ADVANCING ACCESS TO JUSTICE THROUGH GENERIC SOLUTIONS: THE RISK OF PERPETUATING EXCLUSION

Patricia Hughes

Recent reports about access to justice have focused on issues of affordability, with little reference to the differences of equity-seeking groups. They have tended to recommend “generic” solutions intended to help people represent themselves better and to access limited legal services that fail to consider characteristics that exclude people from using them effectively. The author argues that if factors such as low literacy or living in remote areas are not taken into account, generic solutions run the risk of perpetuating exclusion rather than increasing access to justice.

Des rapports sur l’accès à la justice qui ont été publiés récemment s’intéressent principalement à la question de la capacité de payer et s’attardent peu aux différences au sein des groupes en quête d’équité. Ils tendent à recommander des solutions « génériques » pour aider les justiciables à mieux se représenter eux-mêmes et à jouir d’un accès à des services juridiques limités qui ne tiennent pas compte des facteurs qui empêchent les gens d’utiliser ces services efficacement. L’auteure plaide que si des facteurs tels qu’une faible littératie ou le fait de résider dans une collectivité éloignée ne sont pas pris en compte, les solutions génériques risquent de perpétuer l’exclusion plutôt que d’améliorer l’accès à la justice.

I. INTRODUCTION

In many of the recent studies and reports about the problems facing the legal system the predominant focus has been on the lack of affordable legal services and the complexity of the legal process. Several reports have made recommendations for increased availability of unbundled and pro bono legal services, more self-help materials, greater reliance on technology, more consensual settlement processes at or in connection with the courthouse and greater opportunity for early resolution of disputes.

There is a rush to implement these recommendations in order to fix what is widely perceived to be a system “in crisis”. One report decries “a serious access to justice problem in Canada”, serious enough...
that the system requires “major change”. Another warns that “substantive change in the civil justice system has a particular urgency and timeliness”. More specifically, one report finds that despite a number of recent reforms, “family law disputants in Ontario continue to face difficulties that include gaps in responding to the province’s diverse population, difficulties in understanding and using information, lack of affordable representation and inadequate response to the multidisciplinary nature of family issues”. Still another study laments the “dramatic increases in the numbers of people representing (self-represented litigants or SRL’s) themselves in family and civil court over the past decade, across North America”, referring to numbers reaching up to 80 per cent in some family courts. Yet another emphasizes that it is not only low income but also middle income earners who have difficulty addressing their legal needs, in large measure because of the high cost of legal services, but cautions that the same responses might not be suitable for both.

These recent reports have taken centre stage in efforts to reform the civil legal system, in particular the family law system. Too often, however, the studies pay little attention to a more holistic analysis of the “access to justice” problem, one which explores the meaning of the concept of “access to justice”, and which scrutinizes the system from the viewpoint of particular groups (such as members of Aboriginal communities, persons with disabilities, women or racialized women). The reports attracting Attorney General but “remain[ed] committed to the notion that more fundamental change is needed”: “Family Law and Access to Justice: A time for Change”, Remarks by Chief Justice Warren K. Winkler, 5th Annual Family Law Summit, The Law Society of Upper Canada (June 17, 2011), online: Court of Appeal for Ontario <http://www.ontariocourts.ca/coa/en/ps/speeches/2011-Family-Law-Access-Justice.htm>.


The Ontario Civil Legal Needs Project Steering Committee, Listening to Ontarians: Report of the Ontario Civil Legal Needs Project (Toronto, May 2010) at 10 (citations omitted), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf> [Listening to Ontarians].


Over the past two decades or so, there have been many examples of these analyses, addressing the way law is written, implemented or interpreted in relation to race, gender, Aboriginality, disability, age, sexual orientation and other grounds. In some cases, they go further to undertake inquiries based on intersectionality. I am able to refer here to only a few of these analyses in order to give a sense of how different they are from the reports that discuss particular reforms to the legal system. Of particular interest are explorations of intersectionality that are important for a nuanced understanding of how social identity is affected by and in turn affects how people perceive particular aspects of law, how
attention consider “justice” almost in a vacuum; while making brief and, in some cases, mere passing references to particular grounds of marginalization, they place their recommendations in an ostensibly neutral legal system. They do not identify the frameworks within which they promote changes. For example, generally speaking, they do not explain how their reforms would promote a particular form of equality and thus do not consider how these reforms would effect broader change. This is not their purpose: their purpose is to propose practical reforms that can be applied in the legal system, specifically in the courts or in the delivery of legal services and the like and sometimes more broadly to include non-legal actors.

While the studies may make the point that we have to consider the impact of reforms on various groups or take into account various factors such as low education or disability, these studies do not position themselves within this equality discourse. Accordingly, the reforms are disconnected from a broader understanding or exploration of how the current system reinforces relations of inequality. The studies and reports that promote specific reforms in the legal system and the theoretical work that explores the larger question of how various institutions, including the legal system, operate, travel on different tracks.

I begin with a discussion of the relevance of inclusivity to access to justice. I move then to a consideration of the operational barriers and their possible impact on the effectiveness of generic solutions to increasing access to justice. For illustration, I consider how literacy skills and living in rural and remote areas affect access to unbundled legal services and the use of technology to provide information. I conclude that unless we adequately consider the impact of access to justice reforms on the legal services are delivered, the kind of information that is relevant to how disputants understand and present their case and how adjudicators and others are able to see the subtext beneath the surface of a dispute. See e.g. Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19 Queen’s LJ 179 (on how placing people in particular categories [such as that of “women”] veils or suppresses the significance of characteristics that distinguish them [such as race]); Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” in Dan Danielsen & Karen Engle, eds, After Identity: A Reader in Law and Culture (New York: Routledge, 1995) (on the importance of recognizing difference as a source of empowerment and how a failure to do so can result in women of colour being marginalized in both anti-racist and feminist theories and practice); Beth Ribet, “Surfacing Disability Through a Critical Race Theoretical Paradigm” (2010) 2 Georgetown Journal of Law & Modern Critical Race Perspectives 209 (a comparative analysis of persons with disabilities and racialized persons assumes that persons with disabilities are white, while exploring the experiences of racialized persons with disabilities reveals the compound nature and subordination of the experiences). One of the few examples of intersectionality in the jurisprudence is Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 (the Supreme Court of Canada identified, “race”, “band membership” and “place of residence” as forming the distinct ground of “off-reserve band member status” or “Aboriginality-residence”).

For an example of how definitions of equality will affect how the situation of marginalized groups is understood, see e.g. Marcia H Rioux, “Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality” (1994) 7 Can JL & Jur 127 (using the example of persons with intellectual disabilities to illustrate that how one defines equality reflects the distribution of social goods [including access to the legal system] and what become legitimate forms of exclusion [for example, whether it is permissible to develop a means to access legal services that would exclude particular persons]).

From time to time, the jurisprudence does take into account how the law affects people in different communities. For a look at how a variety of cultural factors affect the interpretation of different areas of the law, see Lana KL Li, “Cultural Factors in the Law” (2011) 44 UBC L Rev 111; specifically in tort, see Jeff Berryman, “Accommodating Ethnic and Cultural Factors in Damages for Personal Injury” (2007) 40 UBC L Rev 1.
circumstances of disadvantaged groups, we risk perpetuating an underclass of persons excluded from justice.

II. INCLUSIVITY: ENHANCING ACCESS TO JUSTICE

A. Generic Approaches to Improving Access to Justice

The task of “reimagining” the legal system to include appropriate responses to the challenges faced by all groups is a significant one and it is not surprising that reports seeking to bring about changes do not always address the complex web of factors that create barriers to justice. The list of disadvantaged or excluded groups is long. Mary Anne Noone offers the following concise articulation of these barriers, coupled with institutional barriers:

Access to justice may be restricted because of geographical factors; institutional limitations; racial, class and gender biases; cultural differences as well as economic factors. The way legal services are delivered by the legal profession, the nature of court proceedings, including procedural requirements and the language used, are also barriers limiting people’s opportunity to obtain justice.\(^\text{12}\)

Few would dispute that this list accurately – if perhaps incompletely – describes the barriers today. And probably most people would agree that “something needs to be done” to remedy the injustices that result. In itself, it is of concern that these problems exist, but what is even more disheartening about this list is that it was published in 1992, over 20 years ago, and yet it is still valid. Indeed, some of these issues seem to pose even greater challenges than ever.

A number of studies have identified particular forms of disadvantage that constitute barriers to access to justice, recognizing that enhancing access to justice requires responses that take into account these contextual barriers. A recent American Access to Justice Index has focused on low income, disability, limited English proficiency, and gender, race and ethnicity.\(^\text{13}\) A New South Wales study identified a much longer list of characteristics: living with a disability, including intellectual, physical, sensory, psychiatric or acquired disabilities; cultural and linguistic diversity; Indigenous Australian status; young and older age; geographic location (remote and rural areas and disadvantaged urban environments); low levels of education and lower levels of literacy; being gay, lesbian or transgendered; women; living in an institution (prisoners, juvenile corrective and psychiatric institutions, immigration detention centres and nursing homes) and having been released from an institution; low income or other financial support; homelessness; not being able to obtain legal representation for family law or violence matters (men);

---


and living with multiple disadvantages. A U.S. study that identified 193 separate tasks that self-represented litigants needed to complete during litigation concluded that whether litigants could carry out certain tasks themselves depended on a variety of characteristics, such as “level of education, familiarity with computers, language skills [whether English is the first language and level of literacy], cognitive abilities and communication skills”.

In contrast to these studies, recent Canadian studies, such as Roadmap for Change or the Final Report in the National Self-Represented Litigants Project, have, for the most part, named “generic” solutions, such as an increased reliance on technology, pro bono representation and limited scope retainers (otherwise known as unbundled services), meant to make the system easier to access, and have only occasionally considered the efficacy of these solutions for specific groups who are at a higher risk of exclusion from the legal system. The goal in most of these reports is that people seeking to access their legal rights have sufficient help in order to get a fair result. To that end, their proposals are designed to make it easier to obtain legal help or to do without legal help, to find courts easier to deal with, or to avoid courts altogether. Occasionally, there is also a recognition that individuals’ legal problems affect and are affected by other experiences in their lives.

The recommendations in these reports range from very specific recommendations for simpler court forms to calls for more expansive steps, such as being open “to re-thinking and re-working the way that legal and court services are conceived and offered to enhance Access to Justice” or for “Refocus[ing] the Justice System to Reflect and Address Everyday Legal Problems”. Clearly, some proposed solutions are more attainable than others and some can be accomplished quite quickly and easily if there is a will, while others are more about the objectives of the legal system, rather than any specific part of it. We might disagree with some of them, some may be too vague, one or two may seem “pie-in-the-sky”. Regardless, they all have their place. They all add something to the conversation, they all have had their turn in the media spotlight and they all have as their goal increasing access to justice.

16 For example, Roadmap for Change points out that some groups do experience more problems and legal problems may be related to other kinds of problems: supra note 3 at 2-3. However, the solutions the report proposes tend to be at a higher level that does not take into account in any detail these realities of the current system.
17 NSRLP: Final Report, supra note 6 at 114.
19 Roadmap for Change, supra note 3 at 11.
Because they offer seemingly “simple” solutions, they are appealing to those anxious to “stop talking” and to “start acting” to reform the system.

Despite referring to various disadvantaged groups, the reports too often present “generic” solutions as an option for everyone who cannot afford representation (and are not eligible for legal aid) or to increase the efficiency and effectiveness of the system. At best, they gloss over the significant differences among excluded groups. Furthermore, although most people who could not afford legal representation were historically those with low income, today many people in the middle class face the same challenge. As one lawyer explained to the Law Commission of Ontario in its project on accessing the family justice system,

Many of my clients are middle class. They have no significant savings so they live off debt or have to sell their homes, borrow money etc. They are often living pay cheque to pay cheque before the relationship breakdown. Things generally do not improve financially after the breakdown. Their children are left during this difficult time in their lives with having parents who are additionally stressed by the judicial system and the lack of a speedy and effective remedy.

Yet those who cannot afford full legal representation, while similar in this respect, may be otherwise quite different. And those who are portrayed as communities distinct from each other may share characteristics in common. Aboriginal persons and persons with disabilities have different histories, experiences and approaches to the legal system, yet a great many persons in these two “groups” may share similar characteristics (“factors of similarity”), such as living in poverty or low income, having difficulty with obtaining transportation to benefit from legal services or having disproportionate numbers of people with low literacy skills. Of course, the reasons for and appropriate solutions to increase literacy rates or compensate for low rates may differ between the two groups and it may not be enough simply to identify these other grounds (such as low literacy) without appreciating the unique factors that contribute to low literacy in each group. Thus a full appreciation of these barriers (such as literacy, easy access to transportation and so on) requires reference to the considerable work that has been done in compiling these “portraits” of disadvantaged groups. Appropriate attention to these

---

20 It may be more accurate to say that the solutions are simply stated, since their implementation is far from simple: in many cases they require political will, resources, and a cultural shift to collaborative and integrated processes and options, away from the siloed approach to delivering justice currently prevalent.

21 See e.g. *Reaching Equal Justice* which refers to work indicating that education and literacy skills made it difficult for some people to benefit from self-help materials: *supra* note 4 at 28, 44, 45; it also refers to challenges posed by living with a disability: at 79. *Roadmap for Change* refers generally to the increased likelihood that persons with particular challenges will experience legal problems and that the focus must be on helping them: *supra* note 3 at 2, 7, 14. However, it does not provide a useful analysis about how effective the solutions as presented might be for groups experiencing particular challenges such as being a member of an Aboriginal community or lacking adequate literacy skills or, therefore, what might be required to make them effective.


23 *Increasing Access to Family Justice*, *supra* note 5 at 49.
“factors of similarity” may provide a means to bridge the gap between more complex explorations and the desire to implement specific solutions that are not necessarily dedicated to particular groups.

My purpose here is to argue that some of these common traits (low “traditional” literacy skills (reading and understanding the written word), low computer literacy, lack of trust in the system, residence in remote areas of the province, isolation or lack of family or community support, among others) need to be taken into account in designing or implementing otherwise “generic” solutions to increase access to justice. These traits constitute a very small piece of recognizing “diversity” while at the same time cutting across different grounds of marginalization. Without care, generic solutions can pose unintended barriers to people with characteristics such as low literacy skills. We might call these impediments “operational barriers”, since they result from the way initiatives to increase access to justice may operate or be structured. For example literacy and place of residence (rural or remote) are factors that may significantly affect how some individuals can benefit from the generic solutions of use of technology and unbundled legal services.

It is not that those concerned with reform of the legal system do not know that generic solutions do not work for everyone. Rather, they do not usually differentiate between those who can use them effectively and those who cannot, presumably expecting that this will be addressed after the reforms are implemented. However, it is only through deliberate and systematic analysis of how these characteristics affect the effectiveness or accessibility of the proposed solutions to increase access to justice that their purpose can be achieved by putting in place appropriate measures to counteract their non-availability to vulnerable litigants. The risk is that these solutions will be viewed as providing the answer – or at least a partial answer. For example, unbundled legal services have already gained the imprimatur of several law societies who have primarily identified the concerns as those related to their institutional governance issues rather than their effectiveness for some litigants.  

The failure to take more specific but common traits into account when designing and implementing these changes will create an underclass of people still excluded from the legal system. The system risks leaving them behind because it is believed that the solutions are responsive primarily to a single factor, lack of the economic means required to access the legal system, and to some extent, the complexity of the system. Unless a more nuanced approach is taken when designing and implementing solutions to increase access to justice in the current movement for reform, those most in need of help will continue to have the greatest difficulty in obtaining it.

B. Defining “Inclusivity”

Access to justice requires both removing barriers that limit access by disadvantaged groups and proactive policies and actions that make access easier or more effective. Truly inclusive access to justice places a great emphasis on understanding the impact various characteristics and experiences have on impeding access, and on measuring the extent of access by investigating how well the system

incorporates those who have previously faced difficulties. It also requires an understanding of how individuals’ legal experiences affect and are affected by their other life experiences.\(^{25}\)

Over thirty years ago, Cappelletti and Garth articulated three “waves” of access to justice: “procedural availability of lawyers to the poor”; provision of legal services for different interests (such as consumer or environmental interests); and “new” forms of representation and of resolving disputes (such as administrative agencies).\(^{26}\) Of these, legal representation for the poor remains outstanding, and is perhaps more of a challenge today than it was in 1981 because “the poor” have been joined by people earning middle-class incomes. Despite legal aid (including the community legal clinic system), unbundled legal services, \textit{pro bono} legal services, allowing paralegals to practice in at least some areas of law, student assistance and other initiatives, we have yet to provide effective access to legal representation to many people who need it.

There is one other aspect of “access to justice” that has relevance for understanding the difficulties facing disadvantaged people and that is the relationship between legal problems and non-legal problems. This is important because, while exclusion from the legal system often has far-reaching ramifications for most people, those who continue to be excluded by generic solutions likely also face difficulties accessing other similarly structured services (such as providing information primarily online). Almost anyone with a legal problem may find that it is caused by or leads to other, non-legal, problems. However, the risk is greater for disadvantaged people who face significant challenges in dealing with their legal problems in an effective way or whose inability to resolve other kinds of problems leads to legal difficulties. One Ontario study found that “significant proportions [of people reporting problems] reported that they experienced stress-related or mental illness, loss of confidence, physical ill health, loss of employment or income, and relationship breakdown”.\(^ {27}\) As an Australian study found, legal problems can “get subsumed by other needs – accommodation [or] mental health”.\(^ {28}\)

We should not underestimate the extent to which legal and other problems reinforce each other or how, in general, they prevent resolution of problems for many people who do not experience the traditional grounds of disadvantage. However, we also cannot ignore that, for those who have suffered and are suffering traditional forms of disadvantage, this reinforcement effect of myriad problems looms large indeed. Accordingly, those who are unable to benefit from the generic initiatives being implemented today may face even more challenges than continued exclusion from the legal system. For them, falling through the cracks of various initiatives intended to increase access to justice may result in a spiralling of other significant issues that they are unable to resolve adequately. Thus someone’s ability


\(^{27}\) \textit{Listening to Ontarians, supra} note 7 at 37.

\(^{28}\) Schetzer & Henderson, \textit{supra} note 14 at 24.
to defend themselves against an eviction notice will have crucial consequences for whether they have access to adequate housing; more than that, however, this might affect their ability to hold employment or lead to challenges with their children who feel cast adrift. Failure to deal with family dissolution effectively may lead to distress, illness, time off work or mental challenges. In short, an individual’s ability to function fully in society can be reduced by not being able to address their legal problems. And failure to redress other kinds of problems appropriately may interfere with someone’s ability to resolve a legal problem.  

Underlying the view that reforms need to address who can benefit from them and who cannot, is the principle that inclusivity in the legal system matters. To respond to the full complexity of the individual’s situation is impossible. We therefore resort to group identifiers, which may be overbroad because they include persons who in fact are not at disadvantage. Nevertheless, considering access to justice through the lens of diversity or inclusivity allows us to see the red flags that signal impediments to achieving equal justice and, by addressing them, work towards substantive equality.

As discussed (all too briefly above), while communities based on race, disability, gender, sexual orientation and other characteristics face challenges unique or disproportionately disadvantageous to them, it is also important to identify the circumstances or characteristics that cut across those categories of identities to prevent people from accessing justice (for instance, living in low income or low levels of education). Understanding the impact of these characteristics has been crucial to revealing inequality in society and to increasing substantive equality, an exercise that is ongoing. Similarly, this model has helped reveal the extent to which individuals and groups enjoy – or do not enjoy – access to justice. Considering inclusion from the viewpoint of these groups has revealed important ways in which various groups have been excluded from societal benefits, including those accruing from the justice system, for discriminatory reasons, whether intentional or not. We need to ensure that we remember this in considering implementation of the practical solutions proposed in the recent rash of reports on increasing access to justice.

For example, the relationship between many Aboriginal peoples and the legal system is affected by different worldviews and normative belief systems and the residual impact of historical experiences. It is as true of Canada as of Australia that for Aboriginal peoples to say that “the limited ability of the law and traditional legal approaches to resolve problems that in many cases involve not just legal, but also significant political, historical and cultural issues” is a serious challenge to inclusion. Relations of

---

29 Several studies make mention of this. See e.g. Reaching Equal Justice, supra note 4 at 97: one of the report’s targets is the following: “By 2030, 80% of lawyers in people law practices work with an integrated team of service providers; in many cases these teams will operate in a shared practice that includes non-legal services and services provided by team members who are not lawyers.” Although Roadmap for Change refers to “integration of multidisciplinary services” in the family law system, it does not say what these are: supra note 3 at 17. A background paper to Roadmap for Change says a little more: Action Committee on Access to Justice in Civil and Family Matters, Meaningful Change for Family Justice: Beyond Wise Words” at 4, 6, 38, online: CFCJ <http://www.cfcfcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf> (referring to “non-legal” services” and more specifically to “options for responding to problems relating to violence, finances or housing”). Creation of multidisciplinary centres or networks incorporating responses to diversity issues is a major recommendation in the LCO’s Increasing Access to Family Justice, supra note 5 at 89.

30 Schetzer & Henderson, supra note 14 at 63.
oppression or dominance do not exist only between the marginalized group and the majority group (or between the marginalized group and the dominant system), but also within the marginalized group. For instance, First Nations women’s experiences are often distinctive, as victims of domestic violence and as offenders, not only in comparison with those of First Nations men, but also compared to those of women belonging to dominant groups. Past treatment by dominant institutions, such as the law, police and courts, have significantly affected how Aboriginal persons experience the criminal and family systems, and the remnants of historical treatment, as well as current discrimination and economic and social conditions, continue to have their negative impact. The barriers facing members of Aboriginal communities include administrative and operational problems (such as geographic barriers as a result of living in remote communities, lack of access to computers and telephones, and language barriers); the lack of cultural competency among lawyers and LAO staff; the lack of public legal education and information accessible to members of these communities, as well as service providers to them; and insufficient outreach by LAO to Aboriginal communities and organizations. All these issues invite practical solutions similar to those that have already been implemented, such as separate courts, with Aboriginal participants, that travel to northern Aboriginal communities; video conferencing which allows participation by persons living in remote communities; legal information that addresses the particular concerns of Aboriginal peoples; Aboriginal-run court worker programs with the capacity to


33 Legal Aid Ontario developed its Aboriginal Strategy to respond to these barriers. Legal Aid Ontario (LAO), The Development of Legal Aid Ontario’s Aboriginal Strategy (June 20, 2008) at 11, online: LAO <www.legalaid.on.ca/en/publications/downloads/0807-29_DiscussionPaper_public.pdf>.

34 Courts of Saskatchewan, “Cree Court”, online: Courts of Saskatchewan <http://www.sasklaw-courts.ca/index.php/home/provincial-court/cree-court-pc>. On other responses to challenges faced by Aboriginal peoples, see “Aboriginal Justice Initiatives in Canada”, Canadian Court Communiqué (Winter 2012) at 10, online: Association of Canadian Court Administrators <http://www.accaaaac.ca/LinkClick.aspx?fileticket=h_QV6YVmRBg%3D&tabid=37&mid=701>

35 For example, a court in a major Ontario centre was linked with a remote northern community for a sentencing hearing that allowed the family, the community and the Chief to participate in the process; video has also been used for child protection hearings: Ministry of the Attorney General, Court Services Division Annual Report 2011-12, 5ff, online: Ontario <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_11/Court_Services_Annual_Report_FULL_EN.pdf>.

36 See e.g., Legal Services Society of British Columbia, online: LSSBC <http://www.lss.bc.ca/abor-iginal/> (information specific to Aboriginal persons, including where in the province Aboriginal people can obtain assistance); Legal Aid Ontario, “Are you Aboriginal?”, online: LAO <http://www.legalaid.on.ca/en/getting/aboriginal.asp>.
assist people in their legal problems and undertake programs in the community related to legal issues in a culturally appropriate way; and shelters that are specifically designed for Aboriginal women.

The problems persons with disabilities face arise in large part from the fact that the legal system has been constructed for the able-bodied, for persons whose need for breaks conforms to an expected standard, for persons who are assumed to be able to absorb information and express themselves without great difficulty, among other examples. Changes have been occurring to mitigate these problems. For example, the Ontario Ministry of the Attorney General has issued guidelines for communicating with people with communication challenges. LAO is developing a mental health strategy. The courts in Ontario created a Disabilities Committee to address the actions required to satisfy the requirements of the Accessibility for Ontarians with Disabilities Act, 2005 [AODA]. Nevertheless, a disproportionate number of persons with disabilities are low income, have low literacy skills and face similar challenges in interacting with the legal system. Some persons with disabilities have communication difficulties which mean that other people may have difficulty understanding them and they may have difficulty in understanding others; this complicates the giving and understanding of instructions and advice. When there is a lack of appropriate training for court personnel, lawyers and judges and other adjudicators, the appearance of particular disabilities or the disability’s impact on walking or talking may be perceived in the courtroom as drunkenness. Cognitive and mental health disabilities make interaction with the system and with individuals within the system difficult. Persons with intellectual disabilities may have difficulty

---

37 See e.g. Ontario Aboriginal Courtworker Program at The Ininew Friendship Centre, online: Ininew Friendship Centre <http://www.ininewfriendshipcentre.ca/courtworkprogram.htm> (a program of the Ontario Federation of Indian Friendship Centres, focused on criminal law matters and to some extent on child protection proceedings).

38 For just three of many examples, in different environments, see Minwaashin Lodge, Aboriginal Women’s Support Centre (Ottawa), online: Minwaashin Lodge <http://www.minlodge.com/> (for “First Nations, Inuit and Mètis women and children (regardless of status) who are survivors of domestic and other forms of violence, and who may also be suffering the effects of the residential school system”); Fort Chipewyan-Paspeiw House (Mikisew First Nation, Alberta), online: Alberta Council of Women’s Shelters <https://www.acws.ca/content/fert-chipewyan-mikisew-crea-first-nation-paspeiw-house>; Native Women’s Shelter of Montreal, online: Native Women’s Shield of Montreal <http://www.nwsm.info/>. As described by Minwaashin Lodge, “[a]ll programs and services are provided in the context of cultural beliefs and values to ensure a holistic approach is used as part of the healing journey”.


40 See Legal Aid Ontario, Mental Health Strategy, online, <http://www.legalaid.on.ca/e-n/policy/mentalhealth.asp>.


understanding information. A major problem is the lack of access to legal interpreter services appropriate for persons with hearing disabilities.44 There are, of course, other communities whose relationship to the law could be considered here. I have limited my discussion to Aboriginal persons and persons with disabilities only to maintain brevity in the discussion of the ways in which some characteristics common to a disproportionate number of people in several communities hinder the effective implementation of generic solutions.45 The “operational” barriers identified here need to be understood as part of a more complex web of factors that limit access to justice. Understanding how to minimize the negative impact of these barriers will therefore require taking other reasons for exclusion into account. More simply, when a generic approach is presented to those who do not have the skills or other means required to employ them, the solutions themselves risk perpetuating the problem of exclusion.46

III. GENERIC SOLUTIONS: THE IMPACT OF “OPERATIONAL” BARRIERS

That there will always be large numbers of people who are unable to afford lawyers has been widely accepted. (In contrast, Justice Thomas Cromwell recently stated that the solution to the issue of unrepresented litigants is not only to provide ways to help them represent themselves, but to recognize that they need lawyers.47) Recent efforts focusing on affordability have tended to embrace “self-help” as an answer, and make the assumption that with sufficient information those who cannot afford legal services will be able to represent themselves. For example, the Access to Justice Working Group of the Nova Scotia Barristers’ Society has been working with other judicial partners in coordinating services with the goal of “increas[ing] opportunities for members of the public to resolve disputes themselves, through formal and informal dispute resolution mechanisms and improved access to legal information”.48

Thus, it seems to make sense to provide information on-line or on telephone hotlines, available to people when they need them and wherever it is convenient to access them. It also seems to make sense

45 Not all persons within a community are equally or similarly disadvantaged. For example, not all Aboriginal people live in low-income environments; there is a rising Aboriginal middle-class: Don McCaskill, Kevin FitzMaurice & Jaime Cidro, Toronto Aboriginal Research Project: Final Report (Toronto Aboriginal Support Services Council, October 2011), online: Aboriginal Business and Community Development Centre <http://abdc.bc.ca/uploads/file/09%20Harvest/TARP-FinalReport-Oct%202011.pdf>. Similarly, not all persons with disabilities are poor and not all actually experience challenges in dealing with the legal system. Neither group is homogenous. This does not mean that other barriers do not remain and are extensive, only that, as is the case with many other groups, their circumstances are not as easy to describe as we sometimes think.
46 This lack of skills or the impact of other factors does not exist independently of the other kinds of disadvantages I have discussed above.
48 Nova Scotia Barristers’ Society, “Improving the administration of justice”, online: Nova Scotia Barristers’ Society <http://nsbs.org/improving_justice/improving_the_administration_of_justice> (emphasis added). I note the same document also refers to improving access to legal services by rural residents and the need for information responsive to the needs of diverse groups and cultural competence training for lawyers, as well as committees dedicated to advancing equity issues, something that is common in law societies.
to promote “partial” legal services, including limited scope retainers and pro bono services. Yet these
and similar options place the onus on the individual to determine the information relevant to their
situation and to decide when they must resort to legal advice or other legal help. There are those who
would argue that individuals representing themselves are pleased to have more control over their own
case; however, as a case becomes more complex, those untrained in law are less likely to know how to
address their issues effectively or to address the arguments made by the other side; as the case
progresses, their appreciation of the impact their lack of knowledge may have on their case is likely to
diminish.

Appealing as some of these ideas may be, they can pose operational barriers for a good portion of
people who cannot afford legal representation and who are not eligible for legal aid. By the phrase
“operational barrier”, I refer to those factors that constitute barriers to the legal system resulting from the
structure or implementation of a particular initiative intended to increase access to justice. Thus, for
example, the format of online information may pose an operational barrier to persons with low literacy
skills because they cannot access the benefit without a certain degree of literacy. To illustrate the need to
consider potential operational barriers in developing and implementing measures to increase access to
justice, I will focus on how literacy capacity and living in a remote or rural location affect access to two
particular “solutions” to the problem of lack of access: the use of technology and unbundled legal
services.

A. “Operational Barriers”: Literacy and Living in Remote or Rural Areas

1. Literacy

The challenge of lack of sufficient literacy skills derives in large measure from its complex nature
and its ramifications. Literacy is not only about whether someone is able to read; it also encompasses
other types of behaviour and consequent challenges. Level of literacy is not synonymous with language
facility; thus people whose second language is English may have high levels of literacy in their original
language, while persons for whom English is their “native” language may have low levels of literacy.
While this is a problem generally in relation to access to justice, it raises particular difficulties for self-
represented litigants who are urged to seek out information about their legal issue and legal processes.
Individuals using information, however acquired, must be able to read it, understand it and apply it to
their own situation. Each of these tasks requires an increasing level of literacy. Yet a significant minority
of people lack the required literacy even to understand the information, particularly since it is often
difficult to avoid legal terminology and the information can quickly become complex.

For quantifying the literacy issue the Adult Literacy and Life Skills Program is based on five levels of
literacy, with Level 1 the lowest. Level 3 is considered to be “the desired threshold for coping well in a
complex knowledge society”. It requires an individual to match the text and information provided or to

49 A number of self-represented litigants in the National Self-Represented Litigants Project expressed this view: see
NSRLP: Final Report, supra note 6 at 12 and 48.
50 Lynn Barr-Telford, François Nault and Jean Pignal, Building on our Competencies: Canadian Results of the
International Adult Literacy and Skills Survey (2003) (Human Resources and Skills Development Canada, Statistics
Canada, November 2005) 13 (Catalogue no.89-617-XIE) at 37 [Building on our Competencies], online: Canada
make matches based on low-level inferences or otherwise “work” with the text. The International Adult Literacy and Skills Survey (IALSS) defines “prose literacy” as “the knowledge and skills needed to understand and use information from texts including editorials, news stories, brochures and instruction manuals” and “document literacy” as “the knowledge and skills required to locate and use information contained in various formats, including job applications, payroll forms, transportation schedules, maps, tables and charts”. The IALSS for Canada shows that about 20 per cent of Ontarians have level 1 (lowest) prose literacy level and about 25 per cent have level 2. The results for document literacy are similar.

Low levels of literacy are found disproportionately among Aboriginal populations and persons with disabilities. The Survey found that “[t]he prose literacy performance of the Aboriginal populations surveyed is lower than that of the total Canadian population reflecting, at least in part, differing levels of formal education and use of a mother tongue other than English or French.” More than half of Aboriginal persons surveyed scored lower than level 3 in prose and document literacy. Learning disabilities may make learning to read difficult and thus are associated with low literacy, particularly if the learning disability is not identified early. Other forms of disability may also be linked to low literacy skills. During the Law Commission of Ontario’s (LCO) consultations for its project on the law and persons with disabilities, it was told that for many Deaf persons, English or French is a second language and interpreters are required for written documents.

Brief reference to findings in relation to other groups shows the breadth of this issue. Building on our Competencies which summarizes Canadian literacy skills surveys does not distinguish literacy rates for immigrants based on province, but reports that “[s]ixty percent of recent and established immigrants, compared to 37 percent of the Canadian-born population, are at Levels 1 and 2 in prose literacy”. Of note is that “[t]hirty-four percent of recent female immigrants are at Level 1 – compared to nine percent for Canadian-born females”. Immigrants whose mother tongue is neither English nor French have lower prose literacy rates; however, Building on our Competencies cautions that one cannot generalize from these rates to rates in immigrants’ mother tongues.
Literacy and age also intersect. The IALSS revealed that prose literacy decreased with age and that the largest proportion of persons over 65 was at Level 1, a situation that will presumably change in the future with higher educational attainment in the population generally.

Reasons specific to each group related to their broader disadvantage may help explain why there are low literacy levels among a high proportion of the members of the group. Fully addressing literacy requires addressing these other factors, but this does not change the fact that certain kinds of proposals to increase access to justice may be of limited assistance to them.

Low literacy may mean difficulty in reading documents the individual receives from the court, being able to complete the forms required, providing documents requested or answering questions, whether in a criminal or civil legal context. The researchers in the previously referenced New South Wales study were told that people with low levels of literacy did not know about legal processes and services, had poor communication skills and difficulty accessing legal information, all of which were disadvantages in relation to the legal system. Individuals may prefer to “cope” rather than to disclose that they lack literacy skills.

The importance of addressing literacy has not gone unnoticed. For example, the Canadian Council of Administrative Tribunals has issued a guide to address some of the consequences. The Canadian Bar Association’s *Reaching Equal Justice* refers to a number of studies and findings that indicated that literacy is a barrier faced by marginalized groups in benefitting from information and from other aspects of the legal system.

2. Living in Remote or Rural Areas

Geographic location, often coupled with other factors, such as living in an Aboriginal community or older age, also affects access to justice. Ontario has reversed the proportion of its population living in rural and urban areas over the past 150 years: in 1851, 86 per cent of the population lived in rural areas; by 2006, 85 per cent lived in urban centres. Nevertheless, legal services must still be delivered across the province, including more remote locations. Yet broadband access is not available in certain parts of Ontario. Provision of other services, too, is hampered by the long distances between communities and the sparse population.

---

61 *Ibid* at 37.
65 *Reaching Equal Justice, supra* note 4 at e.g. 26 (the high number of legal aid clients lacking literacy skills), and 44 (“increasingly prevalent ‘self-help services’ are most effective for people with higher levels of literacy and comprehension”) and references therein.
Although over 60 per cent of the Aboriginal population lives in cities, “[n]inety-five of the 127 First Nation communities in Ontario are located in rural or remote areas or are accessible by air only”. 67 Northern areas of Ontario distribute the population over a wide expanse and many people live a considerable distance from even a small town. For example, the Northeast Region of Ontario consists of an area of 366,192 square kilometres, with only 5 per cent of Ontario’s population, resulting in a density of 1.5 people per square kilometre. The further north one goes, the greater the likelihood of unstaffed satellite locations that can only be reached by air.

Furthermore, people in the northern parts of provinces may also have less access to the complementary aspects of the legal system, such as support services or community justice services or, as the Saskatchewan Northern Access to Justice Committee called them, “human services” such as health services. 68 It has long been recognized that difficulties in family problems are exacerbated in the north. In many respects, as the Ontario Court of Justice and Ministry of the Attorney General Joint Fly-In Court Working Group explained in a 2013 Report, the circumstances facing northern communities are worse than they were in the past.

Geographic location as a factor affecting access to justice is not limited to northern regions of the province. Rural living poses problems of transportation, particularly for those who do not have their own car whether it is because they cannot afford it, have never learned to drive, have reached an age where they find driving more difficult or are no longer permitted to drive. A family lawyer explained to the author that a worker from the Frontenac Children’s Aid Society picked up family law clients in the north end of the county (where there is no bus service) and drove them to court in Kingston (a cab costs $80 one way). Reaching Equal Justice pointed out that lower levels of literacy are higher in rural areas. 71

Submissions to the New South Wales study identified “remoteness, isolation and physical distance from services, often exacerbated by limited access to affordable and regular public transport”, as well as issues of confidentiality, lower levels of literacy and numeracy and longer download times for the internet as challenges in rural and remote regions. 72

B. Generic Responses: Use of Technology and Unbundled Legal Services

As explained above, many of the measures or initiatives that have been proposed and implemented in recent reports to increase access to justice have tended to be generic. In part, this is because,
increasingly, the focus has been on un- or self-represented litigants as a group. Affordability, rather than diversity of disadvantage experienced by particular groups, has become the cornerstone of efforts to reform the system. There is no doubt that the cost of accessing the system is a serious problem that not only affects individuals seeking access to the legal system, but court personnel, lawyers, judges and the reputation of the system itself. The lack of affordable assistance requires redressing, but within a framework that recognizes that other factors will continue to result in exclusion if they are not taken into account in the options created for unrepresented litigants to use the system more effectively. Technology (the internet and telephone services) and limited scope retainers or unbundling, for example, may be effective for many people, as may more printed self-help materials. Nevertheless it must be considered whether there has been inadequate consideration of whom they leave out: for whom are they less effective? Using this question as a basis for analysis I will examine the use of technology and unbundled services.

1. Technology

Most recommendations about self-represented litigants involve providing more online information and hotlines or helplines. Much of what is available on the web is nothing more than “on-loaded” print material, or its equivalent in electronic form; there is also a great deal of material and quality control is difficult. These efforts to increase access to justice do have advantages however. Online technology has been used extensively for providing information and to an increasing extent, for providing forms that can be completed online. People can access both at a time of their own choosing. For many people that is helpful. But to do so, one must be able to read the information and forms, understand the information provided and apply it to one’s own circumstances. It has been pointed out that

…[Technological] innovations assume access to a computer, reasonable proficiency at using the machines and necessary software programs, reading capability, fluency in English and sufficient phone or cable and electricity availability and capacity at affordable cost to support the connections and streams of information and interactivity. Without all of that, those who have the tools and means, the proficiency and the phone or other infrastructure available get further ahead and those without fall further behind in having the justice system work for them. The lack of equality gets greater, not less.

Thus, one group of people for whom on-line information is not helpful, particularly if unaccompanied by some form of in-person assistance, are those whose level of literacy is low. As discussed above, for many groups, literacy is only one of a complex web of factors that affect their interaction with the legal system, but it is one upon which proposed reforms, such as unbundled services or the provision of more self-help information or increased use of technology generally, rely to be effective.

---

73 The Law Commission of Ontario found this to be the case in Ontario with respect to family law: *Increasing Access to Family Justice*, supra note 5 at 18. Also see Schetzer & Henderson, supra note 20 at 44-45.
Audio and image-based technologies can be of limited assistance to persons with low literacy, but the assumption that everyone can access technology can also be a barrier. Technologies intended to provide information and instructions to persons who cannot afford legal assistance can pose problems for all litigants who are likely to need in-person assistance to use them effectively, but it can be a formidable barrier for people who cannot read it, understand it or apply these tools to their own circumstances. For people with low literacy, the failure to provide in-person assistance throughout the legal process is a denial of access to justice. At the earliest stages, it may not be necessary that the persons providing assistance have legal training, as long as they have sufficient understanding to explain basic legal information; however, at later stages more expertise would be required.

One popular use of technology has been the “hotline” that people can call for advice or to obtain information. One U.S. study found, however, that the value of the hotline may be limited by the individual’s capacity to take the next step advised by the hotline adviser, such as seeing a lawyer or going somewhere to complete paperwork. Generally, clients did not follow up advice because they did not understand it, it was too complex or they could not afford to hire a lawyer.

The study’s recommendations about hotlines noted that unsuccessful outcomes were related to certain demographic characteristics, such as low education and low English language skills by Spanish-speaking clients, even though the hotlines called by Hispanics were staffed by Spanish-speaking advisers. Regarding other barriers (lack of transportation, stress or fear, for example) it was recommended was that the hotlines needed to develop protocols for addressing these issues and providing more support to these clients. The New South Wales study also found that the people who needed to use the helplines to most found them the least accessible.

The use of technology to overcome difficulties of distance may pose challenges at the individual level, since individuals may not own a computer, be computer illiterate or lack access to high-speed internet. Despite the highly significant spread of access to the internet, and the high usage among Canadians, delivering information online remains a problem in Canada, since even if there is internet availability, it might only be dial-up, or people living in low-income might rely on publicly accessible computers, such as at libraries. In 2010, Statistics Canada found that high internet use occurred among the group earning $87,000 or more (94%), with lower usage among earners of $30,000 or less (59%). Urban dwellers had a very high level of internet use (82% or higher) and those living in rural areas a lower level (about 76%). Among seniors, 51 per cent did not use the internet and 39 per cent of non-users had a low-income. Among those who did not use the internet, about 22 per cent lacked the skills or

---

76 *Ibid* at 69.
77 Schetzer & Henderson, *supra* note 14 at 45.
78 *Ibid* at 20.
found computers too difficult to use; 12 per cent identified lack of access to a computer; and 9 per cent attributed non-use to cost.

Technology is becoming increasingly creative and sophisticated, however. Interactive technology may permit individuals to be taken step by step through preparation of a document, engage with a legal adviser in relation to a particular question or “chat” with a librarian about how to access and use relevant resources. One group that is planning a technology-based process for improving the experience of self-represented litigants has identified certain values to guide their work, including the following: the processes should not be mandatory and there should be alternatives; the technology should not pose barriers; “computation-based decision support tools should only be employed in conjunction with human judgment”. One particular tool was designed to compile documents; however, it was also designed to take the user along a road to the courthouse that, using signposts, “help[s] position the user within the inevitable complexity by indicating what stage of the process is currently at work” and while adding information necessary to complete the documentation. It is, in effect, an online interview with relevant information provided. An audio component can read out the information to the user.

Researchers in the American hotline study recommended that “[h]otlines should develop special protocols for dealing with clients [who are less likely to follow up on advice], possibly including increased support or more extended services” and that there should be further study to determine whether hotlines are an effective tool for non-English speaking clients. While some assistance can be delivered through technology (including telephone), in some cases it needs to be done in person, although not necessarily by lawyers, as long as those providing the assistance have access to lawyers.

Over time, technology may resolve certain of the difficulties facing individuals who cannot afford full legal representation or even partial representation. However, there remain (and will continue to remain for some time) people who, because of their literacy skills, difficulty with language or cognitive challenge may feel even more an “outsider” to the system when expected to use the approach often considered “the answer” to the self-represented litigant phenomenon -- online information and instruction. They will require some form of in-person assistance at various stages of the legal process. In the UK, one study indicated that lawyers believed that it was most important to have face-to-face contact with individuals who were “highly distressed” (as in family law), had communication problems, had cognitive challenges and lacked IT literacy. It has been argued that even for middle class users of

---


83 Ibid at 80ff. See also Legal Aid Ontario, The Legal Aid Ontario Family Law Information Program, online: LAO <http://www.legalaid.on.ca/en/getting/flip.asp#> (FLIP also has an audio option, but it is not interactive).

84 Pearson and Davis, supra note 75 at 69.

85 Staudt, supra note 82 at 92.

86 Legal Services Board of England and Wales (LSB), Evaluation: How can we measure access to justice for individual consumers? A discussion paper (September 2012) at 28, online: LSB
technology, its use “is most effective when accompanied by follow up and support for users, who may
need human contact to help figure out how to apply the information offered to their own lives and the
problem at hand, and appropriate referrals”.  

2. Unbundled Legal Services

As with technology, unbundled legal services do have advantages for people who cannot afford full
representation: people can obtain legal advice and assistance when they need it for specific functions.
This method should therefore be a more affordable means of obtaining legal services, as well as a way
of providing in-person assistance for persons with low literacy. Unfortunately, unbundled services are
not effective for persons with low literacy skills. To use this method effectively, one must be able to
understand instructions and follow through on those instructions. As with the hotline, this can be
difficult for persons with low literacy, certain disabilities or who have English as a second language. It is
also questionable for litigants who need the time to develop trust in a lawyer. This can be important for
clients such as members of some Aboriginal communities, who have a mistrust of the system and need
to establish trust with legal personnel.

Persons with low literacy and people with mild cognitive or intellectual disabilities may have
considerable difficulty in expressing themselves or in understanding what they are being told. They may
have difficulties following instructions. These are factors that are not well suited to irregular or
unbundled services. It may be difficult for people with these characteristics to relate their legal problem
to “new” lawyers or other service deliverers. They may not be able to properly communicate what they
have been told to another lawyer or in a different setting. Clearly written retainers and follow up letters
of advice have only limited utility in this context, unless the “client” has personal support who can read
them to him or her – or unless it is recognized that intermittent legal assistance is inadequate for people
with these characteristics.

Although unbundled legal services are being promoted as a way of increasing access to justice for
those who cannot afford full legal representation, at least some (although certainly not all) unrepresented
litigants have low levels of education, difficulties with language and other disadvantages. This points to
a serious problem given that the New South Wales study cited a 2000 Australian Law Reform
Commission report that concluded that “unbundling can really only work for educated, articulate
litigants in routine matters”.  


87 The Canadian Bar Association, Underexplored Alternatives for the Middle Class (February 2013) at 9 [Underexplored Alternatives], online: CBA <http://www.cba.org/CBA/advocacy/pdf/Mid-ClassEng.pdf>.

88 Schetzer & Henderson, supra note 14 at 79. While a number of reports discuss the potential problems with limited scope retainers, in many cases the emphasis is on the problems it creates for lawyers or how it interferes with the smooth functioning of the system generally. See e.g. the references in Underexplored Alternatives, supra note 95 at 15 and Action Committee on Access to Justice, Report of the Access to Legal Services Working Group (May 2012) 11, online: CFCJ
This does not mean that limited scope retainers cannot help some people. It does mean that we should not assume that they can help everybody who cannot afford full legal representation and that consideration of this option should also include consideration of making it more effective for those who cannot take full advantage of it. This can be done by providing plain language and appropriately formatted documents to individuals who have at least some reading capacity or access to further assistance.

IV. CONCLUSION

It is widely acknowledged that justice remains inaccessible for many people for many reasons, hence the current major “movement” across Canada to change the tide of inadequate access to the legal system. Conferences leading to reports and reports giving rise to symposia dedicated to discussion about implementation of reports have provided the forum for representatives of many constituencies (government officials, academics, funders, judges, legal practitioners, library professionals, community organizations and others) to develop an agenda for change.

Overriding all this potential for change, however, is the common view that governments are not prepared to provide adequate funding to the legal system. Work is therefore being undertaken to gain a more empirical understanding of the cost of reforming the legal system as well as the cost of not reforming the system.

Reformers are not waiting for the results of empirical studies or for news that funding is available before proceeding with designs for reform. In these initiatives for reform, reformers need to be mindful of developing measures that have the greatest impact on increasing access to justice. We need to recognize the complexity of diversity among those who are disadvantaged in accessing the legal system and understand that not all people with a particular characteristic, or belonging to a particular community, have the same difficulty in accessing justice, while people characterized differently may share the same difficulty. In short, we need to be sure that the measures help those they are intended to help and that scarce resources are not wasted where they are ineffective or unnecessary.

Ideally, responding to the challenges facing individuals who cannot afford lawyers challenges us to apply the lessons offered by the rich scholarship exploring the complex dynamics in the relationship between dominant and marginalized groups or communities or even the simpler understanding of the relationship of marginalized groups to the legal system. It requires us to apply what we know about why particular groups and individuals are excluded from access to justice. Without doing so, we cannot


89 See e.g., the CBA’s Envisioning Equal Justice Summit in Vancouver in April 2013 and the resulting report, Reaching Equal Justice, supra note 4; the National Action Committee’s Roadmap for Change, supra note 3, with its accompanying background papers and subsequent provincial conferences and national Colloquium in Toronto in January 2014.

90 The Canadian Forum on Civil Justice has undertaken a five year study on The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems, online: CFCJ <http://www.cfcj-fcjc.org/cost-of-justice>.
expect to provide adequate solutions that will promote access to justice. I have referred to a number of programs that build on those lessons and knowledge. Not surprisingly, given their orientation, recent studies and reports at the centre of the current drive to increase access to the legal system (called “access to justice”) do not concern themselves with these large questions or spend much time explicitly positioning themselves along the continuum of access to justice.

Nevertheless, they do purport to offer proposals that increase access to justice for those who are disadvantaged when interacting with the legal system, particularly those disadvantaged by economic circumstances and by other grounds that often coincide with a low income, although the latter are often discussed only in passing. In doing so, they offer little analysis of whether the individuals on whose behalf the proposals are made can in fact benefit from them. Many will be able to do so. Others, however, will not because of factors that exist disproportionately within groups already disadvantaged and excluded from the system for one reason or another. If the “promise” that these reports hold out is to be realized, it will be necessary to take these factors into account in the implementation of what are, in the main, generic proposals.

I have related two factors, literacy skills and living in rural or remote regions, to two generic measures, the use of technology and unbundled legal services, that have been widely touted as offering increased access to justice and are being increasingly being relied on to attain that objective. Adequate literacy skills and adequate access to the internet are fundamental to using technology effectively. Literacy skills are also integral to benefitting from unbundled legal services. It is crucial that the design and implementation of what I have called generic measures take into account factors that might inhibit their use. Otherwise, the very measures intended to increase the ability to use the legal system risk perpetuating an underclass of disadvantaged or marginalized persons for whom access to justice will be more distant than ever, since these measures are in many quarters believed to be prime ways of responding to problems with access to the system.

It will be tempting to believe that we have reduced the challenge of exclusion more than we have if we do not go beyond the reports to a more nuanced implementation. And if we do not, at least some of those seeking access to the system will be compromised by the very measures that are intended to provide a solution to their exclusion from justice.