

# EMERGING TRENDS IN ACCESS TO JUSTICE AND DISPUTE RESOLUTION IN CANADA

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## **Emerging Trends in Access to Justice and Dispute Resolution in Canada**

Jean-François Roberge

### **ABSTRACT**

Providing access to justice is a major challenge for any judicial system. Canada has gone to great lengths to meet this challenge over the past thirty years, in part by developing alternative dispute resolution methods. Unfortunately, results have been mixed. Canadian society is currently preparing to renew its vision of access to justice and the contribution of dispute resolution methods in meeting that challenge. What lessons can we learn from Canada's experience? What are the new directions and initiatives for access to justice? Our paper suggests that the Canadian experience can make two contributions to the access to justice debate. First, we suggest that the notion is evolving in the legal community from an institutional perspective to a contextual vision of access to justice. Second, we point out an evolution of alternative or appropriate dispute resolution methods toward a participatory justice culture. Our paper suggests an evolving Canadian perspective on access to justice and dispute prevention and resolution methods.



## INTRODUCTION

Access to justice has been a major issue in Canada for over thirty years.<sup>1</sup> Despite the many efforts made by legislators, legal administrators and public policy makers, Canada is not ranked among the best in the world in terms of fostering access to civil justice for its citizens.<sup>2</sup> Why is that? This disappointing conclusion is causing the Canadian legal community to mobilize and intensify its efforts to address the access to justice challenge.<sup>3</sup> What can we do differently in the future to be more effective? Our paper addresses these two issues.

In the first part, we will explore the evolution of the Canadian vision of access to justice. We describe the *institutional* approach to access to justice that prevails in Canada. According to this vision, the starting point

1. See, for example, the speech of the Chief Justice of Canada: B. McLachlin, *Speech at the Canadian Bar Association Council Meeting*, Vancouver: 2012, online: <<http://www.canadianlawyermag.com/4273/chief-justice-mclachlin-speech-to-cba-council-2012.html>>; B. McLachlin, *Access to Civil Justice for Middle Income Canadians Colloquium*, University of Toronto: 2011, online: <<http://hosting.epresence.tv/MUNK/1/watch/219.aspx>>; B. McLachlin, *The Challenges We Face*, Toronto, Empire Club of Canada, 2007, online: <<http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>>. See also: T.C.W. Farrow, *Civil Justice, Privatization, and Democracy*, University of Toronto Press, 2014; National Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice. A Roadmap for Change*, October 2013 <<http://www.cfcj-fcjc.org/collaborations>>; Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act*, November 2013 <<http://www.cba.org/CBA/equaljustice/main>>.
2. Canada ranks 8th out of 24 in North America and European in an analysis conducted in 2014, 9th out of 16 countries in North America and Western Europe in 2012-2013 and ranked 9th out of 12 countries in 2011; M.D. Agrast and J.C. Botero *et al.*, *World Justice Project Rule of Law Index 2014*, Washington D.C., 2014; M.D. Agrast and J.C. Botero *et al.*, *World Justice Project Rule of Law Index 2012-2013*, Washington D.C., 2013; M.D. Agrast, J.C. Botero and A. Ponce, *World Justice Project Rule of Law Index 2011*, Washington D.C., 2011, online: <<http://worldjusticeproject.org/rule-of-law-index>>.
3. See in particular the reports filed in 2012 and 2013 by the National Action Committee on Access to Justice in Civil and Family Matters, headed by the Supreme Court of Canada: <<http://www.cfcj-fcjc.org/collaborations>>; and the access to justice committee of the Canadian Bar Association: <<http://www.cba.org/ABC/Access/main/default.aspx>>. See also "Cost of Justice. Weighing the Costs of Fair and Effective Resolution to Legal Problems" <<http://www.cfcj-fcjc.org/cost-of-justice>>.

is the judicial system. We suggest that this approach, which focuses on the constraints of the legal process and attempts to reduce them in order to improve public access to civil justice, is essential but not sufficient to respond to the challenge of access to civil justice. To better meet this challenge, we propose the complementary *contextual* approach, with the public's expectations of justice as the starting point. This vision focuses on the expectations of justice and the ability of litigants to achieve them in order to enhance the sense of justice felt during and after use of the judicial system. We note that the contextual vision of access to justice is coming to the fore in Canada and its potential is promising.

In the second part, we will point out the hopes resting on dispute prevention and resolution methods for improving access to justice in Canada. We will demonstrate the influence of the institutional approach to access to justice on their development and limitations. We will then explore the influence of the contextual approach to access to justice on the creation of a participatory justice movement in Canada. We conclude that Canada's contribution to the access to justice challenge can be viewed as the intersection between the traditional approach and a new contextual perspective that is demonstrated by the use of participatory justice practices.

## 1. The evolution of the access to justice vision in Canada

What is access to justice? The term is not universally defined and is viewed from several different angles.<sup>4</sup> In Canada there are two different and complementary visions. Traditionally, we have addressed the challenge of access to justice from an *institutional* perspective: we have tried to improve public access to legal information so people will know their rights, as well as access to the courts, so they can exercise them. The goal of this method is to facilitate the legal process for parties within the dispute settlement mechanisms and thereby ensure the stability of the

4. Canadian Bar Association, *Access to Justice Metrics. A Discussion Paper. Envisioning Equal Justice*, April 2013 at p. 5, online: <[http://www.cba.org/ABC/Access/PDF/Access\\_to\\_Justice\\_Metrics\\_fr.pdf](http://www.cba.org/ABC/Access/PDF/Access_to_Justice_Metrics_fr.pdf)>; L. Curran, *Literature Review: examining the literature on how to measure the 'successful outcomes': quality, effectiveness and efficiency of Legal Assistance Services*, Australia, 2012 at p. 3; P.-C. Lafond, *L'accès à la justice civile au Québec. Portrait général*, Cowansville, Éditions Yvon Blais, 2012 at p. 14; M. Buckley, "Searching for the Constitutional Core of Access to Justice" (2008) 42 S.C.L.R. (2d) 567; R.A. Macdonald, "L'accès à la justice aujourd'hui au Canada – étendue, envergure et ambition" in J. Bass, W.A. Bogart and F.H. Zemans, dir., *L'accès à la justice pour le nouveau siècle: les voies du progrès*, Toronto, Law Society of Upper Canada, 2005 at pp. 23-29; R.A. Macdonald, "Accessibilité pour qui? Selon quelle conception de la justice?" (1992) 33 C. de D. 457-480.