

***THE JUSTICE CRISIS: THE COST AND VALUE OF ACCESSING LAW*, TREVOR C.W. FARROW & LESLEY A. JACOBS, EDs. (VANCOUVER: UBC PRESS, 2020)**

When it comes to access to justice as a quotidian issue facing Canadians, scholarship has proliferated ever since Roderick MacDonald proclaimed “there has been little agreement about what *it* means.”¹ MacDonald’s expansive notion of the term went beyond the mere ability to engage with lawyers and courts. Rather, he contextualized the topic into five “waves,” each of which employed a more capacious conceptualization of a fair and just legal system.

For readers who may not be familiar with MacDonald’s five waves, they embark from the concept of access to justice being limited to the degree of access to lawyers and courts. The other four waves though go well beyond that myopic view. The second wave focuses on how the design of institutions relates to their accessibility. The third wave concerns the law’s assurance of an equality of outcomes. The fourth wave is preventative — how does the law prevent disputes from crystallizing into legal problems? And the fifth wave addresses the effect that broader societal forces — mainly economic conditions — have on Canadians accessing the law and legal institutions.² For this multi-dimensional conceptualization, MacDonald devised a multi-faceted strategy that could arguably be characterized better as a sociological rather than legal analysis.³

Macdonald’s socio-legal approach has been adopted in recent years by scholars who address the continuing inability of Canadians to resolve disputes within their available means. In this vein comes Trevor Farrow and Lesley Jacobs’ recent contribution to the access to justice literature in Canada. In *The Justice Crisis: The Cost and Value of Accessing Law*, the two professors based out of York University commission a group of academics and practitioners to analyze ongoing deficiencies in civil justice systems across Canada from a diverse range of views.⁴

Framing meaningful access to civil justice systems as a basic right, the two editors take the view that to appropriately understand and measure it requires an approach that accords with four basic pillars: (1) meaningful access to justice is about assisting people with their legal problems; (2) it should be centred on the user of civil justice systems rather than the providers; (3) users’ legal consciousness (that is, how they understand and make sense of their rights) is key to their “legal mobilization” — generally meaning their ability to use the law to their benefit; and (4) barriers to meaningful access to justice are often systemic rather than ad hoc and disparate events.⁵

The editors state at the outset that the book’s purpose is to undertake empirical analyses of the various deficiencies in the civil justice system that have barred Canadians from

¹ Roderick A MacDonald, “Access to Justice in Canada Today: Scope, Scale and Ambitions” in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto: LSUC, 2005) at 19 [emphasis added].

² *Ibid* at 20–23.

³ For a summary, see *ibid* at 23–26.

⁴ Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020).

⁵ Trevor CW Farrow & Lesley A Jacobs, “Introduction: Taking Meaningful Access to Justice in Canada Seriously” in Farrow & Jacobs, *ibid*, 3 at 8.

meaningful access to justice.⁶ This approach is welcomed — especially if there is to be concerted policy reform in the future. As a legal academic, I found the compilation and presentation of data to be quite useful, and an easy method by which to reference the varied ways that Canadians continue to struggle in accessing civil justice mechanisms. On the other hand, the volume’s granularity splices the authors’ attention into narrow topics that result in certain blind spots around broader systemic access to justice challenges that concern Indigenous and racialized groups. These challenges should no longer be ignored. I come back to this point later in this review.

For Farrow and Jacobs, meaningful access to justice means that “affordable and timely paths to justice are available to individuals and are well calibrated to their particular needs and situation.”⁷ To that end, the volume hones in on a number of specialized topics where it is evident that meaningful access to justice is simply not available at the present moment. For instance, the chapters delve into the use of paralegals at the Landlord and Tenant Board, the merits of class actions, and a more just conception of contingency fees. At the same time, they consider certain external forces — both within the legal world and outside of it — that do and can affect the contours of civil justice in Canada. These broader forces include the level of public funds devoted to civil disputes, the potential for legal technology to make civil dispute resolution more efficient, and the effects of adversarial processes on users of the system.

The volume is broken into four distinct parts, each of which include chapters that take the above-noted internal and external perspectives. Part I frames the crisis from a policy perspective by looking at how public funds have and should be used to ensure an effective civil justice system. In Chapter 1, Michael Trebilcock writes on how to drive down the costs of legal services by adopting alternative business structures (namely, synergies between law firms and private investors and an increased role for lay persons in the legal profession) as well as a panoply of effective legal technologies. For Trebilcock, there is a stark choice when it comes to the administration of civil justice — devote more public funds or adopt the above-noted measures.

In Chapter 2, Moktar Lamari, Pierre Noreau, and Marylène Leduc present empirical work on a number of performance measures in OECD countries. These measures include public budgets for legal aid, the proportion of lawyers and judges in each country’s population, salaries for legal professionals, the number of available courts, and length of proceedings. From the data, the authors conclude that Canada ranks somewhere in the middle of the sampled countries, suggesting the need to increase financial and human resources dedicated to civil justice across Canadian jurisdictions. Written by Lisa Moore and Mitchell Perlmutter, Chapter 3 assesses the level of public funding in light of the rather expansive notion of access to justice to which MacDonald pointed us to decades ago. They argue that public spending today adheres more to “old wave” models of access to justice rather than addressing measures to prevent disputes or considering broader economic and social conditions that lead to disputes in the first place.

⁶ *Ibid* at 6.
⁷ *Ibid* at 8.

With broader policy considerations in mind, Part II zeroes in on how Canadians actually experience legal problems. In Chapter 4, Ab Currie focuses on the fact that large numbers of Canadians are deterred from using the formal legal system to resolve disputes in light of exorbitant costs associated with the process. Like authors in the preceding chapters, he sees low-levels of public funding as a part of the problem, but one overshadowed by the need to embrace a culture shift in how legal services are provided and by whom. In Chapter 5, Matthew Dylag analyzes survey data to flesh out the various types of civil disputes in Ontario. He relates that the most common methods of civil dispute resolution have not been through formal engagement with the legal system, but rather via talking with the opposing party or seeking advice from friends or relatives.

In Chapter 6, Trevor Farrow addresses issues in the claims processes for residential school survivors. He sees problematic conduct on the part of both the plaintiff and defence counsel that relates to issues of cultural insensitivity and a lack of confidentiality. He also calls out the fact that contingency fees on the part of plaintiff counsel were far above allowable rates. Farrow points to the Truth and Reconciliation Commission Report as a positive step in bringing to light the plight of residential school survivors, but cautions there is work to do in order for the civil and criminal justice systems to adequately respect the Indigenous experience. To round out this part of the volume, in Chapter 7, Jennifer Koshan, Janet Mosher, and Wanda Wieggers address access to justice in domestic violence cases. In doing so, they take an interdisciplinary and inter-jurisdictional perspective by assessing how doctrines in, for instance, criminal, refugee, and family law, affect the ability of victims to access the applicable dispute resolution mechanisms.

Part III again canvasses a number of internal and external barriers to access to justice, but does so from the perspective of distinct areas of the law. In Chapter 8, David Wiseman breaks down how parties are represented at Ontario's Landlord and Tenant Board. Overall, he finds that, in one way or another, landlords are far more often represented than tenants, citing that "65 percent of self-represented tenants faced a represented landlord."⁸ Authored by Lesley Jacobs and Carolyn Carter, Chapter 9 analyses the unique process known as "Legal Information Sessions" in Ontario family law disputes. According to the authors, these sessions are meant to help attendees grasp the impact of separation and divorce and the methods — both formal and informal — available to resolve related disputes. Reading this chapter elicited a 'face in palm' response as the authors reported that individuals tasked by the provincial government to lead these sessions often read directly from a script for hours without looking up once.⁹ The authors interviewed a number of attendees who were generally dismayed by the sessions.

In a turn of sorts, in Chapter 10, Catherine Piché measures class actions in a rather positive light. She concludes that even though "take up rates" in Quebec class actions vary by case, class actions on the whole compensate victims for the harm they have incurred.

⁸ David Wiseman, "Paralegals and Access to Justice for Tenants: A Case Study" in Farrow & Jacobs, *ibid*, 173 at 184.

⁹ See Lesley A Jacobs & Carolyn Carter, "Court-Ordered Family Legal Information Sessions in Ontario: A Path to Justice Approach" in Farrow & Jacobs, *ibid*, 192 at 196: "The presenter did not introduce himself or make eye contact with the audience. The other male presenter took over where the first one left off. He introduced himself and read for approximately twenty minutes. The two men took turns reading the MIP [Mandatory Information Program] script for another *two hours and forty-five minutes*" [emphasis added].

Chapter 11 continues this positive outlook. Justice Lorne Sossin of the Ontario Court of Appeal and Devon Kapoor look at how socially responsible economic activities can improve access to justice. They see these activities as relevant and potentially effective at three distinct junctures: (1) avoiding conflict; (2) resolving conflict; and (3) avoiding further conflict. They canvass a number of nascent projects that span from clinics at universities and law schools to legal apps and not-for-profit institutions.

Part IV of the volume turns the lens onto the legal profession. In Chapter 12, Jerry McHale frames the crisis as a cultural one, citing resistance from both the mainstream, as well as the legal profession itself. Rather than focus solely on what he characterizes as the “usual suspects” (costs, delays, lack of resources), he sees a need to alter existing structures, such as unnecessarily complex civil procedures and adversarial attitudes and processes. Naturally, he supports a streamlined and more collaborative institutional design that can decrease the costs of civil disputes and speed up their timelines. In Chapter 13, Herbert Kritzer writes about the need to rethink legal fees. To him, fees are comprised of three components: (1) how they are computed; (2) who pays them; and (3) how they are regulated. From a client’s as well as a lawyer’s perspective, he assesses incentive structures in place for the various types of fee regimes (hourly, flat fee, itemized, contingency). After presenting the impact of specific reforms with respect to fees in England, Kritzer remains weary that similar reforms will have positive effects in Canada.

In Chapter 14, Michaela Keet and Heather Heavin undertake a psychological analysis of the adverse impacts of the litigation process. They propose a client-centred framework that would inform decision-making around civil litigation. That framework not only considers financial measures, but broader indicators such as effects on career progression, productivity, family and community relationships, and general health and wellness. They see the lawyer as being responsible for bringing awareness to clients around all of these categories. Finally, in Chapter 15, Noel Semple pushes against the prospect of fee caps and price reviews in contingency fee arrangements. As a substitute, he supports greater transparency as well as standardized contracts that would bind lawyers and clients across the industry.

The lengthy review of the contents of this volume is arguably necessary given the breadth and variety of research its authors have undertaken and presented. There are plenty of useful facts and empirical analyses here. Even more than that, the multi-faceted perspectives taken by the volume’s authors provide something of interest for a wide swath of practitioners and legal scholars who write, think, or interact with civil dispute resolution processes in Canada. As mentioned, the lasting insight to be taken from this work is that the crisis its editors indicate and its authors flesh out is not restricted to one factor or phenomenon. Rather, there are a number of internal and external factors that both contribute to and can, in theory, serve as a basis to alleviate, if not eliminate, the crisis. After finishing this work, a reader will not only have a good understanding of these various factors, but (at least for some of the factors) will be able to appreciate how other countries have fared in addressing them.

Moreover, with the diversity of topics included in this volume, a law student, lawyer, policy-maker, or scholar can limit their reading to one or a few chapters and be fairly well versed about the crisis from the point of view of one of the factors that has caused or perpetuated the crisis or within a particular area of law. Many of the chapters are rich with

qualitative and quantitative analysis — a nod to the empirical bent the editors indicate at the outset. This richness can inform how practitioners who engage the civil justice system daily can contribute to combatting the crisis just as much as it can inform decision-makers on how to alter the system in order to make it more accessible for the vast majority of Canadians who will be faced with a civil dispute in their lifetime.

Lastly, there is an appropriate mix here of issue spotting and problem solving. A reader will not be left with the overwhelming feeling that the crisis is beyond a reasonable solution. Rather, various chapters canvass a number of potential solutions. They range from broader shifts in culture (that is, a move from adversarial to collaborative processes) to more focused measures such as the use of burgeoning legal technologies and a wider utilization of paralegals and lay persons. Even though these potential solutions are not presented in a way so as to suggest they are inevitable in the near future, the authors seem optimistic that there are ways to solve the crisis if the legal profession and the relevant policy-makers turn their collective minds to them and facilitate mechanisms to allow them to come to fruition. In short, if concerted changes are pursued, the crisis does not necessarily need to remain as such.

With the volume's contributions in mind, there were a few missed opportunities (perhaps due to the empirical bent the editors chose to take) that ought to receive further attention in future work. I focus on three: (1) the need to canvass insights from regulators and policy-makers; (2) the disproportionate impact of the crisis felt by racialized and Indigenous communities; and (3) the role of the legal academy in helping to resolve the crisis.

First, the authors — predominantly legal scholars and practitioners — are critical of the government's role in perpetuating the access to justice crisis. But, there are no government-centric voices in this work and very little in the way of presenting the competing interests that governments must consider when it comes to putting more resources into civil dispute resolution processes. I think it is fair to assume that provincial and federal government officials with the ability to improve the level of resources dedicated to civil dispute resolution would say that they are constrained by their already exceedingly tight budgets. And where budgets allow, limited resources can only offer band-aid solutions in particular trouble spots. The numbers corroborate this. In an email statement to *CBC News* in April 2021, Justice Minister David Lametti pointed to budget increases to immigration and refugee legal aid funding by the nominal amount of \$500,000 in 2020 and 2021 from the previous funding level in 2019.¹⁰ However, there were no equivalent increases to real estate, consumer welfare, personal injury, or family matters.

Without discounting the more effective role governments can play in alleviating the crisis, an appreciation that governments are limited or lack the political will to take systemic or even ad hoc steps to combat the crisis then suggests that more attention ought to be given to the potential role of private industry. Here, Sossin and Kapoor's recognition that social innovation enterprises — and even for-profit businesses if the market calls for them — may be in a prime position to offer solutions that avoid and resolve civil conflict. Those authors state at the end of their chapter that “[o]ur hope is to see additional study and analysis of the

¹⁰ Olivia Stefanovich, “‘We’re in Trouble’: Advocates Urge Ottawa to Help Close the Access-to-Justice Gap,” *CBC News* (18 April 2021), online: <www.cbc.ca/news/politics/access-to-justice-federal-budget-2021-requests-1.5989872>.

current and potential impacts of social innovation and social enterprise in relation to the [civil] justice system.”¹¹ That is indeed where literature on the crisis may need to turn in the future. However, it is hard to make a strong argument for that turn unless we first establish how and why governments are not well-positioned to tackle the crisis as it currently stands.

Second, other than Farrow’s chapter about issues that have arisen in the course of the residential schools litigation, there is little analysis around how racialized and Indigenous communities experience civil justice systems across Canada. If the crisis results, in part, from broad socio-economic factors as MacDonald and his heirs have suggested, then it likely affects those on the lower rungs of the social stratosphere to a greater extent. While there has been work published in the past in this regard and also about the criminal justice system,¹² some empirical work here that would have looked at, for instance, the Black, Muslim, or Indigenous communities (or, otherwise, even immigrant and refugee communities more broadly) would have shed light on if and how those communities have been disproportionately affected by the crisis. Again, while this may have been a missed opportunity here, empirical analyses around how minority and historically disenfranchised communities experience civil dispute resolution can (and should) be an area of study this volume spurs.

Third, there is an increasing appreciation that law schools and the legal academy stand to play an important role in improving long-standing structural issues that have plagued the law and the legal profession. As Professor Sari Graben of Toronto Metropolitan University’s Faculty of Law notes with regard to the school’s approach to legal technology, “[i]ncorporating technology ... into legal education seems to be the way to move beyond the current model. Creating space in the legal curriculum ... is key to developing critical thinking about legal service and the production of law.”¹³ Whether it be a broader cultural shift for which McHale advocates here or even a more refined focus on how we can do certain things better when it comes to civil justice than how we have done them in the past, these changes can and should begin with how we train the next generation of lawyers.

Even though many of the writers in this volume are law professors, they devote little space to contemplating how they are aptly placed to change the ways in which the legal profession approaches civil dispute resolution. Exposing future lawyers to facts and data around the crisis may direct them to advocate for a more just and efficient system or, at minimum, contribute to them avoiding practices that perpetuate the parts of the crisis within their control. Plainly, the legal academy should be recognized as a segment of the profession that not only investigates and analyzes the crisis, but possesses robust influencing capabilities that over time have an impact on the crisis.

¹¹ Lorne Sossin & Devon Kapoor, “Social Enterprise, Social Innovation and Access to Justice” in Farrow & Jacobs, *supra* note 4, 226 at 241.

¹² See e.g. Neil Funk-Unrau & Anna Snyder, “Indian Residential School Survivors and State-Designed ADR: A Strategy for Co-Optation?” (2007) 24:3 Conflict Resolution Q 285; Reem Bahdi, “Arabs, Muslims, Human Rights, Access to Justice and Institutional Trustworthiness: Insights from Thirteen Legal Narratives” (2018) 96:1 Can Bar Rev 72; Pooja Parmar, “Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence” (2019) 97:3 Can Bar Rev 526; Akwasi Owusu-Bempah et al., “Race and Incarceration: The Representation and Characteristics of Black People in Provincial Correctional Facilities in Ontario, Canada” (2021) XX Race & Justice 1.

¹³ Sari Graben, “Law and Technology in Legal Education: A Systemic Approach at Ryerson” (2021) 58:1 Osgoode Hall LJ 139 at 161.

To conclude, let me be clear: the above critiques do not reduce the meaningful contributions made in this volume, particularly around the empirics of the civil justice crisis. The fact is that despite an increasing scholarly focus around our inabilities to effectively resolve civil disputes through available state-based mechanisms, there remains a great deal of analysis yet to be done — and one edited volume cannot be expected to satisfy that pressing need. In that light, the editors and authors ought to be commended for turning our attention to both the breadth and depth of the crisis and potential ways that it can be confronted. Ultimately, as I have mentioned, this work should spur even deeper and more niche conversations that can then be converted into sustainable solutions led by a host of public and private actors.

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