

Alleviating the Access to Justice Gap in Canada: Justice Factors,  
Influencers, and Agenda for Moving Forward

by

Suzy Flader  
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University of Victoria

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## **Defense Committee**

**Supervisor:** Dr. Evert Lindquist  
School of Public Administration, University of Victoria

**Second Reader:** Mr. Robert Lapper, QC  
School of Public Administration & Faculty of Law (Lam Chair),  
University of Victoria

**Chair:** Dr. Astrid Pérez Piñán  
School of Public Administration, University of Victoria

## Abstract

The Canadian justice system requires significant reform if it is to become truly accessible for a diverse range of individuals. While past efforts have focused on increasing the public's access to formal or recognizable dispute resolution processes, they have typically failed to consider those justice factors which are required to transform the system. This paper explores the importance of fairness and equality as necessary aspects of inclusive access to justice initiatives—those that are more capable of addressing the needs of the vulnerable populations who overwhelmingly require change. Three intentionally broad mechanisms are used in pursuit of this goal. First, a literature review focuses on breaking down the legal concepts of fairness and equality and applying them to the access to justice conversation. Second, a systemic map of key influencers within the justice system highlights the types of changes that different groups can help enact. Finally, case analyses of three recent, high-profile arbitration clause cases—*Seidel*, *Wellman*, and *Heller*—exemplify how divided judicial interpretations of access to justice can negatively implicate vulnerable parties. The overall message is that fairness and equality are factors that should underlie various law- and policy-making processes, particularly those related to marginalized members of Canadian society. Those with monitoring and enforcing powers over the justice system need to use their authority to enforce strategic changes, and must do so by working with justice-seekers. The paper concludes with some guidelines for moving forward to reform access to justice strategies, including implementation goals and suggestions for further research.

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# 1. Introduction

It is uncontroversial that access to justice is a pressing issue in Canada with broad-reaching implications for people of varying social and economic backgrounds.<sup>1</sup> People are struggling to deal with their legal issues at alarming rates, from everyday issues to those that are more complex. This is despite the many innovations that have emerged from the 1960s until today in order to alleviate the access to justice gap,<sup>2</sup> and a growing number of influential people involving themselves in the access to justice conversation.<sup>3</sup> Ultimately, a key element is still overlooked when it comes reform. That element is justice, and its underlying factors of fairness and equality. For too long, access to justice initiatives have focused primarily on promoting access to formal justice services in expedient and efficient manners. While this has worked for some, others are falling through the cracks because access-focused innovations are failing to recognize the underlying factors that systemically exclude them from obtaining the justice they require.

The goal of this paper is to explore the importance of fairness and equality as necessary aspects of inclusive access to justice initiatives—those that are more capable of addressing the needs of the vulnerable populations who overwhelmingly require change. Though access to justice is an issue that has the potential to affect almost all Canadians, the gap is most prominent for middle- and low-income individuals who face a variety of systemic barriers.<sup>4</sup> It is crucial that our justice system adapt to the needs of those who are most impacted by it, and who have the most to lose when they cannot navigate through its complex and expensive processes. While the focus here is the civil justice system, many of these problems overlap with the criminal and family systems.

The approach taken here is intentionally broad and relies on distinct methods to highlight a vast and complex challenge. The general nature of the paper is exploratory due to the relatively new nature of the academic fields at issue and the need to highlight big issues that should be narrowed down in future research. The instances of specificity utilized throughout the paper, particularly in Section 7, help exemplify circumstances requiring an improved access to justice agenda and how various actors may contribute to reforming the justice system.

This paper begins with an overview of the background and context necessary to understand access to justice crisis in Canada, and its differing “access” and “justice” focused streams of reform. Three mechanisms are then relied upon to highlight the need for justice-oriented changes. First, a literature review concerned with the elements of fairness and equality clarifies how these legal concepts may be integrated into reform processes. Second, an analytical map of the key players affected by access to justice initiatives highlights the roles that various clusters of individuals play and the specific implications they are likely to face in light of the proposed inclusive changes. Finally, analyses of three recent, high-profile arbitration clause cases—

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<sup>1</sup> See for example Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) [Action Committee, A Roadmap for Change] at 1-5.

<sup>2</sup> See Jerry McHale, "What Does Access to Justice Mean?" (2 February 2016), online (blog): *UVic Ace* <<http://www.uvicace.com/blog/2016/2/2/what-does-access-to-justice-mean>> [McHale, What Does Access to Justice Mean].

<sup>3</sup> See for example Action Committee, A Roadmap for Change, *supra* note 1 at i, v for the opening remarks of former Chief Justice Beverly McLachlin and the Honourable Thomas Cromwell.

<sup>4</sup> Canadian Bar Association Access to Justice Committee Final Report, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, November 2013) at 61 [CBA Justice Committee, Reaching Equal Justice].

*Seidel*,<sup>5</sup> *Wellman*,<sup>6</sup> and *Heller*<sup>7</sup>—exemplify how divided judicial interpretations of access to justice can negatively implicate vulnerable parties. The paper concludes with some guidelines for moving forward to reform access to justice strategies, including implementation goals and suggestions for further research.

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<sup>5</sup> *Seidel v Telus Communications Inc*, 2011 SCC 15 [*Seidel*].

<sup>6</sup> *TELUS Communications Inc v Wellman*, 2019 SCC 19 [*Wellman*].

<sup>7</sup> *Heller v Uber Technologies Inc*, 2019 ONCA 1 [*Heller*].

## 2. Access to Justice in Canada: A Complex and Wicked Problem

Despite having a justice system that is highly regarded around the world, the consensus amongst scholars and the general public is the system requires serious changes to become truly accessible.<sup>8</sup> Many Canadians do not understand or feel welcomed by the justice system that is meant to protect them.<sup>9</sup> To quote former Supreme Court of Canada Justice Thomas Cromwell, we are living through an access to justice “crisis.”<sup>10</sup> Though innovations and strategies have emerged to help combat the issue, it remains a crisis due to the size and severity of the problem and the various individuals and domains involved. Like other crises, it is rooted in systemic inequalities and lack of prevention.

Nearly half of Canadian adults will experience at least one legal problem in a given three-year period.<sup>11</sup> The majority of these problems are uncomplicated, everyday ones that would not typically require court adjudication.<sup>12</sup> Key problems stem from consumer, debt, and employment issues, with neighbour, discrimination, and family problems trailing just behind.<sup>13</sup> While these everyday legal problems may not always seem pressing from a systemic standpoint, they can feature heavily in the lives of those affected.<sup>14</sup> Further, these problems tend to multiply and produce negative social, economic, and health-related costs for those inflicted.<sup>15</sup> Many facing compounding legal issues are then forced to rely on various forms of governmental assistance, which is estimated to cost hundreds of millions of dollars annually.<sup>16</sup> Prevention therefore makes sense from both individual and systemic standpoints.

Most people with legal issues face some sort of access to justice barrier when going through the designated resolution processes. This is due to the cost of legal services and the length of proceedings both continuously increasing, yet legal aid funding and coverage not being available to most. Poor and vulnerable Canadians are thus particularly affected by the access to justice crisis.<sup>17</sup> For example, those who self-identify as disabled are more than four times more likely to experience social assistance problems and three times more likely to experience housing related problems.<sup>18</sup> People who self-identify as aboriginal are nearly four times more likely to experience social assistance problems.<sup>19</sup> In general, Indigenous peoples face difficulties accessing and interacting with the justice system due to systemic discrimination.<sup>20</sup> Other factors that may influence a person’s ability to access justice include gender, race, class, citizenship,

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<sup>8</sup> See *Ibid* at 3; Trevor C W Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016) at 3 [Farrow, Everyday Legal Problems].

<sup>9</sup> Trevor C W Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 974 [Farrow, What is Access to Justice].

<sup>10</sup> The Honourable Thomas A Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (2012) 63:1 UNBLJ 38 at 39.

<sup>11</sup> Farrow, Everyday Legal Problems, *supra* note 8 at 2.

<sup>12</sup> *Ibid*. See also Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007) [Currie, Everyday Legal Problems].

<sup>13</sup> Farrow, Everyday Legal Problems, *supra* note 8 at 7.

<sup>14</sup> Estelle Hurter, "Access to justice: to dream the impossible dream?" (2011) 44:3 The CILSA 408 at 417 [Hurter, To Dream the Impossible Dream].

<sup>15</sup> Action Committee, A Roadmap for Change, *supra* note 1 at 3; Farrow, What is Access to Justice, *supra* note 9 at 964.

<sup>16</sup> Farrow, Everyday Legal Problems, *supra* note 8 at 17.

<sup>17</sup> See for example Currie, Everyday Legal Problems, *supra* note 12 at 23-26; Farrow, What is Access to Justice, *supra* note 9 at 973; Action Committee, A Roadmap for Change, *supra* note 1 at 2.

<sup>18</sup> Action Committee, A Roadmap for Change, *supra* note 1 at 2.

<sup>19</sup> *Ibid*.

<sup>20</sup> Farrow, What is Access to Justice, *supra* note 9 at 981-982.

language, education, culture, age, sexual orientation, poverty, homelessness, mental illness, geography, and socioeconomic status.<sup>21</sup> The more vulnerable someone is prior to facing a legal issue, the more likely they are to face significant consequences when they cannot rely on the justice system.

In a 2013 report focused on achieving equal justice, the Canadian Bar Association's Access to Justice Committee labelled access to justice a 'wicked problem' because of its high resistance to resolution.<sup>22</sup> In particular, it is a problem that (1) is difficult to clearly define; (2) often coexists with other problems; (3) goes beyond the capacity of any one organization to understand and respond to; (4) often causes disagreement about its causes; and (5) requires solutions which involve changing the behaviours or groups or all members of society.<sup>23</sup> While wicked problems are naturally difficult to resolve, the difficulty increases for marginalized individuals whose social and personal issues are more likely integrated into their justice system experiences.<sup>24</sup>

As this crisis is a wicked one, no single solution will solve everyone's related issues. Such uncertainty is grounded in the complex and diverse nature of access to justice problems.<sup>25</sup> Improving the ability for people to access the services they need requires those with the power to make changes to consider the various underlying factors that contribute to people needing assistance in the first place. A significant issue with past access to justice innovations is they have failed to focus on individual needs—particularly the needs of vulnerable parties—and have instead focused on the “access” or expediency aspects of the crisis. In order to address the need for individualized responses to the access to justice crisis, the sections that follow explore the nature of fairness and equality in relation to the justice system, the roles of key players in the access to justice reform process, and the implications of the modern judicial divide on whether the definition of access to justice should focus more on ‘access’ than ‘justice.’

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<sup>21</sup> Farrow, What is Access to Justice, *supra* note 9 at 973.

<sup>22</sup> CBA Justice Committee, Reaching Equal Justice, *supra* note 4 at 126.

<sup>23</sup> *Ibid* at 126-127; see also Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (Commonwealth of Australia, 2008) at 3-5; Brian Head & John Alford, “Wicked Problems: Implications for Public Policy and Management” (2013) 47:6 *Administration & Society* 711 [Head & Alford, Wicked Problems].

<sup>24</sup> CBA Justice Committee, Reaching Equal Justice, *supra* note 4 at 63.

<sup>25</sup> Head & Alford, Wicked Problems, *supra* note 23 at 718.

### 3. Methodology and Methods

The research for this paper involved a formal literature review, with emphasis on review of case law, legal commentaries, and scholarly articles. In recognition that a formal literature review is a specific piece of argumentative writing, the research relied on academic discourse and debates that together constructed arguments about justice factors and their related access to justice strategies.<sup>26</sup> The literature review led to the creation of an analytical map, which focuses on analyzing the specific roles of three clustered-groups in terms of how they can positively influence access to justice strategies. The clusters can help inform future access to justice research by: (1) helping to identify key players in the reform process; (2) emphasizing the complex roles of various players, and how they might interact or conflict with the needs and values of others; and (3) suggesting cluster-specific implications and implementation strategies. The literature review also informed the final case analysis section.

The methods and strategies of Zina O’Leary<sup>27</sup> and Arlene Fink<sup>28</sup> were used to complete this report, with emphasis on outlining, gathering diverse research materials, synthesizing results and key themes, and describing implications and recommendations. I relied on the following specific methods for each element of the report. For legal research, I collected relevant legal cases through databases, including CanLII, LexisNexus Quicklaw, and Westlaw. I collected academic articles and case commentaries through databases such as HeinOnline, JSTOR, legal blogs, and books. I relied on the Boolean qualifiers to search databases in order to optimize my search results. I did an initial screen of any saved resources, to ensure they were relevant to my topic.<sup>29</sup> I also reviewed related organization websites to analyze their justice mandates and see if they had published anything useful documents.. The case review relied on a standardized process to abstract data from articles and cases and monitor the quality of the review using appropriate screening methods. These notes and findings were applied to the relevant sections of the paper. For the analytical map: Upon completing the review, I mapped the players in the justice system with key roles in reforming access to justice strategies. Finally, the key themes which emerged from my research were reviewed and analyzed for implications for implementation strategies and potential future research.

Three key limitations factored into the writing of this paper. First, it was impossible within the confines of one paper to account for every conception of fairness or equality that exists in the Canadian legal or academic contexts. Ideally, future scholarship will address any gaps that have not been addressed. Second, the diverse interests established by analytic map made it unrealistic to suggest many concrete implications or implementation goals. While the focus of this paper was essentially limited to the needs of vulnerable individuals who face one or more systemic barriers to accessing adequate access to justice (gender, race, Indigeneity, socioeconomic status, sexuality, etc.), this itself is a vast group with varying justice needs. Third, the requirements for this paper only allowed for exploring the case law in the one policy domain, but as discussed in the conclusion, the framework should be applied to the full range of access to justice issues.

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<sup>26</sup> Zina O’Leary, *The Essential Guide to Doing Research*, 1<sup>st</sup> ed (Thousand Oaks: SAGE Publications Ltd, 2004) at 78.

<sup>27</sup> Zina O’Leary, *The Essentials Guide to Doing Your Research Project*, 3<sup>rd</sup> ed (Thousand Oaks: SAGE Publications Ltd, 2017).

<sup>28</sup> Arlene Fink, *Conducting Research Literature Reviews*, 5<sup>th</sup> ed (Thousand Oaks: SAGE Publications Ltd, 2019).

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

## 4. Access or Justice? Two Streams of Thought

There is a general understanding that access to justice strategies should be informed by concepts such as equality, equity, fairness, universality, and justice.<sup>30</sup> However, different people will inevitably have unique interpretations of these qualities.<sup>31</sup> To understand why access to justice innovations have failed to provide adequate solutions for so many Canadians, one must be aware of the two streams of thought that have emerged from those seeking to define the term ‘access to justice.’

### *The Access Stream: Expediency and Procedural Solutions*

The first stream (the “access stream”) focuses on procedural changes in order to provide people with increased access to existing or familiar resolution processes. Though the access stream has evolved over time, it has been the primary guiding point for the majority of access to justice measures to date. In the 1960s, it began as a stream focused on getting more people access to the litigation services of lawyers, judges, and courts.<sup>32</sup> In the 1970s, it progressed to focusing on making the justice system work better through innovations such as procedural rules to expedite hearings, small claims courts, class actions, contingency fees, and regulatory schemes/tribunals that cover entire classes of claims (workers compensation, human rights, landlord-tenant disputes, etc.). Court avoidance has also been enhanced through services like consumer protection offices, ombudspersons, and no-fault insurance schemes.<sup>33</sup>

In the 1980s, innovations continued to include managerial reforms (including case management and case-flow management systems), judicial specialization, and use of plain language in legal proceedings and documents. Access discussions expanded to include concepts like public legal education, legal literacy, dispute prevention, and self-help.<sup>34</sup> Alternative methods of dispute resolution (“ADR”), including negotiation and mediation, also began to form and popularize. To this day, ADR tools are highly regarded for their ability to promote resolutions out of court and important non-adversarial values like conflict management and collaboration.<sup>35</sup>

The access stream’s innovations have cumulatively affected justice reform, and have led to a modern understanding of access involving diverse strategies, programs, and processes for resolving disputes.<sup>36</sup> Of critical importance is the notion that formal justice—which revolves around the courts—is no longer considered a central feature of access to justice strategies.<sup>37</sup> This means the search for access to justice must also focus on equal access to any legal or non-legal information, resource, service, or process that contributes to the prevention or resolution of disputes outside the formal system.<sup>38</sup> Additionally, it means that critique of access strategies

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<sup>30</sup> McHale, What Does Access to Justice Mean, *supra* note 2 at para 1.

<sup>31</sup> *Ibid*; See also Justice Ronald Sackville, "Access to Justice: Assumptions and Reality Checks" (10 July 2002), online: *Federal Judicial Scholarship* <<http://www.austlii.edu.au/au/journals/FedJSchol/2002/12.html>> at para 1.

<sup>32</sup> McHale, What Does Access to Justice Mean, *supra* note 2, Access to Dispute Resolution Services section at para 1.

<sup>33</sup> *Ibid* at para 2.

<sup>34</sup> *Ibid* at para 3.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* at para 4.

<sup>37</sup> *Ibid*; Hurter, To Dream the Impossible Dream, *supra* note 14 at 409.

<sup>38</sup> McHale, What Does Access to Justice Mean, *supra* note 2, Access to Dispute Resolution Services section at para 4.

must expand to ensure that marginalized groups are not losing justice opportunities in the wake of complex systemic change.

### *The Justice Stream: The Need for Complex and Substantive Change*

Concern about over-emphasis on procedural rather than substantive change led to the second stream of access to justice scholarship. This stream (the “justice stream”) emphasizes “justice” to promote two broader underlying factors of access to justice. First, that on top of access to justice enhancing peoples’ access to ADR, the public should also have access to and the capacity to meaningfully participate in the processes by which laws and legal procedures are created.<sup>39</sup> Second, access to justice strategies must take into account the structural inequalities in the justice system in order to contextualize and individualize more effective policies.<sup>40</sup> In many ways, this stream moves away from thinking about access to justice and focuses more on the “elimination of injustice.”<sup>41</sup>

The justice stream has helpfully illuminated some of the issues with the access-focused strategies that have continually dominated access to justice policy-making. Of particular note is over-reliance on ADR processes, and how this can harm vulnerable parties and even act as a rival to effective access to justice strategies.<sup>42</sup> Though ADR is meant to exist outside the formal justice system, its services still typically mirror formal processes. ADR processes are also prone to private regulation, meaning that vulnerable parties may be subject to more power imbalance than exists in the publicly-regulated court system. Mandatory private arbitration clauses in standard-form contracts are a particularly public issue, with large businesses using them in employment or consumer contracts to keep legal disputes out of the public eye. This phenomenon is explored further in Section 7.

### *Linking Procedural and Substantive Solutions*

The argument here is not that access strategies are always ineffective or harmful. Indeed, they have been integral to the access to justice movement by encouraging us to think beyond formal justice methods and institutions. ADR and other informal strategies have also helped many expedite their legal issues—allowing them to access the justice they have needed without going through unnecessary procedures. However, procedural changes should be influenced by substantive concerns to adequately meet the needs of those who need them most. Otherwise, it becomes too easy for powerful institutions to exploit weaker parties in the name of access to justice.

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<sup>39</sup> McHale, What Does Access to Justice Mean, *supra* note 2, Access to Justice section at para 1.

<sup>40</sup> *Ibid* at para 2.

<sup>41</sup> *Ibid*.

<sup>42</sup> Hurter, To Dream the Impossible Dream, *supra* note 14 at 412-413.

## 5. Fairness and Equality as Two Key Justice Factors

Two key justice factors—fairness and equality—can help introduce substantive changes that will make the justice system work better for a diverse range of needs. This literature review focuses on defining the two concepts in relation to their legal uses to help practically guide the changes sought in this report. While fairness and equality are certainly not the only justice factors that may help inspire accessible reform, they serve here as stepping stones for more expansive justice-oriented research.

### *Why Fairness and Equality?*

Why have fairness and equality been selected as two of the most pressing justice factors requiring review? The answer lies in the demographics most impacted by access to justice issues. As demonstrated in the above section, people who face at least one social or economic barrier are more likely to become involved with the justice system and suffer from the consequences of lacking required services. The failure of overreliance on ADR strategies demonstrates that effective access innovations require focus on those who face the most barriers. This is inherently guided by notions of fairness and equality, but requires further refining. The overall message here is that justice, guided by the notions of fairness and equality, is necessarily focused on outcomes, procedures, and the acceptance of social justice norms into our inherently unjust justice system.<sup>43</sup> In addition, fairness and equality are increasingly being considered in relation to broader concepts like democracy and the rule of law<sup>44</sup>—both of which inform access to justice initiatives.

Despite the important roles that fairness and equality must play in the Canadian justice system, the terms lack uniform, wide-spread definitions. This has limited their practical applications. In a system that is adversarial by design, what is fair to one party will likely always seem unfair to the other. And though the bargaining power between parties may be significantly unbalanced, this may be difficult for both parties to internalize when forced to rely on resolution strategies that structurally support inequality. Despite the many ways that fairness and equality may be interpreted by players in the justice system, it is crucial for at least some elements of the terms to be clarified in support of just and effective accessibility.

The definitions of fairness and equality presented in this paper are premised on established legal conceptions. They therefore differ from common colloquial or academic definitions. For example, fairness is often used as a qualifier for equality when people are trying to use the term more inclusively.<sup>45</sup> The goal here is not to provide universal definitions of fairness and equality. Rather, the below discussion frames the two in terms of their legal definitions to guide a justice-focused access to justice strategy in a useful and recognizable way.

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<sup>43</sup> Hurter, *To Dream the Impossible Dream*, *supra* note 14 at 414-415.

<sup>44</sup> Kerri Froc, "Is the Rule of Law the Golden Rule? Accessing Justice for Canada's Poor" (2008) 87:2 *Can Bar Rev* 459 at 464 [Froc, *Accessing Justice for Canada's Poor*].

<sup>45</sup> This leads to a discussion of the difference between "equality" and "equity." While some definitions of equality require all people to be treated the same, equity is said to promote contextual treatment that is more mindful of what individuals need to get to the same place. See for example Mary E Guy & Sean A McCandless, "Social Equity: Its Legacy, Its Promise" (2012) 72 *Public Administration Review* S5 at S5.

A final preliminary point is that fairness and equality are not mutually exclusive concepts. The successful application of both will inevitably require at least some integration, with fairness being considered in terms of equality and vice versa. There is also overlap in the definitions, which makes sense given that both terms are targeted towards the same goal of improving justice for those who need it most. Attempting to apply the terms separately could result in negative side effects for the vulnerable groups of focus here.

### *What is Fairness?*

Despite the many ways in which fairness may be interpreted, its relevance to the justice system is ultimately premised on the need to ensure just processes that lead to desirable outcomes. Fairness cannot always ensure that a more vulnerable party gets to court or wins their case, because there are circumstances in which that may be greatly unfair to another party or the greater good. However, ensuring that parties have access to necessary resources and processes is essential to promoting a fair justice system. In this way, fairness is at least partially concerned with assessing access-oriented access to justice strategies.

Fairness in the context of Canadian administrative law helps clarify how fairness might relate to an access to justice scheme. In administrative law, fairness is broken down into two components: procedural fairness and substantive review. In *Baker*,<sup>46</sup> the Supreme Court of Canada affirmed the importance of procedural fairness amongst administrative bodies—a duty that is “flexible and variable.”<sup>47</sup> The majority reasons of Justice L’Heureux-Dubé recognized certain contextual factors that help determine whether an administrative decision is fair. The principles of procedural fairness include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual(s) affected; (4) the legitimate expectations of the person challenging the decision; and (5) respect for the decision-maker’s choice of procedures.<sup>48</sup> Fairness is also assessed on the bases of whether a decision-maker provided adequate written reasons for their decision,<sup>49</sup> whether the decision-maker evoked a reasonable apprehension of bias,<sup>50</sup> and whether the complainant was provided an oral hearing.<sup>51</sup>

While the established procedural fairness factors are not necessarily exhaustive,<sup>52</sup> they provide a broad range of balanced considerations that may also trigger fairness concerns in relation to access to justice. It is crucial that access to justice innovations focus on pressing issues like housing, healthcare, and employment security. When deciding which issues to prioritize, decisionmakers should also consider that some issues are of more concern to different groups. For example, access to justice in family law cases is a matter of particular concern to women. However, increased legal aid funding has largely ignored family law, and has prioritized areas that are of less concern to women (like criminal law.)<sup>53</sup> It therefore makes sense for access to

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<sup>46</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC) [*Baker*].

<sup>47</sup> *Ibid* at para 22.

<sup>48</sup> *Ibid* at paras 23-27.

<sup>49</sup> *Ibid* at para 43.

<sup>50</sup> *Ibid* at para 45.

<sup>51</sup> *Ibid* at paras 30-34.

<sup>52</sup> *Ibid* at para 28.

<sup>53</sup> Laura Track, Shahnaz Rahman & Kasari Govender, *Putting justice back on the map: The route to equal and accessible family justice* (Vancouver: West Coast Leaf, February 2014) at 12 [West Coast Leaf, Putting Justice Back on the Map].

justice innovations focused on family law issues to (1) expand and (2) focus on the interests and needs of women, particularly those who face one or more additional barriers further impeding their justice potential.

The actions of a decision-maker are also crucial to examine in the context of promoting access to justice. The reasons of an initial decision-maker can determine whether a party seeks judicial review or another form of appeal<sup>54</sup>—which can cost a significant sum in legal resources, if even available to the party. Detailed reasons also help provide accurate insight into the decision-maker’s decision, highlighting necessary procedural fairness factors, such as whether they were biased, and substantive factors, such as whether they had the necessary expertise. Reasons are therefore particularly necessary when an issue plays an important role in a person’s life.<sup>55</sup>

Though *Baker* first established that reasons are important to consider in a procedural fairness analysis, it is important to note the minimal precedent that has been set by that decision. To understand this point, one must understand more about the case and the plaintiff. Ms. Baker, was a Jamaican citizen who had been living in Canada for almost 20 years with her four children (all of whom were citizens). She faced a variety of barriers, including mental illness and poverty, which led to her losing custody of her children for a period.<sup>56</sup> Ms. Baker was ordered deported after it was determined that she had worked illegally in Canada and overstayed her visitor’s visa. She applied for an exemption under the *Immigration Act*, based on humanitarian and compassionate grounds including the impact on her children and mental health that the deportation would cause.<sup>57</sup>

Despite Ms. Baker’s vulnerable position, her application was denied with no attached reasons.<sup>58</sup> Upon request from her counsel, Ms. Baker was provided with the notes of the immigration officer who denied her stay, which were brief and included discriminatory and misguided assumptions about her.<sup>59</sup> Justice L’Heureux-Dubé accepted these notes as adequate reasons, accepting that “transparency may take place in various ways.”<sup>60</sup> In this author’s view, fairness often commands more than this bare-minimum form. Increased detail and formality should be required in important situations such as the one presented in *Baker*, where interests like deportation and separation from one’s children are concerned.

The Supreme Court of Canada’s decision in *Dunsmuir*<sup>61</sup> recognized two standards of review upon which the courts may review administrative appeals: (1) correctness and (2) reasonableness. The preference is for reasonableness, which grants administrative decision makers deference primarily on the basis of their assumed expertise. Soon, the Supreme Court of Canada is expected to update the standard of review through a trilogy of decisions heard in March 2018. No one anticipates that the Court’s respect for deference will disappear. It is possible the Court will decide that reasonableness should be the only standard of review, as

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<sup>54</sup> *Baker*, *supra* note 46 at para 43.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid* at para 2.

<sup>57</sup> *Ibid* at para 3.

<sup>58</sup> *Ibid* at para 4.

<sup>59</sup> *Ibid* at para 5.

<sup>60</sup> *Ibid* at para 44.

<sup>61</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9.

proposed in obiter by Justice Abella in *Wilson*.<sup>62</sup> Seeing as administrative decision makers are increasingly having more binding authority, it is important they make fair decisions that uphold a diverse range of needs.

The practical applications of administrative fairness are usefully portrayed through the work of ombudsman/person (“ombuds”) offices across the country. An ombuds officer’s role is to independently and neutrally monitor the decisions of administrative bodies and intervene when necessary by providing non-binding suggestions. When ombuds officers investigate, they tend to rely on the contextual fairness and natural justice principles founded by administrative law, including an assessment of the decision-maker’s powers and potential bias, whether an individual had a fair opportunity to present their case to the decision-maker, and whether adequate reasons were provided.<sup>63</sup> At the same time, depending on the leadership goals of a particular office, ombuds officers may be permitted to make less formal decisions that factor in other perceived surrounding factors.<sup>64</sup> The contextual nature of ombuds services highlights the importance of fairness-driven strategies for alleviating access to justice concerns in the country.<sup>65</sup> At the same time, ombuds officers do not stand to replace other key players in the justice system due to their non-binding authority and neutral positions.

To summarize, the fairness approach suggested here supports contextual analyses of issues that evoke justice concerns. Thus, when a new access to justice innovation is implemented, or an old one is evaluated, it should be considered in relation to how it aids the needs of those requiring the service. In other words, it is important to ensure that access to justice services meet their intended goals. The role of the decision-maker also plays a crucial role in a fairness assessment. If a decision-maker is unqualified to make a decision, or to provide adequate reasons, it is unfair to the person seeking that decision—particularly if they are forced to go through the expensive appellate process for an issue that could have been dealt with the first time around. Given the many interests that fairness is meant to satisfy, and the great potential for needs to conflict, equality will typically also play a key role in any fairness assessment.

### *What is Equality?*

The concept of equality is protected under some of the most influential legal documents in Canada, including human rights codes and the *Canadian Charter of Rights and Freedoms*.<sup>66</sup> Like fairness, equality can be interpreted in a variety of ways. Here, the goal is to emphasize an inclusive approach that recognizes the diverse needs of individuals in our society. Equality must not focus solely on the equal treatment of everyone, because some people will require more services to achieve justice whereas others require less. Herein lies the difference between the legal concepts of ‘formal equality’ and ‘substantive equality.’ While the former demands equal

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<sup>62</sup> *Wilson v Atomic Energy of Canada Ltd*, 2016 SCC 29 at paras 31-32.

<sup>63</sup> See for example Alberta Ombudsman, *Administrative Fairness Guidelines* (Calgary: Alberta Ombudsman, n.d.).

<sup>64</sup> This was a recurring comment from ombuds officers during discussions at the *Future of Parliamentary Ombudship Symposium* held in Victoria, BC from June 20-21, 2019.

<sup>65</sup> Julinda Beqiraj, Sabina Garahan & Kelly Shuttleworth, *Ombudsman schemes and effective access to justice: A study of international practices and trends* (Bingham: International Bar Association, October 2018) at 34-35.

<sup>66</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

treatment of all people at all times, the latter recognizes the importance of understanding the adverse effects of differences.<sup>67</sup>

Substantive equality is usefully examined through the equality protections afforded by s. 15(1) of the Charter, which reads as follows:

“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.”

Since *Andrews*,<sup>68</sup> and most recently affirmed by the Supreme Court of Canada in *Barton*,<sup>69</sup> the s. 15 test has focused on substantive equality. More specifically, it questions (1) whether the law creates a distinction based on an enumerated or analogous ground and (2) whether the distinction is discriminatory.<sup>70</sup> This adverse impacts approach is meant to ensure that laws and policies do not subordinate groups who already face social, political, or economic disadvantages in Canada.<sup>71</sup> It recognizes that individuals may require different treatment in order to achieve true equality.<sup>72</sup>

Though substantive equality has emerged as a favourable legal concept, the term carries some practical flaws. Claimants are rarely successful when making a s. 15 claim. Further, if a claimant is successful, that individual result may not promote greater substantive equality.<sup>73</sup> Taking recent s. 15 cases into account, the current approach to equality cases based on grounds and adverse effects has not been positive for vulnerable groups seeking justice from government harm or inaction.<sup>74</sup> Due to the confusion surrounding s. 15, and its resulting failures for claimants, lawyers are bringing equality claims under the guise of other *Charter* sections or using alternative legal strategies.<sup>75</sup>

The Supreme Court of Canada has displayed a preference for avoiding s. 15 arguments when possible, through minimal analysis or avoiding the topic altogether.<sup>76</sup> In the recent example of *Trinity Western*,<sup>77</sup> the majority found in favour of the equality-defending law societies based on an administrative law framework rather than engaging with the pled s. 15. While the equality-seeking groups were ultimately successful, the Court could have taken the opportunity to explain

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<sup>67</sup> See *R v Kapp*, 2008 SCC 41 at para 15.

<sup>68</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 165, 1989 CanLII 2 (SCC).

<sup>69</sup> *R v Barton*, 2019 SCC 33 at para 202.

<sup>70</sup> See *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at paras 19-21.

<sup>71</sup> Jennifer Koshan & Jonnette W Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013) 64 UNBLJ 19 at 24-25.

<sup>72</sup> *Ibid* at 24-25. See also Brian Etherington, “Promises, Promises: Notes on Diversity and Access to Justice” (2000) 26:1 Queen’s LJ 43 at 48.

<sup>73</sup> *Ibid* at 37.

<sup>74</sup> Jennifer Koshan, “Redressing the Harms of Government (In)Action: A Section 7 versus Section 15 Charter Showdown” (2013) 22 Const F 31 at 34.

<sup>75</sup> *Ibid* at 35-41. Koshan provides examples of how s. 7 of the *Charter*—which protects life, liberty, and security of person rights—has been used, and may continue to be used, to advance certain equality claims more successfully than s. 15.

<sup>76</sup> *Ibid* at 34.

<sup>77</sup> *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33. For a summary of this case, see <https://www.scc-csc.ca/case-dossier/cb/37318-37209-eng.pdf>

why the equality rights of LGBTQ students triumphed over the university's religious mandate in this circumstance. Alternatively, if s. 15 did not prevail here, the Court could have clarified why.

The Supreme Court of Canada has also held onto the concept of substantive equality and engaged with it in relation to other *Charter* sections. For example, in *Boudreault*,<sup>78</sup> Justice Martin relied on a substantive equality approach to find mandatory victim surcharges unconstitutional under s. 12 of the *Charter*.<sup>79</sup> She specifically noted that marginalized claimants were more likely to offend and be required to pay these surcharges. This form of punishment presented undue hardship and was “grossly disproportionate” to those lacking “adequate financial capacity.”<sup>80</sup> Of note are the types of social and economic barriers that Justice Martin accepted the marginalized claimants in this case faced: serious poverty, precarious housing situations, addiction, growing up under child protection, Indigeneity, and physical disabilities.<sup>81</sup> Justice Martin's nuanced understanding of marginalization—which exceeds the current limits of s. 15—suggest a potential way forward for an inclusive understanding of equality rights under s. 15 of the *Charter* and beyond.<sup>82</sup>

Despite judges repeatedly adopting the concept of substantive equality, the trend of courts failing to uphold equality rights in the context of s. 15 implies problematic judicial confusion. A primary factor barring the practical acceptance of substantive equality is that the s. 15(1) test overly focuses on siloed grounds of discrimination. These grounds lead to unrealistic comparisons of individuals to larger groups which may not align with their realities. This is particularly true for those who face discrimination based on analogous or intersecting grounds. It follows that the current substantive equality approach under s. 15 cannot adequately uphold the human dignity of the majority of claimants<sup>83</sup>—particularly those who cannot present as “caricatures” of their claimed ground.<sup>84</sup> As proposed by now-Justice Nitya Iyer, understanding social identity is not about increasing the number of enumerated grounds to become more inclusive. Rather, the categorical approach itself fails to “comprehend social identities” because it cannot “accurately describe relationships of inequality.”<sup>85</sup>

In order to understand individual equality claims, a person's barriers must be examined holistically, with an understanding that it may not be possible to compare peoples' situations due to a variety of surrounding circumstances. This process should be about moving attention away from dominant views of difference towards visualizing the types of “invisible norms” against which vulnerable individuals are often measured.<sup>86</sup> Intersectionality thus emerges as a theory that can help revise the failing substantive equality approach.

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<sup>78</sup> *R v Boudreault*, 2018 SCC 58 [*Boudreault*].

<sup>79</sup> Section 12 of the *Charter* protects against “cruel and unusual punishment.”

<sup>80</sup> *Boudreault*, *supra* note 78 at paras 55, 57, 60.

<sup>81</sup> *Ibid* at para 54.

<sup>82</sup> See generally Jennifer Koshan & Jonnette Watson Hamilton, “The Impact of Mandatory Victim Surcharges and the Continuing Disappearance of Section 15 Equality Rights” (7 January 2019), online (blog): *ABlawg* <[ablawg.ca/wpcontent/uploads/2019/01/Blog\\_JK\\_JWH\\_Boudreault\\_Dec2018.pdf](http://ablawg.ca/wpcontent/uploads/2019/01/Blog_JK_JWH_Boudreault_Dec2018.pdf)> at [Koshan & Hamilton, “Impact of Mandatory Victim Surcharges”].

<sup>83</sup> See generally Denise G Reaume, “Dignity, Equality, and Comparison” in Deborah Hellman and Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: OUP, 2013).

<sup>84</sup> Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993-1994) 19 *Queen's LJ* 179 at 181.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid* at 204-205.

Intersectionality is a feminist theory introduced by Kimberlé Crenshaw that examines how intersecting social or economic barriers, sometimes labeled ‘oppressions,’ can uniquely impact an individual’s circumstances.<sup>87</sup> For example, racialized women are more likely to face heightened systemic discrimination than white women or racialized men. Barriers may manifest according to enumerated equality grounds. However, they are often more complex, and must incorporate other unlisted barriers to justice such as poverty, homelessness, and Indigeneity.<sup>88</sup> Canadian judges have expressed their familiarity with the concept of intersectionality, and have recognized the intersection of enumerated equality grounds as analogous grounds.<sup>89</sup> However, there have been practical gaps between judicial interpretations of intersectionality and how they have applied the concept to vulnerable claimants in equality cases. These gaps are demonstrated by the messy jurisprudence surrounding substantive equality and s. 15.

Due to inconsistent applications of intersectionality by key institutional players, academics have sought to refine the theory to promote contextuality and inclusivity. Leslie McCall’s “intercategorical complexity” approach focuses on the nature of unequal relationships rather than categorical grounds.<sup>90</sup> Alternatively, Colleen Sheppard focuses on “inclusive equality” and underscores the importance of examining both “inequitable substantive outcomes in various social contexts” and “unfairness and exclusions in the structures, processes, relationships, and norms that constitute the institutional contexts of our daily lives.”<sup>91</sup> Sheppard promotes reliance on multiple layers of contextual analysis in order to create strategies that work for those who are typically silenced by discrimination and institutionalized inequalities.<sup>92</sup> Taking these works into account, a more relevant version of intersectionality must promote contextual analysis of individual circumstances and not focus solely on strict labelling based on established grounds.

As already discussed, intersectional discrimination increases a person’s chances of encountering a legal issue, and decreases the chances of the issue being adequately resolved. The recognition of equality as an underlying justice factor highlights how access strategies can further negatively impact those who face challenges when accessing the justice system. Dean Spade notes the “violence” that legal and administrative systems promote through justice processes related to criminal punishment, immigration enforcement, child welfare, and public benefits.<sup>93</sup> Spade implies that the best way to promote intersectional law reform in our society is to avoid all interactions with harmful justice institutions.<sup>94</sup>

Although Spade’s insinuation is extreme, the violence highlighted does influence the ways in which vulnerable individuals sometimes choose to avoid interaction with the justice system—including access to justice strategies. In a recent study involving interviews and focus groups with individuals who face poverty and social exclusion in Sakatoon, Sarah Buhler found that

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<sup>87</sup> See generally Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 *Stan L Rev* 1241.

<sup>88</sup> While some argue that ‘Indigeneity’ fits under the umbrella term ‘race’, the former requires specific attention due to the unique discrimination Indigenous peoples in Canada have experienced due to colonialism and harmful government-initiated programs that have sought to erase Indigenous identities (residential schools, forced sterilization of Indigenous women, etc.).

<sup>89</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 94, 1999 CanLII 675 (SCC).

<sup>90</sup> Leslie McCall, “The Complexity of Intersectionality” (2005) 30 *Signs* 1771 at 1784-1785.

<sup>91</sup> Colleen Sheppard, *Inclusive Equality* (Montreal & Kingston: McGill-Queen’s University Press, 2010) at 4.

<sup>92</sup> *Ibid* at 9, 13.

<sup>93</sup> Dean Spade, “Intersectional Resistance and Law Reform” (2013) 38 *Signs* 1031 at 1031-1032.

<sup>94</sup> *Ibid* at 1037.

marginalized individuals are more likely to describe the law and justice system as “fundamentally unfair, unsafe, and filled with risk for marginalized community members.”<sup>95</sup> As such, Buhler argues that access to justice must commit to taking marginalized perspectives and experiences seriously, and do so by working with marginalized communities in non-defensive ways.<sup>96</sup> She specifically suggests moving away from the current focus on “access” towards “a renewed emphasis on learning with and from communities about what it would take to move towards justice.”<sup>97</sup>

The case law and academic scholarship on equality presented here highlights the significant complexity and uncertainty surrounding how to make access to justice strategies—and the Canadian justice system as a whole—more equal. However, it is clear that the voices of vulnerable individuals must be elevated to ensure their unique experiences are understood and accommodated. When decision-makers are assessing vulnerable perspectives and experiences, they must consider the complexity of these experiences beyond caricatured conceptions of mutually exclusive grounds. A respect for complexity will inevitably require an additional respect for uncertainty—which will be troublesome for decision-makers focused on obtaining traditional forms of evidence. Yet, change is an integral part of the type of inclusive progress that we need to ensure that access to justice strategies work for those who need them most.

### *Justice Factors and the Need for Change*

The above discussions show that fairness and equality are not easily defined. Proper analyses of both concepts are necessarily contextual and open-ended; those looking for straight-forward justice-oriented solutions to the access to justice crisis are likely out of luck. Still, the point of introducing these justice factors is not to overwhelm key decision-makers or block necessary changes which may sometimes come in the form of access-driven strategies. Rather, the goal is to ensure that a diverse range of people have access to reasonable forms of justice. No single solution will work perfectly for everyone, because that would assume unrealistic homogeneity.

Adequate change is not going to come overnight. New and reformed strategies must take various forms, from increased discretion and guidelines to more formal legal methods. Understanding how fairness and equality should factor into access to justice strategies will require significant, diverse public input. It will also require decision-makers to commit to continual learning in order to understand and act on the needs of those currently neglected. Popular access to justice strategies will require monitoring and evaluations to screen for fairness and equality in both processes and outcomes, with changes occurring where necessary. As the arbitration clauses cases discussed in Section 7 demonstrate, well-intentioned strategies can end up harming those they were supposedly created to protect. Issues and needs cannot all be anticipated and mistakes happen: that is a part of the learning process when enacting laws or policies to solve complex issues. Nevertheless, allowing such mistakes to persist produces unfair and unequal results—especially when masked as protecting the greater good.

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<sup>95</sup> Sarah Buhler, "Don't Want to Get Exposed: Law's Violence and Access to Justice" (2017) 26 J L & Soc Pol'y 68 [Buhler, Law's Violence and A2J] at 80 [Buhler, Law's Violence and A2J].

<sup>96</sup> *Ibid* at 69.

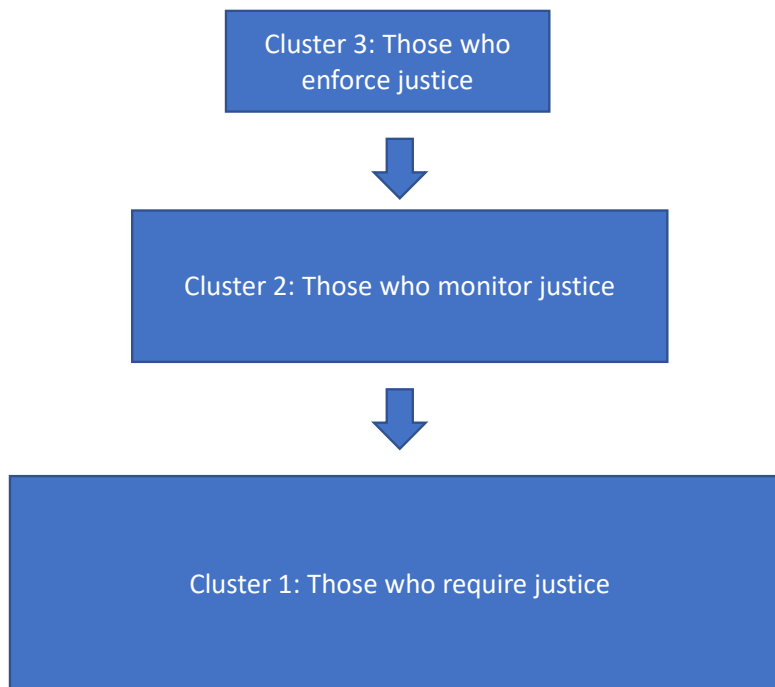
<sup>97</sup> *Ibid*.

## 6. Key Access to Justice Influencers and Cluster-Specific Implications

This section explores some practical implications of restricting access to justice strategies, keeping in mind the various players inevitably involved in influencing necessary changes. The goal is to identify the roles of broader groups with influential commonalities.

A review of the relevant scholarship, policy work, and jurisprudence suggests three broad clusters of key influencers: (1) those who require justice; (2) those who monitor justice; and (3) those who enforce justice. This section’s goal is to highlight how each cluster is influenced by and/or influences access to justice reforms. The clusters are not definitive; further research will need to highlight more specific solutions for the unique communities and individuals amongst the clusters.

**Figure 1: The three access to justice influencer clusters and their direction of authority**



### *Cluster 1: Those Who Require Justice*

**Key members:** The entire Canadian public, with increased focus on vulnerable individuals who face one or more barriers that make them more susceptible to facing legal issues and less capable of accessing the justice mechanisms they require. This is the broadest cluster.

The likes of Farrow, the CBA Justice Committee, and the Action Committee have demonstrated how the public struggles most with access to justice issues, seeing as they are the ones forced to navigate and rely on the justice system and its services. Therefore, the most inspiring proposals concerning access to justice reform focus on public-centered, ground-up approaches.

Specifically, they propose giving voice to those who require justice the most—due to facing at least one barrier of marginalization—but who lack the resources to navigate or rely on the

existing justice system.<sup>98</sup> This typically includes members of the middle- and lower-income classes, though the needs of each class are distinct.<sup>99</sup> Moving conceptions of access to justice away from justice providers to the public, those who actually use the services, is a key feature of modern, justice-oriented access to justice research.<sup>100</sup>

For fairness and equality to take central roles in access to justice strategies, it is important for public input to feature prominently in their creation and continuation. At the same time, it is crucial to recognize that diverse public opinions will clash, with different people needing or wanting different solutions. In the face of this conflict, those who face the most adversity in access the justice system must not get swept aside due to them traditionally having the least powerful voices. It will therefore be necessary for public input to be assessed broadly and considered contextually, with fairness and equality in mind, by those who will then monitor or enforce the required justice.

The work of feminist-legal scholars like Réaume, Koshan, and Justice Iyer highlights the need for contextual analyses of equality-based discrimination. Administrative law principles inspire the same thought concerning the fairness of access to justice strategies. As such, we must be careful when attempting to classify the needs of vulnerable members of the public, because it is easy to caricature a need or identity and present solutions that do not adequately address complex, intersectional issues.

Being mindful of potential oversimplification, an examination of recent research highlights the key issues that marginalized groups face when attempting to access the justice system. Kerri Froc argues that Canada's poor are unable to benefit from access to justice under the existing rule of law due to the normative evaluation of the content of laws that *Charter* rights like those expressed under ss. 7 and 15 support and inform.<sup>101</sup> She notes the poor claimants have scarce chances of making successful claims against the government for systemic failures because they lack the financial means to pursue their legal rights. The poor have had some successful equality and fairness claims, concerning matters such as the government's systemic failures to provide funding for legal services in civil matters or its imposition of financial barriers to access to justice.<sup>102</sup> However, these cases have arguably been won because the courts were able to generalize the issues away from poverty and towards seeing access to justice as an issue experienced by "ordinary," middle-class litigants.<sup>103</sup> Froc interprets the rule of law as necessarily recognizing poor peoples' right of access to justice in a contextual, realistic way.<sup>104</sup>

Gender also plays a significant role in widening the access to justice gap. Women have experienced many issues accessing adequate justice due to factors like imbalanced employment

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<sup>98</sup> See for example Action Committee, A Roadmap for Change, *supra* note 1 at 6-7; CBA Justice Committee, Reaching Equal Justice, *supra* note 4 at 60-61; Farrow, What is Access to Justice, *supra* note 9 at 968.

<sup>99</sup> CBA Justice Committee, Reaching Equal Justice, *supra* note 4 at 61.

<sup>100</sup> Trevor C W Farrow, "A New Wave of Access to Justice Reform in Canada" in Adam Dodek and Alice Wooley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: University of British Columbia Press, 2016) at 165-166 [Farrow, A New Wave of A2J Reform].

<sup>101</sup> Froc, Accessing Justice for Canada's Poor, *supra* note 44 at 459.

<sup>102</sup> See for example *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 1999 CanLII 653 (SCC).

<sup>103</sup> Froc, Accessing Justice for Canada's Poor, *supra* note 44 at 461-462.

<sup>104</sup> *Ibid* at 463.

opportunities and societal misunderstandings of gendered issues like the pervasiveness of sexual harassment and how to inclusively define equality.<sup>105</sup> Women are particularly susceptible to facing access to justice issues in the realms of family and civil law. Due to their lack of adequate legal representation, women are losing custody of their children, giving up their valid legal rights to support and fair division of property, and being victimized by litigation harassment from opposing sides.<sup>106</sup> Female survivors of violence (both sexual and non-sexual) also face a variety of legal traps, dead-ends, and obstacles when attempting to take action against a male perpetrator, which often ends up victimizing a woman more than if she had done nothing.<sup>107</sup>

ADR is sometimes portrayed as positive for women, due to its cost, efficiency, and flexibility benefits. However, strategies like private arbitration are more recently coming to light as failing to deliver adequate justice for women in the forms of effective remedies and transparent accountability.<sup>108</sup> For example, California recently took legislative steps to prevent companies from forcing their employees to sign mandatory arbitration agreements due to arguments from women's advocate groups that these agreements prevent women from being able to sue their employers over serious workplace issues like discrimination and sexual harassment.<sup>109</sup> Ideally, this decision will influence Canadian decision-makers.

As already noted in Section 2, Indigenous peoples face some of the most significant systemic discrimination in Canada. Though they are disproportionately impacted by a variety of pressing legal issues, they also face increased barriers to accessing adequate justice due to factors like the justice system's inherently colonial structure and Indigenous people feeling incapable or afraid of relying on a system that so often harms them.<sup>110</sup> In its final report, the Truth and Reconciliation Commission specifically noted how the legacy of residential schools has disproportionately victimized Indigenous peoples to this day in both the criminal and civil justice systems.<sup>111</sup> The harms to Indigenous people presented by the child welfare system also factor into the general discussion of access to justice.<sup>112</sup> The TRC's Calls to Action concerning justice and child welfare are thus important reference points for justice-oriented access to justice strategies that are rightfully inclusive of Indigenous priorities and reconciliation.<sup>113</sup>

Despite these examples, the struggles faced by the specified vulnerable groups undoubtedly intersects with others. For example, the Supreme Court of Canada has recognized the "feminization of poverty" as an "entrenched social phenomenon" in Canada. That is, women face unique economic barriers resulting in increased chances of poverty. This typically makes

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<sup>105</sup> Mary Jane Mossman, "Shoulder to Shoulder: Gender and Access to Justice" (1990) 10 Windsor YB Access Just 351 at 351, 353, 356.

<sup>106</sup> West Coast Leaf, Putting Justice Back on the Map, *supra* note 53 at 12.

<sup>107</sup> Lisa Gormley, "Traps, Dead-Ends And Obstacles to Justice: Solutions Proposed by Human Rights Law Frameworks" in Lisa Gormley Women's Access to Justice for Gender-Based Violence (Geneva: International Commission of Jurists, 2016) at 132-135.

<sup>108</sup> *Ibid* at 135-136.

<sup>109</sup> See Alexia Fernández Campbell, "Hollywood and Silicon Valley can no longer silence women with this contractual clause," *Vox* (11 October 2019), online: <<https://www.vox.com/identities/2019/10/11/20909589/california-forced-arbitration-bill-ab-51>>

<sup>110</sup> Buhler, Law's Violence and A2J, *supra* note 95 at 75.

<sup>111</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Library and Archives Canada Cataloguing in Publication, 2015) at 164-182 [TRC, Final Report Summary].

<sup>112</sup> See *Ibid* at 137-144.

<sup>113</sup> See Truth and Reconciliation Commission of Canada, *Calls to Action* (Ottawa: Library and Archives Canada Cataloguing in Publication, 2015) 1-2, 3-4.

women more vulnerable than men in situations like divorce.<sup>114</sup> The TRC has also highlighted how Indigenous women are particularly susceptible to justice issues, particularly in reference to the violence experienced by the unacceptably large number of murdered and missing Indigenous women and girls.<sup>115</sup> There is no limit to the number of intersectional barriers that increasingly prevent vulnerable Canadians from accessing the justice that they need to function. Thus, diverse public input is essential.

### *Cluster 2: Those Who Monitor Justice*

**Key members:** Those who monitor the formal justice system, including judges, tribunal members, lawyers, and other legal service providers. Also, those who oversee justice in a manner typically outside of the formal system, including government policy makers, independent officers, academics, non-profit organizations, community workers, advocates, and international governing organizations. This is the most flexible cluster.

Establishing the members of this cluster is a difficult task, given the flexible ways in which one might interpret the act of monitoring justice. In an attempt to clarify this cluster, the monitoring of justice may be broken down into two forms: (a) monitoring of the formal justice system and (b) informal, but influential, monitoring. The formal justice system most commonly revolves around courts and tribunals, with judges, lawyers, and any other relevant legal service providers acting as the key players.<sup>116</sup> Formal justice providers play a key role in monitoring the state of access to justice, provided that they provide the access to the legal information, advice, and representation that ordinary people need to understand and protect their legal rights.<sup>117</sup> Though past access to justice strategies have arguably focused too heavily on reforming the formal justice system—attempting to increase access to the courts when this is not always the most justice-oriented strategy—the roles of judges, lawyers, and other legal service providers are integral to helping reform the system in both advocacy and policy capacities.

The monitoring roles of judges and formal justice decision-makers are demonstrated by their decisions and how they impact or impede change. The many cases mentioned throughout this paper are meant to highlight this point. While judges do technically have the authority to create significant changes in the justice system, they are often limited by factors like deferring to legislative intent and interpretation—both key to the success of our democracy. Thus, they end up functioning more like monitoring entities with the potential to enforce if necessary.

While access to justice reform used to focus exclusively on the formal justice system, leading to overreliance on access-focused strategies, decisions made outside the scope of that system are now coming to the forefront in access to justice services and scholarship. This has made roles informally tied to the justice system more prominent, including those of certain government policy makers, independent officers (ombuds officers, privacy commissioners, etc.), academics, non-profit organizations, community workers, advocates, and international governing

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<sup>114</sup> *Moge v Moge*, [1992] 3 SCR 813, 1992 CanLII 25 (SCC).

<sup>115</sup> TRC, Final Report Summary, *supra* note 113 at 180-181.

<sup>116</sup> Action Committee, A Roadmap for Change, *supra* note 1 at 2.

<sup>117</sup> The Honourable Justice Thomas A Cromwell & Siena Anstis, "The Legal Services Gap: Access to Justice as a Regulatory Issue" (2016) 42:1 Queen's LJ 1 at 3.

organizations. The term ‘informal’ is not meant to belittle the influence of these monitoring individuals. In reality, those with informal titles are becoming increasingly influential as the justice system reforms, with many of them having more influence than some formal players.

Lawyers have particular justice-monitoring abilities. Farrow has called for access to justice to become “a central element of legal professionalism.”<sup>118</sup> Specifically, he argues that lawyers need to see themselves as the providers of the everyday justice needs that too many people lack.<sup>119</sup> Farrow also finds that three aspects of the culture shift proposed by the Action Committee are relevant to the role of lawyers in access to justice reform. First, client problems need to be understood and addressed from their own perspectives, not solely based on legal doctrine and procedural options.<sup>120</sup> Second, lawyers need to see their roles as collaborative, and consider how legal issues intersect with surrounding issues (violence, employment training, youth services, etc.).<sup>121</sup> Finally, theories and approaches to lawyering need to focus on larger social goals and not oppose the meaningful improvement of access to justice in Canada.<sup>122</sup>

Farrow also stresses the need for lawyers to accommodate access to justice innovations that may not prioritize the long-term health and relevance of the legal profession, but that do develop the growing everyday needs of Canadians.<sup>123</sup> For example, Farrow and Wooley have proposed reducing or eliminating the exclusive rights to practice law possessed by lawyers in favour of allowing other legal service providers to practice in certain areas of law, either alone or under a lawyer’s supervision.<sup>124</sup> Legal service providers may include paralegals, notaries, or other licensed professionals—all of whom would require adequate training.<sup>125</sup> Law students can also provide useful formal legal services that help alleviate the access to justice gap, through organizations like Pro Bono Students Canada, Access Pro Bono, and school clinics.<sup>126</sup>

Despite the benefits presented by boosting the powers of new legal service providers, it is important to remember the fairness and equality risks associated with overreliance on these services. Notably, those with more privilege and resources will be able to afford more highly qualified legal assistance, and will consequently be more likely to achieve their desired legal outcomes over weaker parties.<sup>127</sup> Given that this power imbalance already exists, it is unclear how much things would change with increased use of new legal services providers. But it is still worth considering.

There are also more people involved with informal monitoring work, with the numbers continually increasing as new access to justice innovations create new roles. The vastness of the informal group presents a challenge for trying to break down every person’s role within the

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<sup>118</sup> Farrow, A New Wave of A2J Reform, *supra* note 102 at 176.

<sup>119</sup> *Ibid* at 177.

<sup>120</sup> *Ibid* at 177-178.

<sup>121</sup> *Ibid* at 178.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid*.

<sup>124</sup> Alice Wooley & Trevor Farrow, "Addressing Access to Justice Through New Legal Service Providers" (2016) 3:3 A&M L Rev 549 at 550 [Wooley & Farrow, New Legal Service Providers].

<sup>125</sup> *Ibid*.

<sup>126</sup> See for example Brea Lowenberger, Michaela Keet & Janelle Anderson, "Collaborative Policy-Making, Law Students, and Access to Justice: The Rewards of Destabilizing Institutional Patterns" (2017) 34:1 Windsor YB Access Just 148.

<sup>127</sup> Wooley & Farrow, New Legal Service Providers, *supra* note 126 at 577.

confines of one paper. Two key member groups are therefore provided as examples. First, public servants involved throughout the process of creating/implementing access to justice policies have a key role to play in scoping out the underlying justice needs of vulnerable individuals. These policy-makers may be largely responsible for the necessary public outreach, either through primary or secondary research. They also have the ability to meet key elements of the Action Committee's guiding principles. Notably, they have the power to coordinate the action necessary to implement necessary changes, and strategically and consistently assess the outcomes of the implemented services.<sup>128</sup> Many of these policy-makers will also have experienced working within the formal justice system, so they can bridge their experiences in order to create public-friendly solutions that are simplified, coherent, proportional, and sustainable.<sup>129</sup>

McHale points to provincial governments officials as having essential roles and responsibilities in responding to the access to justice crisis, due to their unique administration and funding goals.<sup>130</sup> He also points to the three broad strategies typically available to provincial government officials when they seek to enhance access to justice: (1) invest more resources; (2) reduce case volumes; or (3) create efficiencies within existing justice services.<sup>131</sup> However, McHale suggests that the access to justice problem is more complex than what these solutions can provide, and proposes solutions premised not just on money but also on "fulfilling the justice mandate more effectively."<sup>132</sup> This is a useful direct call for key government policy-makers to inform their policies on the basis of justice factors like fairness and equality.

Second, the community leaders or liaisons who represent vulnerable groups are integral voices in promoting justice-oriented strategies. 'Community leader' is a deliberately broad characterization, and describes any individual who can shed light on a unique societal perspective. They could be an advocate, activist, scholar, or other type of community worker. While validation of a person's role from other community can help validate a one's leadership status, some communities are more organized than others. Also, the internal politics or beliefs of some vulnerable communities may compete with others. Ultimately, one person should never be the sole representative of an entire group.

Community liaisons are integral to access to justice reform because they can allow for more efficient coordination efforts between vulnerable groups and monitoring/enforcing officials. They can also interpret community concerns appropriately, provided that they are likely to share comparable sentiments. Of ultimate importance is the ability of a community worker to engage with a marginalized group in a familiar and non-threatening way. Despite all best efforts, government employees and/or academic scholars may not always obtain accurate accounts of vulnerable experiences, due to the fears that marginalized people may possess about being mistrusted or harmed by the justice system. The type of community-based research proposed here is often utilized in the health sector, but is also beneficial in this context.<sup>133</sup>

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<sup>128</sup> Action Committee, *A Roadmap for Change*, *supra* note 1 at 8-9.

<sup>129</sup> *Ibid* at 8.

<sup>130</sup> Jerry McHale, "Access to Justice: A Government Perspective" (2012) 63 UNBLJ 352 at 352-353 [McHale, A2J Government Perspective].

<sup>131</sup> *Ibid* at 362-363.

<sup>132</sup> *Ibid* at 363.

<sup>133</sup> See for example Nina Wallerstein et al, "Developing and Maintaining Partnerships with Communities" in Barbara A Israel et al, eds, *Methods in Community-Based Participatory Research for Health* (San Francisco: Jossey-Bass, 2005); Jamie Rogers &

### Cluster 3: Those Who Enforce Justice

**Key members:** Those with roles that explicitly require the enforcement of justice mandates. Key members include high-ranking government officials (elected and non-elected) who have the power to enact reforming legislation and policies, and appellate justices. The smallest cluster, though arguably the most influential.

The cluster of people who enforce justice in our society is the smallest of the three. However, it is arguably the most influential. Despite the many calls for ground-up approaches, those who enforce justice are the ones who must allow for significant reforms to take place—actively or passively. Key members of this cluster are those with the powers to initiate significant changes within the justice system, including high-ranking public officials (elected and non-elected) responsible for enacting reforming legislation and policies and the appellate justices whose decisions take precedent under the principle of *stare decisis*.<sup>134</sup>

An enforcer must have the ability to clarify access to justice goals in a binding way. As legislative intent takes priority in our democratic system, those with the power to enact justice-oriented legislation can systematically help vulnerable groups access the justice they require. However, judges—especially appellate justices—can interpret and modify legislation and policies when required. Such actions may have justice-oriented results, which can trickle into future progressive decision-making.

Access to this cluster is exclusive, typically requiring advanced education and other social and economic privileges. Since this is the cluster least likely to have personally faced access to justice issues, enforcers must recognize their relative status and focus on collaborating with vulnerable groups when it comes to initiating access to justice reforms. It is generally important for these powerful leaders not to intentionally distance themselves from the everyday struggles of those with unfamiliar needs and experiences. With great power comes great responsibility, and so influential justice enforcers must make constant efforts to learn from those willing to teach through various mediums.

Justice enforcers must also recognize that reforming the justice system is not simply about fitting everyone into the existing formalized structure. Inclusive, justice-oriented change must allow for the system to work according to unique needs, which will inevitably change the roles and tasks of justice enforcers. Many common, engrained formal justice strategies cannot adequately address diverse needs, requiring changes in processes including the collection and evaluation of evidence, courtroom dynamics (including the use of courtrooms at all), and treatment of witnesses.<sup>135</sup>

Looking back at the many Supreme Court of Canada decisions examined in this paper, there is a pattern of judges hesitating to interfere with laws or policies due to democratic rights. Further,

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Ursula A Kelly, “Feminist intersectionality: Bringing social justice to health disparities research” (2011) 18:3 *Nursing Ethics* 397.

<sup>134</sup> In the common law system, *stare decisis* refers to the rule that a higher court’s decision takes precedent over that of a lower court.

<sup>135</sup> See for example Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston: McGill-Queen’s University Press, 2018).

engrained legal principles like freedom of contract and allowing for governments to reasonably interfere with *Charter* rights<sup>136</sup> can prevent marginalized claimants from finding adequate justice within the formal system. Though some justices have recognized complex justice factors, most have avoided discussing fairness and equality in detail.

Judicial limitations make the roles of governmental enforcers particularly important for instructing influential justice-oriented reforms. This also means that government enforcers have a heightened duty to learn about marginalized needs, act upon them, or recognize when another party is more capable of taking the lead on a certain initiative. The power of implementation goals such as those proposed by the Truth and Reconciliation Commission is they stem from those who directly experience systemic discrimination.

### *Cluster Overlap: Recognizing Privilege and Reform Potential*

While broad generalizations about cluster membership have been made above, individuals will undoubtedly belong to more than one group. An individual's influence on the justice system may vary according to factors like their particular role, their degree of influence, and any personal privileges/barriers they possess. For example, a lawyer who monitors the fate of justice in a courtroom is also a member of the public, and may have individuals concerns about their own treatment within their influential position or the justice system at large.<sup>137</sup> While some may only require justice, others will find themselves members of two or even three clusters.

With inevitable overlap comes varying degrees of privilege amongst those in each cluster. Those who belong only to the first cluster are more likely to be disadvantaged by their lack of knowledge of or authority over the justice system and its many pathways. Therefore, individuals must recognize any privileges they have respecting access to justice reform, and use them to collaborate with those around them. Further, those with privilege must be willing to listen to those with less in order to prioritize any unfamiliar but necessary goals.

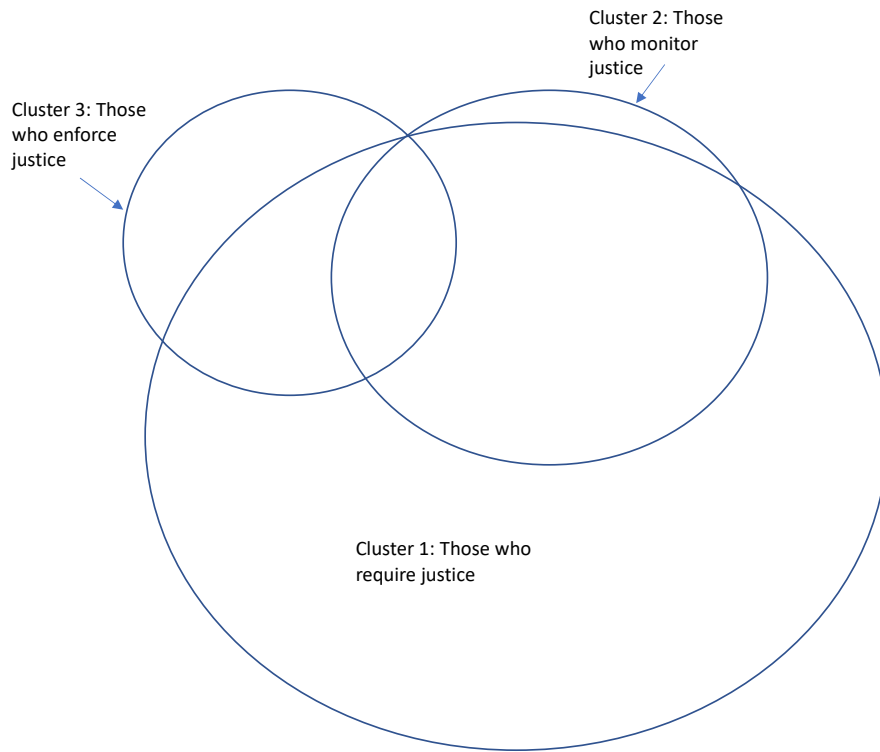
The overlap in cluster membership also has the potential to significantly improve reform efforts. Those who belong to multiple clusters are more likely to understand the various perspectives that exist throughout the domains, particularly if they engage with a diverse spectrum of individuals. Those who understand these varying perspectives can then act as fulcrums of reform through their more privileged monitoring or enforcing roles. For example, they can help enact more inclusive laws and policies, require more fulsome community engagement or consultation strategies, or even help promote justice-seekers into more authoritative roles.

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<sup>136</sup> Section 1 of the *Charter* allows for a court to uphold a government action that violates a *Charter* principle if the violation was “prescribed by law as can be demonstrably justified in a free and democratic society. Every *Charter* right analysis concludes with a s. 1 analysis, guided by the test from *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC).

<sup>137</sup> See for example The Continuing Legal Education Society of British Columbia, “But I Was Wearing a Suit—Mini Documentary” (23 November 2017), online (video): *YouTube* <[https://www.youtube.com/watch?time\\_continue=53&v=HTG7fi-5c3U](https://www.youtube.com/watch?time_continue=53&v=HTG7fi-5c3U)>. In this short documentary, Indigenous lawyers discuss some of the discriminations they have faced within their profession, from both colleagues and the greater public.

**Figure 2: Membership overlap between the access to justice influencer clusters**



Though the implications of justice-oriented reforms will inevitably have overlapping effects, each cluster will face specific implications that are worth mentioning. These implications are ultimately inspired by the Action Committee’s suggestion that in order to close the access to justice gap in Canada, a “cultural shift” is required.<sup>138</sup> The six elements proposed as part of this shift are: (1) put the public first; (2) collaboration and coordination amongst legal and other social and healthcare providers; (3) focus on prevention and education; (4) amplify the justice system and make it more coherent, proportional, and sustainable; (5) take action; and (6) focus on outcomes.<sup>139</sup> These goals all play different roles in terms of how they implicate the fairness and equality roles that each cluster must play and/or promote.

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<sup>138</sup> Action Committee, A Roadmap for Change, *supra* note 1 at 1.

<sup>139</sup> *Ibid* at 6-9.

## 7. The Access to Justice Divide in Recent Jurisprudence: Some Examples

The literature review and analytical map presented above demonstrate some of the general concerns related to justice-focused strategies, and how reform might impact different groups. This section focuses on specific legal examples of how varying perceptions of access to justice are currently hurting vulnerable parties. The following cases were selected because they are recent, high-profile appellate decisions that usefully depict the access to justice divide of focus here. Other cases may also display this theme.

The three selected cases—*Siedel*, *Wellman*, and *Heller*—all focus on mandatory arbitration clauses in standard-form contracts. A standard-form contract contains terms set by a party who is typically more powerful than the other, making power imbalance of particular concern. While some justices have shown a preference for arbitration clauses in standard-form contracts, due to factors like expediency and freedom of contract, others have shown concern for the access to justice needs of less powerful parties in forced arbitration situations. The following summaries emphasize this divide, suggesting the need for a clarified definition of “access to justice.”

### *Seidel v TELUS Communications Inc: Consumer Protection Versus Access to Justice?*

In *Seidel*, a 5-4 split decision of the Supreme Court of Canada, the Court found that a mandatory arbitration clause in a TELUS contract could not prevent a proposed class action due to both consumer protection legislation and access to justice concerns. The appellant, Ms. Seidel, entered into a standard-form consumer contract with TELUS for cell phone services. The contract included terms requiring all disputes between the parties to be resolved by arbitration, confirming that she waived her right to participate in future class action proceedings against TELUS.

In violation of the arbitration clause, Ms. Seidel filed a class action against the company alleging that it had illegally billed her for time when her phone was unconnected to the cellular network. Her causes of action included that TELUS had violated British Columbia’s consumer protection legislation, the *Business Practices and Consumer Protection Act*.<sup>140</sup> TELUS then applied to stay the proceeding based on previous judicial support for staying class proceedings in favour of mandatory arbitration clauses in consumer contracts.<sup>141</sup> Due to this precedent, the British Columbia Court of Appeal stayed the class action in favour of mandatory arbitration.

All of the Supreme Court of Canada justices agreed the key issue in this case was access to justice and whether it could be served through mandatory private arbitration.<sup>142</sup> The majority decision, delivered by Justice Binnie, disregarded private arbitration as an appropriate method in this case because it would not be able to adequately satisfy the remedies conferred upon Ms. Seidel by the *BPCPA*. Enforcing arbitration in this case was said to be “antiethical.”<sup>143</sup> It was agreed that, in general, parties agreements to arbitrate are to be enforced in the absence of

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<sup>140</sup> *Business Practices and Consumer Protection Act*, SBC 2004, c 2, s 172 [*BPCPA*].

<sup>141</sup> See *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35. Note that both cases were out of Quebec—a province that lacked consumer protection legislation at the time the decisions were made.

<sup>142</sup> *Seidel*, *supra* note 5 at paras 22, 52.

<sup>143</sup> *Ibid* at paras 38-39.

legislative language expressing otherwise. In this case, the parties could not contract out of BC's consumer protection legislation.

The dissent, written by Justices LeBel and Deschamps, was critical of the majority's distaste for private arbitration in this situation. The justices agreed that the remedies sought by Ms. Seidel pursuant to the *BPCPA* could be met through private arbitration. They made a point of stating that access to justice was best served through an alternative dispute resolution method in this case as "[a]ccess to justice in Canada no longer means access just to the public court system."<sup>144</sup>

Comparing the two decisions in relation to their views of access to justice, the minority seems to have favoured the "access" model whereas the majority focused more on holistic "justice" model factors. Considering the litigants involved, TELUS was a significantly more powerful entity than the individual Ms. Seidel. In a private arbitration situation, Ms. Seidel was more at risk of not achieving an equitable result. While arbitration may have led to a more expedient result, it would not necessarily be as fair. Still, it is important to note that the majority decision was also founded on the existence of consumer protection legislation. This meant that future class action litigants could still be precluded from bringing their actions due to mandatory arbitration clauses.

#### *Telus Communications Inc v Wellman: An Arbitration Clause Prevents a Class Action.*

The Court in *Seidel* seemed wary of mandatory arbitration clauses in standard form contracts. However, in *Wellman*, another 5-4 split decision of the Supreme Court of Canada, the majority affirmed that such clauses are still enforceable in the context of non-consumer (i.e. business) contracts. The plaintiff filed a proposed class action in Ontario against TELUS, claiming that the company was overcharging customers by rounding up calls to the next minute without disclosure. The proposed class action included both consumers and non-consumers (i.e. business customers). The issue potentially barring the class action was that the service contracts between TELUS and its consumers contained an arbitration clause requiring contractual disputes to be resolved through binding arbitration.

TELUS conceded that the Ontario *Consumer Protection Act*<sup>145</sup> invalidated the arbitration clause to the extent that it prevented class members who qualified as "consumers" from pursuing their claims in court. However, business customers are not granted the same statutory protection. Therefore, TELUS sought to have the class action stayed with respect to the business customer claims, relying on the mandatory arbitration clause.

The trial judge dismissed TELUS motion for stay and certified the class action. She held that under s. 7(5) of the Ontario *Arbitration Act*,<sup>146</sup> courts have the discretion to refuse a stay in a case such as this where it would not be reasonable to separate the matters dealt with in an arbitration agreement from the other matters. She deemed it reasonable to allow non-consumers to participate in the class action because it would be unreasonable to separate these claims from the consumer ones. The Court of Appeal dismissed TELUS' appeal.

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<sup>144</sup> *Seidel*, *supra* note 5 at para 54.

<sup>145</sup> *Consumer Protection Act*, SO 2002, c 30, Sched A, s 7 [CPA].

<sup>146</sup> *Arbitration Act*, SO 1991, c 17, s 7(5).

Unlike the courts below, the Supreme Court of Canada upheld TELUS' position. Justice Moldaver, writing for the majority, found that s. 7(5) of the *Arbitration Act* does not grant courts the discretion to refuse a stay of matters subject to a mandatory arbitration agreement. Justice Moldaver noted the general rule proved under s. 7(1) of the *Arbitration Act*, which provides for a mandatory stay in favour of arbitration where a proceeding is commenced in violation of an arbitration agreement. He also found that the alleged overcharging issue in this case was covered by the arbitration agreement, meaning the s. 7(5) stay exception did not apply. Justice Moldaver acknowledged the policy concerns raised by the dissenting justices, including the importance of promoting access to justice, the difficulty of distinguishing between consumers and non-consumers, and the potential unfairness caused by enforcing arbitration clauses contained in standard form contracts.<sup>147</sup> However, he found that such policy concerns were best left to the legislature and could not be used “to make the provision say something it does not.”<sup>148</sup>

The four dissenting justices, guided by the reasons of Justices Abella and Karakatsanis, would have dismissed TELUS' appeal. In the dissent's view, s. 7(5) reflected an explicit legislative intention to override an otherwise applicable arbitration clause by affording courts the discretion to grant or refuse a partial stay. Denying business consumers the opportunity to join this class action was found to deny their access to justice, especially considering the range of business consumers who would be impacted and that some might be pursuing identical claims as consumers.<sup>149</sup> While the majority's focus on the words of the legislation was said to be important, so too were the policy considerations and consequences ultimately brushed aside.<sup>150</sup> The overall purpose of the *Arbitration Act* was said to promote access by allowing parties to choose a timely and efficient justice method.<sup>151</sup> However, forcing the separation of matters in this case would result in costly and lengthy factual inquiries that would hinder justice for many.<sup>152</sup> Eliminating judicial discretion in the context of s. 7(5) was also said to eliminate access to justice.<sup>153</sup> *Wellman* illuminates how enforcing a method intended to promote access to justice can end up hurting the justice prospects of many by staying their class action claims.

### *Uber v Heller: Does Access to International Arbitration Count Result in True Justice?*

A final case to consider is *Heller*—a decision that has recently worked its way up to the Supreme Court of Canada.<sup>154</sup> In anticipation of the final decision, the vastly contrasting lower court decisions suggest the need for clarity surrounding what access to justice should mean. The lead plaintiff, Mr. Heller, lives in Ontario and works for the food delivery service Uber Eats. He proposed a class action seeking \$400 million in damages and a declaration that Uber drivers are employees of Uber and therefore entitled to the benefits and protections included under the provincial *Employment Standards Act*.<sup>155</sup>

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<sup>147</sup> *Wellman*, *supra* note 6 at para 78.

<sup>148</sup> *Ibid* at para 79.

<sup>149</sup> *Ibid* at para 106.

<sup>150</sup> *Ibid* at para 108, 130.

<sup>151</sup> *Ibid* at paras 137-138.

<sup>152</sup> *Ibid* at para 157.

<sup>153</sup> *Ibid* at para 169.

<sup>154</sup> *Uber Technologies Inc, et al v David Heller*, 2019 CanLII 45261 (SCC).

<sup>155</sup> *Employment Standards Act*, SO 2000, c 41 [ESA].

The issue potentially barring the class action is that the company's driver services agreement<sup>156</sup> includes an agreement to arbitrate disputes in the Netherlands pursuant to the *International Commercial Arbitration Act*<sup>157</sup> or, if necessary, the *Ontario Arbitration Act*. The upfront administrative/filing-related costs for a driver to participate in the international mediation-arbitration agreement prescribed in the arbitration clause is US\$14,500. These fees do not cover counsel fees, travel, or inevitable other expenses.<sup>158</sup> For a driver like Mr. Heller, who earns about \$20,800-\$31,200 per year before taxes and expenses, the costs of international arbitration make it a prohibitive option.<sup>159</sup>

The trial judge granted Uber's motion to stay the class action in favour of arbitration. Applying the *Seidel* and *Wellman* decisions, Justice Perell held that courts must enforce arbitration agreements freely entered into, even in standard-form contracts such as the one in question. Any restriction on a party's freedom to arbitrate must be found in legislation, which in this case did not exist. The *ESA* was not found to restrict the arbitrability of employment agreements nor was the agreement found unconscionable.<sup>160</sup>

The Ontario Court of Appeal overturned the motion judge's decision, finding the arbitration clause invalid because it: (1) illegally contracted out of the *ESA* and (2) is unconscionable under common law. Under the first ground, it was held that s. 5 of the *ESA* prevents parties from contracting out of employment standards. Specifically, employees cannot contract out of provisions of the *ESA* that allow them to bring complaints about labour standards before the Ministry of Labour. In making this decision, the Court found that Mr. Heller and other Uber drivers were in fact employees of the company.<sup>161</sup>

The unconscionability ground is more relevant to the topic of access to justice because it questions the general enforceability of arbitration clauses. Relying on the test for unconscionability from *Titus*,<sup>162</sup> the Court found the arbitration is unconscionable because:

1. it represents a substantially improvident or unfair bargain;
2. there is no evidence that Mr. Heller had any legal or other advice prior to entering into the services agreements nor is it realistic to expect that he would have;
3. there is a significant inequality of bargaining power between Mr. Heller and Uber; and
4. Uber knowingly and intentionally chose the arbitration clause in order to favour its interests over those of its drivers.<sup>163</sup>

The Court found the "fundamental flaw" in the motion judge's approach to this case was that he proceeded on the basis that the arbitration clause in question was comparable to normal commercial contracts where the parties are of "relatively equal sophistication and strength."<sup>164</sup> Relying on the Supreme Court of Canada's decision in *Douez*,<sup>165</sup> the Court found the arbitration

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<sup>156</sup> Every Uber driver must sign this agreement prior to offering services.

<sup>157</sup> *International Commercial Arbitration Act*, SO 2017, c 2, Sched 5.

<sup>158</sup> *Heller*, *supra* note 7 at paras 14-15.

<sup>159</sup> *Ibid* at para 15.

<sup>160</sup> *Ibid* at paras 16-18.

<sup>161</sup> *Ibid* at para 49.

<sup>162</sup> *Titus v William F Cooke Enterprises Inc*, 2007 ONCA 573.

<sup>163</sup> *Heller*, *supra* note 7 at para 68.

<sup>164</sup> *Ibid* at para 70.

<sup>165</sup> *Douez v Facebook, Inc*, 2017 SCC 33.

clause, which also functioned as a forum selection clause, operated to unfairly defeat consumer/employee claims.<sup>166</sup>

Unlike *Seidel* and *Wellman*, access to justice has not explicitly come up as a policy issue underlying *Heller*. However, it is one of relevance that may sway the Supreme Court of Canada when it reveals its decision from the hearing that took place on November 6, 2019. *Heller*, like the latter two cases, demonstrates how an access to justice measure can be used against vulnerable parties when their justice needs and imbalanced bargaining positions are disregarded for other factors such as expediency and freedom of contract. At the heart of this decision should be the ability of Uber drivers to freely access fair, realistic dispute resolution methods.

### *Summary: Implications for Further Case Analysis*

Despite the complex facts underlying the decisions in each of these cases, together they demonstrate the need for justice factors to underlie access to justice strategies like ADR. In each, the parties have significantly different bargaining positions, with the more powerful parties having the opportunities to exploit the weaker by enforcing ADR strategies. The cases also demonstrate how access to justice innovation can conflict, with the validity of class action suits being questioned in relation to mandatory arbitration clauses. The split courts in both *Seidel* and *Wellman* suggest judicial unease on how access to justice should factor into discussions surrounding other important legal principles like freedom of contract and unconscionability. As *Heller* moves forward, it will be crucial for considerations such as access to justice, fairness, and equality to factor into the discussion about enforcing ADR.

These cases also highlight how different groups in the justice system can promote or prevent effective access to justice remedies. The justice-seeking plaintiffs all sought collaborative remedial efforts when faced with challenges to achieving essential services. The plaintiffs have all sought class actions as the ideal means to meet their justice requirements, presumably to increase the power of their claims and help make achieving justice cost-effective. They have thus demonstrated the necessity of justice-seekers collaborating their efforts in order to have greater impacts on those with more authority. In particular, Mr. Heller represents a vulnerable group of individuals forced to rely on precarious work in the growing gig economy. Fairness and equality necessarily emerge as underlying factors in all of these cases, given the significant power imbalances at play. Reliance on justice factors can help illuminate these discrepancies, as suggested by the Ontario Court of Appeal in *Heller* through its unconscionability finding.

Typically, the involved justices have avoided overly exerting their enforcement power, choosing instead to rely on monitoring approaches guided by legislative intent. This stresses the important role of governmental enforcers with the capacity to enact legislation that can protect vulnerable consumers. However, those with both monitoring and enforcing capacity—including judges—must not be overly hesitant about exerting their enforcing authority when necessary to protect vulnerable interests. Legislatures do not always make fair or equitable decisions, and judges should interfere when necessary. As suggested by the dissenting justices in *Wellman*, “policy objectives matter, and consequences matter.”<sup>167</sup> Judicial overreliance on pure textualism can

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<sup>166</sup> *Heller*, *supra* note 7 at paras 70-71.

<sup>167</sup> *Wellman*, *supra* note 6 at para 108.

force litigants to overspend their money, deny meaningful remedies, and prevent individuals from using the justice system altogether.<sup>168</sup> Policy considerations like fairness and equality should thus factor into legal analysis.

The roles of various justice monitors are also highlighted in these cases, though in less explicit ways. For example, lawyers were involved in advocating for the parties in these cases, some of whom likely acted pro bono or at lowered rates in order to argue these issues of great public importance and protect the vulnerable parties involved. Supreme Court of Canada litigation often also involves intervenors, who argue on behalf of public interest authorities that seek to aid judicial interpretations of issues with greater public significance. In addition, we can look to the monitoring capacities of various public organizations in the context of these cases, particularly those with both advocacy and policymaking capacities. For example, could an ombuds-like authority have prevented this sort of litigation from needing to happen in the first place?

These cases ultimately underline the need for those who monitor and enforce to continuously grapple with new justice-oriented concepts. Our common law system is necessarily premised on the concept of precedent, entrenching theoretically-wise legal principles that do not always practically apply to large numbers of the public. Allowing for justice factors and their flowing policy considerations to factor into legal interpretations can help support those who struggle with accessing justice while also upholding the justice system's greater values. This process will inevitably require increased collaboration and inclusion efforts purported by those in authoritative positions. However, it must be fundamentally led by those justice-seekers like Ms. Seidel, Mr. Wellman, and Mr. Heller who have all struggled to obtain individual justice in a system fairly stacked against them.

This paper relied on the *Seidel*, *Wellman*, and *Heller* decisions to explore one faction of the access to justice crisis and its implications. However, access to justice issues will manifest differently in varying sectors or domains, revolving around concerns like healthcare, the environment, family matters, or criminal justice reform. This should be researched further to improve substantive justice in other areas.

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<sup>168</sup> *Wellman*, *supra* note 6 at para 109.

## 8. Conclusion—Suggestions for Moving Forward

This paper has considered the broad challenges of reforming access to justice strategies, introduced a framework for locating such changes, and provided a case analysis of recent Supreme Court decisions that could be informed by the analytic distinctions arising from the literature review. Together, these tactics demonstrate the need for a big agenda. This conclusion outlines some suggestions for implementation strategies and further research.

### *Implementation Strategies*

Due to the many issues and players that influence access to justice reform, McHale’s suggestion that “one size does not fit all” with respect to required strategies is correct.<sup>169</sup> Attempting to suggest specific implementation goals within the confines of this paper is somewhat unrealistic, given the necessary primary research with vulnerable groups that is required to come to adequate conclusions. However, a few key goals are worth mentioning.

First, the Action Committee has provided us with a nine-point access to justice roadmap that does address some of the justice concerns this paper seeks to alleviate. The roadmap is broken down into three sections: (1) innovation goals, (2) institutional and structural goals, and (3) research and funding goals.<sup>170</sup> The innovation goals are particularly relevant to this justice-oriented discussion, seeing as they focus on issues like addressing everyday legal problems, making essential legal services available to everyone, and restructuring the delivery of civil and family services to make them more accessible. Vulnerable populations are somewhat accounted for, including through the calls for increased legal aid funding<sup>171</sup> and self-represented litigants.<sup>172</sup> However, as suggested by the Action Committee, the more detailed guidance is required to truly meet justice needs.<sup>173</sup>

In concurrence with the Action Committee’s point about the necessity of immediate action, members of all three identified clusters must focus on collaborating and coordinating with each other in order to come up with adequate access to justice strategies. The values and needs of these groups will inevitably conflict—even within the clusters themselves. However, leaders within each group must work to mediate and negotiate through points of conflict, and come to agreements about initial strategies. Public feedback must remain of utmost importance, with the needs of particular groups being prioritized if they are identified as a key marginalized population within a targeted area. However, new voices must continuously be added to access to justice conversations to prevent stagnancy or invisible groups being silenced.<sup>174</sup>

New and existing access to justice strategies must also be evaluated on the basis of the justice factors identified plus any new ones that arise as this conversation continues. It is crucial that

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<sup>169</sup> McHale, A2J Government Perspective, *supra* note 132 at 365.

<sup>170</sup> Action Committee, A Roadmap for Change, *supra* note 1 at 10.

<sup>171</sup> *Ibid* at 14.

<sup>172</sup> *Ibid* at 16.

<sup>173</sup> *Ibid* at 1.

<sup>174</sup> An organization that has already begun working on collaborative access to justice efforts is Access to Justice BC. See more about them here: <https://accesstojusticebc.ca/>

those selected to evaluate programs are aware of diverse needs, and receive appropriate social justice training. It would also be appropriate to reimagine evaluation processes where appropriate, to coincide with the unique needs of vulnerable populations. Deciding how this should be done will require further research.

### *Suggestions for Further Research*

This paper explores a vast topic, using only secondary research. Additional research, ideally grounded in primary research with vulnerable individuals, is necessary to creating the identified justice-oriented changes. The research of academics including Farrow and Buhler emphasizes how powerful research methods like surveys, interviews, and focus groups can be in an access to justice context. Buhler in particular highlighted primary examples of vulnerable experiences in meaningful way that is worthy of replication. Future primary research could focus on additional intersectional experiences, which opens the doors to a limitless number of projects. It would also be useful to get a better sense of how monitoring and enforcing parties feel about working with the public, and how they might be better supported throughout this process.

This paper has also limited the conception of justice to two factors: fairness and equality. Future research could focus on additional justice factors. It would also help to get a better sense of how justice factors work together and/or conflict, and how to best prioritize factors according to the unique needs of particular individuals. Additional justice-factor research could also focus on justice-oriented evaluation strategies, and who should be involved in evaluation processes. More research is required respecting how groups should best coordinate or collaborate in order to produce effective justice-oriented changes. The call for such efforts is meaningless without considering such aspects as what motivations are necessary to bring or drive people to act together, and how to sustain and advance effective collaboration and coordination. As the goal of this paper is to inspire to inspire desirable and long-lasting social efforts, strategies must begin on the right foot. Finally, as noted in Section 3, this research paper was limited in that it explored case law in one policy domain. As a wicked problem, the access to justice challenge spans many policy domains and future research should start applying the concepts and framework developed in this paper to other policy domains.

The access to justice crisis is not going to end until true justice needs take priority over problematic efficiency strategies. This paper has attempted to bring some of these justice needs to light, through the legally-guided concepts of fairness and equality. Despite the often-theoretical nature of this discussion, the practical point that must reside is that the vulnerable individuals who are most susceptible to facing legal barriers must be at the forefront of reforming the justice system. Inspiring this type of change is a necessarily collaborative effort. There may not be any perfect solutions, given the diverse nature of Canadian society and the many conflicting opinions that exists as a result of it. However, there are steps those in power can take to help make accessing justice a significantly less burdensome task. Marginalized people need to feel like valuable players in the justice system. This requires urgent action. Not only will a more accessible and fair justice system be more substantively and procedurally just for citizens, but it also promises to be fair and more efficient.

## Bibliography

### Legislation

*Arbitration Act*, SO 1991, c 17, s 7(5).

*Business Practices and Consumer Protection Act*, SBC 2004, c 2.

*Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

*Consumer Protection Act*, SO 2002, c 30, Sched A, s 7.

*Employment Standards Act*, SO 2000, c 41.

*International Commercial Arbitration Act*, SO 2017, c 2, Sched 5.

### Jurisprudence

*Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2 (SCC).

*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC).

*Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34.

*Doez v Facebook, Inc*, 2017 SCC 33.

*Dunsmuir v New Brunswick*, 2008 SCC 9.

*Heller v Uber Technologies Inc*, 2019 ONCA 1.

*Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

*Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 94, 1999 CanLII 675 (SCC).

*Moge v Moge*, [1992] 3 SCR 813, 1992 CanLII 25 (SCC).

*New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 1999 CanLII 653 (SCC).

*R v Barton*, 2019 SCC 33.

*R v Boudreault*, 2018 SCC 58.

*R v Kapp*, 2008 SCC 41.

*Rogers Wireless Inc. v. Muroff*, 2007 SCC 35.

*Seidel v Telus Communications Inc.*, 2011 SCC 15.

*TELUS Communications Inc v Wellman*, 2019 SCC 19.

*Titus v William F Cooke Enterprises Inc.*, 2007 ONCA 573.

*Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33.

*Uber Technologies Inc, et al v David Heller*, 2019 CanLII 45261 (SCC).

*Wilson v Atomic Energy of Canada Ltd.*, 2016 SCC 29.

### **Secondary Materials**

Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007).

Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013).

Alberta Ombudsman, *Administrative Fairness Guidelines* (Calgary: Alberta Ombudsman, n.d.).

Alice Wooley & Trevor Farrow, "Addressing Access to Justice Through New Legal Service Providers" (2016) 3:3 A&M L Rev 549.

Arlene Fink, *Conducting Research Literature Reviews*, 5<sup>th</sup> ed (Thousand Oaks: SAGE Publications Ltd, 2019).

Australian Public Service Commission, *Tackling Wicked Problems: A Public Policy Perspective* (Commonwealth of Australia, 2008).

Brea Lowenberger, Michaela Keet & Janelle Anderson, "Collaborative Policy-Making, Law Students, and Access to Justice: The Rewards of Destabilizing Institutional Patterns" (2017) 34:1 Windsor YB Access Just 148.

Brian Etherington, "Promises, Promises: Notes on Diversity and Access to Justice" (2000) 26:1 Queen's LJ 43.

Brian Head & John Alford, "Wicked Problems: Implications for Public Policy and Management" (2013) 47:6 *Administration & Society* 711.

Canadian Bar Association Access to Justice Committee Final Report, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, November 2013).

Dean Spade, "Intersectional Resistance and Law Reform" (2013) 38 *Signs* 1031 at 1031-1032.

Denise G Reaume, "Dignity, Equality, and Comparison" in Deborah Hellman and Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: OUP, 2013).

Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal & Kingston: McGill-Queen's University Press, 2018).

Estelle Hurter, "Access to justice: to dream the impossible dream?" (2011) 44:3 *The CILSA* 408.

Jamie Rogers & Ursula A Kelly, "Feminist intersectionality: Bringing social justice to health disparities research" (2011) 18:3 *Nursing Ethics* 397.

Jennifer Koshan, "Redressing the Harms of Government (In)Action: A Section 7 versus Section 15 Charter Showdown" (2013) 22 *Const F* 31.

Jennifer Koshan & Jonnette W Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 *UNBLJ* 19 at 24-25.

Jennifer Koshan & Jonnette Watson Hamilton, "The Impact of Mandatory Victim Surcharges and the Continuing Disappearance of Section 15 Equality Rights" (7 January 2019), online (blog): *ABlawg* <[http://ablawg.ca/wpcontent/uploads/2019/01/Blog\\_JK\\_JWH\\_Boudreault\\_Dec2018.pdf](http://ablawg.ca/wpcontent/uploads/2019/01/Blog_JK_JWH_Boudreault_Dec2018.pdf)> at [Koshan & Hamilton, "Impact of Mandatory Victim Surcharges"].

Jerry McHale, "Access to Justice: A Government Perspective" (2012) 63 *UNBLJ* 352.

Jerry McHale, "What Does Access to Justice Mean?" (2 February 2016), online (blog): *UVic Ace* <<http://www.uvicace.com/blog/2016/2/2/what-does-access-to-justice-mean>>.

Julinda Beqirag, Sabina Garahan & Kelly Shuttleworth, *Ombudsman schemes and effective access to justice: A study of international practices and trends* (Bingham: International Bar Association, October 2018).

Justice Ronald Sackville, "Access to Justice: Assumptions and Reality Checks" (10 July 2002), online: *Federal Judicial Scholarship* <<http://www.austlii.edu.au/au/journals/FedJSchol/2002/12.html>>.

Kerri Froc, "Is the Rule of Law the Golden Rule? Accessing Justice for Canada's Poor" (2008) 87:2 *Can Bar Rev* 459.

Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43 *Stan L Rev* 1241.

Laura Track, Shahnaz Rahman & Kasari Govender, *Putting justice back on the map: The route to equal and accessible family justice* (Vancouver: West Coast Leaf, February 2014).

Leslie McCall, "The Complexity of Intersectionality" (2005) 30 *Signs* 1771 at 1784-1785.

Lisa Gormley, "Traps, Dead-Ends And Obstacles to Justice: Solutions Proposed by Human Rights Law Frameworks" in Lisa Gormley *Women's Access to Justice for Gender-Based Violence* (Geneva: International Commission of Jurists, 2016).

Mary E Guy & Sean A McCandless, "Social Equity: Its Legacy, Its Promise" (2012) 72 *Public Administration Review* S5.

Mary Jane Mossman, "Shoulder to Shoulder: Gender and Access to Justice" (1990) 10 *Windsor YB Access Just* 351 at 351, 353, 356.

Nina Wallerstein et al, "Developing and Maintaining Partnerships with Communities" in Barbara A Israel et al, eds, *Methods in Community-Based Participatory Research for Health* (San Francisco: Jossey-Bass, 2005).

Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993-1994) 19 *Queen's LJ* 179.

Sarah Buhler, "Don't Want to Get Exposed: Law's Violence and Access to Justice" (2017) 26 *J L & Soc Pol'y* 68.

The Honourable Thomas A Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (2012) 63:1 *UNBLJ* 38.

The Honourable Justice Thomas A Cromwell & Siena Anstis, "The Legal Services Gap: Access to Justice as a Regulatory Issue" (2016) 42:1 *Queen's LJ* 1.

Trevor C W Farrow, "A New Wave of Access to Justice Reform in Canada" in Adam Dodek and Alice Wooley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: University of British Columbia Press, 2016).

Trevor C W Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016).

Trevor C W Farrow, "What is Access to Justice?" (2014) 51:3 *Osgoode Hall LJ* 957.

Truth and Reconciliation Commission of Canada, *Calls to Action* (Ottawa: Library and Archives Canada Cataloguing in Publication, 2015).

Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Library and Archives Canada Cataloguing in Publication, 2015).

Zina O’Leary, *The Essential Guide to Doing Research*, 1<sup>st</sup> ed (Thousand Oaks: SAGE Publications Ltd, 2004).

Zina O’Leary, *The Essentials Guide to Doing Your Research Project*, 3<sup>rd</sup> ed (Thousand Oaks: SAGE Publications Ltd, 2017).

### **Other Materials**

Alexia Fernández Campbell, “Hollywood and Silicon Valley can no longer silence women with this contractual clause,” *Vox* (11 October 2019), online:

<<https://www.vox.com/identities/2019/10/11/20909589/california-forced-arbitration-bill-ab-51>>

The Continuing Legal Education Society of British Columbia, “But I Was Wearing a Suit—Mini Documentary” (23 November 2017) , online (video): *YouTube*

<[https://www.youtube.com/watch?time\\_continue=53&v=HTG7fi-5c3U](https://www.youtube.com/watch?time_continue=53&v=HTG7fi-5c3U)>