining or enforcing judicial or administrative decisions;
- the drafting and dissemination of legal information in simple and clear language or language adapted to a specific clientele;
- the creation, distribution and use of legal instruments or referral services;
- access to legal services, including services provided free of charge or at a moderate cost by community organizations;
- the optimal use of legal services;
- research on access to the law or the justice system and on the public’s expectations in that regard; and
- the improvement, in any way, of the Québec model of access to justice.<sup>150</sup>

As an example of how access to justice is promoted and championed in the province, The Accessing Law and Justice Research Project (ADAJ) is tasked with examining the relationship between “the citizen and the legal sector in complex societies.”<sup>151</sup> It describes this relationship as “one of the major challenges confronting contemporary democracy.”<sup>152</sup>

In this context, access to justice challenges manifest themselves in the following ways:

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<sup>148</sup> Law Commission of Ontario, “Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity”, February 2013, available at <https://www.lco-cdo.org/en/our-current-projects/family-law-reform/increasing-access-to-family-justice-through-comprehensive-entry-points-and-inclusivity-final-report-february-2013/part-i-section-i-what-we-mean-by-access-to-justice/>

<sup>149</sup> National Assembly, *An Act to Establish Access to Justice*, n.d., available at <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2012C3A.PDF>

<sup>150</sup> Ibid, 1 at 3.

<sup>151</sup> Accessing Law and Justice, “Introducing the Project”, 2019, available at <http://adaj.ca/home#description>

<sup>152</sup> Ibid

- disaffection with the courts;
- increasing numbers of citizens who represent themselves before the courts;
- lack of understanding of legal language;
- litigant’s distrust of the practitioners;
- circumvention of the judicial institutions through developing private settlement procedures;
- isolation of crime victims; and
- mutual ignorance between the justice world and the media world.<sup>153</sup>

Together, these challenges create a divide between the citizen and the legal system, between the “promises of equality conveyed by the democratic ideal and the concrete conditions for the citizens’ legal equality.”<sup>154</sup>

ADAJ focuses on three areas to facilitate investigation into access to justice issues and facilitate cooperation between universities, research teams, and legal sector actors. These areas include the following:

- knowledge and awareness of law as being elements of citizenship;
- adapting professional practices and institutional constraints in the field of justice to the actual state of social relationships; and
- the public and political legitimacy of contemporary legal and judicial institutions.<sup>155</sup>

It is the hope of ADAJ that the practices developed through an interdisciplinary approach to law research will be experimented with in other provinces and other countries to be transposed in other legal systems.

#### Atlantic Canada

Across Atlantic Canada, citizens encounter common barriers when attempting to access legal services or the justice system. They include poverty, disempowerment, racism, discrimination, cultural bias, mental health issues, little access to legal education, bureaucracy, and improper media coverage of justice issues.<sup>156</sup> Many of these challenges mirror findings outlined in the seminal access to justice report entitled the *Access to Civil & Family Justice Roadmap for Change*.

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<sup>153</sup> Accessing Law and Justice, “Introducing the Project”, 2019, available at <http://adaj.ca/home#description>

<sup>154</sup> Ibid

<sup>155</sup> Ibid

<sup>156</sup> Nova Scotia Barristers’ Society, #TalkJustice, 2015, available at [https://nsbs.org/sites/default/files/ftp/2015\\_05-19\\_TalkJusticeReport\\_final\\_web.pdf](https://nsbs.org/sites/default/files/ftp/2015_05-19_TalkJusticeReport_final_web.pdf)

The Access to Family Justice Task Force in New Brunswick reported significant increases in the number of self-represented litigants, an increase in the number of child-protection hearings, and the tendency of courts to intensify procedural requirements.<sup>157</sup> The result has been reduced services to the public including delays in obtaining a hearing date, numerous adjournments, the inability to provide proportionate resolution to problems, and a failure to update standards at the same rate as other jurisdictions.<sup>158</sup>

In many cases, the “majority of individuals handle their own family law matters because of the unaffordable costs of legal representation and limited legal aid services.”<sup>159</sup> At the same time, “citizens lack the resources to hire a lawyer or access legal services that assist in court cases.”<sup>160</sup> Due to a lack of legal knowledge, self-represented litigants often require additional time in court. Delays in the legal system inadvertently raise legal costs for others who have retained counsel for the purpose of court proceedings.<sup>161</sup>

To address similar concerns in Nova Scotia, the Nova Scotia Barristers’ Society created a mandate to improve access to justice by focusing on two areas: 1) reforming regulations to support the delivery of legal services, and 2) improving the administration of justice by enhancing access to legal services and justice systems for all citizens.<sup>162</sup> This work is a response to the Royal Commission on the Donald Marshall, Jr. Prosecution, which found that “racist and discriminatory attitudes exist within Nova Scotia’s justice system.”<sup>163</sup> It also is linked to Section 4(2)(d)(i) of the *Legal Profession Act*, which outlines the following professional responsibilities:

- uphold and protect the public interest in the practice of law;
- seek to improve the administration of justice in the Province; and
- consult with organizations and communities in the Province having an interest in the Society's purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province.<sup>164</sup>

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<sup>157</sup> Access to Family Justice Task Force, *Report of the Access to Family Justice Task Force*, 2009, available at <http://leg-horizon.gnb.ca/e-repository/monographs/30000000046807/30000000046807.pdf>

<sup>158</sup> Ibid

<sup>159</sup> Deborah Doherty, “Promoting Access to Family Justice by Educating the Self-Representing Litigant”, (2012) University of New Brunswick Law Journal, available at <https://www.thefreelibrary.com/Promoting+access+to+family+justice+by+educating+the+self-representing...-a0302776659>

<sup>160</sup> Ibid

<sup>161</sup> Ibid

<sup>162</sup> Nova Scotia Barristers’ Society, #TalkJustice, 2015, available at [https://nsbs.org/sites/default/files/ftp/2015\\_05-19\\_TalkJusticeReport\\_final\\_web.pdf](https://nsbs.org/sites/default/files/ftp/2015_05-19_TalkJusticeReport_final_web.pdf)

<sup>163</sup> Ibid, 1 at 8.

<sup>164</sup> The University of Saskatchewan College of Law, *Putting the Public First: The Dean’s Forum on Dispute Resolution and Access to Justice*, by Kelsey Corrigan, Lorne Fagan & Sarah Nordin, 2016, available at [https://law.usask.ca/documents/research/deans-forum/12\\_PuttingthePublicFirst\\_PolicyDiscussionPaper\\_2016DeansForum.pdf](https://law.usask.ca/documents/research/deans-forum/12_PuttingthePublicFirst_PolicyDiscussionPaper_2016DeansForum.pdf); TalkJustice;



At the present time, there are not established definitions of the term “access to justice” in the Atlantic provinces. However, a focus on legal aid suggests that access to justice is viewed as access to legal services and courts. For example, the Department of Justice and Public Safety in Prince Edward Island defines legal aid in the following way:

*Prince Edward Island Legal Aid is an access to justice program, providing legal representation and assistance to low income individuals who have serious legal needs in the areas of criminal law, youth criminal justice, or family and civil law.*<sup>165</sup>

To advance access to justice advocacy and initiative in Nova Scotia and Atlantic Canada, the Access to Justice & Law Reform Institute was incorporated in 2018. The mandate of the Institute is to “make recommendations for the improvement, modernization and reform of the law.”<sup>166</sup> It also brings the “voices of Nova Scotians to the center of justice reform through community engagement and the collection of first-hand experiences of those who have navigated the system.”<sup>167</sup>

#### The Territories

Nunavut, the Northwest Territories, and the Yukon face unique challenges related to access to justice issues. First, the communities in these areas bring together Inuit and non-Inuit citizens that require a blend of Inuit traditions with the common law and statutory legal frameworks.<sup>168</sup> At the same time, communities in the three northern territories are remote and geographically isolated. In many cases, individuals are required to work with limited resources, including finances and available staff. Each day, “Inuit and non-Inuit [citizens] work with extraordinary dedication to bring about social and legal justice. Under-resourced, under-compensated, and very over-worked, every day they take on daunting challenges and unthinkable caseloads.”<sup>169</sup>

The northern territories have the “highest rates of violent and sexual offending in Canada coupled with few social and legal resources.”<sup>170</sup> The Law Society of Yukon identified four areas of concern regarding the causes for criminality and aboriginal overrepresentation in the criminal justice system. They include the following:

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<sup>165</sup> Government of Prince Edward Island, “Legal Aid”, 2019, available at <https://www.princeedwardisland.ca/en/information/justice-and-public-safety/legal-aid>

<sup>166</sup> Access to Justice & Law Reform Institute of Nova Scotia, “Justice & Law Reform Since 1991”, n.d., available at <https://www.lawreform.ns.ca/>

<sup>167</sup> Ibid

<sup>168</sup> LawNow, *Creating Access to Justice in Nunavut*, by Mary Stratton, 2009, available at <https://www.cfcj-fcjc.org/sites/default/files/docs/2009/stratton-access-in-nunavut-en.pdf>

<sup>169</sup> Ibid, 1 at 3.

<sup>170</sup> Law Society of Yukon, “Access to Justice in Remote Communities”, 2015, available at <https://www.lawsocietyyukon.com/accesstojustice.php>

- lack of social resources: insufficient resources to address underlying causes of criminality including residential school trauma, poverty, addictions, and mental health treatment;
- lack of legal resources: legal services are offered from major centers, the legal aid system is overburdened with volumes of cases, and legal practitioners are overwhelmed;
- lack of alternative measures and restorative justice programs: there is a lack of specialized skills required to develop programs and build partnerships with community members; and
- lack of gladue information before the courts: defense and the judiciary share the responsibility for ensuring that information regarding aboriginal heritage is presented before the court, but there is often a failure to complete this requirement.<sup>171</sup>

To address the abovementioned issues, law societies and provincial governments have defined access to justice in several ways. The values at the core of these definitions reflect Inuit rights to participate in and co-develop social practices, equality, reconciliation, and peaceful resolutions to disputes. For example, the Nunavut Department of Justice created a vision statement for access to justice that states:

*to serve the public by promoting and protecting a peaceful society and by adhering to the principles of Inuit Qaujimajatuqangit. To build public confidence in the justice system by respecting the role of community members in maintaining harmony. To promote the rule of law by providing a full range of legal services to the Government of Nunavut and designated boards and agencies, and access to justice for Nunavummiut.*<sup>172</sup>

This statement provides a social context of contemporary Nunavut and achieves a vision for justice that accounts for western and traditional Inuit concepts of what *justice* means in practice.<sup>173</sup>

Other organizations, such as the Law Society of the Northwest Territories, have adopted the definition of “access to justice” created by the Canadian Forum on Civil Justice. Under this framework, access to justice includes the following criteria:

- fairness, equality, morality and active social participation;
- an acknowledgement that not everyone has equal access to justice;
- citizens often feel alienated by the legal and justice systems;
- all citizens should have a right to justice;

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<sup>171</sup> Law Society of Yukon, “Access to Justice in Remote Communities”, 2015, available at <https://www.lawsocietyyukon.com/accesstojustice.php>

<sup>172</sup> LawNow, *Creating Access to Justice in Nunavut*, by Mary Stratton, 2009, available at <https://www.cfcj-fcjc.org/sites/default/files/docs/2009/stratton-access-in-nunavut-en.pdf>, 1 at 2

<sup>173</sup> Ibid

- justice is a fundamental issue;
- justice should be made simpler, cheaper, and faster;
- education, prevention and understanding are tenants of access to justice; and
- costs of not making justice accessible must be considered.<sup>174</sup>

The above definition provides a framework for service provision in criminal, civil, and family courts. In this way, the northern territories are working towards the reconciliation of different worldviews and the creation of a justice system that combines Inuit culture and tradition with western concepts of justice.

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<sup>174</sup> Law Society of the Northwest Territories, “Access to Justice”, n.d., available at <https://www.lawsociety.nt.ca/lawyers/access-justice>; Canadian Forum on Civil Justice, “What is A2J?”, 2018, available at <http://cfcj-fcjc.org/infographics/what-is-a2j/>

## Access to Justice and Collaborative Governance

Governance, a collective action to provide public goods and implement rules, is no longer the exclusive responsibility of governments. Today, it involves a network of actors in the private sector, civil society, research community, and multiple levels of government.<sup>175</sup> Collaborations between various stakeholders in society play a key role in achieving sustainable development goals, access to justice objectives, and developing solutions to complex social and economic problems, such as poverty, discrimination, or marginalization.

Collaborative governance has become a common term in the research and public administration communities. However, much like the term “access to justice”, there is not a universal definition that describes what collaborative governance entails or how partnerships between stakeholders should function.

Researchers approach definitions of “collaborative governance” from different perspectives. For instance, O’Leary, Bingham, and Gerard state that governance is the “means to steer the process that influences decisions and actions within the private, public, and civic sectors.”<sup>176</sup> Ansell and Gash state that it is “a governing arrangement where one or more public agencies directly engage non-state stakeholder in a collective decision-making-process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets.”<sup>177</sup> Under their definition, six core components for collaborative governance exist, including the following:

- the collaborative governance forum is initiated by public agencies or institutions;
- participants in the governance forum include non-government actors;
- participants engage directly in the decision-making process, not just consulted;
- the governance forum is formally organized and meets collectively;
- the governance forum aims to make decisions by consensus; and
- the focus of collaboration is on public policy or public management.<sup>178</sup>

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<sup>175</sup> Ann Florini & Markus Pauli, “Collaborative Governance for the Sustainable Development Goals” (2018) 5:3 *Asia & the Pacific Policy Studies* at 583.

<sup>176</sup> Rosemary O’Leary, Lisa Blomgren Bingham & Catherine Gerard, “Special Issue on Collaborative Public Management” (2006) 66:1 *Public Administration Review* 6 at 7.

<sup>177</sup> Chris Ansell & Alison Gash, “Collaborative Governance in Theory and Practice” (2008) 18:4 *Journal of Public Administration Research and Theory* 543 at 544.

<sup>178</sup> Canadian Regional Development, *A Primer on Collaborative Multi-Level Governance, 2011*, by Ryan Gibson, 1 at 5.

Together, these components result in *collaborative dynamics*, which is a demonstration of principled engagement, capacity for joint action, and shared motivation.<sup>179</sup> The outcome of this dynamic is *collaborative action*, which is defined as “the steps taken in order to implement the shared purpose of collaborative governance.”<sup>180</sup>

Emerson, Nabatchi, and Balogh (2012) take a broad approach and state that collaborative governance is “the process and structures of public policy decision making and management that engage people constructively across the boundaries of public agencies, levels of government, and/or the public, private and civic spheres in order to carry out a public purpose that could not otherwise be accomplished.”<sup>181</sup> This definition encompasses the idea of multi-partner governance, which includes partnerships among the state, the private sector, civil society, and the community, as well as joined-up government and hybrid arrangements such as public-private and private-social partnerships and co-management regimes.<sup>182</sup>

Defining “collaborative governance” is the starting point for work between diverse stakeholders. Research suggests that there are four elements required to establish a workable definition of “collaborative governance”, each one expanding or contracting depending on the scope and needs of the community. They include the following elements:

- *Who collaborates?* Includes public agencies, non-state actors, research organizations, citizens, and the legal community;
- *Who sponsors collaboration?* This concept relates to the stakeholder that ultimately initiates and sponsors collaborations. In regard to policy-making, the sponsor is often an organization, institution, or government department. However, when considering community-mobilization, non-state groups may take the lead and initiate collaborations;
- *What does collaboration mean?* The purpose of this stage is to distinguish collaboration from consultation. For instance, speaking to the public about their views does not make for a collaboration. Involving the public and providing them with a concrete decision-making role brings them into a collaborative governance initiative as a stakeholder; and
- *How is collaboration organized?* Collaborations rest on decision-making processes that are formal, consensus-oriented, and deliberate. The framework for the governance initiative

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<sup>179</sup> Kirk Emerson, Tina Nabatchi & Stephen Balogh, “An Integrative Framework for Collaborative Governance” (2011) 22:1 *Journal of Public Administration Research and Theory* 1 at 1

<sup>180</sup> *Ibid*, 1 at 6

<sup>181</sup> *Ibid*, 1 at 2

<sup>182</sup> Arun Agrawl & Maria Carmen Lemos, “A Greener Revolution in the Making? Environmental Governance in the 21<sup>st</sup> Century” (2007) 49:5 *Environment* 1 at 36

or strategy should define how this process will function among stakeholders from diverse backgrounds and agencies.<sup>183</sup>

Basing a definition of “collaborative governance” on the abovementioned elements supports regulatory negotiation processes and helps stakeholders achieve agreements in complex disputes and produces higher levels of satisfaction and learning about the situation under investigation.<sup>184</sup>

### Drivers and Challenges that Impact Collaborative Governance Frameworks

Collaboration can take a variety of forms but typically rest on cooperation and communication between individual participants in order to advance “genuine and mutually respectful dialogue and understanding conducive to an equitable reconciliation of differences.”<sup>185</sup> However, ideal collaborations are difficult to create; when formal governance mechanisms are in play, “collaborative mechanisms of representation risk functioning as corporate mechanisms, coopting less powerful participants.”<sup>186</sup> Asymmetries among stakeholders and agencies can work against empowerment and diminish the participation or influence of marginalized actors.<sup>187</sup>

When collaborative governance initiatives are properly designed, they can recognize the threat of marginalizing vulnerable stakeholders and work to promote shared decision-making situations.<sup>188</sup> Researchers have identified a number of drivers and challenges that create conditions at the “outset of collaboration that can either facilitate or discourage cooperation among stakeholders and between agencies and stakeholders.”<sup>189</sup>

In order to establish successful collaborations that sustain initiatives from start to finish, the following drivers must be present:

- *Leadership*: A project leader who is in the position to initiate and secure resources and support for the collaborative governance initiative;
- *Consequential incentives*: the internal or external drivers for collaborative action, including resources, interests, opportunities, and identification of threats; and

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<sup>183</sup> Chris Ansell, “Collaborative Governance” in David Levi-Faur, ed., *Oxford Handbooks Online* (Oxford, UK: Oxford University Press, 2018) 2 at 15.

<sup>184</sup> *Ibid*

<sup>185</sup> George Stetson & Stephen Mumme, “Sustainable Development in Bering Strait: Indigenous Values and the Challenge of Collaborative Governance” (2014) 29:7 *Society & Natural Resources* 791 at 798.

<sup>186</sup> *Ibid*, 791 at 798.

<sup>187</sup> *Ibid*

<sup>188</sup> *Ibid*

<sup>189</sup> Chris Ansell & Alison Gash, “Collaborative Governance in Theory and Practice” (2008) 18:4 *Journal of Public Administration Research and Theory* 543 at 550.

- *Interdependence*: the acknowledgement that individuals or organizations are unable to accomplish a goal on their own, which results in the need for collaborative action and partnerships.<sup>190</sup>

When functioning together, driver such as those listed above, promote the goal of bringing different groups together to facilitate dialogue, communication, and conflict resolution.<sup>191</sup> These are essential to cooperation between public agencies in order to increase the efficiency and effectiveness of public management.

Listing the elements that drive collaborative governance frameworks is essential, but just as important is the identification of obstacles that may threaten successful outcomes or the achievement of collective goals. For instance, Booher states that there are four key challenges facing collaborative governance frameworks.<sup>192</sup> They include the following elements:

- *Pluralism*: The idea that the public is not informed enough or engaged enough to be active in public policy. The public belief is that new governance lacks authority and legitimacy because it operates outside of the traditional framework of accountability that people are familiar with;
- *Activism*: The idea that collaborative partnerships are at odds with activism. The public may believe that collaborative governance imposes constraints on engagement and ties the hands of activists;
- *Institutional Challenges*: Stakeholders come from environments with different politics, bureaucratic styles, and hierarchies. It can be difficult to bring a variety of stakeholders together under one initiative or system; and
- *Transaction Challenges*: Stakeholder must recognize and be willing to contribute resources that fuel collaborative governance such as time, finances, and support.<sup>193</sup>

By working to overcome the abovementioned challenges, collaborative governance can promote democratic engagement with citizens and rejuvenate trust in a government and legal system that promotes and supports public participation and citizen input into policy outcomes.

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<sup>190</sup> Kirk Emerson, Tina Nabatchi & Stephen Bologh, “An Integrative Framework for Collaborative Governance” (2011) 22:1 *Journal of Public Administration Research and Theory* 1 at 9

<sup>191</sup> Chris Ansell, “Collaborative Governance” in David Levi-Faur, ed., *Oxford Handbooks Online* (Oxford, UK: Oxford University Press, 2018).

<sup>192</sup> D. Booher, “Collaborative Governance Practices and Democracy” (2004) 93:4 *National Civic Review*.

<sup>193</sup> Canadian Regional Development, *A Primer on Collaborative Multi-Level Governance, 2011*, by Ryan Gibson, 1 at 7.

## Stakeholders and Collaborative Effectiveness

Access to justice challenges typically involve complex layers of social, economic, and political challenges. Overcoming these challenges requires the perspective and feedback from multiple actors in society. Policy scholars state that collaborative effectiveness depends on agencies' ability to

*draw upon different forms of knowledge, both community-centered relational knowledge based on an inclusive, socially aware, and context-sensitive approach to problem assessment, as well as scientific and technical policy assessments, and on an informed understanding of [stakeholder] governance, including the spatial and temporal circumstances shaping [stakeholder] engagement in collaborative procedures.*<sup>194</sup>

Bridging the gap between stakeholders and marginalized communities is no easy task, particularly because of the “absence of social mechanisms that incentivize dialogue and mutual comprehension across the knowledge divide.”<sup>195</sup> This divide is even more difficult to close when “fundamental questions of identity, power, and sovereignty are at stake, amplifying the potential for misunderstanding and conflict.”<sup>196</sup>

Brugnach et al. stated that policy actors bring different frames of reference to the collaborative process that are shaped by unique backgrounds, experiences, social positions, values, and beliefs, to name a few.<sup>197</sup> In this framework, impartial boundary agents are required to serve as bridges between stakeholders in order to promote collaborative success. Their presence can promote the dissemination of essential information and promote intersubjective understanding.

The role of border agents points to the importance of examining access to justice challenges in a holistic manner, taking into account human rights challenges including discrimination, poverty, lack of access to health and education, or lack of recognition of lands, territories, and resources.<sup>198</sup> Essentially, collaborative governance in the context of access to justice involves the ability to “seek and obtain remedies for wrongs through institutions of justice, formal or

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<sup>194</sup> George Stetson & Stephen Mumme, “Sustainable Development in Bering Strait: Indigenous Values and the Challenge of Collaborative Governance” (2014) 29:7 *Society & Natural Resources* 791 at 792.

<sup>195</sup> *Ibid*, 791 at 792.

<sup>196</sup> *Ibid*, 791 at 792.

<sup>197</sup> M. Brugnach, M. Craps & A. Dewulf, “Including Indigenous Peoples in Climate Change Mitigation: Addressing Issues of Scale, Knowledge and Power” (2014) 140:1 *Climate Change*.

<sup>198</sup> United Nations General Assembly, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples*, 2013, by Human Rights Council.



informal, in conformity with human rights standards. It is essential for the projection and promotion of all other human rights.”<sup>199</sup>

What is most essential to any collaborative governance initiative, particularly to problem definition, decision making, and policy implementation, is understanding the cognitive frames at play as various actors address complex problems.<sup>200</sup> This process applies to “understanding the problem itself and building the intersubjective social trust undergirding the legitimacy of policy solutions, and generating the social capital needed for effective policy implementation.”<sup>201</sup>

Essentially, collaborative governance and the development of policy knowledge in the context of access to justice is the outcome of a social process; it is a shared and relational product. Knowledge about the needs of the community is embedded in a network of “possible connections and relations among people [that] scale up knowledge from the individual to the group level and directs attention to how relations are organized as a group.”<sup>202</sup> These types of collaborations validate the concerns of vulnerable communities and acknowledge root causes of challenges that contribute to access to justice barriers.

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<sup>199</sup> United Nations General Assembly, Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples, 2013, by Human Rights Council 1 at 3.

<sup>200</sup> George Stetson & Stephen Mumme, “Sustainable Development in Bering Strait: Indigenous Values and the Challenge of Collaborative Governance” (2014) 29:7 Society & Natural Resources.

<sup>201</sup> Ibid, 791 at 800.

<sup>202</sup> Ibid, 791 at 800.

## Access to Justice and Marginalized Communities

Earlier in this literature review, broad definitions and concepts related to access to justice in Canada were reviewed. Research findings suggest that access to justice is evolving towards user-centric models in which the needs of the people being served guide the development of programs and services. In a practical sense, this work is termed “needs-based service delivery” and is guided by the cultural and geographic differences of individuals within a community.<sup>203</sup>

Effective user-centric services take into account that what is considered just for one individual may be unjust for another.<sup>204</sup> As Canadian society is multi-cultural in nature, access to justice programs require the legal system, the government, not-for-profit and community-based organizations to think systemically but act locally.<sup>205</sup>

When working with diverse communities within a jurisdiction, access to justice definitions can initially be informed by rights outlined in the *Charter of Rights and Freedoms*, specifically Sections 7 and 15, which provide the following rights:

- protections of individual freedoms from unreasonable and unjustified actions by the federal or provincial governments;
- guarantee of the right to life, liberty and security;
- equality before and under the law; and
- equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.<sup>206</sup>

Branching off from these rights, access to justice definitions that apply to marginalized or disadvantaged communities must consider the practical aspects of ‘access’ and ‘justice’. In other words, how are the rights outlined in the *Charter of Rights and Freedoms* applied in real-life situations? Roderick A. Macdonald stated:

*in a liberal democracy, true access to justice requires that all people should have an equal right to participate in every institution where law is debated, created, found, organized, administered, interpreted and applied. This means providing equal opportunities for the excluded to gain full access to positions of authority within the legal system. Improving access to legal education, to the judiciary, to*

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<sup>203</sup> Canadian Centre for Policy Alternatives Manitoba, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba*, by Allison Fenske and Beverly Froese, (Winnipeg: Canadian Centre for Policy Alternatives, November 2017).

<sup>204</sup> The Canadian Bar Association, *Equal Justice: Balancing the Scales*, Report of the CBA Access to Justice Committee (2013).

<sup>205</sup> Ibid

<sup>206</sup> *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

*the public service and the police, to Parliament and to various law societies is now seen as the best way of changing the system to overcome the disempowerment, disrespect and disengagement felt by many citizens.*<sup>207</sup>

As discussed earlier in this literature review, researchers including Macdonald and Farrow state that access to justice involves respect for individuals, feelings of engagement with the justice system, and the confidence that circumstances and needs are accurately captured and considered as decisions are made.<sup>208</sup> However, exclusion is a significant problem for marginalized and disadvantaged communities, and one that places individuals on the fringe of society. In many cases, marginalized individuals face legal systems and societies that are filled with blind spots related to the complexities of gender, race, religion, ethnicity, nationality, social status, and economic pressures.<sup>209</sup>

In general, there is a lack of sufficient data about the true characteristics and needs of marginalized and disadvantaged communities. Because of this problem, published literature is often full of conflicting information or document assumptions. One example is literature discussing the needs of senior citizens. In previous years, research suggested that most seniors in Canada are financially secure; recent studies suggest that the majority of seniors struggle financially.<sup>210</sup> Conflicting statements such as this demonstrate the necessity of building relationships with the community through consultations, outreach, or programming in order to connect with individuals and document the true challenges and needs that must be overcome to achieve access to justice.

### Promoting Access to Justice by Removing Linguistic Barriers

It takes time to set up consultations in order to understand and document access to justice barriers in a community. Research suggests that there is one strategy that can start the process of removing access to justice barriers while larger initiatives are underway. This is, removing linguistic barriers that set up an “us-them” dichotomy. The language used to define access to justice or discuss challenges that prevent full participation in the legal system sets a tone that promotes the equal right to services and the judicial system.<sup>211</sup> At the same time, language cannot gloss over differences or remove the reality of different needs, capacities, and perspectives. Access to justice definitions must find a balance that promotes inclusion but does

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<sup>207</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005) 1 at 23.

<sup>208</sup> Roderick A Macdonald, *Access to Justice for a New Century: The Way Forward* (Toronto: The Law Society of Upper Canada, 2005); Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 Osgoode Hall Law Journal.

<sup>209</sup> Alberta Civil Liberties Research Centre, “Access to Justice and Canadian Elders”, 2019, available at <http://www.aclrc.com/new-page-30>

<sup>210</sup> Ibid

<sup>211</sup> The Canadian Bar Association, *Equal Justice: Balancing the Scales*, Report of the CBA Access to Justice Committee (2013).

not exclude the diverse circumstances that describe daily life for citizens living in a community or jurisdiction. As the Canadian Bar Association states:

*words are the tools of the justice system's trade, yet finding the right words is not always easy. This is especially true in choosing words to refer to groups of people. We often refer to people involved in the justice system as 'clients' or 'users,' but the Committee has opted to instead employ 'people' whenever feasible to avoid reducing the individual's role in the justice system to a passive category of recipient of services.*<sup>212</sup>

Essentially, it is important “to recognize tension between language that is inclusive and language that reinforces disadvantage.”<sup>213</sup> The Canadian Bar Society uses the phrases “people living in marginalized conditions” or “situations of disadvantage”<sup>214</sup> to discuss circumstances that prevent access to the legal system. It admits that while this terminology does not present a perfect solution, it reflects the intention to “show respect by separating the person, who is always a person, from the social and economic situation in which they live, while recognizing that this situation can and often does have an impact on their justice system experiences.”<sup>215</sup>

Making conscious decisions about how people are addressed sets the tone for relationships between citizens and the legal system. This is particularly important as “vulnerable groups generally have more contact with the law than others.”<sup>216</sup>

### Access to Justice Challenges for Marginalized Communities

Studies have found that approximately 22% of people have 85% of legal problems and that these issues lead to cascading challenges, such as increased use of social assistance, health-related and social problems.<sup>217</sup> Individuals living in marginalized conditions are also less likely to take action to resolve these problems or have the capability to handle problems alone.<sup>218</sup> The compounding of problems not only increases costs for the individual, but also places additional strain on the State in regard to increased demand for social programs, health-related costs, and the like.

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<sup>212</sup> The Canadian Bar Association, *Equal Justice: Balancing the Scales*, Report of the CBA Access to Justice Committee (2013) 1 at 12.

<sup>213</sup> *Ibid*, 1 at 12.

<sup>214</sup> *Ibid*, 1 at 12.

<sup>215</sup> *Ibid*, 1 at 12.

<sup>216</sup> *Ibid*, 1 at 12.

<sup>217</sup> Trevor C.W. Farrow, “What is Access to Justice?” (2014) 51:3 *Osgoode Hall Law Journal*.

<sup>218</sup> Patricia Hughes, “Defining Access to Justice: The Charter and the Courts (and the Law Commission of Ontario)”, (2011) 29:119 *National Journal of Constitutional Law*.

The remaining sections of this literature review discuss a number of marginalized communities in Nova Scotia including Indigenous peoples, African Nova Scotians, homeless individuals, the LGBTQ community, persons with disabilities, seniors, and New Canadians. While their circumstances and challenges are diverse and complex, a number of common themes emerged in the review. In a general sense, people living in situations of disadvantage encounter heightened challenges in the following areas:

- victimization and retraumatization;
- systemic racism, discrimination or stereotypes;
- poverty and the criminalization of poverty;
- heightened encounters with violence and crime, either as a victim, offender, or both;
- instability in individual circumstances such as secure housing, employment, or income; and
- inability to access services (including legal services) due to physical barriers, availability of legal aid, delays, available information, or feelings of personal safety and comfort.

It is recommended that future studies or consultation in Nova Scotia focus on the abovementioned areas, as solutions will address the complex social and economic issues that perpetuate access to justice barriers.

## Indigenous Peoples in Nova Scotia

The effects of colonization and the legacy of residential schools, combined with multi-generational factors such as racism, alienation, violence, addictions, poverty, and limited educational opportunities have resulted in significant access to justice barriers for Indigenous people in Canada. Research suggests that the realities of colonization and assimilation driven policies continue to resonate in the legal system and must be renounced to end the perpetual cycle of injustices within Indigenous communities.<sup>219</sup>

Indigenous Nations have legal orders and laws that are distinct from Western laws.<sup>220</sup> For instance, the legal traditions of many First Nations communities focus on restorative justice, whereas the Canadian justice system is structured around retribution and punishment.<sup>221</sup> Research suggests that the act of decolonization “requires that law be transformed from a tool of oppression and dispossession into a forum where Indigenous peoples’ rights and dispute resolution practices are fully embraced.”<sup>222</sup>

Because of this ideological clash, combined with the history between the government and Indigenous peoples,

*many Aboriginal people have a deep and abiding distrust of Canada’s political and legal systems because of the damage these systems have caused. They often see Canada’s legal system as being an arm of a Canadian governing structure that has been diametrically opposed to their interests...[the] law has been, and continues to be, a significant obstacle to reconciliation.*<sup>223</sup>

Given the history and the current relationship between Indigenous peoples and the Canadian legal system, what steps must be taken to promote access to justice for First Nations?

## Aboriginal Victimization in Canada

Criminal justice studies about Aboriginal representation in the criminal justice system are largely offender focused. Research examines how to make the justice system more relevant for

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<sup>219</sup> Jane L. McMilan, “Living Legal Traditions: Mi’kmaw Justice in Nova Scotia” (2016) 67:187 University of New Brunswick Law Journal.

<sup>220</sup> Canadian Centre for Policy Alternatives Manitoba, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba*, by Allison Fenske and Beverly Froese, (Winnipeg: Canadian Centre for Policy Alternatives, November 2017).

<sup>221</sup> Ibid

<sup>222</sup> Jane L. McMilan, “Living Legal Traditions: Mi’kmaw Justice in Nova Scotia” (2016) 67 University of New Brunswick Law Journal 1 at 2.

<sup>223</sup> Canadian Centre for Policy Alternatives Manitoba, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba*, by Allison Fenske and Beverly Froese, (Winnipeg: Canadian Centre for Policy Alternatives, November 2017) 1 at 26.

Aboriginal offenders, but few discussions examine the issue of access to justice from the perspective of the victim.

Researchers have stated that at an individual level, access to justice means the “availability of measures which avoid traumatization or ‘behavior of justice personnel and institutional culture that exacerbates rather than reduces survivor/victims’ distress.”<sup>224</sup> Traumatization can include circumstances where a victim must face an assailant in court or factors that an Indigenous person faces when moving through the legal system, including racism, sexism, or other forms of discrimination.<sup>225</sup> When individual pressures, such as those mentioned above, are combined with a cultural history of abuse from the legal system, research suggests that access to justice “requires both an individualized and systematized approach to addressing factors which might cause retraumatization.”<sup>226</sup>

Researchers have adopted the concept of “trauma theory” to explain the high rates of Aboriginal victimization. It has been suggested that the “victimization of Aboriginal people has occurred not only to Aboriginal people as individuals but to Aboriginal people as a society, as a result of the colonization process which saw communities losing control over family and culture.”<sup>227</sup> The effects of this victimization are believed to be expressed through social disorders in Aboriginal societies where “alcohol, suicide, abuse, and victims of violence are symptoms of underlying traumatization.”<sup>228</sup>

Victimization among “Aboriginal people in Canada is often regarded as a mirror image of Aboriginal offending.”<sup>229</sup> Numerous studies have identified demographic and social factors that contribute to elevated risks of victimization or offending including youth, living in single-parent family situations, living common-law, high levels of unemployment, and alcohol consumption.<sup>230</sup> The demographic and social characteristics of many Aboriginal communities are in line with the factors that contribute to violence. Thus, the issue of victimization among Aboriginal people is complex, as the perpetrators of violence are often other members of the Aboriginal community, such as spouses, relatives, or friends.

#### Access to Justice for Victims and Survivors

One significant access to justice challenge related to victims and/or survivors is appropriate resource provision. Researchers state that determining resource availability is an important first

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<sup>224</sup> Department of Justice Canada, *Access to Justice for Indigenous Adult Victims of Sexual Assault*, by Patricia Barkaskas and Sarah Hunt (Ottawa: Department of Justice Canada, 2017) 1 at 34.

<sup>225</sup> Ibid

<sup>226</sup> Ibid, 1 at 34.

<sup>227</sup> Department of Justice Canada, *Aboriginal Victimization in Canada: A Summary of the Literature*, by Katie Scrim (Ottawa: Department of Justice Canada, 2017) 1 at 1.

<sup>228</sup> Ibid, 1 at 1.

<sup>229</sup> Ibid, 1 at 1.

<sup>230</sup> Ibid

step, but represents a “basic and crude measure of whether resources are distributed evenly among all victims/survivors.”<sup>231</sup> It is essential to determine whether resources reach victims because research has found that “increased victim support services may be a step towards breaking the cycle of violence.”<sup>232</sup> We must go several steps further and take “detailed measures of resource availability, utility, and other important characteristics of an organization or policy will need to be identified.”<sup>233</sup>

To determine how victims access resources, a number of accessibility measures can be considered including the following:

- average distance traveled by victims to access resources;
- languages in which services are available; and
- immediate access to resources vs. wait lists.<sup>234</sup>

Along with accessibility measures, resource utility metrics can capture the “characteristics of the victims/survivors who are served, which in turn, can be compared to the characteristics of victims/survivors in the population.”<sup>235</sup> For example, a geographic region may have a high concentration of Aboriginal persons, but resources are only serving a small proportion of victims.<sup>236</sup> By identifying patterns in resource use, service providers can develop strategies that promote equitable distribution and use of resources.

Coy et al. provided a number of examples of evidence-based resource distribution. For instance, “documenting the existence of a shelter does not tell us the number of beds available or the services it offers in-house or in the community through outreach programs.”<sup>237</sup> Also, “documenting the availability of a specialized domestic violence police unit does not provide information as to the size of the unit (e.g. whether it is comprised of on full or part-time police officer, ten police officers with support staff, or a number of civilian employees).”<sup>238</sup>

In order to accurately understand what resources and services are available to victims, and whether they meet the expressed needs of the community, the following pieces of evidence may

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<sup>231</sup> Department of Justice Canada, *Documenting the Growth of Resources for Victims/Survivors of Violence*, by Myrna Dawson, (Ottawa: Department of Justice Canada, 2015) 1 at 1.

<sup>232</sup> Department of Justice Canada, *Aboriginal Victimization in Canada: A Summary of the Literature*, by Katie Scrim (Ottawa: Department of Justice Canada, 2017) 1 at 1.

<sup>233</sup> *Ibid*, 1 at 1.

<sup>234</sup> Department of Justice Canada, *Documenting the Growth of Resources for Victims/Survivors of Violence*, by Myrna Dawson, (Ottawa: Department of Justice Canada, 2015) 1 at 1.

<sup>235</sup> *Ibid*, 1 at 1.

<sup>236</sup> *Ibid*, 1 at 1.

<sup>237</sup> *Ibid*, 1 at 1.

<sup>238</sup> *Ibid*, 1 at 1.



be collected:

- capture the availability, accessibility, and utility of resources;
- document the quality of available resources in terms of size, breadth of services, and level of commitment; and
- compare the availability, accessibility, utility, and quality of resources against the population of victims/survivors served.<sup>239</sup>

However, collecting the abovementioned is challenging because beyond the national Victim Services Survey, there are no central databases on legal or community-based resources for victims/survivors. In addition, there is typically an overemphasis on criminal justice services, and many community-based or non-profit resources are ignored. Therefore, “once victim/survivor resources are defined and measures identified, the final task is to determine whether there are any existing data that are reliable and valid and can be built upon. If not, data needs and methods for collecting these data will need to be identified.”<sup>240</sup>

In conclusion, researchers state that if the cycle of violence in Aboriginal communities is to be broken, Aboriginal involvement with the legal system must be documented and understood from the perspective of offenders and victims.<sup>241</sup> Currently, there are significant gaps in the body of literature that discuss the victimization of Aboriginal peoples, and filling these knowledge gaps may lead to new levels of understanding, and ultimately, action towards the correction of these circumstances.<sup>242</sup>

#### Indigenous Peoples in Nova Scotia

The Aboriginal population accounts for approximately 2.7% of the total population of Nova Scotia.<sup>243</sup> According to the Office of Aboriginal Affairs, Government of Nova Scotia, there are 33,845 people of Aboriginal identity in Nova Scotia; of this group, 21,895 are First Nations peoples.<sup>244</sup> Currently, there are 16,245 Status Indians registered to Nova Scotia bands, and 64% of these individuals live on one of the 42 reserves locations in the province.<sup>245</sup> The Mi’kmaq are the predominant Aboriginal group within the province and are considered to be the “founding people of Nova Scotia.”<sup>246</sup>

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<sup>239</sup> Department of Justice Canada, *Documenting the Growth of Resources for Victims/Survivors of Violence*, by Myrna Dawson, (Ottawa: Department of Justice Canada, 2015) 1 at 1.

<sup>240</sup> Ibid, 1 at 1.

<sup>241</sup> Department of Justice Canada, *Aboriginal Victimization in Canada: A Summary of the Literature*, by Katie Scrim (Ottawa: Department of Justice Canada, 2017) 1 at 1.

<sup>242</sup> Ibid

<sup>243</sup> Office of Aboriginal Affairs, “Fact Sheet and Additional Information”, 2011, available at <https://novascotia.ca/abor/aboriginal-people/demographics/>

<sup>244</sup> Ibid

<sup>245</sup> Ibid

<sup>246</sup> Office of Aboriginal Affairs, “Aboriginal People in Nova Scotia”, 2015, available at <https://novascotia.ca/abor/aboriginal-people/>

The First Nation population is significantly younger than the most other communities in Nova Scotia; the Office of Aboriginal Affairs reported that the median age is 25.4 versus 41.6 for the total province.<sup>247</sup> Despite the high number of First Nations youth, it is estimated that only 73% of individuals completed high school. In comparison, 88% of the general population in Nova Scotia graduated from grade 12.<sup>248</sup> In addition to lower educational achievement, Indigenous peoples also face lower employment rates than the general population in Nova Scotia. For instance, the unemployment rates for individuals living on reserves was estimated to be 24.6% versus 9.1% for all Nova Scotians.<sup>249</sup>

The Department of Justice, Government of Nova Scotia stated that there is an over-representation of Indigenous people in the province's jail system and account for 10% of individuals in custody in the province.<sup>250</sup> Former Justice Minister, Diana Whalen, said she believes this is symptomatic of long-standing problems related to racism, poverty, and lack of educational opportunities.<sup>251</sup> El Jones, an educator and activist who works with prisoners, also stated that there is "insufficient supports for people on parole who are attempting to leave the jail system."<sup>252</sup>

To add to these challenges, there are very few Indigenous court officials, lawyers, judges, and jury-members relative to the size of the Indigenous population overall.<sup>253</sup> This level of under-representation in the legal system creates a significance imbalance of power; it has been reported that the act of having an Indigenous lawyer can double the number of "not guilty" pleas at first appearance to 49%.<sup>254</sup>

On February 26, 2019, Nova Scotia's Public Prosecution Service announced a "blueprint to help ensure Indigenous people receive fair treatment when they encounter the justice system."<sup>255</sup> This announcement is a response to the need for cultural competency when reviewing cases involving Indigenous peoples. Josie McKinney, an Indigenous Senior Crown Attorney, stated: "our

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<sup>247</sup> Office of Aboriginal Affairs, "Fact Sheet and Additional Information", 2011, available at <https://novascotia.ca/abor/aboriginal-people/demographics/>

<sup>248</sup> Ibid

<sup>249</sup> Ibid

<sup>250</sup> CBC, *Black, Indigenous Prisoners Over-Represented in Nova Scotia Jails*, by Shaina Luck, available at <https://www.cbc.ca/news/canada/nova-scotia/black-indigenous-prisoners-nova-scotia-jails-1.3591535>

<sup>251</sup> Ibid

<sup>252</sup> Ibid

<sup>253</sup> Canadian Centre for Policy Alternatives Manitoba, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba*, by Allison Fenske and Beverly Froese, (Winnipeg: Canadian Centre for Policy Alternatives, November 2017).

<sup>254</sup> Canadian Centre for Policy Alternatives Manitoba, *Justice Starts Here: A One-Stop Shop Approach for Achieving Greater Justice in Manitoba*, by Allison Fenske and Beverly Froese, (Winnipeg: Canadian Centre for Policy Alternatives, November 2017).

<sup>255</sup> CBC, *N.S. Prosecutors Introduce Policy for Fair Treatment of Indigenous People in Courts*, by Blair Rhodes, 26 February 2019, available at <https://www.cbc.ca/news/canada/nova-scotia/indigenous-court-policy-nova-scotia-1.5033869>

Supreme Court of Canada has made it clear, Parliament has made it clear in the Criminal Code that Indigenous people are unique in this country, and equality and fairness doesn't always mean treating everyone exactly the same."<sup>256</sup>

Nova Scotia is the fourth province to implement such a policy and it reflects the need for "special treatment of Indigenous persons in the criminal justice system due to their history of deprivation and dislocation that had occurred with the resulting impact upon the economic situation and increased criminality."<sup>257</sup>

#### Defining Access to Justice for Indigenous Persons

The Truth and Reconciliation Commission of Canada stated: "Access to justice, most fundamentally, means that law ceases to be a tool for the dispossession and dismantling of Indigenous peoples."<sup>258</sup> Researchers have gone on to suggest that access to justice must cover Indigenous peoples' sovereignty, which includes shaping justice mechanism and redefining justice so that it aligns with Indigenous worldviews and contemporary realities.<sup>259</sup>

Within this context, access to justice is a "collectively held Indigenous right that should be defined by Indigenous people themselves, supported and enacted through Canadian law."<sup>260</sup> The Truth and Reconciliation Commission of Canada stated: "until Canadian law becomes and instrument supporting Aboriginal peoples' empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force"<sup>261</sup>

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<sup>256</sup> CBC, *N.S. Prosecutors Introduce Policy for Fair Treatment of Indigenous People in Courts*, by Blair Rhodes, 26 February 2019, available at <https://www.cbc.ca/news/canada/nova-scotia/indigenous-court-policy-nova-scotia-1.5033869>

<sup>257</sup> Ibid

<sup>258</sup> Department of Justice Canada, *Access to Justice for Indigenous Adult Victims of Sexual Assault*, by Patricia Barkaskas and Sarah Hunt (Ottawa: Department of Justice Canada, 2017) 1 at 34.

<sup>259</sup> Ibid, 1 at 34.

<sup>260</sup> Ibid, 1 at 1.

<sup>261</sup> Department of Justice Canada, *Aboriginal Victimization in Canada: A Summary of the Literature*, by Katie Scrim (Ottawa: Department of Justice Canada, 2017) 1 at 1.

## African Nova Scotians

People of African descent have lived in Canada since the time of the transatlantic settlement. The earliest arrivals were enslaved Africans from the United States of America and the West Indies. Between the mid 1700s to the mid 1800s, most Black individuals migrating to Canada were fleeing slavery in the United States.<sup>262</sup> After slavery was abolished in 1834, African Canadian had to deal with de facto segregation in housing, schooling and employment, and exclusion from public places.<sup>263</sup>

Today, African Canadians continue to account for a significant percentage of visible minority groups. According to the 2011 census, the African Canadian population across the country was 945,665, or 2.9% of the total Canadian population. This community also accounted for 15% of the visible minority population in the country.<sup>264</sup>

Despite the diverse origins and cultural roots of African Canadians, many face a similar set of challenges. Opinion surveys and human-rights commissions report that “racism survives and that black [individuals] still face discrimination in employment, accommodation and public services.”<sup>265</sup>

## The Access to Justice Landscape in Nova Scotia

The African Nova Scotian community has resided in and helped develop the province for over three hundred years. The community has unique cultural and community traditions tied to land bases throughout the province. Many individuals in the community have ancestral roots in the Caribbean, United States and African countries.

Today, there are 20,790 African Nova Scotians residing in the province; 80.7% of these individuals were born in Nova Scotia. The community makes up the largest racially visible group in the province.<sup>266</sup>

Despite their roots in the province, the African Nova Scotian community has faced significant challenges related to racism and discrimination. One of the most notable examples is the community’s expulsion from Africville, a community north of Halifax that was destroyed in the 1960s due to industrial development.<sup>267</sup> The “denial of services, environmental racism and

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<sup>262</sup> United Nations General Assembly, *Report of the Working Group of Experts on People of African Descent on its Mission to Canada*, 16 August 2017, available at [https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a\\_hrc\\_27\\_68\\_eng.doc](https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a_hrc_27_68_eng.doc)

<sup>263</sup> Ibid

<sup>264</sup> Ibid

<sup>265</sup> Walker, James W. St.G., “Black Canadians” (14 May 2015) *The Canadian Encyclopedia* 1 at 1.

<sup>266</sup> Ibid

<sup>267</sup> United Nations General Assembly, *Report of the Working Group of Experts on People of African Descent on its Mission to Canada*, 16 August 2017, available at [https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a\\_hrc\\_27\\_68\\_eng.doc](https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a_hrc_27_68_eng.doc)

targeted pollution of the community and other deplorable tactics employed by the authorities to displace the residents of Africville is a dark period in Nova Scotian history.”<sup>268</sup> In 2010, the city of Halifax issued an apology to the community and \$3 million was allocated to build a museum on the former Africville site.<sup>269</sup>

#### Access to Justice for African Nova Scotians

The Nova Scotia Human Rights Commission states: “African Nova Scotians have the right to move and live freely in this province without being subject to racial profiling on the street or in stores or other places.”<sup>270</sup>

Statistics from Nova Scotia's Justice Department show that African Nova Scotian and Aboriginal individuals make up between 7 - 16% of prison inmates, despite the fact that these groups only account for approximately 4% of the population.<sup>271</sup> Robert S. Wright, a forensic social worker in Halifax stated: “from street checks and traffic stops to incarceration in provincial or federal institutions, African Nova Scotians are statistically over-represented in the judicial system.”<sup>272</sup> While these statistics are troubling and point towards racism and discrimination in the system, Wright also states that African Nova Scotians encounter “differential treatment...when encountering the judicial system, including harsher sentences high security incarceration, less access to programming, and longer periods of custody before community release.”<sup>273</sup>

A recent case in the province highlighted the racism and discrimination that is targeted towards the African Nova Scotian community in the province. A public inquiry launched against the Nova Scotia Home for Colored Children in 2015 captured public attention and highlighted the legacy of systemic racism that exists in Nova Scotia. A report published during the inquiry stated that the issue transcended events at the orphanage; it provided an “understanding and addressing historic and ongoing impacts of the systemic racism on African Nova Scotians, while necessarily rooted in both past and present experiences, is a critical lens necessary to create meaningful change for the future.”<sup>274</sup>

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<sup>268</sup> Ibid, 1 at 4.

<sup>269</sup> United Nations General Assembly, *Report of the Working Group of Experts on People of African Descent on its Mission to Canada*, 16 August 2017, available at [https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a\\_hrc\\_27\\_68\\_eng.doc](https://www.ohchr.org/en/hrbodies/hrc/regularsessions/.../a_hrc_27_68_eng.doc)

<sup>270</sup> Nova Scotia Human Rights Commission, *Working Together to Better Serve All Nova Scotians*, 2013, 1 at 2, available at <https://humanrights.novascotia.ca/sites/default/files/crp-report.pdf>

<sup>271</sup> CBC, *Cultural Assessments Alone will not Improve Nova Scotia Justice, Says Social Worker*, by Moira Donovan (Halifax: CBC News, 26 May 2016), available at <https://www.cbc.ca/news/canada/nova-scotia/cultural-assessments-social-worker-1.3601904>

<sup>272</sup> Ibid

<sup>273</sup> Jennifer Stairs, *Judges Look to Broaden their Perspective by Engaging African Nova Scotian Community Leaders*, 2018, available at [http://courts.ns.ca/documents/ANSEngagementNewsRelease\\_06\\_08\\_18.pdf](http://courts.ns.ca/documents/ANSEngagementNewsRelease_06_08_18.pdf)

<sup>274</sup> Council of Parties of the Nova Scotia Home for Colored Children Restorative Inquiry, *Council of Parties Second Public Report: Nova Scotia Home for Colored Children Restorative Inquiry*, (Halifax: Province of Nova Scotia, 2018) 1 at 6.

The inquiry was a national landmark because it was the first restorative justice initiative; the “framework takes a unique collaborative approach that will help rebuild relationships between African Nova Scotians, government, public agencies and the community.”<sup>275</sup> Deputy Premier Diana Whalen stated: “It’s never been done before... This is not a traditional inquiry where there are lawyers and it becomes very much a part of the legal system. This is about rebuilding relationships and using a restorative approach.”<sup>276</sup> The framework involved meetings with former residents, black youth, community organizations and health care providers. As well, the inquiry held sharing circles where former residents of the orphanage discussed experiences with caregivers, the justice system, the community, and the education system.

The report described the complexities of responding to institutionalized abuse and racism in the following way:

*understanding the legacy of the Home requires more than simply knowing what happened to former residents under the Home’s care. It requires examining the context in which the Home operated and the ways that people with various levels of connection, authority and responsibility did (and did not) respond to reported abuse. This includes responses within community and within public agencies such as the education, child welfare and justice systems. It also includes examining how former residents’ needs and concerns were addressed both as children in case and as adults coming forward to seek justice.*<sup>277</sup>

The Restorative Inquiry approach was utilized in order to understand the central issues and identify shared common threads.<sup>278</sup> Themes that emerged during the sharing circles included feelings of helplessness and isolation, systemic neglect, stigma and silence, no preparation for adult life, and a desire to make a difference.<sup>279</sup> The identification of the abovementioned variables will assist with an understanding of how systems respond to the needs of vulnerable and marginalized citizens, while also understanding and addressing how race and racism influence those responses.

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<sup>275</sup> HuffPost, *Systemic Racism Plaguing Nova Scotia: Report*, by Aly Thomson, 2017, available at [https://www.huffingtonpost.ca/2017/02/09/racism-nova-scotia\\_n\\_14661566.html](https://www.huffingtonpost.ca/2017/02/09/racism-nova-scotia_n_14661566.html)

<sup>276</sup> Ibid

<sup>277</sup> Council of Parties of the Nova Scotia Home for Colored Children Restorative Inquiry, *Council of Parties Second Public Report: Nova Scotia Home for Colored Children Restorative Inquiry*, (Halifax: Province of Nova Scotia, 2018) 1 at 4.

<sup>278</sup> Ibid, 1 at 7.

<sup>279</sup> Ibid, 1 at 10

## Homelessness and Poverty

Researchers have identified a wide number of vulnerabilities that can result in homelessness including low levels of education, unemployment, lack of support from social networks, dysfunctional family life and disabilities. The resulting lifestyle is highly unpredictable and transient. As a result, it is difficult to quantify street communities because they are constantly in flux.

Homelessness is a social issue that is indiscriminate and members of the street community are among the most marginalized and vulnerable persons in society.<sup>280</sup> It impacts individuals from all backgrounds and circumstances. There is no demographic profile that defines homeless individuals, as they belong to all ethnicities, generations, sexual orientations and religions. Because of the complex and unique nature of each case, it is difficult to make generalizations about the needs of the homeless community in specific jurisdictions.

The Homeless Hub: Canadian Homeless Research Library at York University developed a definition of homelessness that states:

*homelessness is an extreme form of poverty characterized by the instability of housing and the inadequacy of income, health care supports and social supports. This definition includes people who are absolutely homeless (those living on the streets, sometime referred to as 'rough sleepers'); shelter dwellers (people staying temporarily in emergency shelters or hostels); the hidden homeless (people staying temporarily with friends or family); and others who are described as under housed or at risk of homelessness.*<sup>281</sup>

It is estimated that within the period of one year, 235,000 Canadians experience some form of homelessness.<sup>282</sup> Risk factors include a weak sense of belonging with family and friends, alcohol or drug use, low educational achievement, sexual orientation other than heterosexual, victims of abuse, poor mental health, disabilities, and separation or divorce.<sup>283</sup>

In many cases, the state of homelessness is a “result of policy decisions on the allocation of taxpayer funds, and often underfunded complex patchwork of social safety nets.”<sup>284</sup> Sadly, many

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<sup>280</sup> Alberta Civil Liberties Research Centre, “What does Access to Justice Mean for the Homeless?”, n.d., available at <http://www.aclrc.com/homelessness-and-access-to-justice>

<sup>281</sup> The Homeless Hub, “What is Homelessness?”, 2009, available at <https://homelesshub.ca/resource/what-homelessness>)

<sup>282</sup> Statistics Canada, *Hidden Homelessness in Canada*, by Samantha Rodrigue, Catalogue no. 75-006-X (Ottawa: Statistics Canada, 15 November 2016).

<sup>283</sup> Ibid

<sup>284</sup> Alberta Civil Liberties Research Centre, “What does Access to Justice Mean for the Homeless?”, n.d., available at <http://www.aclrc.com/homelessness-and-access-to-justice>

members of society view the homeless as responsible for their circumstances and unworthy of assistance, which is inaccurate and creates barriers to services.<sup>285</sup> As a result, municipalities focus on treating the effects of homelessness, such as creating bylaws that ban sleeping in public spaces, erecting nighttime shelters, public urination, or panhandling.<sup>286</sup> These actions create situations where the results of homelessness are criminalized but the root causes are not addressed.

#### Homelessness in Nova Scotia

Poverty in Nova Scotia is a complex societal problem that impacts residents spanning all backgrounds, ages, cultures, and level of educational achievement. For some, the experience of living in poverty is brief and for others, it is an ongoing problem that impacts all aspects of life. While there is “no single reason someone experiences poverty, and there is no single solution.”<sup>287</sup> However, there are groups who are at higher risk of poverty and are more likely to experience extended periods of poverty through their lifetime including:

- single parents and their children;
- unattached individuals who have work-limiting health conditions;
- female lone parents are more likely to be low income than male lone parents; and
- unattached individuals who have work-limiting health conditions, are recent immigrants, African Nova Scotians, and Aboriginals, face higher rates of poverty in Nova Scotia.<sup>288</sup>

Across the province, the criminalization of poverty is also a significant challenge facing the homeless community. Examples include “outlawing ‘squeegee kids’, or pan-handling in general, and welfare fraud tip-lines.”<sup>289</sup> As discussed earlier in the literature review, criminalization of poverty in Nova Scotia is a “symptom of a particular view of poverty, one that places blame on individuals, and seeks to isolate the poor ‘safely’ out of public view.”<sup>290</sup> This perspective on poverty sets up an unbalanced relationship of power between the homeless community and the bodies who regulate them. This attitude “must shift if we are to have a successful poverty reduction strategy that gets at the root causes of poverty (and crime, for that matter).”<sup>291</sup>

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<sup>285</sup> Alberta Civil Liberties Research Centre, “What does Access to Justice Mean for the Homeless?”, n.d., available at <http://www.aclrc.com/homelessness-and-access-to-justice>

<sup>286</sup> The Homeless Hub, “What is Homelessness?”, 2009, available at <https://homelesshub.ca/resource/what-homelessness>

<sup>287</sup> Canadian Centre for Policy Alternatives, *The Cost of Poverty in Nova Scotia*, by Angella MacEwen & Christine Saulnier (Halifax: Canadian Centre for Policy Alternatives, October 2010) 1 at 11.

<sup>288</sup> Ibid

<sup>289</sup> Ibid, 1 at 16.

<sup>290</sup> Ibid, 1 at 16.

<sup>291</sup> Canadian Centre for Policy Alternatives, *The Cost of Poverty in Nova Scotia*, by Angella MacEwen & Christine Saulnier (Halifax: Canadian Centre for Policy Alternatives, October 2010) 1 at 16.



During a task force in crime in the Halifax Regional Municipality that occurred in 2008, Don Clairmont stated:

*we've got to have programs in place to provide people with a meaningful way to operate in society. Currently, significantly more government money goes toward policing an incarceration or punishment-related expenses than to crime prevention...social development factors such as affordable housing, jobs, and improved race relations as key factors in any thorough attempt to reduce crime and violence.*<sup>292</sup>

Due to limited resources, mental health or addiction issues, poor literacy, and feelings of hopelessness, legal issues remain unaddressed or take a backseat to more pressing needs, such as locating accommodation or finding food and money.<sup>293</sup> In many cases, when a homeless individual does reach out for legal services, the situation has reached a crisis point and may not be resolved. Examples include evictions, loss of benefits, or court cases that take place the same day.<sup>294</sup>

#### Access to Justice for Homeless Individuals

For homeless individuals, access to justice “encompasses not only the ability to enforce one’s rights, but the need to safeguard basic human dignity.”<sup>295</sup> To successfully increase access to justice for homeless individuals “must engage multiple stakeholders and the various organizations dedicated to serving [the] homeless.”<sup>296</sup>

Homelessness has a “potentially catastrophic effect on civil liberties, including the right to vote, the right to secure government benefits or essential services, the right to security of the person, and the right to participate in the democratic life of the community.”<sup>297</sup> They are also linked to the criminal justice system as “many discharged inmates end up experiencing homelessness and, conversely, many people experiencing homelessness wind up in prison.”<sup>298</sup> Features of legal services that support homeless individuals include the following:

- physical location in areas where homeless individuals are located or visit frequently;

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<sup>292</sup> Canadian Centre for Policy Alternatives, *The Cost of Poverty in Nova Scotia*, by Angella MacEwen & Christine Saulnier (Halifax: Canadian Centre for Policy Alternatives, October 2010) 1 at 17.

<sup>293</sup> Suzie Forell, Emily McCarron & Louis Schetzer, “No Home, No Justice? The Legal Needs of Homeless People” (2005) Law and Justice Foundation of NSW.

<sup>294</sup> Ibid

<sup>295</sup> Alberta Civil Liberties Research Centre, “What does Access to Justice Mean for the Homeless?”, n.d., available at <http://www.aclrc.com/homelessness-and-access-to-justice>

<sup>296</sup> Ibid

<sup>297</sup> The Homeless Hub, “Legal and Justice Issues”, 2018, available at <https://www.homelesshub.ca/about-homelessness/topics/legal-justice-issues>

<sup>298</sup> Ibid

- staff who are empathetic and experienced in communicating with individuals who have special needs or mental health challenges;
- allowing longer appointment times;
- providing plain-language legal information;
- capacity to provide the same lawyer throughout the full legal process;
- capacity to address or coordinate responses to a broad range of legal issues;
- coordinating legal support with non-legal services, such as housing services, alcohol and drug treatment, or caseworker support; and
- empowering homeless individuals to address legal rights.<sup>299</sup>

Overcoming access to justice barriers and addressing the root causes of poverty requires involvement and intervention of all three levels of government. Strategies must move from single problem focused approaches to client focused approaches.<sup>300</sup> In addition, sustainable legal services directed towards the homeless community must be “included and coordinated with other human services, such as housing, health and community services, in both the planning and delivery of services that address homelessness.”<sup>301</sup>

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<sup>299</sup> Suzie Forell, Emily McCarron & Louis Schetzer, “No Home, No Justice? The Legal Needs of Homeless People” (2005) Law and Justice Foundation of NSW.

<sup>300</sup> Ibid

<sup>301</sup> Ibid, 1 at 1.

## LGBTQ Community

While Canadians are increasingly open about their sexuality, it is still difficult to gauge the size of the LGBTQ community across the country. In 2014, the Canadian Community Health Survey was the first Statistics Canada survey to include a question on sexual orientation. At that time, 1.7% of Canadians aged 18 to 59 stated that they consider themselves to be homosexual. Another 1.3% reported that they consider themselves to be bisexual.<sup>302</sup>

In Atlantic Canada, the Halifax Regional Municipality is home to the largest LGBTQ community in the region and hosts many important LGBT initiatives, including one of the largest Pride celebrations in Canada.<sup>303</sup> Advocacy groups, such as the Nova Scotia Rainbow Action Project, address legal and political barriers facing the LGBTQ community and work with the government, institutions, community organizations, and businesses to promote equality and social justice. These organizations promote the core principles of collaborative government and represent the voice of the LGBTQ persons in discussions about issues that impact the community.

## Access to Justice Barriers

Despite the growing awareness of the LGBTQ community, there is still a great amount of “misinformation about queer and trans people perpetuates discrimination and isolation within society generally, and in the legal system in particular.”<sup>304</sup> Stereotypes, discrimination, and homophobia are still barriers that many individuals face, and in many cases, variables such as these result in increased instances of violence against members of the LGBTQ community.

Research demonstrates that the rate of violent victimization among individuals who self-identify as lesbian, gay, bisexual or transgender is significantly higher than among their heterosexual counterparts.<sup>305</sup> Many instances of physical and sexual violence are motivated by ignorance and hatred based on gender expression, sexual orientation, and gender identity.<sup>306</sup> In addition, incidents motivated by a hatred of sexual orientation were more likely to be violent (71%) and were more likely to result in injuries to the victim (44%). Most (82%) of the victims were male and almost half (43%) of all victims were under the age of 25.<sup>307</sup>

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<sup>302</sup> Statistics Canada, *Same-Sex Couples and Sexual Orientation...By the Numbers*, 2015, available at [https://www.statcan.gc.ca/eng/dai/smr08/2015/smr08\\_203\\_2015](https://www.statcan.gc.ca/eng/dai/smr08/2015/smr08_203_2015)

<sup>303</sup> Nova Scotia Rainbow Action Project, *Towards A Home for the LGBT Community in Nova Scotia*, (Halifax: Nova Scotia Rainbow Action Project, 2010).

<sup>304</sup> Ontario Women’s Justice Network, *Queer and Trans Survivors of Violence: Barriers to Justice*, 2015, available at <http://owjn.org/2015/09/queer-and-trans-survivors-of-violence-barriers-to-justice/>

<sup>305</sup> Statistics Canada, *Violent Victimization of Lesbians, Gays and Bisexuals in Canada, 2014*, by Laura Simpson (Ottawa: Statistics Canada, 31 May 2018).

<sup>306</sup> Ontario Women’s Justice Network, *Queer and Trans Survivors of Violence: Barriers to Justice*, 2015, available at <http://owjn.org/2015/09/queer-and-trans-survivors-of-violence-barriers-to-justice/>

<sup>307</sup> Statistics Canada, *Violent Victimization of Lesbians, Gays and Bisexuals in Canada, 2014*, by Laura Simpson (Ottawa: Statistics Canada, 31 May 2018).

Under the Canadian *Criminal Code*, a crime “motivated by bias, prejudice or hate based on race, nationality, ethnic origin, religion, disability, gender, sexuality, or other similar factor is a hate crime.”<sup>308</sup> In 2013, hate crimes motivated by sexual orientation represented 16% of all hate crimes in Canada and of those offenses, approximately 65% were classified as violent.<sup>309</sup> However, marginalization exists even under the *Criminal Code*. For instance, Statistics Canada does not track rates of gender identity related crimes because “gender identity is not a recognized ground for hate motivated offenses in the *Criminal Code*.”<sup>310</sup>

This undercurrent of marginalization is reflected in the relationship between the LGBTQ community and the legal community. For instance, the General Social Survey states that most incidents of victimization are not brought to the attention of the police.<sup>311</sup> Also, results from the 2016 Incident-based Uniform Crime Reporting Survey show that police-reported hate crimes targeting sexual orientation rose 25% from the previous year, accounting for 13% of all hate crimes reported to the police during that year.<sup>312</sup>

Research suggests that individuals who experience homelessness are more likely to experience violent victimization.<sup>313</sup> Poverty and homelessness are socioeconomic factors that impact the LGBTQ community at a higher rate than heterosexual counterparts. For example, bisexual individuals were three times more likely than their heterosexual counterparts to experience living in a shelter, on the street, or in an abandoned building (6% versus 2%).<sup>314</sup>

Finally, LGBTQ individuals are at an equal or higher risk of experiencing domestic violence than their heterosexual counterparts. In 2013, it was reported that 44% of lesbian women, 61% of bisexual women, and 35% of straight women report having experienced rape, physical violence, and/or stalking by an intimate partner in their lifetime.<sup>315</sup> At the same time, “26% of gay men, 37% of bisexual men, and 29% of straight men have reported having experienced rape, violence, and/or stalking by an intimate partner in their lifetime.”<sup>316</sup>

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<sup>308</sup> Ontario Women’s Justice Network, *Queer and Trans Survivors of Violence: Barriers to Justice*, 2015, available at <http://owjn.org/2015/09/queer-and-trans-survivors-of-violence-barriers-to-justice/>

<sup>309</sup> Ibid

<sup>310</sup> Ibid

<sup>311</sup> Statistics Canada, *Violent Victimization of Lesbians, Gays and Bisexuals in Canada, 2014*, by Laura Simpson (Ottawa: Statistics Canada, 31 May 2018).

<sup>312</sup> Ibid

<sup>313</sup> Ibid

<sup>314</sup> Ibid

<sup>315</sup> Jenna Calton, Kris T. Gebhard & Lauren Bennett Cattaneo, “Barriers to Help Seeking for Lesbian, Gay, Bisexual, Transgender, and Queer Survivors of Intimate Partner Violence” (2015) 1:16 *Trauma, Violence & Abuse* 1 at 2.

<sup>316</sup> Jenna Calton, Kris T. Gebhard & Lauren Bennett Cattaneo, “Barriers to Help Seeking for Lesbian, Gay, Bisexual, Transgender, and Queer Survivors of Intimate Partner Violence” (2015) 1:16 *Trauma, Violence & Abuse* 1 at 2.

## Access to Justice for the LGBTQ Community

Stereotypes, negative assumptions and discrimination by stakeholders in the justice system prevent many queer and transgender individuals from reporting sexual violence to the police or from pursuing a case through the court system.<sup>317</sup> In many cases, survivors of violence, particularly sexual violence are revictimized by a system that has been characterized by discriminatory attitudes, practices, and laws.<sup>318</sup>

Research suggests that there is a “systemic prejudice that a survivor is only credible (believable) if the violence on trial matches the stereotype of a straight, cisgender and feminine victim and an aggressive, straight, cisgender and masculine attacker. These stereotypes have led to the invisibility of queer and trans victims.”<sup>319</sup> In addition, many individuals do not report incidences due to concerns about their safety, particularly when the perpetrator lives in the same community.<sup>320</sup> Many LGBTQ survivors lack familial or community support, as well as the financial resources, to relocate to other communities.<sup>321</sup> As a result, many instances of violence directed towards members of the LGBTQ community remain unreported.

Increased instances of violence, victimization, poverty, and discrimination create complex challenges and barriers for queer and transgender individuals. These include the following:

- employment barriers and discrimination;
- discrimination in medical care;
- identity documents that do not match gender, appearance, or identity;
- avoidance of public spaces due to safety concerns or exclusion from communities;
- lack of support and familial homophobia;
- economic marginalization; and
- risk of mental health challenges and suicide.<sup>322</sup>

In addition to the abovementioned variable, there are a number of barriers that relate specifically to the legal system and access to justice. These include the following:

- vulnerability, threats, or public disclosure;
- secondary victimization through victim-blaming;

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<sup>317</sup> Ontario Women’s Justice Network, *Queer and Trans Survivors of Violence: Barriers to Justice*, 2015, available at <http://owjn.org/2015/09/queer-and-trans-survivors-of-violence-barriers-to-justice/>

<sup>318</sup> Ibid

<sup>319</sup> Ibid

<sup>320</sup> Gender Health and Justice Research Unit, *Access to Justice for Lesbian, Gay, Bisexual and Transgender Survivors of Sexual Offences in South Africa*, by Alex Muller & Talia Meer (Cape Town: Gender Health and Justice Research Unit, 2018).

<sup>321</sup> Ibid

<sup>322</sup> TransPulse, *Transgender People in Ontario, Canada: Statistics from the Trans PULSE Project to Inform Human Rights Policy*, by Greta R. Bauer & Ayden I. Scheim (London: University of Western Ontario, 2014).

- experiences of prejudice at points of entry into the justice system;
- perceptions of inefficiency of the justice system;
- cases reach court but are not identified as LGBTQ related;
- non-disclosure of sexual orientation and/or gender identity; and
- cases are not identified as bias-motivated crimes.<sup>323</sup>

Within this context, researchers have defined access to justice for the LGBTQ community as the “development of prevention programs, improving responses of the justice system, and strengthening the capacity of civil society and the state to address and prevent violence” against members of the LGBTQ community.<sup>324</sup>

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<sup>323</sup> Gender Health and Justice Research Unit, *Access to Justice for Lesbian, Gay, Bisexual and Transgender Survivors of Sexual Offences in South Africa*, by Alex Muller & Talia Meer (Cape Town: Gender Health and Justice Research Unit, 2018) 1 at 6.

<sup>324</sup> *Ibid*, 1 at 15.

## Persons with Disabilities

Arriving at an operational definition of the term “access to justice” is a complex task. When this work involves examining barriers presented to Canadians with disabilities, the waters become even more murky. The term “disability” is associated with different concepts. Some only consider physical limitations, while others advocate for the inclusion of cognitive and emotional factors. In order to ensure that access to justice initiative serve community members, it is first essential to arrive at a clear understanding of what the term “disability” means to the community.

The *Canadian Human Rights Act* defines a disability as a “previous or existing mental or physical disability.”<sup>325</sup> At the same time, the Supreme Court of Canada stated:

*disabilities should not be narrowly defined. Courts should not recognize disability on the basis of medical circumstances or functional circumstances alone, and should also take into account a person’s subjective experience with their condition, perceptions by others of their condition and the impact of hurtful stereotypes, and anything that affects that person’s dignity, respect and right to equality.*<sup>326</sup>

A scan of literature discussing access to justice for persons with disabilities indicates that the social model of disability it typically utilized to set parameters for discussions. This model is based on the idea that “disability is the result of the interaction between a person’s functional limitations and barriers in the environment, such as social and physical barriers, that make it harder to function on a daily basis.”<sup>327</sup> Essentially, disability is a “social disadvantage imposed on a person by an unsupportive environment.”<sup>328</sup>

The 2012 Canadian Survey on Disability also adopted the social model of disability. It describes disabilities according to ten categories: seeing, hearing, mobility, flexibility, dexterity, pain-related, learning, developmental, mental health-related, and memory.<sup>329</sup> Other factors that were considered during the survey were the severity of the disability (i.e. mild, moderate, severe, and very severe), the limitations in daily activities, and the length of time limitations were experienced.

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<sup>325</sup> University of Windsor, *Navigating the Justice System: A Guide for Self-Represented Litigants with Disabilities*, by Bilal Ahmed, Joanna Pawlowski & Julie Macfarlane (Windsor: National Self-Represented Litigants Project, October 2017) 1 at 6.

<sup>326</sup> University of Windsor, *Navigating the Justice System: A Guide for Self-Represented Litigants with Disabilities*, by Bilal Ahmed, Joanna Pawlowski & Julie Macfarlane (Windsor: National Self-Represented Litigants Project, October 2017) 1 at 6.

<sup>327</sup> Alberta Civil Liberties Research Centre. “Access to Justice and Persons with Disabilities”, n.d., available at <http://www.aclrc.com/access-to-justice-persons-with-disabilities>

<sup>328</sup> Ibid

<sup>329</sup> Ibid

## Persons with Disabilities in Nova Scotia

In Nova Scotia, there are approximately 144,000 people living with disabilities, a total that accounts for 19% of the population of the province. This is the largest percentage of any other Canadian province.<sup>330</sup>

In terms of economic factors, the income gap between residents with disabilities and those without is significant. In many cases, “persons with disabilities face much higher rates of unemployment than other Canadians, even with the same levels of education.”<sup>331</sup> This is particularly true for persons with disabilities who are also minorities. For instance, “women and Aboriginal Canadians with disabilities currently face the highest levels of unemployment in Canada.”<sup>332</sup>

The Canadian Centre for Policy Alternatives reported that in Nova Scotia, the “median income of people with disabilities was \$18,231 compared to \$25,959 of those Nova Scotians without disabilities.”<sup>333</sup> Some also report a phenomenon called the “disability wall” in the labour market, which is “discrete but interconnected systemic and attitudinal barriers that...delay, discourage or prevent those with disabilities from participating in the labour market to their full potential.”<sup>334</sup>

When considering access to justice for individuals with disabilities, the issue is complex because it involves many compounding problems. For instance, common access barriers include transportation, physical access to buildings, or access to technologies that assist with tasks.<sup>335</sup> There are also attitudinal barriers and systemic challenges that must be overcome, including discrimination, lack of employment opportunities, inflexibility in policies, or fear of losing essential disability support.<sup>336</sup> These barriers prevent individuals from participating in the workplace, communities, or the legal system.

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<sup>330</sup> Government of Nova Scotia, *Access by Design 2030: Achieving an Accessible Nova Scotia* (Halifax: Department of Justice, 2018)

<sup>331</sup> Government of Canada, *Future Directions to Address Disability Issues for the Government of Canada: Working Together for Full Citizenship* (Hull: Human Resources Development of Canada, n.d.) 1 at 3.

<sup>332</sup> *Ibid*

<sup>333</sup> Canadian Centre for Policy Alternatives, *The Cost of Poverty in Nova Scotia*, by Angella MacEwen & Christine Saulnier (Halifax: Canadian Centre for Policy Alternatives, October 2010) 1 at 11.

<sup>334</sup> *Ibid*

<sup>335</sup> Government of Canada, *Future Directions to Address Disability Issues for the Government of Canada: Working Together for Full Citizenship* (Hull: Human Resources Development of Canada, n.d.).

<sup>336</sup> Government of Canada, *Future Directions to Address Disability Issues for the Government of Canada: Working Together for Full Citizenship* (Hull: Human Resources Development of Canada, n.d.).



## Access to Justice for Persons with Disabilities

The definition of access to justice for persons with disabilities is dependent upon “the circumstances of those who are seeking justice.”<sup>337</sup> In a broad sense, access to justice for persons with disabilities has been defined in the following way:

*for persons with disabilities, access to justice means achieving substantive equality. From a broad perspective, substantive equality is rooted in the fundamental principles of respect for human dignity and worth. It means having the opportunity to participate in and live in a society whose structures and organizations include them. More narrowly, access to justice means being able to participate in the justice system, obtaining a fair result when they do, and having their unique circumstances recognize and respected by the justice system. The justice system is not confined to court processes but applies to the entire system by which law and legal systems are designed, implemented, and operated.*<sup>338</sup>

When disabilities are present, appropriate accommodations are meant to address the barriers and challenges that a person with disabilities experiences.<sup>339</sup> Examples can range from the provision of wheelchair ramps to allowing additional time or aid when reviewing information required to make decisions. The Supreme Court of Canada states that “reasonable accommodation for persons with disabilities is a recognition of equal rights: i.e., to access the same processes in society as those without disabilities.”<sup>340</sup>

In terms of access to services, “reasonable accommodation imposes a duty on others to do whatever is reasonably possible to accommodate persons with disabilities in order to facilitate their equal access, including access to the justice system.”<sup>341</sup> At the present time, the following barriers are encountered by persons with disabilities who utilize legal services or the courts:

- attitudinal barriers and discrimination;
- information and communication barriers;
- technological barriers;
- architectural, structural or physical barriers; and
- organizational or system barriers.<sup>342</sup>

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<sup>337</sup> Alberta Civil Liberties Research Centre. “Access to Justice and Persons with Disabilities”, n.d., available at <http://www.aclrc.com/access-to-justice-persons-with-disabilities>

<sup>338</sup> Ibid

<sup>339</sup> University of Windsor, *Navigating the Justice System: A Guide for Self-Represented Litigants with Disabilities*, by Bilal Ahmed, Joanna Pawlowski & Julie Macfarlane (Windsor: National Self-Represented Litigants Project, October 2017).

<sup>340</sup> Ibid, 1 at 7.

<sup>341</sup> University of Windsor, *Navigating the Justice System: A Guide for Self-Represented Litigants with Disabilities*, by Bilal Ahmed, Joanna Pawlowski & Julie Macfarlane (Windsor: National Self-Represented Litigants Project, October 2017) 1 at 7.

<sup>342</sup> Ibid, 1 at 10.

Service providers have a responsibility to “remove discriminatory barriers unless there is a ‘hardship’ justification for not doing so, which the service provider must prove.”<sup>343</sup> In many cases, accommodation must be responsive to a particular individual’s needs. The overarching goal is to ensure that the “service provider’s accommodation reflects and maintains respect for the person’s dignity and individuality, as well as their integration, and full participation, in the system concerned.”<sup>344</sup>

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<sup>343</sup> University of Windsor, *Navigating the Justice System: A Guide for Self-Represented Litigants with Disabilities*, by Bilal Ahmed, Joanna Pawlowski & Julie Macfarlane (Windsor: National Self-Represented Litigants Project, October 2017) 1 at 7.

<sup>344</sup> *Ibid*, 1 at 8.

## Senior Citizens

With the exception of Newfoundland, the Atlantic Provinces have the highest percentage of senior citizens in the country.<sup>345</sup> Approximately 20% of the population of Nova Scotia is over the age of 65.<sup>346</sup> This percentage is expected to increase to 25% by 2030.

The Department of Seniors, Government of Nova Scotia estimates that by 2030, a quarter of the population of Nova Scotia will be over 65; the Department of Seniors estimates the total seniors' population to be 257,874 by this time, which is an 86.3% increase from 2007.<sup>347</sup> The aging of the population is largely attributed to the baby boom generation, who began turning 65 in 2012. Other factors include increased life expectancies, declining birth rates and low immigration.<sup>348</sup>

The aging population is more highly concentrated in towns than regional municipalities or rural Nova Scotia. For instance, Halifax is the youngest country in the province, with seniors making up 10.9% of the population, while 11 out of 18 countries have a senior population that is greater than 15% of the total population.<sup>349</sup>

Seniors also represent a population that is less diverse than other demographics in the province. In 2006, 91% of all seniors were non-immigrants. Also, minority groups are also not highly represented. For instance, only 4% of residents of Mi'kmaq reserves were 65 or older.<sup>350</sup> At the last reporting by the Department of Seniors, the largest visible minority group among the non-immigrant senior population is African Nova Scotian, which may relate to the fact that Nova Scotia has the largest indigenous Black population in the country.<sup>351</sup>

In regard to living arrangements, approximately two-thirds of seniors live with family members and one-third live alone.<sup>352</sup> In 2006, 4% of the province's seniors lived in public rental housing, while 3.6% lived in a licensed nursing home. A smaller portion, 0.8% lived in a licensed residential care facility.<sup>353</sup>

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<sup>345</sup> Nova Scotia Department of Seniors, *Seniors Statistical Profile, 2009* (Halifax: Province of Nova Scotia, 2009) available at [https://novascotia.ca/seniors/pub/2009\\_StatProfile.pdf](https://novascotia.ca/seniors/pub/2009_StatProfile.pdf)

<sup>346</sup> Government of Nova Scotia, *Access by Design 2030: Achieving an Accessible Nova Scotia* (Halifax: Department of Justice, 2018)

<sup>347</sup> Nova Scotia Department of Seniors, *Seniors Statistical Profile, 2009* (Halifax: Province of Nova Scotia, 2009) available at [https://novascotia.ca/seniors/pub/2009\\_StatProfile.pdf](https://novascotia.ca/seniors/pub/2009_StatProfile.pdf)

<sup>348</sup> Ibid

<sup>349</sup> Ibid

<sup>350</sup> Ibid

<sup>351</sup> Ibid

<sup>352</sup> Nova Scotia Department of Seniors, *Seniors Statistical Profile, 2009* (Halifax: Province of Nova Scotia, 2009) available at [https://novascotia.ca/seniors/pub/2009\\_StatProfile.pdf](https://novascotia.ca/seniors/pub/2009_StatProfile.pdf)

<sup>353</sup> Ibid

### Senior Citizens and Poverty

One of the large challenges facing seniors in Nova Scotia is poverty. A 2013 report from the Organization for Economic Cooperation and Development found that “poverty in old age increased by two percentage points in Canada between 2007 and 2010.”<sup>354</sup> It is also estimated that 42.9% of Nova Scotian seniors who collect Old Age Security also received the Guaranteed Income Supplement; of this group, three quarters of individuals were reported to be single.<sup>355</sup>

During the SHIFT project, one of the key messages from working groups meeting with community members across the province was that “the cost of living (including food, housing, transportation, and access to technology) – and by association, income security – are major barriers to health for older adults.”<sup>356</sup> The study also found that the largest increases in old-age poverty occurred among elderly women, particularly if they had been divorced or separated. Researchers suggest that “higher poverty among older women reflects lower wages, more part-time work and career gaps during women’s working lives, as well as the effect of longer female life expectancy for which many women have not been able to save enough.”<sup>357</sup>

### Access to Justice for Senior Citizens

To date, there is not a significant body of research that discusses how seniors in Canada access justice; many studies about elder issues “have failed to produce aggregate results to evaluate the effectiveness of the interventions intended to address elder issues.”<sup>358</sup> Despite this knowledge gap, the Alberta Civil Liberties Research Centre published a working definition of access to justice for seniors. It states:

*from a narrow perspective, access to justice for elders would simply mean their ability to get their rights represented by a lawyer before a court. A wiser perspective would include understanding of social and systematic barriers that elders face in order to protect their interests. In this sense, access to justice for elders means ensuring equal and fair opportunities for them to enforce their rights.*<sup>359</sup>

It is important to acknowledge that the existing knowledge gap provides blind spots related to the complexities of gender, race, religion, ethnicity, nationality, or social status, which are factors

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<sup>354</sup> Nova Scotia Department of Seniors, *SHIFT: Nova Scotia’s Action Plan for an Aging Population* (Halifax: Province of Nova Scotia, 2017) 1 at 12.

<sup>355</sup> Nova Scotia Department of Seniors, *Seniors Statistical Profile, 2009* (Halifax: Province of Nova Scotia, 2009) available at [https://novascotia.ca/seniors/pub/2009\\_StatProfile.pdf](https://novascotia.ca/seniors/pub/2009_StatProfile.pdf)

<sup>356</sup> Nova Scotia Department of Seniors, *SHIFT: Nova Scotia’s Action Plan for an Aging Population* (Halifax: Province of Nova Scotia, 2017) 1 at 12.

<sup>357</sup> *Ibid*, 1 at 12.

<sup>358</sup> Alberta Civil Liberties Research Centre. “Access to Justice and Canadian Elders”, n.d., available at <http://www.aclrc.com/new-page-30>

<sup>359</sup> *Ibid*

many seniors navigate in their daily lives. Researchers have also reported that the body of literature on the topic of seniors and access to justice contains conflicting and incoherent results, such as earlier reports that seniors are financially secure while recent studies suggest that the majority of seniors struggle financially.<sup>360</sup>

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<sup>360</sup> Alberta Civil Liberties Research Centre. “Access to Justice and Canadian Elders”, n.d., available at <http://www.aclrc.com/new-page-30>

## Immigrants and Refugees

Immigrants, also referred to as “New Canadians”, are typically more “vulnerable than other Canadians in the mainstream of society because of their differentiating and disadvantaged circumstances. As a result, they face greater barriers to accessing justice.”<sup>361</sup> After arriving in Canada, these individuals are often disadvantaged in terms of income levels, employment opportunities, education, health, and personal safety.<sup>362</sup>

Migrants face unique access to justice challenges because of the design of Canada’s immigration and refugee laws. Individuals wishing to reside in Canada typically enter the country under one of three streams including:

- Family reunification stream: immigrants are typically sponsored by family members;
- Economic stream: including individuals on temporary work visas; and
- Humanitarian stream: including refugees.<sup>363</sup>

To provide an idea of the percentage of immigrants split across streams, 272,000 immigrants were granted with permanent resident status in 2015. Of these individuals, 62.7% were in the economic stream; 24.1% were in the family reunification stream, and 13.2% were in the humanitarian stream.<sup>364</sup>

In the current global climate of political and climatic instability, there are approximately 65 million forcibly displaced persons around the world.<sup>365</sup> There is a significant demand for immigration and refugee law services, particularly legal aid, as a result of this displacement. However, due to the significant financial challenges associated with the increased demand for legal aid, provinces are struggling to keep up. For instance, as of 2017, Nova Scotia and New Brunswick did not receive government funding for legal aid services related to refugee proceedings.<sup>366</sup>

## Immigrants and Refugees in Nova Scotia

The size of the immigrant population in Nova Scotia has grown over the years. Statistics Canada reported that in 2016, immigrants composed 6.1% of the total population of Nova Scotia. During the period between 2011 to 2016, 11,790 individuals immigrated to the province. This number is

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<sup>361</sup> Alberta Civil Liberties Research Centre. “Access to Justice – New Canadians”, n.d., available at <http://www.aclrc.com/access-to-justice-new-canadians>

<sup>362</sup> Ibid

<sup>363</sup> Ibid

<sup>364</sup> Ibid

<sup>365</sup> The Canadian Bar Association, *Insufficient Funding for Immigration and Refugee Legal Aid Services across Canada: Impact to Right to Representation by a Lawyer* (Ottawa: The Canadian Bar Association, 2 October 2017).

<sup>366</sup> Ibid

up significant from previous periods: 8,080 immigrants between 2006 to 2010; 5,100 immigrants between 2001 to 2005.<sup>367</sup>

In 2018, Nova Scotia approved 2,272 individuals from a variety of immigration programs, such as the Atlantic Immigration Pilot project. This is a significant increase from previous years. The province also had a record number of landings during the same year; Nova Scotia Immigration reported 5,225 individuals between the months of January and October alone.<sup>368</sup>

The Province is committed to promoting Nova Scotia as a place to work and live to immigrants, particularly young people, in order to support economic development. To this end, Nova Scotia introduced two new immigration programs in 2018: the Labour Market Priorities System and the Physician Stream.<sup>369</sup> Both initiatives focus on skilled workers and professionals in order to meet the needs of the labour market in the province. At the same time, Nova Scotia receives an immigration quota from the federal government, has an Atlantic Immigration Pilot allotment of 792 newcomers, and finally, has a provincial nominee quota of 1,350 newcomers.<sup>370</sup>

#### Access to Justice for Immigrants and Refugees

Access to justice is a “foundational component of the rule of law and fundamental human rights issue for all members of society, which includes refugees, immigrants, and those with precarious status.”<sup>371</sup> For immigrants, particularly those in precarious states, the consequences of legal proceedings and government decisions can be life or death situations; those who do not have access to prompt and effective legal representation are at risk of deportation, torture, or death.<sup>372</sup>

For New Canadians, access to justice has been defined in the following way:

*the ability to invoke and effectively participate in justice processes (procedural access); obtaining a fair result when they do (substantive access); and having their unique circumstances and needs recognized and respected by the justice system (inclusive access). This concept of access to justice applies not only to court processes but also to the entire justice system through which law and legal institutions are designed, implemented, and operated.*<sup>373</sup>

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<sup>367</sup> Statistics Canada, *Focus on Geography Series, 2016 Census*, Catalogue no. 98-404-X2016001 (Ottawa: Statistics Canada, 2017).

<sup>368</sup> Ibid

<sup>369</sup> Ibid

<sup>370</sup> Ibid

<sup>371</sup> The Canadian Bar Association, *Insufficient Funding for Immigration and Refugee Legal Aid Services across Canada: Impact to Right to Representation by a Lawyer* (Ottawa: The Canadian Bar Association, 2 October 2017) 1 at 3.

<sup>372</sup> Alberta Civil Liberties Research Centre. “Access to Justice – New Canadians”, n.d., available at <http://www.aclrc.com/access-to-justice-new-canadians> 1 at 3.

<sup>373</sup> Alberta Civil Liberties Research Centre. “Access to Justice – New Canadians”, n.d., available at <http://www.aclrc.com/access-to-justice-new-canadians>

A scan of literature involving access to justice for New Canadians identified three critical barriers that prevent participation in the justice system, fair results, or the recognition of needs.

1. Individual Circumstances:

- ability to secure housing, employment, and stable income;
- language and education barriers;
- limited support networks;
- lack of access to transportation;
- limited knowledge of the Canadian legal system and legislation; and
- health problems or post-traumatic stress disorder.<sup>374</sup>

2. Access to Legal Aid Services

- level of funding from the federal or provincial governments do not match the level of service demand; and
- self-representation due to lack of legal aid can result in longer proceedings, delays in asylum appeals.<sup>375</sup>

3. Services provided by workers who are not legally trained

- alternative legal services and the dissemination of legal information provided by paralegals, community legal workers, and immigrant consultants do not replace the need for legal representation.<sup>376</sup>

Given the complexity, financial demands, and level of need involved in services directed towards New Canadians, the Canadian Bar Association recommends a collaborative approach of “shared responsibility between the federal government, the provincial governments and the legal aid societies.”<sup>377</sup>

1. Funding for Legal Aid Services:

- should be a shared responsibility of provinces;
- provinces should work closely with the federal government to monitor volume or claimants and demands on legal services; and

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<sup>374</sup> Ibid; The Canadian Bar Association, *Insufficient Funding for Immigration and Refugee Legal Aid Services across Canada: Impact to Right to Representation by a Lawyer* (Ottawa: The Canadian Bar Association, 2 October 2017)

<sup>375</sup> Ibid

<sup>376</sup> Alberta Civil Liberties Research Centre. “Access to Justice – New Canadians”, n.d., available at <http://www.aclrc.com/access-to-justice-new-canadians>

<sup>377</sup> The Canadian Bar Association, *Insufficient Funding for Immigration and Refugee Legal Aid Services across Canada: Impact to Right to Representation by a Lawyer* (Ottawa: The Canadian Bar Association, 2 October 2017) 1 at 2.



- allocate funds in ways that reflect the demand on legal services.<sup>378</sup>

2. Reform and streamline the existing refugee system:

- eliminate restrictive timelines for refugee hearings;
- claimants coming or transitioning from the United States by ground are not eligible for work permits unless their refugee claims are approved;
- provide refugees with access to open work permits to reduce the burden on provincial governments and provincial welfare systems.<sup>379</sup>

Through collaborations across all three levels of government, sustainable strategies that streamline services for immigrants and provide support to the legal system are possible.

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<sup>378</sup> The Canadian Bar Association, *Insufficient Funding for Immigration and Refugee Legal Aid Services across Canada: Impact to Right to Representation by a Lawyer* (Ottawa: The Canadian Bar Association, 2 October 2017) 1 at 2.

<sup>379</sup> *Ibid*

## Conclusion

In a narrow sense, access to justice refers to “a range of institutional arrangements to assure that people who lack the resources or other capacities to protect their legal rights and to solve their law-related problems have access to the justice system.”<sup>380</sup> Broadly speaking, access to justice “engages the wider social context of our court system, and the systematic barriers faced by different members of the community.”<sup>381</sup> In a multi-cultural and diverse country such as Canada, concepts of justice, equality, and rights vary across jurisdictions. Ideologies are informed by variables such as cultural histories, previous experiences interacting with the government or court systems, education, health, and socioeconomics. The challenges related to these variables change over time and as a result, definitions of the term “access to justice” have not remained static.

As this literature review demonstrates, access to justice reflects the values of equality, dignity, and justice in Canadian society. It embodies an individual’s right to access the legal system and arrive at meaningful resolutions to disputes and injustices. Moving forward, successful strategies and implementation plans will rest on stakeholders’ abilities to understand the needs of citizens, particularly marginalized communities, form collaborations to advocate for necessary changes to legislation, social services, and the legal system, and develop user-centric models that engage citizens in the process of creating, debating, upholding, and enforcing the law. In these ways, organizations may develop definitions of the term “access to justice” that describe the scope, scale, and ambition of their work.

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<sup>380</sup> Alberta Civil Liberties Research Centre, “What is Access to Justice?”, n.d., available at <http://www.aclrc.com/what-is-access-to-justice>

<sup>381</sup> Ibid