MEASURING ACCESS TO CIVIL JUSTICE: AN EMPIRICAL STUDY OF ONTARIO'S REFORM INITIATIVES

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Abstract

Access to civil justice remains one of the most pressing concerns within the legal community in Canada. Yet, despite over a half century of reform efforts, many people still struggle to resolve their legal difficulties in a timely and cost effective manner. Part of the reason that reform efforts have yet to solve this crisis is that scholarship has only recently begun to investigate possible measures that can evaluate whether programs and initiatives have positively impacted the ability of ordinary Canadians to resolve their legal problems. The primary purpose of this dissertation is to support the development of such measures and it contributes to this work in three ways. First, it situates the access to civil justice conversation within a theoretical framework in order to define what is being measured. The dissertation asserts that John Rawls' theory of justice as fairness is an appropriate conception of justice for a pluralistic democracy. Applying this theory, in conjunction with Lesley Jacobs' three dimensional model of equal opportunities, this dissertation identifies three measures of justice for assessing the impact of programs and initiatives: procedural fairness, background fairness, and stake's fairness. Second it takes seriously the need to include public perceptions of justice into policy development by examining hundreds of conversations about legal problems that are posted to the social media website Reddit. Engaging in both a quantitative and qualitative content analysis of this data, this dissertation identifies common themes about how these individuals understand and interact with their legal problems. It explains how these themes can in turn act as benchmarks to assess the efficacy of access to justice initiatives. Finally, the dissertation notes that people commonly use Reddit to crowd source both legal research and legal advice. It argues that despite legitimate concerns, when assessed against a justice as fairness measurement framework, both of these methods of resolution have a positive impact on improving access to civil justice.

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Chapter 1

The Access to Civil Justice Crisis

1.1 Introduction

Access to civil justice has become one of the most pressing concerns within the legal community. Everyday people struggle to resolve their legal difficulties in a timely and cost effective manner, and in some instances simply abandon their problem entirely. The implications of these struggles are manifold. Individuals not only bear the burden of unresolved or poorly resolved problems – whatever those might be – but may also suffer from severe stress or financial ruin. From a democratic governance perspective, there are concerns that the inability for individuals to act upon their legal entitlements undermines the rule of law and can lead to greater societal inequalities. Yet despite more than half a century of reform efforts, individuals still struggle to resolve their legal problems efficiently and effectively. Part of the reason that reform efforts have yet to solve this crisis is that scholarship has only recently begun to investigate possible measures that can evaluate the effectiveness of initiatives seeking to improve access to civil justice. Absent such measures there is no way to know whether access to civil justice policies actually benefit those whom they are targeting.

The primary purpose of this dissertation is to support the development of meaningful and practical measures that can be used to assess whether access to civil justice programs and initiatives positively impact the legal needs of ordinary Canadians. In this chapter, I explain that before these measures can be applied, two prerequisites must be met. First, there needs to be a shared understanding of justice grounded in a theoretical framework, and second there needs to be input from those who have experienced legal problems. Without these two prerequisites access to justice risks becoming little more than a rhetorical device. Before engaging in the substance of this argument, this introductory chapter first aims to situate my project within the broader access to civil justice movement by providing a brief history of the evolution of access to civil justice thinking, with particular emphasis on Ontario's reform efforts. Once this context has been established this chapter will then provide a detailed plan outlining the project's theory and methods that support the dissertation's final goal.

1.2 The Access to Civil Justice Movement

1.2.1 Origins of the Modern Access to Civil Justice Movement

The modern access to civil justice movement had its genesis during the eve of the post-war era of the 1960s and 1970s when legal scholars began to criticize the civil justice systems of liberal democratic states for being inaccessible to the majority of its citizens.[1] While the right to petition a court for assistance in resolving a legal dispute was generally accepted as both a basic right inherent to liberal democratic citizenship and a fundamental principle underlying the rule of law, critics saw this right as being merely formalistic wherein those without means were excluded from utilizing these mechanisms of democracy and left to fend for themselves.[2] Increasingly scholars understood that in order to be effective the right to access the courts required positive action by the state.[3] As scholarship coalesced into an identifiable school, the stated goal of the project was to ensure that the legal system was equally accessible to all.[4]

1.2.2 Public Legal Aid

Early efforts to improve access to civil justice typically focused on making traditional legal services more widely available through the expansion and reform of publically funded legal aid.[5] In England, France, and Germany a "judicare" model was adopted wherein the state would pay for the legal services of a private lawyer on behalf of eligible applicants.[6] Conversely, the United States adopted a public salaried attorney model, wherein the government would pay the salaries

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[1] See Mauro Cappelletti & Bryant Garth, *Access to Justice: A World Survey, Vol. 1* (Milan: Dott A. Giuffre Editore, 1978).

[2] See e.g. Mauro Cappelletti & Bryant Garth, "Access to Justice: The Newest Wave in Worldwide movement to Make Rights Effective" (1978) 27:2 Buffalo Law Review 181.

[3] See e.g. Marc Galanter & Jayanth K Krishnan, "'Bread for the poor': Access to justice and the rights of the needy in India" (2004) 55:4 Hastings Law Journal.

[4] Cappelletti & Garth, *supra* note 2 at 182.

[5] *Ibid* at 197–199; For a discussion of the challenges faced by Canada's first community legal clinic see also Frederick Zemans, "The Dream is Still Alive: Twenty-five Years of Parkdale Community Legal Services and the Osgoode Hall Law School Intensive Program in Poverty Law" (1997) 35 Osgoode Hall Law Journal 499.

[6] Cappelletti & Garth, *supra* note 2 at 199–202. There are of course nuances. England, for example, also established a network of Citizen Advice Bureaux during World War 2 which were staffed by non-lawyer citizen volunteers to assist people with navigating the growing welfare state. This network of independent charities continues to operate today. See Citizens Advice, "History of the Citizens Advice Service", (2021), online: <https://www.citizensadvice.org.uk/about-us/about-us1/history-of-the-citizens-advice-service/>.

of lawyers who staffed community law offices located in low-income neighbours.[7] Ontario's *Legal Aid Act* of 1966 followed the judicare model by establishing a system of publically funded legal aid certificates managed by the Law Society of Upper Canada (now the Law Society of Ontario).[8] These certificates could be used by eligible people in economic need to pay for the services of a lawyer on the private market. Prior to that Act, the only form of legal assistance available to poorer litigants in Ontario was one that operated on a charitable basis and depended on lawyers volunteering their services.[9] However, the joint committee that recommended the new certificate system argued that legal aid was both a right and a responsibility that belonged not to good intentioned lawyers but to the state.[10] Not long after the passage of the *Legal Aid Act*, it quickly became evident that the certificate model was not working for low-income individuals; it focused on criminal and family law and in doing so ignored many poverty law issues, lawyers had limited experience with poverty law issues, and many lawyers had little appetite to take up poverty law issues.[11] Thus, in 1971 Osgoode Hall Law School, supported by federal grants, founded the first community-based legal clinic in Ontario, which relied heavily on supervised law students to provide services in the area of poverty law.[12] This basic framework remained in place for the next thirty years until the government of Ontario adopted the recommendations of the *McCamus Report* for the creation of an independent agency to oversee both the certificate system and the community legal clinics.[13]

[7] Cappelletti & Garth, *supra* note 2 at 202–205. Recognizing the benefits of the public salaried attorney model, some jurisdictions opened community law offices to supplement the judicare model. England, for example, began to establish a network of Law Centres with staff lawyers located in poorer neighbourhoods beginning in the 1970s. See Michael Zander, "Law Centres: The Early History", (2020), online: <https://www.lawcentres.org.uk/about-law-centres/how-law-centres-started-out>.

[8] *Legal Aid Act,* SO 1966, c 80.

[9] John D Honsberger, "The Ontario Legal Aid Plan" (1967) 15 McGill Law Journal 436 at 436–437; Michael Trebilcock, *Report of the Legal Aid Review 2008* (Toronto, 2008) at 5; Zemans, *supra* note 5 at 501.

[10] Mary Jane Mossman, Karen Schucher & Claudia Schmeing, "Comparing and Understanding Legal Aid Priorities : A Paper Prepared for Legal Aid Ontario" (2010) 29:7 Windsor Review of Legal and Social Issues 149 at 8.

[11] Zemans, *supra* note 5 at 502–504.

[12] Zemans, *supra* note 5; See also Doug Ewart, "Catch Your Dreams Before They Slip Away: The Parkdale Dream Revisited" (1997) 35:3 Osgoode Hall Law Journalg 494.

[13] John D McCamus, "Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services", *Ontario Legal Aid Review* (1997); A more recent review of Legal Aid occurred in 2008 which led to another set of reforms. See Trebilcock, *supra* note 9.

1.2.3 Other Early Reform Efforts

As well as expanding legal aid programs, other early reform efforts focused on making the litigation process itself less expensive and quicker by redesigning institutional systems.[14] For example, in 1966 the United States adopted Rule 23 of the *Federal Rules of Civil Procedure* which allowed for the maintenance of the modern class action law suit.[15] Similarly, throughout the 1960s many Canadian provinces – with the notable exception of Ontario – began to relax their prohibition against contingency fees.[16] Both of these developments were seen as shifting much of the upfront cost of litigation away from the individual litigant.[17] In doing so, it was argued that those who neither qualified for legal aid nor had resources of their own would have an opportunity to bring their claim to court.[18] Similarly in the early 1970s, various jurisdictions including New York, Australia, England, and British Columbia created small claims courts and tribunals with the belief that they would not only reduce the cost of litigation by redirecting certain disputes out of the sluggish court system to more specialized and ostensibly efficient forums, but also allow individuals to litigate effectively without lawyers.[19] Likewise during this time, Manitoba, British Columbia and New York all established specialized forums for landlord tenant disputes on the grounds that an accessible and affordable dispute resolution procedure was needed for these types of disputes.[20] Although actively debated in Ontario, the legal sector was nonetheless quite late in adopting many of these reform efforts.[21] It was not until 1992 that Ontario enacted the *Class Proceedings Act, 1992* which allowed for proceedings to be

[14] Roderick a Macdonald, "Access to Civil Justice" in Peter Cane & Herbert M Kritzer, eds, *The Oxford Handbook of Empirical Legal Reserach* (Oxford: Oxford University Press, 2010) 493 at 505–506.
[15] Adolf Homburger, "Private Suits in the Public Interest in the United States of America" (1974) 23:2 Buffalo Law Review 343 at 357.
[16] Walter B Williston QC, "The Contingent Fee in Canada" (1969) 1 Alberta Law Review 184; Michael Trebilcock, "The Case For Contigent Fees: The Ontario Legal Profession Rethinks its Position" (1989) 15:3 Canadian Business Law Journal 360.
[17] There are, of course, many other arguments in support of these procedural reforms. For example, class actions arguably enhance the bargaining power of the litigant. See e.g. Cappelletti & Garth, *supra* note 2 at 217–220; Law Commission of Ontario, *Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto, 2019) at 2. Whereas contingency fees may encourage lawyers to act in the best interest of their client. See Trebilcock, *supra* note 16 at 361–362.
[18] Trebilcock, *supra* note 16; Law Commission of Ontario, *supra* note 17.
[19] See e.g. Cappelletti & Garth, *supra* note 2 at 243–245, 271–274.
[20] *Ibid* at 271–274.
[21] See e.g. Trebilcock, *supra* note 16.

commenced by way of class action.[22] Similarly, lawyers were not allowed to enter into contingency fee agreements with their clients until the *Solicitors Act* was amended a decade later in 2002.[23] In terms of alternative forums, the *Tenant Protection Act, 1997*, which established the Ontario Rental Housing Tribunal and moved residential tenancies issues out of the court system, was not adopted until 1997.[24] Yet despite the delay in adopting some of these institutional reform measures typical of the access to justice movement, Ontario was quick to adopt other access to civil justice reforms.[25]

Around the early 1980s, during what is often characterized as a "third wave" of access to civil justice thinking, scholars started to examine ways of addressing legal problems outside of the formal institutions through various alternative dispute resolutions (ADR) mechanisms such as consensus arbitration or industry ombudsman.[26] Many of the arguments in favour of ADR echoed earlier claims made in favour of institutional redesign: that is courts were inaccessible because they were too slow and costly.[27] Not only would ADR mechanisms address these concerns but they would also give parties more control over their outcomes in an environment that was less hostile than traditional litigation.[28] In 1991, Ontario passed its *Arbitration Act, 1991* which created a regime that permitted parties to enter into enforceable arbitration agreements and limited court intervention in such matters.[29] The ADR movement also gave rise to the widespread adoption of court managed ADR processes such as mandatory mediation. Ontario, for example, amended its *Rules of Civil Procedure* in 1998 to provide for mandatory mediation in

[22] *Class Proceedings Act, 1992,* SO 1992, c 6.
[23] *Justice Law Amendment Act, 2002,* SO 2002, c 24, schedule A.
[24] *Tenant Protection Act, 1997,* SO 1997, c 24.
[25] For example, Ontario was quick to adopt a Consumer Protection Bureau. See e.g. Lesley Jacobs & Matt Mcmanus, "Meaningful Access to Justice for Everyday Legal Problems : New Research on Consumer Problems Among Canadians" (2017).
[26] Cappelletti & Garth, *supra* note 2 at 232–233; Macdonald, *supra* note 14 at 506–507.
[27] See e.g. Jack B Weinstein, "Some Benefits and Risks of Privatization of Justice Through ADR" (1996) 11:2 The Ohio State Journal on Dispute Resolution 241.
[28] See e.g. Pepper A Randy, "Why Arbitrate: Ontario's Recent Experience with Commercial Arbitration" (1998) 38:4 Osgoode Hall Law Journal 807.
[29] *Arbitration Act, 1991,* SO 1991, c 17.

certain types of civil litigation cases and a year later did the same for estate matters.[30] Since then, the use of court managed ADR mechanisms has only increased in Canada.[31]

1.2.4 Criticisms of Early Reform Efforts

While all of these reform efforts claimed that they would increase an individual's ability to access civil justice, none proved to be the panacea some had hoped for. For example, although contingency fees are generally accepted as facilitating access to legal services for certain types of litigation, they also allow for the exploitation of clients who do not have the legal sophistication to judge the fairness of such agreements.[32] In regards to ADR, there is little evidence that it has made accessing a dispute resolution forum easier especially considering that many of these arbitral proceedings have become just as complicated and expensive as any court, and that they are dominated by institutional litigants who are able to leverage them strategically.[33] Administrative tribunals have likewise been critiqued as the legal entitlements of claimants – along with institutional resources and expertise – have become fragmented among numerous forums all of which have differing norms and mandates.[34] Even small claims courts have been criticized as being increasingly inaccessible to lower income individuals and primarily used by wealthier litigants and business enterprises for debt collection.[35] In other words, despite the early

[30] O Reg 453/98; O Reg 290/99.
[31] Prevention Triage and Referral Working Group, *Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector* (Ottawa, 2013) at 18–19.
[32] See e.g. Allan C Hutchinson, "Improving Access to Justice: Do Contingency Fees Really Work?" (2020) 36 Wind Yearb Access to Justice 184; Noel Semple, "Regulating Contingency Fees: A Consumer Welfare Perspective" in Trevor C W Farrow & Lesley A Jacobs, eds, The *Justice Crisis: the Cost and Value of Access to Law* (Vancouver: UBC Press, 2021) (The Law Society of Ontario now mandates that lawyers use a standard form contingency fee agreement in an attempt to address this concern).
[33] See e.g. Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1:3 Journal of Empirical Legal Studies 459; Weinstein, *supra* note 27; Trevor C W Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014).
[34] Lorne Sossin & Jamie Baxter, "Ontario's Administrative Tribunal Clusters: A Glass Half-full or Half-empty for Administrative Justice?" (2012) 12:1 Oxford University Commonwealth Law Journal 157.
[35] Anthony Niblett & Albert H Yoon, "Unintended Consequences : The Regressive Effects of Increased Access to Courts" (2017) 14:1 Journal of Empirical Legal Studies 5.

efforts of the access to civil justice project, by the turn of the century the legal system continued to be difficult for the majority of citizens to access.[36]

1.3 The Legal Need of Canadians

1.3.1 Legal Needs Surveys

One of the difficulties that inhibited the efficacy of these early reform efforts was an ignorance of the exact nature and scope of legal problems faced by the general population. The mid 1990s and early 2000s thus signalled a major shift in access to justice thinking as countries began to conduct national and sub-national surveys in order to determine and quantify the legal needs of their population.[37] Up to this point most access to justice scholarship was system centric in that it focused on how the legal system should respond to disputes that were brought before it. However, beginning with the American Bar Associations' legal needs study entitled *Legal Needs and Civil Justice: A Survey of Americans,* countries began to look at the legal problems themselves as the basis of analysis.[38] The American Bar Association survey interviewed 1,782 low-income households and 1,305 moderate-income households asking them about 67 specific "legal needs." The accompanying report defined a legal need as a situation that was being dealt with by a member of the household that had a legal context but was not necessarily recognized as legal nor necessary taken to some part of the civil justice system for resolution.[39] In 1999, Hazel Genn released her landmark study entitled *Paths to Justice: What People Do and Think About Going to Law* inquiring into the legal needs of England and Wales.[40] This study was based on a survey that interviewed 4,125 respondents regarding thirteen categories of "justiciable events." A justiciable event was similarly defined as a matter experienced by a respondent that raised legal issues, regardless of whether it was recognized as such or whether any part of the

[36] Civil justice reform efforts have, of course, continued into the 21st century. See e.g. Sir Harry Woolf, *Access to Justice: Final Report* (London: Lord Chancellor's Department, 1996); Honourable Coulter A Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ministry of the Attorney General, 2007).
[37] Jamie Baxter, Michael Trebilcock & Albert Yoon, "The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 55.
[38] American Bar Association, *Legal Needs and Civil Justice: A Survey of Americans* (Chicago, 1994).
[39] *Ibid*.
[40] Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999).

civil justice system was used to resolve it.[41] Like the earlier American survey, this study was also trying to understand the types of legal problems the public was experiencing and how they respond to them. Unlike the earlier American study, however, Genn's study used the individual as opposed to the family as the basic unit of inquiry and did not limit itself to a particular income bracket.[42] Between 1993 and 2017, fifty-six national surveys were conducted across thirty-six different jurisdictions, and while the methods between each survey differ significantly, they do evidence a growing consensus that in order to improve access to justice, policy makers must first understand the actual legal needs of the public.[43]

1.3.2 Canadian Legal Needs Surveys

In Canada there have been four national legal need surveys conducted all of which adopted the design and approach developed by Hazel Genn for her *Paths to Justice* study.[44] The first three surveys, conducted in 2004, 2006 and 2008, were designed by Ab Currie for Canada's Department of Justice.[45] The 2004 survey, the first of its kind in Canada, interviewed low and moderate income Canadians from all ten provinces in regards to fifteen different legal problem categories.[46] The 2006 survey increased its sample size to include all Canadians, not just those with low and moderate incomes, and refined the questionnaire used in the 2004 survey to make the problem definitions more precise.[47] Finally, the 2008 survey added a sixteenth problem category – neighbourhood problems – to the questionnaire.[48] Of the three, the 2006 survey is

[41] *Ibid* at 12.
[42] Genn, *supra* note 40.
[43] Pascoe Pleasence & Nigel J Balmer, *Legal Needs Surveys and Access to Justice* (Paris: OECD Publishing, 2019) at 25–26. See also Nicole Aylwin & Mandi Gray, *Selected Annotated Bibliography of National and Regional Legal Needs Surveys* (Toronto: The Canadian Forum on Civil Justice, 2015); Pascoe Pleasence & Nigel J Balmer, "Caught in the Middle: Justiciable Problems and the Use of Lawyers" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 27.
[44] Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa, 2009) at 5–6 (A fifth Canadian legal needs survey was conducted by Statistics Canada in 2021, which was designed in collaboration with the Department of Justice Canada. The data collected from this survey is scheduled to be released on January 14, 2022).
[45] Ab Currie, *The Incidence of Justiciable Problems in Civil Matters in Canada : Three National Surveys in 2004 , 2006 and 2008* (Ottawa, 2008) at 4–7.
[46] *Ibid*.
[47] *Ibid*; Currie, *supra* note 44 at 6.
[48] Currie, *supra* note 45 at 7.

the most impactful primarily because it was the subject of a comprehensive and extensive analysis detailed in the 2009 report entitled *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians.*[49] Currie also took a lead role in the design of the most recent survey conducted in 2014 by the Canadian Forum on Civil Justice and called the *Everyday Legal Problems and the Cost of Justice in Canada* survey (the *Cost of Justice* survey).[50] Like the previous legal needs surveys, this one interviewed Canadians from all ten provinces and asked about legal problems experienced during a three year reference period. Specifically, it interviewed 3,263 Canadian adults from all income brackets and asked questions concerning 84 different scenarios that were grouped into seventeen legal problem categories.[51] It also built on the previous surveys by examining various costs – to both the individual and to society – associated with having a legal problem.[52] This most recent survey confirmed many of the findings of the past surveys including the pervasiveness of legal problems, the type of problems experienced, and how problems are typically resolved.[53] There are, however, four key findings that should be understood as framing the legal needs landscape in which the access to civil justice movement operates (see table 1.1).

Table 1.1 **Four Key Findings of Legal Needs Research**

Key Findings	2014 Figures
1) Legal problems are ubiquitous	48.4% of Canadians have experienced one or more legal problems within a three year time frame.
2) People rarely interact with the formal system when dealing with a legal problem	6.7% of Canadians with legal problems go before a court or tribunal for adjudication; & 19.0% of Canadians with legal problems solicit legal advice from a professional.
3) People are generally not satisfied with their outcomes	70% of Canadians with legal problems did not achieve the result they expected; & 46.0% of Canadians with legal problems believed their outcomes were unfair.

[49] Currie, *supra* note 44.
[50] Ab Currie, *Nudging the Paradigm Shift: Everyday Legal Problems in Canada* (Toronto, 2016).
[51] Trevor C W Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto, 2016) (The seventeen legal problem categories examined were as follows: consumer, debt, employment, neighbours, family - relationship breakdowns, discrimination, wills & powers of attorney, medical care, housing, personal injury, police action, threat of legal action, disability benefits, social assistance, immigration, family – other, crime).
[52] *Ibid*.
[53] Currie, *supra* note 50; Farrow et al, *supra* note 51.

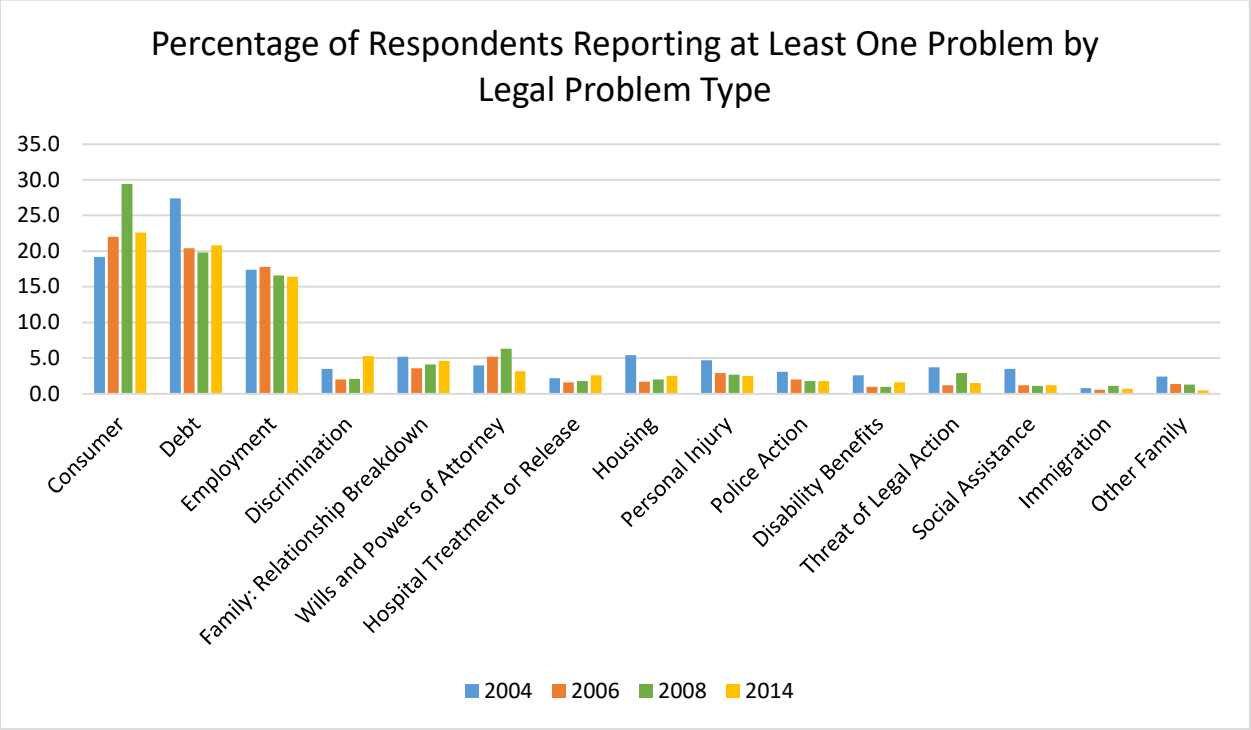
4) The cost to resolve a legal problem can be significant	51% of Canadians with legal problems experienced increased stress or emotional difficulties as a direct result of their problem; & $6,100.00 is the average amount spent to resolve a legal problem.

Source: Trevor CW Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto, 2016).

The first key finding from the *Cost of Justice* survey is that legal problems are ubiquitous among Canadians with nearly half of all Canadians (48.4%) experiencing at least one significant or hard to resolve legal problem during the three year reference period.[54] This result is consistent with the previous surveys and, given how short the reference period examined was, it is not unreasonable to speculate that nearly all Canadians will experience at least one significant legal problem during their lifetime.[55] In terms of the type of problem experienced, the most common legal problems have to do with consumer issues (22.6% of legal problems experienced), debt issues (20.8%), and employment issues (16.4%) while the least experienced problems have to do with criminal issues (0.4%), family issues other than those dealing with a relationship breakdown (0.4%), and immigration issues (0.7%).[56] This again confirms the findings of previous surveys which also reported employment, debt, and consumer problems to be the most frequently experienced legal problem types, while immigration and family problems other than relationship breakdown to be among the least experienced legal problem types (see figure 1.1).[57]

[54] Farrow et al, *supra* note 51.
[55] Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013) at 34.
[56] Farrow et al, *supra* note 51.
[57] Currie, *supra* note 35 at 8–9 (The three earlier surveys did not ask about criminal problems).

Figure 1.1 **Percentage of Respondents who Experienced Legal Problems by Type**



Source: Ab Currie, *The Incidence of Justiciable Problems in Civil Matters in Canada : Three National Surveys in 2004 , 2006 and 2008* (Ottawa, 2008); Ab Currie, *Nudging the Paradigm Shift: Everyday Legal Problems in Canada* (Toronto, 2016).

It is also worth noting that many people have experienced multiple legal problems during the reference period. Of those who reported on problems, over half (57.6%) experienced two or more problems during the reference period.[58] While there was no evidence of problems clustering in distinct patterns, about one third (33.2%) of those that experienced at least two problems said one of their problems was caused directly by another.[59] There is, however, evidence that certain types of social disadvantage are related to experiencing multiple problems. For example, those who were unemployed and those who were receiving disability pension or social assistance benefits were more likely to experience multiple legal problems.[60]

A second key finding of these surveys is that the formal system is rarely used to resolve legal problems and that legal advice is rarely sought. Consistent with earlier surveys, the most recent survey found that the vast majority of legal problems never make it before a formal

[58] Farrow et al, *supra* note 51 at 8.
[59] Currie, *supra* note 50 at 10.
[60] *Ibid* at 8.

adjudicative body, with only 6.7% of people with a legal problem actually appearing before a court or a tribunal.[61] Similarly, only 19.0% of those with a legal problem obtained legal advice from any source.[62] One way to understand these findings is to contextualize them within the monetary value of the problem experienced: most of which were comparatively low-value. Among the most common problem types experienced – being consumer, debt and employment – the majority of problems were valued under $10,000: only 20.0% of consumer problems, 27.0% of debt problems, and 15.3% of employment problems were valued at $10,000 or more.[63] This, however, is not to say that these problems are trivial: $9,000 is still a significant amount of money to many people and some serious problems may not be so easily quantifiable. Indeed, a significant majority of people (87.7%) reported that they believed it was important to resolve their problem and more than half of the respondents (54.3%) stated that the legal problem in question made their day-to-day life more difficult.[64] This ties into the third key finding of these legal needs surveys which is that most people were not satisfied with how the problem was resolved. In terms of perceptions, most people (70%) stated that they did not achieve what they originally expected, and almost half all Canadians with legal problems (46%) felt that the outcome they eventually obtained was unfair.[65] It is interesting to note that among those that resolved the problem themselves, 42% believed the outcome would have been better if they received some assistance.[66]

One of the novel contributions of the most recent survey is that it attempted to quantify the cost of resolving legal problems to both the individual and the state.[67] The result of this effort delivers a fourth key finding, which is that the cost of resolving a legal problem can be significant. In terms of direct costs to the individual, 43% respondents reported that they had to spend money to resolve their legal problem, with the average amount spent being approximately

[61] Farrow et al, *supra* note 51.
[62] *Ibid*.
[63] Currie, *supra* note 50 at 5.
[64] *Ibid*.
[65] Farrow et al, *supra* note 51.
[66] *Ibid*.
[67] Trevor C W Farrow & Lesley A Jacobs, "Introduction: Taking Meaningful Access to Justice in Canada Seriously" in Trevor C W Farrow & Lesley A Jacobs, eds, *The Justice Crises: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 3.

$6,100.[68] Typical expenditures include legal fees, court fees, transportation costs, and child care costs. This figure, however, is likely a conservative estimate of the average amount spent on resolving legal problems since the survey only asked about the cost of resolving at most two of their problems and about 20% of respondents report three or more problems.[69] Moreover, this figure does not include associated opportunity costs such as the cost of taking time off work to deal with a problem. There are also notable non-monetary costs associated with resolving legal problems. For example, just over half of the respondents who reported experiencing a legal problem (51%) stating they experienced increased stress or emotional difficulties as a direct result of the problem.[70] This translates into increased costs to the state, most notably in terms of health care, with approximately 40% of Canadians who reported experiencing high level of stress or emotional difficulties due to a legal problem accessing the health care system beyond normal usage.[71] Taken together, these findings paint a picture of a legal needs landscape that many struggle to cope with.

1.3.3 Summary

There are four key findings from the legal needs surveys which frames the environment in which the access to civil justice project operates. First, legal problems are ubiquitous wherein almost every Canadian will experience at least one major legal problem within their lifetime. Second, most problems are not resolved through the formal system nor do most people obtain legal advice for their problems. Third, most people struggle to resolve their problems and are often not satisfied with the outcome. Fourth, the cost of resolving a legal problem can be significant to the individual not only in terms of direct pecuniary cost, but also in terms of other more difficult to quantify costs, such as physical and mental health. While these key findings can be understood as the four corners of the legal needs portrait, there are numerous others findings that provide further nuance and detail. For example, employment issues are among the most common problem types experienced and those experiencing certain types of social disadvantage

[68] Farrow et al, *supra* note 51 at 12–13.
[69] Farrow et al, *supra* note 51.
[70] *Ibid*.
[71] *Ibid* at 18.

are more likely to experience multiple legal problems. Yet despite all these insights into the legal needs landscape, there are still many unknowns about the legal needs of the public.

1.4 The Research Problem

1.4.1 Defining Legal Needs

The legal needs surveys have provided much needed empirical evidence to support the access to civil justice project: they have identified the types of problems experienced and how individuals respond to them.[72] There are, however, several questions that need to be addressed in order to move the project forward.[73] One of the most foundational questions that remains unanswered concerns the exact scope of the modern movement. Specifically, if the goal of the access to civil justice project has evolved from helping people access legal services and the courts to helping people resolve their everyday legal problems generally, which problems should the movement be concerned with?[74] An obvious, but debatable, starting point for this analysis is that in order to fall within the scope of the access to justice project, problems must possess a legal element.[75] That is, the problem must be one that is recognized as legal by a court or other adjudicative body who in turn would be able to grant some kind of remedy. This is not to say that the access to justice project should only be limited to those problems that make it before the formal system, rather, this premise simply states that the law must recognize the problem as having a legal element as opposed to problems that are, for example, purely medical in nature.[76] Indeed, the legal needs surveys have shown that most problems are resolved outside of the formal system and it would be absurd to exclude the vast majority of legal problems from the scope of the movement; especially because many of these problems do not make it to the formal

[72] Baxter, Trebilcock & Yoon, *supra* note 37; See also Rebecca Sandefur, "What We Know and Need to Know About the Legal Needs of the Public" (2016) 67 South Carolina Law Review 443.
[73] Sandefur, *supra* note 72.
[74] *Ibid* at 450–452.
[75] Most access to civil justice scholarship proceeds from this premise, see e.g. Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012); However, some might argue that the movement should be concerned with systemic underlying problems like poverty, see e.g. Janet Mosher, "Legal Education: Nemesis or Ally of Social Movements?" (1997) 35:3 Osgoode Hall Law Journal 613.
[76] In reality it may be difficult to draw such clear distinctions. For example, the lived reality of those experiencing poverty often do not conform to state imposed legal categories. See e.g. Cherie Robertson, "The Demystification of Legal Discourse: Reconceiving the Role of the Poverty Lawyer as Agent of the Poor" (1997) 35 Osgoode Hall Law Journal 637.

system specifically because of various barriers that the project is trying to overcome. With that said, the access to civil justice project should not necessarily concern itself with every mundane legal problem of day-to-day life. People are often quite capable of dealing with simple legal problems on their own: a disputed bill can be negotiated, a defective product returned, or missing wages requested and paid out.[77] This was the position taken by the Canadian legal needs surveys which only asked about serious or hard to resolve legal problems and validates those who have articulated the position that frivolous problems – even if they have a legal element – are not of concern to the access to civil justice movement.[78] Indeed, in a society where almost every interaction has a legal element, it would be both impractical and overwhelming to suggest otherwise.

The analysis, therefore, needs to be one that differentiates a legal problem that an individual can effectively resolve on their own from a legal problem that an individual cannot effectively resolve on their own. Although this framework has become the accepted paradigm for modern scholarship,[79] there is a major difficulty in identifying these unmet legal needs and differentiating them from a simple 'justice situation.' [80] On one hand, legal problems are highly contextual with individualized facts that make it difficult to generalize legal problems. For example, filing for a divorce is a relatively simple administrative procedure. However, if the separating couple have children or significant assets even a non-acrimonious divorce may become more difficult to resolve. Moreover, every individual has differing levels of capability when handling legal problems. Those with higher education, for example, may find a particular legal problem easier to resolve than others who have experienced similar problems.[81] Finally, legal problems are not static: some problems may begin in a fairly benign way but then escalate into something much more serious. Likewise, other problems may appear simple but have far more complicated and long reaching legal implications. Thus, it is not a straightforward task of

[77] Sandefur, *supra* note 72 at 451–452.
[78] See e.g. Currie, *supra* note 44 at 31–32.
[79] See e.g. Trevor C W Farrow, "What is Access to Justice ?" (2015) 51:3 Osgoode Hall Law Journal 957.
[80] Sandefur, *supra* note 72 at 451–452.
[81] The Canadian legal needs surveys have shown that those with less than high school level education are more likely to report that they took no action to resolve their problem. Further, those with less than high school level education are also more likely to report that they experienced extreme stress or emotional health problems when dealing with a legal problem. Currie, *supra* note 44 at 61, 76.

including certain categories of legal problems and excluding others: for some a divorce, for example, may be a justice situation they can deal with on their own, whereas others it might be an unmet legal need that they are incapable of handling.

This challenge in identifying unmet legal needs is exactly what the "waves" of reform detailed above were responding to.[82] For example, in the early 1970s Canada's legal aid systems were criticised for being oriented exclusively to criminal and family law and ignoring many legal issues experienced by those facing poverty such as workers compensation or landlord tenant issues. [83] Moreover, most lawyers had little interest or capability to handle poverty law cases.[84] Once it became apparent that legal aid certificates were not helpful for many of those experiencing poverty, Canada responded by establishing community legal clinics that focused on poverty law. Likewise, mediation was founded on the premise that some legal problems, if not most, do not benefit from an adversarial court hearing and would be more efficiently resolved through structured negotiations.[85] The growth of consumer protection law beginning in the late 1960s is another example wherein the range of consumer rights and remedies continues to expand in response to unscrupulous business practices.[86] In each of these cases, reform efforts were reacting to newly identified unmet legal needs.

Identifying unmet legal needs, however, also involves a normative aspect that has long been overlooked by the access to civil justice project.[87] If, as suggested above, the project was only concerned with those problems that are recognized as legal by the courts then this framework risks freezing the project in a particular time and place. To illustrate, the access to civil justice project predates the *Canadian Charter of Rights of Freedoms* by approximately twenty years.[88] Applying the legal needs framework within its historical context means that many of the legal rights and entitlements that are currently acknowledged as rightfully belonging within the

[82] Cappelletti & Garth, *supra* note 2; Macdonald, *supra* note 14.
[83] Zemans, *supra* note 5 at 502–503.
[84] *Ibid*; See also Doug Ewart, "Parkdale Community Legal Services: Community Law Office, or Law Office in a Community?" (1997) 35:3 Osgoode Hall Law Journal 475 at 480.
[85] Paul Wangerin, "The Political and Economic Roots of the 'Adversary System' of Justice and 'Alternative Dispute Resolution'" (1994) 9:2 Ohio State Journal On Dispute Resolution 203.
[86] John Zinn, "Let The Buyer Still Beware!" (1977) 42:2 Business Quarterly 54.
[87] Sandefur, *supra* note 72 at 451–452.
[88] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitutions Act, 1982,* being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11.

scope of the project – including many of those enshrined by the *Charter* – would be excluded if subject to a legal needs analysis at the time of the project's inception.[89] This is problematic because the injustices that the *Charter* was trying to rectify existed regardless of whether the courts at the time recognized them as such and it would be absurd to suggest that the project was not concerned with them simply because there was no procedural mechanism for their redress.[90] As new injustices are acknowledged, and with them new rights and entitlements, it behooves the access to civil justice project to have a standard for legal needs that is independent of court recognition.

The access to civil justice project runs in parallel with the human rights project which, in Canada, primarily works to expand the scope of legal protections against discrimination.[91] While many may argue that the right not to be discriminated against based on such grounds as religion, race, or sex is a natural right that exists independent of legal recognition, it became entrenched in Canadian law through the *Canadian Charter of Rights and Freedoms* and through the various federal and provincial human rights codes. Since the Ontario's *Racial Discrimination Act* – Canada's first anti-discrimination legislation – was passed in 1944 the protected grounds against discrimination recognized by legislation has grown exponentially.[92] Where the *Racial Discrimination Act* recognized only two protected grounds – being race and creed – Ontario's current *Human Rights Code* recognizes fifteen with the most recent expansion occurring in 2012 when Ontario amended the Code to include gender identity and gender expression as a protected ground in the realms of business services, accommodation, contracts, and employment.[93] All of these protections gave rise to new rights and entitlements that could be pursued through formal institutions.

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[89] Perhaps the most obvious example being many of the applications that are made under provincial human rights legislation. See below.

[90] Marc Galanter, "Access To Justice in a World of Expanding Social Capability" (2010) 37 Fordham University Urban Law Journal 115; Macdonald, *supra* note 14.

[91] For general background on the development of Human Rights in Canada, see e.g Stanley Corbett, *Canadian Human Rights Law and Commentary*, 2nd ed (Markham: LexisNexis Canada, 2012); Dominique Clement, *Human Rights in Canada: A History* (Waterloo: Wilfrid Laurier University Press, 2016).

[92] *Racial Discrimination Act*, SO 1944, c 51.

[93] *Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression), 2012*, SO 2012, c 7.

In tandem with this expansion of human rights is the continued expansion of the law's regulatory purview into almost every aspect of ordinary life.[94] Whether it is in regards to food safety, retail banking, childhood education, or the workplace the amount of government regulation – and with it new legal remedies – has not only exponentially increased since the beginning of the access to justice movement but continues to grow.[95] In Ontario, for example, the *Consumer Protection Act* was amended in 2014 to regulate tow and storage services.[96] Two years later, in 2016, the Act was again amended to regulate consumer agreements that offered reward points.[97] It was amended yet again a year later to regulate the door-to-door sales industry.[98] While fairly mundane when compared to the expansion of rights entrenched by Ontario's *Human Rights Code*, these amendments not only exemplify the extent to which modern governments regulate individual transactions and interactions, they also display how new rights and entitlements are constantly being created for the individual. Moreover, there is no reason to presume that this expansion will slow down as new technologies such as machine learning and block chain are being more widely integrated into daily life and with it further regulation.[99] This 'moving frontier of justice' shows that what was once considered frivolous in the eyes of the law may in time become recognized as a legitimate ground for a legal claim.[100] In this context, a framework that is limited only to those problems that are currently recognized as legal is not entirely satisfactory and a theory of justice is needed to provide a normative standard for the scope of the project.

1.4.2 Measuring Access to Civil Justice

Apart from resolving a conceptual difficulty, grounding the legal needs framework in a theory of justice is needed to address several practical problems that limit the ability of the

[94] Gillian K Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans" (2010) 37 Fordham University Urban Law Journal 129.
[95] For a historical and comparative examination of Canadian regulation and governance see e.g. G Bruce Doern, Michael J Prince & Richard J Schultz, *Rules and Unruliness: Canadian Regulatory Democracy, Governance, Capitalism, and Welfarism* (Montreal: McGill-Queen's University Press, 2014).
[96] *Fighting Fraud and Reducing Automobile Insurance Rates, 2014,* SO 2014, c 9, Schedule 1.
[97] *Protecting Rewards Points Act (Consumer Protection Amendment), 2016*, SO 2016, c 24.
[98] *Putting Consumers First Act (Consumer Protection Statute Law Amendment), 2017,* SO 2017, c 5.
[99] See e.g. Robert Herian, "Taking Blockchain Seriously" (2018) 29:2 Law and Critique 163.
[100] Galanter, *supra* note 90.

movement to achieve its intended goal. In particular, policy leaders have identified the need for metrics and benchmarks as a priority area for the access to civil justice project.[101] Metrics that can measure the effectiveness of initiatives that facilitate access to civil justice are needed for two key reasons. First, despite the numerous waves of reform that the access to civil justice project has undergone over the last half century, the fact remains that many people are still not satisfied with their outcomes and experience significant difficulty in resolving their problems. This evidences the need for a more strategic approach to reform; one that is based on empirical assessments of effectiveness. Metrics would provide the needed insight into which reforms are working and which reforms are not. Second, the continual expansion of rights and entitlements means that a growing list of potential claimants must compete in an environment of finite resources. Put another way, the access to civil justice project has seen an explosion of unmet legal needs over the last half century within a context of increasing fiscal constraints. This reality is acknowledged by much of the access to civil justice reforms which have often been motivated by attempts to redistribute resources in a more efficient manner.[102] Both consensus arbitration and administrative tribunals, for example, were seen as a way to free up limited court resources by shifting cases to forums that could resolve the problems in a more cost effective manner due to various factors such as simplified rules of procedure or industry expertise.[103] Reliable metrics would help determine how to distribute resources in a manner that best facilities access to civil justice.

Recognizing the importance of having a measurement framework for access to civil justice programing and initiatives, several organizations within Canada have begun to examine this issue.[104] Of these organizations, the most developed proposal comes from A2JBC which has drafted a comprehensive measurement framework in order to evaluate improvements in access to civil justice.[105] The proposed framework contains three elements: improved access to justice

[101] Canadian Bar Association, *supra* note 55 at 144–146; Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa, 2013) at 23.
[102] See e.g. Trebilcock, *supra* note 9.
[103] Weinstein, *supra* note 27 at 264–265.
[104] See e.g. Calibrate, *Measuring Access to Justice: A Survey of Approaches and Indicators in A2J Metrics Initiatives* (2019); Yvon Dandurand & Jessica Jahn, *Access to Justice Measurement Framework Measurement* (2017); Standing Committee on Access to Justice, *Access to Justice Metrics: A Discussion Paper* (Ottawa, 2013).
[105] Dandurand & Jahn, *supra* note 104.

outcomes, improved user experience of access to justice, and improved costs. Each of these elements in turn contain three to five dimensions that act as indicators of improved access to civil justice. For example, to measure improved costs the framework proposes examining the per-capita costs of services, per-user costs of services, and other costs. This approach offers a viable method to measure the efficacy of access to civil justice reforms, and represents a significant step forward in addressing one of the practical problems presented by the legal needs paradigm. However this framework presupposes an undefined conception of justice which leads to numerous normative questions about why these measures matter. For example, the framework states that one of the dimension of improving population access to justice is the social impact of access to justice reforms, including the promotion of gender equality, the advancement of justice for indigenous peoples, and the promotion of social development. Apart from being somewhat nebulous there is a real question of how these components are connected to the access to civil justice project and if they are relevant to many of the everyday legal problems experienced by Canadians. In order to answer these questions, these metrics first need to be grounded within a theory of justice.

One of the primary difficulties in developing access to justice metrics is trying to define what is being measured.[106] As noted by the Canadian Bar Association, there is currently no consensus about the meaning and definition of access to civil justice.[107] The reason for this is in part because much of the access to civil justice literature does not have a theoretical grounding for their conception of justice.[108] Scholarship in this field is exemplified by either empirical studies that examine how people understand and interact with the law[109] or academic critiques of existing legal processes.[110] Like the A2JBC measurement framework, this scholarship typically

[106] Macdonald, *supra* note 14.
[107] Standing Committee on Access to Justice, *supra* note 104 at 1.
[108] There are, of course, notable exceptions: see e.g. Jennifer A Leitch, "Having A Say: 'Access to Justice' as Democratic Participation" (2015) 4 UCL Journal of Law and Jurisprudence 76; Farrow, *supra* note 25; Hilary Sommerlad, "Some reflections on the relationship between citizenship, access to justice, and the reform of legal aid" (2004) 31:3 Journal of Law and Society 345.
[109] See e.g. David M Engel, "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community" (1984) 18 Law & Society Review 551; Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago: University of Chicago Press, 1990); Patricia Ewick & Susan S Silbey, *The Common Place of Law: Stories From Everyday Life* (Chicago: University of Chicago Press, 1998).
[110] See e.g. Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38 Dalhousie Law Journal 119; Nicholas Bala, "Reforming Family Dispute Resolution in

focus on issues of access while presupposing that there is a commonly accepted conception of justice.[111] Although this presumption is understandable given the practical and real world applicability of the access to civil justice project, differing theories of justice will impact the normative positions of the project and in turn impact what the project deems necessary to measure. For example, a utilitarian conception of justice that seeks to maximize benefits among the greatest number of people would have different concerns than either an egalitarian or contractarian conception of justice. The importance of identifying these normative positions has become more acute as the scope of the access to civil justice project has grown over the last half century.

Although a theory of justice can provide guidance for the access to civil justice project, benchmarks are also needed in order to have a standard by which to assess reforms against. While it would be simple enough to focus on system processes such as the number of hearing days per case or the number of cases settled per year, this approach would ignore the findings of the legal needs surveys which have shown that most legal problems never make it before the formal system. Moreover, developing meaningful benchmarks provides a real opportunity to take seriously the needs of the public by incorporating their perspective into the measurement framework. There is a growing consensus within the Canadian access to justice community that we must reorient the civil justice system so that it is people-centred.[112] This is often interpreted to mean that the focus of reform must be on those who use the system as opposed to those who work within it.[113] A user-focused system, however, could also be understood to mean that the public's perception of justice should be incorporated into policy development.[114] From a benchmarking exercise this makes sense because those with legal needs are best positioned to explain the nature and scope of their difficulties, and what they believe would be most helpful.

Ontario: Systemic Changes and Cultural Shifts" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 271; Anthony Duggan & Iain Ramsay, "Front-End Strategies for Improving Consumer Access to Justice" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 95.

[111] Cappelletti & Garth, *supra* note 2 at 182.

[112] Canadian Bar Association, *supra* note 55 at 62.

[113] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101; Canadian Bar Association, *supra* note 55.

[114] Barbara Billingsley, Diana Lowe & Mary Stratton, *Civil Justice System and the Public Learning from Experiences to find Practices that Work* (Edmonton, 2006).

The methodological problem raised by this exercise, however, is how exactly to give the public a voice.

1.4.3 Summary

This dissertation offers an alternative approach in developing metrics by first grounding the discussion within a theory of justice. In doing so, it is not meant to supplant the work and achievements of A2JBC or other organizations. Rather, it intends to support this work by providing that normative standard that remains elusive and undefined. In order to do this, the project engages with three fundamental questions. First, how do we conceptualize access to civil justice such that it has shared meaning that can be analyzed in a practical manner; second what insights can people who have experienced one or more legal problems in recent years provide to this discussion about how to measure access to civil justice; and third, which policy and reform initiatives that have been implemented over the last decade need to be measured.

1.5 Plan and Organization of the Dissertation

The chapters that follow detail this project in terms of theory, methods, and findings. It is organized in a manner that guides the reader through a fairly ambitious empirical study that, on one hand, draws heavily from earlier scholarship while, on the other, makes a novel contribution to the field of access to justice in two distinct ways: first by situating the study within a theoretical framework and second by incorporating the experiences of the public into the benchmarking exercise. In addition, this project also aims to provide more than a simple critique of the legal needs landscape by taking seriously the experiences of those with legal problems, and leveraging those experiences to offer practical solutions to the access to civil justice crisis. Specifically, I demonstrate how social media is being used to crowd source both legal research and legal advice and argue that, despite legitimate concerns, these practices can be leveraged as an effective way to facilitate access to civil justice as conceptualized by the proposed theoretical framework.

Chapter 2 of this project begins with an examination of John Rawls' theory of justice as fairness. In this chapter I explain why this conception of justice is appropriate for a pluralistic democratic country like Canada and why it should be used as a framework for the access to civil

justice project. I then discuss Rawls' two principles of justice and explain how they can be translated into measures for evaluating policies and programs. I note, however, that Rawls' theory of justice as fairness precludes any assessment of outcomes which, I argue, is necessary for a comprehensive assessment of legal needs. As such, I turn to Lesley Jacobs' three dimensional model for equal opportunities to find a third principle of justice that can be used to measure outcomes. This chapter thus explains how three principles of justice – being procedural fairness, background fairness, and stakes fairness – can be used as a measurement framework for the access to civil justice project. While a theory of justice is needed to identify and define measures of justice, benchmarks are required to assess the efficacy of access to civil justice policies and programs. In order to determine appropriate benchmarks, I sought input from those who are best situated to provide insight into meaningful reform; that is those who have experienced a legal problem.

In chapter 3, I discuss the research design and methods of this study. In this chapter I explain how this project follows in the footsteps of legal consciousness scholarship – being the study of how individuals perceive and interact with legality – by identifying common narratives among a community of people that invoke normative claims about the law and the legal institutions. Unlike most legal consciousness scholarship, which typically draws these narratives from extensive ethnographic interviews, my data set is based on hundreds of social media conversations posted to the website Reddit. Like letters to a newspaper editor, these types of social media platforms provide a forum for people to express their views and opinion. However, recognizing that not everyone who posts about their legal problems on Reddit is equally situated, I chose to pull conversations about multiple problem types in order to have differently situated groups as a basis of comparison; specifically I examined conversations relating to housing problems, employment problems, and family problems. I conclude this chapter by explaining how I analyzed and coded the data using a mixed methods approach.

Chapter 4 is an examination of the current access to civil justice landscape within Ontario. This chapter identifies numerous themes that emerge out of both government and non-government policies, programs, and initiatives that claim to improve access to civil justice. I then assess those themes against a justice as fairness framework in order to determine whether those

themes can be properly understood as working to improve access to civil justice. Chapters 5-7 each examines one of the problem categories – being housing, employment, or family – in depth beginning with a discussion of the legal context of the problem type followed by an examination the problems within the context of the online community. I then identify common narratives found within the conversations to explain how Reddit users experience that particular problem type and how they understand and interact with the legal system. Finally, I situate those narratives within a justice as fairness framework in order to examine the problem type against the measures identified in chapter 2.

Finally, chapter 8 uses the findings discussed previously to incorporate a public perception of justice into the access to civil justice policy in two ways. First, I propose three benchmarks – system design, rights allocation, and paths to justice – which can act as standards by which to measure the efficacy of access to civil justice reforms. These benchmarks emerged out of the themes identified in previous chapters. Second, I reflect on how social media is being used to crowdsource both legal research and legal advice. I argue that while there are legitimate concerns with this behaviour it can actually be leveraged as a way to provide meaningful access to justice as understood by the measures identified for those who may otherwise fall through the cracks.

Chapter 2

Theories of Justice

2.1 Introduction

When speaking of justice, one invokes a complex concept whose precise substance is difficult to express. Compounding this difficulty is the fact that justice may have different meanings depending on the context in which it is used and on who is articulating it.[115] The moral philosopher, for example, might emphasise justice as a virtue whereas the political philosopher might focus on how justice promotes the public interest. Justice can make claims on individual behaviour or on societal norms. And while justice often hinges on individual entitlements, rights, duties or obligations, one may question whether those entitlements, rights, duties or obligations, derive from existing laws and institutions or whether they exist independent of those institutions. Regardless of whether one believes that justice emanates from the institutions or transcends the institutions, the legal system is inextricably linked to the concept of justice. When justice is thought of from the perspective of the jurist, two subjects are of particular concern. First, is the question of how to render a just decision. A jurist might judge the outcome of a particular legal process as being either just or unjust based on pre-existing claims to justice. Conversely, one might claim that the outcome is peripheral provided the processes themselves are just. A second subject of concern may be how to justly distribute benefits and burdens among a community. One may argue that benefits and burdens be distributed according to principles of equality wherein everyone receives an equal share by virtue of being a member of that community. Alternatively one could claim that justice requires benefits be given to the most deserving or to those in greatest need. While both of these concerns – just outcomes and just distributions – as well as the more fundamental question raised above, underpin issues of access to civil justice, the Canadian legal community has yet to arrive at a consensus on the meaning of justice in this context.[116]

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[115] David Miller, "Justice", (2017), online: *Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/entries/justice/#JustMappConc>.

[116] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101 at 2.

This chapter seeks to conceptualize a theory of justice in order to provide a theoretical underpinning to the access to civil justice discussion. Specifically, it advances "justice as fairness," as articulated by the American philosopher John Rawls, as a suitable theory to frame the access to civil justice movement. The chapter maps out this theory and discusses how it supports two dimensions of justice: procedural fairness and background fairness. Noting, however, that this theory alone precludes any examination of just outcomes the chapter also introduces Lesley Jacob's three-dimensional model of equal opportunities which adds a third dimension of justice, being stakes fairness. These three dimensions provide practical measures of justice and, in doing so, a framework for the access to civil justice movement. In this way, this exercise is not simply a theoretical discussion; rather it is intended to be used to assess current and proposed policy initiatives.

2.2 Justice as Fairness

2.2.1 Introduction

As a first principle, one could argue that justice exists independent of a legal order. That is to say laws can be just or unjust and justice is not dependent on the existence of particular institutions. This metaphysical debate, however, is not a practical starting point for those who are unable to resolve their legal problems as it has the potential to distract from the real world context that underpins their issues. As such, for the purpose of this dissertation, justice is understood to reside within the context of the Canadian legal system. In other words, it is irrelevant if justice transcends the legal institutions or emanates from it, rather the relevant point is that the institutions that create and administer the laws are presumed in this dissertation to be legitimate and are presumed to aspire to advance justice whatever that might be. The reason for this is simply that the access to civil justice movement that this dissertation engages with is fully situated within the legal system: it takes for granted that the institutions and the laws are the framework within which justice operates.[117] This is not to say that the institutions or the laws cannot be criticized – in fact much of the access to civil justice literature calls for reform of the institutions and laws – but the purpose of this dissertation is to determine practical measures for

[117] See e.g. Trebilcock, Duggan, & Sossin, *supra* note 75.

improving access to civil justice initiatives, not to reimagine the constitutional framework of the country. To do this the dissertation will examine how Canadian citizens interact with the existing institutions and laws rather than theorize on alternative structures. Therefore justice, as conceptualized by this dissertation, needs to align with the aims of existing political institutions within Canadian society. Perhaps the most influential starting point for a principled engagement with theoretical foundations of justice for a modern liberal, pluralistic, and democratic country like Canada is John Rawls' theory of justice as fairness.

John Rawls was an American political and moral philosopher who articulated a concept of justice from the perspective of a liberal, pluralistic, and democratic society, and who can therefore provide direction for how this dissertation conceives of justice.[118] Rawls notes that there are many types of justice – such as justice as it pertains to international state relations, as it pertains to particular attitudes of persons, or as it pertains to persons themselves – however, his work is concerned with justice as the basic structure of an organized society. His theory is premised on the notion that one of the most fundamental aims of a democratic society is to encourage and maintain a system of fair social cooperation over time from one generation to the next.[119] He defines social cooperation as being distinct from mere socially coordinated activity in that social cooperation includes terms of reciprocity (where participants accept reasonable rules provided everyone else accepts them) and rational advantage (where participants who accept the rules are attempting to advance their own good).[120] With this objective of a democratic society in mind, Rawls notes that it is the role of justice to specify these fair terms of social cooperation and determine what the most acceptable political conception of it is.[121]

[118] As noted by Rawls, and as accepted by this dissertation, there are many ways in which one can examine the idea of justice. Natural law, for example, has a long history wherein justice is seen as objective and universal. It is not a creation of state, but manifests itself in the world either by divine order, the human condition, or morale principles, which is then is realized. See e.g. HLA Hart, *The Concept of Law*, 2nd ed (New York: Oxford University Press, 1994) at 185–193. This dissertation, however, is not embarking on a comprehensive examination of these philosophical traditions. Rather, it utilizes Rawls conception of justice as fairness as a lens to approach modern access to civil justice issues.

[119] John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly, ed. (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2003) at 5.

[120] *Ibid* at 6.

[121] *Ibid* at 7.

Rawls understands justice as a foundational requirement for a society that is organized around a common goal of advancing the good of its members.[122] This type of justice he terms social justice and situates it within the context of a society where individuals and institutions must cooperate for mutual advantage.[123] The reality of these societies, he notes, is that conflict will arise as interests will differ. Justice dictates the principles to address these conflicts through the assignment of rights and duties as well as the distribution of burdens and benefits. A well-ordered society is one where everyone knows and accepts the same principles of justice and that the social institutions work to satisfy these principles. Institutions are defined broadly to mean a public system of rules that delineates offices and positions along with the rights and duties associated with them.[124] Institution thus includes things like parliaments and markets as well as rituals and procedures such as trials or systems of property ownership.[125] Rawls emphasises the importance of having an agreed to concept of justice within a society by stating that the failure to adopt one inevitably leads to mistrust among members of society which in turn undermines coordination, efficiency, and stability.[126] One problem in a modern pluralistic state is that not all members of a society will affirm the same conception of justice as people have differing moral, religious, and philosophical beliefs.[127] However, Rawls argues that in a pluralistic society one can find a shared political conception of justice within a reasonable overlapping consensus of its members' beliefs.[128] Rawls proposes that justice as *fairness* is one such conceptualization that can be drawn from a reasonable overlapping consensus in that, according to Rawls, every reasonable person – no matter their moral, religious, or philosophical beliefs – will agree that public conflicts should be dictated by principles of fairness. Justice as fairness can thus be understood to be drawn from the public political culture in that it does not presuppose a

[122] *Ibid* at 5.
[123] John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1971) at 15.
[124] *Ibid* at 55.
[125] *Ibid*.
[126] *Ibid* at 6.
[127] Rawls, *supra* note 119 at 33–34.
[128] *Ibid* at 32–33.

particular moral, religious, or philosophical belief. As such, justice as fairness is an appropriate conception of justice for a modern pluralistic and liberal society.[129]

2.2.2 The Original Position

In order to arrive at justice as fairness as an appropriate conception of justice in a pluralistic liberal society, Rawls has the reader imagine a community containing no institutions wherein all participants are ignorant of not only their own personal characteristics and talents, but also their social and historical circumstances.[130] In essence members of this nebulous pre-society have no knowledge of their religion, their ethnicity, nor their nationality. Moreover, these members are not aware of their gender, race, or social status. They are a blank slate of reasonable individuals tasked with imagining how society should be ordered. This state of being Rawls terms the "veil of ignorance" and he uses it as a heuristic device for decision making in a context where community decisions have the potential to advantage or disadvantage one group of people over another. Rawls argues that in such a situation, reasonable individuals would accept "fairness" as the optimal conception of justice as it would allow them to most effectively advance and secure their own interests without risking being subject to disproportionate burdens. While it will be discussed in greater detail below, fairness, in this context, refers to a fair equality of opportunity and benefits among all members of society only constrained by certain fundamental civil liberties that are equally possessed by all members. Amartya Sen explains that a Rawlsian idea of fairness can be understood as "…a demand to avoid bias in our evaluations, taking notes of the interests and concerns of others as well, and in particular the need to avoid being influenced by our respective vested interest, or by our personal priorities or eccentricities or prejudices. It can broadly be seen as a demand for impartiality."[131] Thus, a reasonable individual, even if acting in pure self-interest, would not want a conception of justice that, for example, precluded women from participating in society, because under the veil of ignorance that individual does not know

[129] *Ibid* at 33.
[130] Rawls, *supra* note 123 at 12.
[131] Amartya Sen, *The Idea of Justice* (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 2009) at 54.

if they are a woman or not and, as such, does not know if such a rule would negatively affect them.

Rawls' conception of justice is essentially contractual in nature in that the principles of justice derive from the agreement of all reasonable members of the community. This can be contrasted with a utilitarian approach, for example, where the institutions of justice are arranged not out of agreement, per se, but out of an ordering that best maximizes the benefits among the greatest number of people.[132] While the social contract has a strong tradition within post-enlightenment political philosophy, Rawls' reliance on it for his original position has been criticised by Amartya Sen, among others, on several grounds.[133] For one, Sen sees the contractual approach as fundamentally parochial in nature.[134] It does not allow for a global view since it is only concerned with the views and opinions of those who agreed to the contract. He notes that societies have influence on each other and that there is a problem with ignoring the perspectives of those who are not party to this contract but are, nonetheless, affected by its decisions. Sen argues that the objectivity inherent in reasonableness demands that voices from elsewhere being given serious scrutiny even if those voices do not possess a deciding vote.[135] Since Rawls' original position does not allow for voices or opinions from outside the system it likewise precludes comparative concepts of justice. Sen also criticized the paramountcy of reason in Rawls' original position noting that while reasonableness is connected to notions of objectivity and impartiality, the "reasonable person" of Rawls clearly possess some normative elements (e.g. what is reasonable to you might not be reasonable to me). However, Sen is still sympathetic to this construction, since it is focused on the process of open-minded and reflective argument.[136] Interestingly, Sen offers a potential alternative to Rawls original position suggesting that a vision of justice should come from a variant of Adam Smith's "impartial spectator."[137] Like Rawls' reasonable person, the impartial spectator is an objective heuristic free from bias and able to

[132] Rawls, *supra* note 123 at 15.
[133] Ronald Dworkin, for example, argued that the conjectural agreement to a hypothetical contract does not provide an independent argument in favour of fairness. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1978) at 150–159.
[134] Sen, *supra* note 131 at 70–72.
[135] *Ibid* at 128–130.
[136] *Ibid* at 42–43.
[137] *Ibid* at 44–46, 130–138.

reflect on society, however, the impartial spectator is not necessarily limited to people within the community.[138] In fact, the impartial spectator requires that this exercise be open and include the perspective of others.[139]

The original position has also been critiqued on a variety of other grounds by other scholars.[140] Perhaps the most well-known political philosopher to have engaged with Rawls, however, is Ronald Dworkin who criticised the original position as one that claims to be objective, but in reality is deeply rooted in the liberal tradition of post-enlightenment Europe.[141] For Dworkin, the original position is not a neutral exercise since members have to choose between differing philosophical traditions and decide which is superior. The tradition that Rawls settled on was a humanist one that presumes a common dignity. "We may therefore say that justice as fairness rests on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with the capacity to make plans and give justice."[142] Moreover, he understands Rawls' original position as being constructivist in the sense that moral judgments are constructed from intellectual devices – e.g. the original position – and then are to be applied to practical situations as opposed to be discovered as some meta-physical higher truth.[143] This is not to say that the constructivist approach is necessarily skeptical of moral truths, rather the constructivist approach argues that moral truths are not needed to defend a theory of political justice. Dworkin sees this constructivist approach as being flawed since there is no practical way to identify a common principles of justice apart from elevating the historical and political

[138] *Ibid* at 44–46.
[139] *Ibid* at 126–128.
[140] Michael Sandel, for example, questioned Rawls' claim that justice was the single most important consideration in assessing the basic structure of society. See Michael J Sandel, *Liberalism and the Limits of Justice*, 2nd ed (Cambridge: Cambridge University Press, 1998). From a feminist perspective, the original position has been critiqued for excluding the family unit from its assessment of fairness. See e.g. Susan Moller Okin, "'Forty Acres and a Mule' for Women: Rawls and Feminism" (2005) 4:2 Politics, Philosophy & Economics 233. Meanwhile, critical race theorists have criticised the original position for, among other things, its failure to acknowledge the social realities of race and its role in the historical development of societies. See e.g. Tommie Shelby, "Race and Ethnicity, Race and Social Justice: Rawlsian Considerations" (2004) 72:5 Fordham Law Review 1697.
[141] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2011) at 63–66, 166–168.
[142] Dworkin, *supra* note 133 at 182.
[143] Dworkin, *supra* note 141 at 63.

traditions of particular states above other traditions.[144] To Dworkin, Rawls' project was important, but it was not a morally neutral one.

Such criticism of the original position, provide fascinating depth to the discussion of justice. Evident from these discussion, however, is that there is no consensus among political philosophers on how a society should arrive at a conception of justice. Fortunately, it is unnecessary for this dissertation to resolve this debate prior to engaging with the substance of Rawls' theory. Thus far, these critiques have been about how Rawls arrived at his destination, not the destination itself. In other words, the arguments presented do not comment on whether Rawls' principles of fairness are themselves a sound conception of justice rather they are a critique on claims that justice as fairness is derived from objective reason, that it reflects our neutral interests, or that it is universalist in nature. All of these critiques may be true, however, they do not necessarily undermine the validity of conceptualizing justice as fairness. It is arguable, for example, that a Rawlsian conception of justice would satisfy the impartial spectator favoured by Sen should the impartial spectator subject justice as fairness to an objective scrutiny. That is, an unbiased observer from another community may very well see Rawls' idea of justice as being a good way to organize society. Similarly, Dworkin, himself a proponent of objective moral truths, is not disagreeing with Rawls' per se, but calling on him to acknowledge that his philosophy prioritizes certain truths – namely post-enlightened humanism – above others.[145] If one did this, the principles underpinning a Rawlsian conception of justice as fairness would not change.

What is important to remember for the purpose of this dissertation is that the original position is merely one of many possible thought experiments created to justify a particular conception of justice and regardless of whether the original position is an effective – let alone possible – mechanic for this task, Rawls' conception of justice is perhaps the best equipped to provide a theoretical foundation of justice for a modern liberal democratic country for two reasons: it is pluralistic, and it is democratic. It is pluralistic not in the sense that it is a relativist theory or one that allows for subjective assessments of justice, but in the sense that it looks for common ground among differing moral and religious traditions. Any acceptable conception of

[144] *Ibid* at 65–66.
[145] Dworkin, *supra* note 141.

justice needs to acknowledge the reality of the modern globalized world we live in, and the diversity of beliefs among peoples. It is democratic because it asks us to engage in a process of solitary deliberation wherein we reflect and debate on how institutions of justice should be organized.[146] In other words, by undergoing this exercise, we recognize the opinions of others and address moral disagreements in open rational debate: a process that is fundamental to democratic deliberation. In essence, the original position is an effective device to contemplate how society should be organized because it moves the focus of discussion from one of pure self-interest to the interest of the community as a whole while allowing for self-realization.[147]

2.2.3 Principles of Justice

According to Rawls, justice as a foundational basis for a society that wishes to organize its institutions to allow for a fair system of social cooperation over time will encompass two fundamental principles as follows:

> (a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity and second, they are to be to the greatest benefit of the least-advantaged members of society.[148]

The first principle refers to the specific liberties that have traditionally been articulated by liberal thinkers. Liberties such as the freedom of thought and conscience, political liberties, freedom of association, and the liberties articulated by the rule of law.[149] This specific list of liberties is justified as being a necessary prerequisite to citizenship that is both free and equal because these rights protect and secure the right of individuals to judge the justness of institutions and policies, and allow individuals to pursue their own conception of the good.[150] Conversely, other social entitlements that we may conceptualize as a right do not belong in this first principle because

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[146] Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1996) at 37–39.
[147] Sen, *supra* note 131 at 204.
[148] Rawls, *supra* note 119 at 42.
[149] Rawls, *supra* note 123 at 61.
[150] Rawls, *supra* note 119 at 45.

they are not necessary for "…the acquisition and exercise of political power."[151] For example, while justice as fairness requires a basic level of material wealth to allow for independent exercise of political will, the first principle would not guarantee a right of inclusion in a particular social class. Likewise, the first principle may require the right to property ownership generally so as to allow sufficient independence and self-respect to exercise moral powers, it would not necessarily require a right to housing.[152] Rather, this distribution of benefits, whose demands are much broader than the first principle, is the subject of the second principle and will be discussed below. In this way, Rawls explains that the first principle is about covering constitutional essentials while it is the second principle that speaks to the legislative stage.[153]

In order for the fundamental liberties encapsulated by the first principle of justice to be meaningful, they must be assessed as a whole system. Specific liberties can – and arguably need to be – restrained to prevent them from colliding with each other. He gives the example of how speech is governed by rules of order during inquiries and debates.[154] These rules restrain the liberty of freedom of speech – because we cannot speak whenever we wish – but are necessary to give benefit to the liberty, for otherwise freedom of speech would be meaningless. In his restatement, Rawls clarifies that such rules are a form of regulating the liberty – which is perfectly acceptable – and should not be mistaken for a restriction on the liberty as, for example, a prohibition on debating certain religious doctrines.[155] Rawls explains that while greater liberty is preferable, this applies to the complete set of liberties rather than each liberty in particular.[156] However, it needs to be emphasised that regardless of how the liberties are arranged and regardless of the extent of liberties granted, the basic liberties assigned under this first principle must be the same for each member in the community. [157] If one group of people possess greater liberty or additional liberties than another group this first principle is violated.

[151] *Ibid* at 48.
[152] *Ibid* at 114.
[153] *Ibid* at 47–48.
[154] Rawls, *supra* note 123 at 203.
[155] Rawls, *supra* note 119 at 111.
[156] Rawls, *supra* note 123 at 203.
[157] *Ibid* at 204.

While the first principle speaks to individual liberties, the second principle speaks to when social and economic inequalities are acceptable. In other words, this principle addresses how to distribute benefits and burdens fairly among members of society. To Rawls, the fair outcome of distribution should fundamentally be a matter of procedural justice. In this context, procedural justice speaks to the system of rules that define schemes of activities that lead to cooperation.[158] Procedural justice as a dimension of justice as fairness, however, needs to be distinguished from the common law principles of natural justice and procedural fairness. Under Canadian common law, natural justice is owed to any person that is party to a judicial or quasi-judicial hearing. Natural justice has been defined to include specific procedural rights such as the right to adequate notice of a hearing, the right to a fair hearing, and the right to an unbiased decision maker during the hearing.[159] Procedural fairness, on the other hand, applies to administrative decisions. Historically, administrative decisions were not subject to principles of natural justice, however, the courts recognized that the distinction between quasi-judicial and administrative decisions is often difficult to determine as administrative decisions may also have an immense impact on the individual.[160] As such the courts have ruled that where an individual's rights, privileges, or interests are affected by an administrative decision, that person is entitled to a basic level of what they call procedural fairness.[161] The precise content and requirements of procedural fairness is variable and context specific, depending on numerous factors but could include the right to present one's case fully, the right to written reasons, or the right to an impartial and open process.[162] For example, where an administrative process resembles a judicial process or a decision is of great importance to the individual affected, more procedural protections will be required. Unlike natural justice, the common law principle of procedural fairness does necessarily mandate a formal hearing and, depending on the type of decision, may simply require that the person affected be consulted. Although there is overlap between the common law principles of natural justice and procedural fairness with the Rawlsian dimension of justice he termed

[158] *Ibid* at 84.
[159] See e.g. *Emerson v. Law Society of Upper Canada* (1984), 44 OR (2d) 729 at para 26, 5 DLR (4th) 294 (Ont. H.C.).
[160] *Nicholson v Haldimand-Norfolk (Regional Municipality) Commissioners of Police,* [1979] 1 SCR 311 at para 23, 88 DLR (3d) 671.
[161] See e.g. *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193 at para 28.
[162] *Ibid* at paras 21-27.

procedural justice they are conceptually different. The common law principles refer to specific rules that apply to certain decision making process whereas procedural justice is broader and examines the processes of all systems in which burdens and benefits are allocated.

Rawls argues that under an ideal incarnation of procedural justice the distributive outcome of a social system will always be fair so long as the proper procedures have been followed.[163] To ensure that procedural justice is applied to the distribution of goods it is necessary to ensure that the background economic and social institutions are arranged in a just manner. To do this, the second principle contains two sub-components or dimensions. The first dimension speaks to fair equality of opportunity of positions and offices and the second speaks to what Rawls terms the difference principle. Under the first dimension – fair equality of opportunity – every member has a legal right to compete for offices and benefits.[164] Lesley Jacobs explains that "Equality of opportunity is, I suggest, an ideal for the normative regulation of competitions that distribute valuable opportunities in society."[165] In other words, no one should be denied access to a position due to an arbitrary characteristic such as race, gender, or social status. Everyone is entitled to equal opportunity not from an efficiency point of view – since it may be possible that everyone benefits by restricting positions to certain classes of people – but on the basis that denying people equal opportunity would deny those people the rewards, such as wealth and privilege, that flow from holding offices, and thus deny them the ability to fully realize one's self – something that Rawls argues is a primary human good.[166] The difficulty in maintaining equality of opportunity is that wealth and property accumulates in fewer hands over time and, in doing so, undermines equality of opportunity as those with wealth and property seek to preserve their share.[167] Rawls recognizes that even if offices have no formal bars to attainment, reality may prevent those who do not share in the wealth and class of current office holders from obtaining the position. Thus, Rawls further notes that what is important for this second principle is not just

[163] Rawls, *supra* note 123 at 86.
[164] *Ibid* at 72.
[165] Lesley A Jacobs, *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (Cambridge: Cambridge University Press, 2004) at 4.
[166] Rawls, *supra* note 123 at 84.
[167] Rawls, *supra* note 119 at 53.

that these offices and positions be open to everyone formally, but also that everyone has a *fair* chance to attain them regardless of the social class one is born into.[168]

In order to ensure that everyone has a fair chance to attain offices and positions, Rawls introduces the second dimension of the second principle, or what he terms the difference principle, wherein economic inequalities can only exist if their existence benefits the least advantaged members of society.[169] "Then the difference principle is a strongly egalitarian conception in the sense that unless there is a distribution that makes both persons better off (limiting ourselves to the two-person case for simplicity), an equal distribution is preferred."[170] Rawls illustrates this point by using a fairly tired trope that is often used to justify free-market capitalism. He compares the relatively high income of the entrepreneurial class to the low-income of unskilled labourers, and notes that this inequality is only justified if removing it would make the unskilled labourers worse off.[171] He states that if the inequality promotes innovation, such that material benefits created by the entrepreneurial class spread throughout system and make the position of the unskilled labourers better off in the long run, then the inequality is justified.[172] To pre-empt any criticism of this example, it is worth remarking that Rawls declined to comment on whether this example reflects reality or not, and is simply using it as an illustrative device. Thus he notes that under the difference principle wealth does not have to be distributed equally, rather it has to be distributed in such a way that it is to everyone's advantage.[173] This principle relates back to his conception of a society whose purpose is organized around the goal of advancing the good of all of its members. "Injustice, then, is simply inequalities that are not to the benefit of all."[174] Together, these sub-principles can be referred to as procedural fairness and

[168] *Ibid* at 44.
[169] It should be noted that in the original statement of justice as fairness, Rawls discussed background justice first before discussing procedural justice. See Rawls, *supra* note 123 at 60. Rawls states that the difference in the revision is merely stylistic. Rawls, *supra* note 119 at 43.
[170] Rawls, *supra* note 123 at 76.
[171] *Ibid* at 78.
[172] For a critique of the argument that inequality can be justified on grounds of incentivization see G A Cohen, *Rescuing Justice and Equality* (Cambridge, Massachusetts: Harvard University Press, 2008) at 27–86.
[173] Rawls, *supra* note 123 at 61–62.
[174] *Ibid* at 62.

background fairness and defined as the mechanics that ensure a fair distribution of income and wealth once basic liberties are secured.[175]

Two key aspects of Rawls theory should also be quickly mentioned. The first point is that the two principles of justice as fairness are not weighed against each other. Rather, the second principle is subordinate to the first principle wherein basic civil liberties have priority over social and economic redistribution.[176] In this way Rawls distinguishes his distributive model from utilitarianism, which prioritizes the greatest good for all, and in doing so arguably does not taking into account the person as an individual.[177] The second key aspect that needs to be highlighted is that justice as fairness is looking to maintain a just arrangement of institutions over generations. The difference principle is the mechanism to ensure that even if the original institutional arrangement is fair, in terms of both fairness of opportunity and the distribution of resources, wealth does not accumulate in a few hands over the course of generations such that it undermines equality of opportunity.

2.2.4 Equality of Opportunity

Rawls contribution to a liberal theory of justice was significant in that it recognized the impact of social-economic factors in a society's ability to guarantee an equality of opportunity over time. However, his focus is on establishing rules to ensure a fair society – equal basic liberties, equality of opportunity for all, and the difference principle. This is of concern because outcomes, just like processes, may be subject to a critique of fairness and can lead to inequality overtime. This is particularly the case in two situations. First, if a competition is arranged in such a way where the winner takes everything and the loser walks away with nothing and second, if one competition has an undue and arbitrary influence on other competitions. As will be discussed

[175] To reiterate, procedural fairness as a dimension of justice as fairness needs to be distinguished from the administrative law principle also termed procedural fairness. Despite the potential confusion, I have chosen this terminology in order to maintain consistency within the language of justice as fairness.
[176] Echoing both Dworkin and Sen, Michael Sandel questions the absolute priority of rights over any conception of the good and Rawls' claim that the principles underlying justice as fairness do not depend on any comprehensive moral or religious conception. See Sandel, *supra* note 140. See also Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York: Basic Books, 1983); Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985).
[177] Rawls, *supra* note 123 at 27.

below, both of these situations raise concerns of fairness and threaten to destabilize fair equality of opportunity.

Recognizing this problem, Lesley Jacobs proposed a three dimensional model for equal opportunities that built on Rawls second principle of justice. This model needs to be understood as a regulative ideal to be used within competitive frameworks. That is, it examines how competitions, be it a legal dispute or a job application, for example, can be regulated to ensure an egalitarian distribution of resources.[178] The first two dimensions of Jacobs' model – which parallel Rawls' theory of justice as fairness – are procedural fairness and background fairness.[179] Jacobs defines procedural fairness as encompassing the formal rules that are specific to a particular competition.[180] The exact parameters of what is procedurally fair is usually dependent on what is at stake in the competition. Where one's liberty is at stake, for example, there would be very high requirements of procedural fairness. Conversely, a municipality changing the waste collection schedule would likely require a minimal amount of procedural fairness. In either event, however, there need to be basic rules that ensures everyone has a fair chance and equal opportunity of engagement. The clearest example of a breach of Jacobs' procedural fairness would be institutional rules that exclude certain classes of people from participating in a competition outright.[181] For example, a rule that prevented women from joining the legal profession would be an obvious breach of procedural fairness. Jacobs notes that while breaches of procedural fairness do occur, the formal requirements of procedural fairness are rarely a source of contention in today's modern democracies.[182]

The second dimension of Jacob's model of equal opportunities is called background fairness and speaks to the starting position of those involved in a competition. Background fairness recognizes that social inequalities translate into unfair starting positions within a competition and looks to level the playing field among competitors. For Jacobs, background

[178] Jacobs, *supra* note 165 at 13.
[179] As evident from the proceeding sections, Rawls used the terms procedural justice and background justice when discussing these related concepts. For the sake of clarity and consistency this dissertation uses the terms provided by Jacobs, being procedural fairness and background fairness, unless referring to specifically to Rawls' work.
[180] Jacobs, *supra* note 165 at 16.
[181] *Ibid*.
[182] *Ibid*.

fairness is rooted in the concept of status equality. Jacobs notes that status equality does not require all individuals in a competition to start with the same resources, nor carry the same level of human capability, but rather that all people enjoy the same standing within a competition.[183] He suggests that the presumption of innocence in criminal trials is one example of status equality wherein everyone accused of a crime – regardless of one's wealth, class, race, or other characteristic – begins the trial at same starting position.[184]

The third dimension of Jacobs' model for equal opportunities is called stakes fairness and takes into account considerations of substantive justice. As noted above, the concern behind this dimension is that in some competitions it may be patently unfair for a "winner" to take all and in such situations there needs to be a distribution of benefits among the participants.[185] For example, think of two pianists who spend their life practicing and honing their skills at interpreting Chopin's masterpieces. While both excel at their craft, one is marginally better than the other. Given the equal input and near equal skills of the two, stakes fairness might see it as problematic if one of the pianists shot up to international fame and fortune while the other struggled in poverty. As well as winner take all situations, stakes fairness is also concerned with limiting the effects of one competition on another. This concern is based on the belief that it is patently unfair for a competition to consider criteria that is completely irrelevant to that competition. For example, Jacobs argues that financial success in the labour market should not influence one's educational prospects since the accumulation of wealth is irrelevant to scholastic accomplishment.[186] In other words, one should not be able to receive top honours from a university simply by paying more money. For Jacobs, stakes fairness is fundamental to preserving background fairness and to guaranteeing equality of opportunity over time by ensuring that benefits within a competition are distributed fairly and that one competition dues not have undue influence over another.

[183] *Ibid* at 29.
[184] *Ibid* at 30.
[185] *Ibid* at 37–39.
[186] *Ibid* at 43.

2.2.5 Conclusion

Rawls' theory of justice as fairness provides a framework which can serve as a basis for conceptualizing access to civil justice. According to Rawls, justice as fairness encompasses two principles: first, justice requires that individuals possess certain basic liberties which allow them the freedom to judge the institutions that govern justice and allow them to develop their own conception of the good; second, justice requires that social and economic inequalities be subject to an equality of opportunity among positions and offices and exist only in so far as they are to the greatest benefit of the least-advantaged. This guarantees that offices and positions remain open to everyone generation to generation, regardless of socio-economic status. However, these two principles are not sufficiently comprehensive to fully assess access to civil justice initiatives since they preclude any examination of outcomes, and a third dimension is needed. Jacobs provided this dimension in the form of stakes fairness – which seeks to assess the fairness of outcomes – in his theory of equal opportunities.

While Rawls' first principle regarding civil liberties is important in order to contextualize the discussion, it is his second principle, complimented by Jacobs' theory of equal opportunities, that is most helpful in establishing a framework for analyzing legal and social policies. As noted above, in order to engage with the access to civil justice conversation, this dissertation starts with the presumption that justice, as a political concept, is fully situated within the existing Canadian legal institutions. This dissertation is not trying to reimagine Canadian society wholesale and therefore accepts that Canada, as a liberal democratic country, already guarantees the basic liberties as required by the first principle, most notably through the common law, the Constitution, the *Charter of Rights and Freedoms* and the provincial human rights codes. While violations of these foundational institutions do occur, there are remedies available and they are not the norm. As such, this dissertation accepts that the constitutive stage – being the first principle of justice – is complete and we now turn to the second principle to assess legislative norms.

Arguably this approach limits my project by confining it to the existing political institutional order. That is, by focusing on the legislative stage this project is precluded from assessing whether Canada's scheme of liberties does in fact guarantee its citizens sufficient

freedom to judge the institutions that govern justice and to develop their own conception of the good. For example, Canada does not recognize most social and economic rights – such as the right to a higher education or the right to an adequate standard of living – at least in the sense of first order rights that would constrain government policy.[187] Some political ideologies may critique this as a gross omission within Canada's basic constitutive structure; they may ask whether individuals are truly able to judge the institutions of justice if they do not have a living wage, for example. Others, however, may argue that Canada's constitutional structure is a "living tree" that is organic and evolves to adapt to changing times.[188] In either event, this is not my project. Rather, this project is trying to develop a theoretical device that can be used to assess polices and initiatives that purport to promote access to civil justice. Differing political ideologies can still debate the extent and scope of the first principle but, by grounding the theoretical device within dimensions of fairness, policy can be critiqued independent of the exact scope of the first principle. The following sections will examine these dimensions of fairness introduced above in greater detail and discuss how they can be used as a theoretical basis for analyzing access to civil justice policies.

2.3 Procedural Fairness

2.3.1 Introduction

Procedural fairness commonly refers to the processes and procedures that make up a legal system.[189] As such it is understood to speak to things like institutional rules, interaction with authorities and decision makers, and the opportunity to present evidence. A Rawlsian conception of procedural fairness is broader. As noted above, procedural fairness fundamentally has to do with the first dimension of Rawls' second principle wherein all offices and positions need to be open to everyone under conditions of fair equality of opportunity. In other words, institutions

[187] In 2019 Canada passed the *National Housing Strategy Act*, SC 2019, c 20, s 313 which recognizes a right to adequate housing. However it is not yet known how the courts will interpret this piece of legislation or what practical impact, if any, it will have.

[188] For example, it took nearly twenty years for the courts to recognize that the right to collective bargaining falls within the scope of the freedom of association guaranteed by the Canadian *Charter of Rights and Freedoms.* See *Dunmore v Ontario (Attorney General)*, 2001 SCC 94.

[189] Rebecca Hollander-Blumoff & Tom R Tyler, "Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution" (2011) 1 Journal of Dispute Resolution 1 at 3.

should be arranged such that all citizens who possesses equal talent and ability, as well as the motivation to employ them, have the same educational and economic prospects regardless of individual characteristics such as social class, race, or gender. An individual born into a poor family should have the same chance of being accepted into a top tier university as an individual born into wealth, assuming they are equally capable. Likewise equality of opportunity also means that government offices and positions should not be denied to people merely on the basis of race, gender or other personal characteristics irrelevant to the job. If a woman was denied the opportunity to apply for a position simply due to their gender than procedural fairness would likely be violated.[190] However, procedural fairness should also be understood to apply to rules governing all types of competition within a free market economy. Indeed Rawls emphasized that the second principle of justice as fairness applies to the distribution of wealth as well as to the design of hierarchical organizations.[191] Thus, if the rules of a competition are designed in a way that one group is favoured above another simply due to a characteristic that is irrelevant to that competition, then procedural fairness is offended. If, for example, an individual was charged a higher interest rate on a loan simply because they belonged to a minority community procedural fairness would be offended since they were not given an equal opportunity to compete for the loan.

Rawls identifies three types of procedural fairness: perfect, imperfect, and pure. According to Rawls, perfect procedural fairness should be strived for when a just outcome is dependent on a particular pre-existing criteria. A criminal trial, for example, is dependent on the actual guilt or innocence of the accused and a miscarriage of justice would occur should an innocent person be convicted. In order to avoid such a miscarriage of justice perfect processes and procedures are need to be designed to ensure that the court reaches the required outcome. An example of such perfect procedural fairness provided by Rawls involves the cutting of a cake.[192] In this example, the desired outcome is that everyone gets an equal share of the cake. To guarantee this happens Rawls suggests that the person who cuts the cake chooses their piece

[190] This analysis would necessarily be context driven since there may be instances where gender, for example, is arguably a legitimate job qualification. One such example might be a counsellor at a women's shelter.
[191] Rawls, *supra* note 123 at 61.
[192] *Ibid* at 85.

last. Presuming everyone, including the cutter, desires the biggest slice of cake possible the cutter is incentivized to cut absolute equal shares of the cake since they will be left with the smallest piece if they do not cut all slices equally. In this way the procedure – being the rules determining how the cake is cut – is designed to ensure that the desired outcome is achieved.[193] Imperfect procedural fairness exists where there is a desired outcome, however, there is no procedure that can guarantee it. Given the complexity of the criminal law system and all the demands that flow from it, the example of a criminal trial is a more realistic representation of imperfect procedural fairness where, no matter how fairly the procedures are designed and how closely the processes are followed, there is still the possibility of a miscarriage of justice and an accused being wrongfully convicted.[194] This reality evidences that perfect procedural fairness is not much more than a theoretical goal: Rawls himself notes that "…perfect procedural justice is rare, if not impossible, in cases of much practical interest."[195] With that said, arranging institutions and rules in a manner that could approximate as close as possible perfect procedural justice is one aim of justice as fairness. Procedural rules, such as those that allow a party to present evidence to an impartial adjudicator or those that mandate the provision of adequate notice of a hearing, are examples of how institutions strive to approximate perfect procedural fairness and ensure that a fair decision is reached.

In some instances, however, it is difficult, if not impossible, to assess whether an outcome is objectively just. Even if one is privy to all the facts of a case, one may still ask if, for example, a $50,000 insurance payout is adequate compensation for an injury suffered. Why not $75,000 or $45,000? Similarly, if two or three equally qualified persons apply for a single position one cannot say – without adding additional facts – that it is a miscarriage of justice to appoint one of them over the other. In such examples a just outcome is not dependent on a particular pre-existing criteria such as guilt or innocence, rather the "justness" is dependent on the processes that are followed. If the processes are fair than the result will become just simply by virtue of the rules being followed. When this occurs, Rawls believes that pure procedural fairness is achieved.[196] An

[193] *Ibid* at 84–85.
[194] *Ibid* at 85–86.
[195] *Ibid* at 85.
[196] *Ibid* at 87–88.

example of pure procedural fairness provided by Rawls involves gambling where winnings could be distributed multiple ways depending on the betting rules.[197] No single gambler has a pre-existing claim to the winnings and thus, regardless of how winnings are divided, the outcome will be considered just so long as the betting rules are followed.[198]

Rawls argued that pure procedural fairness is preferable to perfect procedural fairness because there is no independent criterion of what is a just outcome. Pure procedural fairness eliminates any need to keep track of varying circumstances and positions of people and allows for the fair distribution of goods to take care of itself.[199] In other words, we can focus solely on the processes and not worry about the outcomes. Like perfect procedural fairness, however, pure procedural fairness is more of a theoretical condition than a practical one. A coin toss can be used to illustrate a situation where neither outcome – heads nor tails – can make an independent claim to being more just. Yet in any real life application to legal, political, or economic decision making there will almost always be a pre-existing claim to a more just outcome: the more deserving candidate should be appointed, those in greatest need should be given government benefits, or an estate should be divided equally among beneficiaries. In such circumstances there is arguably no distinction between pure procedural fairness and perfect procedural fairness. Thus the debate of whether an outcome can be objectively determined as just is academic since the goal of the institution remains the same: rules should be designed in such a way that they come as close as possible to guaranteeing a just outcome. Unfortunately, it is impossible to assess whether processes or procedures approximate either perfect or pure procedural fairness since this would require infallible knowledge of what the just outcome should be: be it guilt or innocence, compensation or deprivation, or simply the right decision. One possible alternative to assessing procedural fairness, therefore, is to examine whether the participants themselves judge a particular proceeding to be just or not.

While participants may not be well situated to judge the justness of an outcome, they are well situated to judge the fairness of the processes. In his book *Why People Obey the Law,* Tom

[197] *Ibid* at 86.
[198] Jacobs would likely critique this assessment suggesting that even in instances where the processes are fair and are followed, one can still have unjust distributions where, for example, the winner takes all. This issue is addressed in the section on stakes fairness below.
[199] Rawls, *supra* note 123 at 87.

Tyler notes that an individual's judgment of procedural fairness can be measured either by looking to instrumental concerns or to normative concerns.[200] While instrumental concerns focus on the outcomes of a proceeding, normative concerns look to other indicators that have little or nothing to do with the final outcome. Somewhat counter-intuitively, it turns out that the final outcome of a proceeding has little impact on an individual's assessment of its fairness. Rather, it is the normative qualities that are the most important determinant of whether an individual is satisfied with a legal procedure.[201] Tyler notes that there are seven or eight independent normative variables that contribute to how fair people view processes to be. Of these, however, four tend to have the most impact on assessments of procedural justice. These are voice, trustworthiness, interpersonal respect, and neutrality.[202]

2.3.2 Normative Concerns

The first variable that has a large impact on whether an individual believes that a process is fair is that of voice. This variable refers to an individual's ability to participate in a proceeding and the opportunity to express their views or tell their stories. As noted by Tyler, "Voice effects have not been found to be dependent on having control over outcomes. Instead, people have been found to value the opportunity to express their views to decision-makers in and of itself."[203] As an example of its importance, Tyler points to the fact that victims of crime will value the opportunity to give victim impact statements at sentencing hearings regardless of the sentence that the accused received.[204] In one sense, aspects of voice have long been held by the common law to be a fundamental requirement to any decision-making process that affects the rights or interests of a person. The maxim *audi alteram partem*, one of the twin pillars of natural justice, states that no person who is affected by a decision should have a decision made against them without them first having the opportunity to plead their case.[205] Voice, however, speaks not just

[200] Tom R Tyler, *Why People Obey the Law* (Princeton: Princeton University Press, 2006) at 163.
[201] *Ibid*.
[202] Tom R Tyler, "Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform" (1997) 45 The American Journal of Comparative Law 871 at 887.
[203] *Ibid*.
[204] *Ibid*.
[205] See e.g. *McRae v Marshall* (1891), 19 SCR 10 at 30.

to the opportunity to plead a case, but to the ability to participate in a proceeding more broadly. Michelle Flaherty notes that Canada's adversarial system assumes that the parties have the ability to understand the complicated rules of procedure and present their positions effectively, which may not be the case especially, for example, with self-represented litigants.[206] Thus, while an individual may have the technical opportunity to participate in a proceeding, the reality is that they may not be able to do so effectively. In such instances, procedural fairness may be threatened because, even if the processes lead to a just outcome, the individual will have perceived them as unfairly denying them a voice in the proceedings.

Tyler defines the second variable, trustworthiness, as an assessment of whether a third-party is motivated to treat them in a fair manner, be concerned about their needs, and consider their arguments. This is the most influential factor in an individual's determination of the fairness of a legal authority.[207] Trustworthiness is inherently tied to the first variable since people will not believe they have been given an opportunity to tell their story unless they believe the adjudicator has sincerely considered their arguments. Trustworthiness can apply to both individual adjudicators, as well as institutions. While no doubt an adjudicator's behaviour will affect whether an individual trusts them, feelings of distrust may also arise out of the complicated rules of procedure that are beyond the adjudicator's control. For example, Flaherty, who drew on her experience as an adjudicator for the Ontario Human Rights Tribunal, notes that some rules of evidence – such as those governing the admission of similar fact and good character evidence – may not be understood by self-represented litigants and seen as unfair since it bars them from presenting what they feel is relevant and determinative evidence. [208] In such circumstances, procedural fairness will be questioned since the litigant believes that the adjudicator failed to consider their case on the merits. Perhaps more troubling than an individual's negative assessment of a particular adjudicator is the systemic distrust of legal systems held by many marginalized communities. In her article "'Don't Want to Get Exposed': Law's Violence and Access to Justice," Sarah Buhler discusses the findings of a 2013 study she conducted to determine how members of Saskatoon's marginalized communities understand the law and the

[206] Flaherty, *supra* note 110 at 124.
[207] Tyler, *supra* note 202 at 889.
[208] Flaherty, *supra* note 110 at 127–128.

justice system.[209] The respondents spoke of feelings of intimidation such that people whose rights were violated avoided reporting this to the legal system for fear of further harm: "The spectre of child apprehension, loss of benefits or arrest is constant one in the community, according to these respondents."[210] These beliefs were based on personal experiences and interactions with the legal systems and display a high level of mistrust in the legal system which fundamentally undermines any subjective assessment of fairness.

Interpersonal respect, the third variable, refers to the courtesy extended by people in authority to those with whom they are dealing. Tyler notes that when treated with courtesy and dignity, individuals have a greater sense that the process was fair.[211] The reason interpersonal respect is important is because it shows that the person in authority is taking the dispute or problem of the individual seriously. In doing so, it reaffirms one's social status and worth in the community.[212] Commenting on a study of racialized youth in Toronto, Janet Mosher observed that the notion of mutual respect was commonly cited as a requirement to justice.[213] To the youth respect meant that the authority figures need to acknowledge them, and understand their reality. Pervasive stereotyping by authorities, however, meant that the youths were misjudged and prevented authority figures from understanding their lived experiences. Further, it was commented that until the youth were shown respect by authority figures, authority figures could not expect to earn the full respect of the youth. Unfortunately, the youth often felt that school officials and police were being aggressive, belittling, and discriminatory.[214] It is evident that this behaviour seriously undermined any sense of procedural fairness the youth may have had in their experiences with authority and displays the importance of interpersonal respect to procedural fairness.

The fourth variable that has an impact on individuals' perception of procedural fairness is neutrality. Neutrality refers to an individual's belief that a decision maker was free from bias

[209] Sarah Buhler, "'Don't Want to Get Exposed': Law's Violence and Access to Justice" (2017) 26 Journal of Law and Social Policy 68.
[210] *Ibid* at 81.
[211] Tyler, *supra* note 202 at 891.
[212] *Ibid* at 892.
[213] Janet E Mosher, "Lessons in Access to Justice : Racialized Youths and Ontario's Safe Schools" (2008) 46:4 Osgoode Hall Law Journal 807 at 849.
[214] *Ibid* at 834.

when making their decision. According to Tyler, "Neutrality includes assessments of honesty, impartiality, and the use of facts, not personal opinions, in decision-making."[215] It is noted that these assessments are important because people are seldom in a position to know the "correct" outcome and therefore use evidence of neutrality as a proxy.[216] Just as discrimination has a negative effect on one's assessment of the trustworthiness or respect of the legal system, so too does it affect one's assessment of neutrality. The individuals interviewed for the study of Toronto marginalized youth often felt that they were "marked" and singled out for harsh and inappropriate treatment by school officials and the police based on the neighbourhoods in which they lived, the clothes they wore, their race, their gender, or who they were friends with.[217] They often felt that when it was their word against that of someone in authority, the authority would win and that there was not a neutral person or institution to appeal to for assistance.[218] It is clear that this sense of partiality among school officials contributed to their perception that school disciplinary procedures were essentially unfair. Similarly, several members of Saskatoon's marginalized communities felt that racism was prevalent in the system, that judges based their interpretation of the law on their own personal biases, and that the system as a whole was corrupt.[219] In such circumstances, any process or procedure, regardless of the outcome, will be viewed as unjust.

2.3.3 Conclusion

According to Rawls, procedures should be designed in such a way that the outcome becomes just by virtue of following the procedures. Unfortunately, in a real world situation it is difficult, if not impossible, to objectively know whether a process leads to a just outcome or not. As such, in order to assess whether processes are fair, we should look to the participants' assessment of normative concerns such as voice, trustworthiness, interpersonal respect, and neutrality. If individuals believe that they have not been able to tell their story or have their case heard by an impartial mediator, for example, then they have not been given an opportunity to

[215] Tyler, *supra* note 202 at 892.
[216] *Ibid*.
[217] Mosher, *supra* note 213 at 831.
[218] *Ibid* at 842.
[219] Buhler, *supra* note 209 at 83.

participate equally in the completion and procedural fairness has not been met. In this way, these variables act as practical proxies for determining whether a process or procedure is just.

2.4 Background Fairness

2.4.1 Introduction

While procedural justice speaks to ensuring that processes are fair once an individual is "in the room," background justice speaks to whether an individual can get "through the door." In essence background fairness is the idea that the basic structures and institutions of society should be arranged in a way to ensure that all members have a fair opportunity to fully participate. In Justice as Fairness Rawls sets out two fundamental and interconnected components that underpin the second principle of justice as fairness: first, equality of opportunity and second the distribution of benefits.[220] As discussed above, equality of opportunity is connected to procedural fairness in the sense that the rules governing a competition must ensure that everyone, regardless of arbitrary characteristics like race, gender or social class, has an equal prospect of success. The problem with equality of opportunity alone, however, is that it may be subject to charges of formalism.[221] In most liberal democratic countries it is rare to see any institution post formal barriers to a competition based on irrelevant criteria such as race, gender, or religion. In Canada, for example, there is an extensive network of human rights legislation that prevents such discrimination from formally occurring. Nonetheless, history has shown that formally legislated equality does not mean that there is meaningful opportunity for everyone. For example, despite the United States' constitutional guarantee of equal protection of the laws, municipal services were frequently denied to black neighbourhoods in the decades following the civil rights movement, and arguably even today.[222] In order to make equality of opportunity meaningful in practice, Rawls recognized that there needs to be a mechanism to preserve an equality of social conditions.[223] If not, than the initial distribution of benefits will overtime be improperly influenced by natural and social contingencies which, to

[220] Rawls, *supra* note 123 at 78.
[221] Jacobs, *supra* note 165 at 11.
[222] See e.g. Charles M Haar & Daniel Wm Fessler, *Fairness and Justice: Law in the Serivece of Equality* (New York: Simon & Schuster, Inc, 1986).
[223] Rawls, *supra* note 123 at 72.

Rawls, are factors that are "…arbitrary from a moral point of view."[224] In other words, without a mechanism to preserve the equality of social conditions, certain members of the community will be able to accumulate wealth and through that exert influence on competitions such that opportunities become only available to those born into particular social classes. As such, Rawls proposed the second dimension of the second principle which speaks to the distribution of benefits and how public resources are allocated.

2.4.2 Difference Principle

Rawls conceptualized the difference principle as a mechanism to prevent wealth and benefits from accumulating unfairly, while allowing for some justifiable inequality to exist. Rawls understood that even if the basic institutions were arranged such that offices and benefits were formally available under a scheme of equal opportunity, those with greater natural abilities or talents would accrue a disproportionate amount of wealth over generations. This "natural lottery" of abilities and talents was as arbitrary as any other factor like race or gender and thus an unstable way to arrange society. In other words, an individual benefiting simply because they are born with greater natural endowments is no more justifiable, from a moral standpoint, than an individual benefiting simply because they are a Caucasian male. If there is no attempt to regulate the social contingencies beyond formal equality of opportunity, than society would coalesce into what Rawls termed a natural aristocracy.[225] For this reason Rawls contended that some distributive mechanism was necessary to ensure a fair equality of opportunity over time. Since the purpose of a social justice is to establish the rules that allow individuals and institutions to cooperate for mutual advantage, the guiding principle behind this distributive mechanism must also be that social inequalities be arranged to everyone's mutual advantage. Rawls concedes that the idea of social inequalities being arranged to everyone's advantage is ambiguous and examines two principles that may explain what is meant by common advantage: the principle of efficiency and the difference principle. Of these principles, Rawls supports the difference principle as the necessary basis on which to distribute wealth and income.

[224] *Ibid*.
[225] *Ibid* at 74.

Law and economic scholars argue that one purpose of justice is to increase economic efficiency through the distribution of resources.[226] Rawls explains that according to this school of thought, an optimally efficient arrangement is one where it is impossible to improve any one person's position without making another person's position worse off: the so called the Pareto optimality.[227] The difficulty for legal theorists is trying to determine the most efficient way of arranging legal rights such that there is an equilibrium.[228] One famous thought experiment that illustrates how the idea of economic efficiency operates in law involves a cattle herder whose property neighbours a farmer's field.[229] On occasion the cattle will inevitably wander onto the farmer's property and trample some crops. To avoid paying damages, the cattle herder could build a fence to prevent the cattle from wandering, however, the cost of building said fence would have to be less than the cost of the damage done to the crops in order to warrant this course of action. If the cost of fencing exceeded the damages done to the crops then the cattle herder would be better off just paying the farmer directly for the damages and therefore the laws should not be arranged in a way that forces the cattle farmer to build a fence. To complicate the scenario, and to illustrate the difficulty in finding an optimal efficiency, one should also take into account the costs incurred by the farmer when planting the crops (seed, labour, fertilizer, ect.) such that it may not be optimal from the herder's perspective to simply pay the full market price for the damaged crops. Rather in order to maximize the output of both parties, without making the other worse off, the farmer should leave the field fallow and the herder pay the difference between the cost of planting and the revenue that would be generated by the crops. The efficiency principle thus asks us to compare various social arrangements and choose the one that generates the greatest total yield of benefits among all parties involved. When applied to rights and duties, efficiency would be by reference to the expectations of the parties such that an optimal efficiency would exist when it is impossible to change the rules without lowering the expectations of at least one individual.[230] For Rawls, however, efficiency alone cannot serve as a

[226] See e.g. Richard A Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2:2 The Journal of Legal Studies 399.
[227] Rawls, *supra* note 123 at 66–67.
[228] See e.g. R H Coase, "The Problem of Social Cost" (1960) 3 The Journal of Law and Economics 1.
[229] *Ibid*.
[230] Rawls, *supra* note 123 at 70.

principle of justice because there are many institutional and social arrangements that may be considered optimal – in the sense that it is not possible to change the arrangement of rights and duties in a way that does not lower the expectation of at least some – but cannot be considered just.[231] He states, for example, that it may be impossible to reform serfdom under the efficiency principle alone. In this example, regardless of how much the serfs gained, the landowners would experience some loss and thus this reform would not be considered optimally efficient.[232]

Under justice as fairness, the distribution of benefits is subject to certain basic rights and thus, one could argue, that a modern democracy could employ the efficiency principle as a basis to distribute wealth and benefits provided the institutions guarantee individual civil rights such as those prohibiting discrimination. This might solve the problem with reforming serfdom. According to Rawls, however, even when the principle of efficiency is constrained by certain background institutions there is still the problem with preserving an equality of social conditions over time.[233] He notes that under liberal conceptions of justice, there is an attempt to mitigate the influence of natural fortune – namely social class – on the distribution of benefits through the guarantee of equal opportunities and education where anyone with similar motivation and endowment has equal prospect of achievement. In such situations there may be a *formal* equality of opportunity – in that everyone has the same legal rights of access – however there may not be a *fair* equality of opportunity as the distribution of benefits are influenced over time by other arbitrary factors such as natural talents and abilities. The efficiency principle allows wealth to accumulate according to natural abilities and talents which Rawls sees as a "natural lottery" and as arbitrary as social class.[234] He states "There is no more reason to permit the distribution of income and wealth to be settled by the distribution of natural assets than by historic and social fortune."[235] Thus, according to Rawls, if benefits are to be arranged according to common advantage, their distribution must be done so in a way that mitigates against the arbitrary effects of both social class and the natural lottery.

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[231] *Ibid* at 70–71.
[232] *Ibid* at 71.
[233] *Ibid* at 72.
[234] *Ibid* at 74.
[235] *Ibid*.

The difference principle, articulated by Rawls, is another way to conceptualize distributive justice and one that mitigates against arbitrary factors such as social class and the natural lottery. To Rawls the problem with efficiency is the indeterminateness of it in that there is no particular position in which to judge the social and economic inequalities of the background structures.[236] As noted above, many types of institutional arrangements that may seem repugnant, such as serfdom, could be justified as being efficient. The difference principle seeks to remove this indeterminateness by creating an objective mechanism that arranges social inequalities. According to the difference principle, any social or economic inequality that exists must be to the benefit of the least advantaged members of society. In other words, inequalities can exist within society, but they must be arranged in such a way that everyone benefits. Benefits, in this context, refers to an expectation of improved well-being in terms of one's life prospects as viewed from one's social station.[237] The difference principle states that the advantages enjoyed by some cannot be justified solely on the grounds that they outweigh the disadvantages suffered by others. Rather social inequality can only be justified if an individual would prefer his prospects with the existence of this inequality to his prospects without it.[238] In other words, an inequality can only be justified when the difference in expectation is to the advantage of the individual who is worse off.[239] Thus, it may be perfectly acceptable under the difference principle to pay a medical doctor a higher salary than an office clerk if doctors are in short supply and their skills are needed to improve the health of the entire community. Arguably, by paying higher salaries to doctors, society is incentivising individuals to become doctors which benefits the entire community. Since, the most advantaged cannot gain under this arrangement unless the least advantaged also gains, the difference principle satisfies the social justice objective of mutual benefit. Interestingly, Rawls argues that the difference principle is compatible with the principle of efficiency.[240] The reason for this is that if the difference principle is satisfied, then it is impossible to make any one person better off without making someone else worse off, thus achieving Pareto optimization.

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[236] *Ibid* at 75.
[237] *Ibid* at 64.
[238] *Ibid*.
[239] *Ibid* at 78.
[240] *Ibid* at 79.

Background fairness speaks to whether institutions are arranged in a way that ensures all members of society are able to participate fully within it and is necessary to ensure that equality of opportunity is meaningful rather than just formal. For Rawls, this means that benefits must be distributed in such way that the least advantaged are made better off. One serious flaw in this conception, however, was identified by Jacobs who contends that Rawls over emphasized the role of natural talents and abilities in determining the distribution of wealth. Jacobs notes that other factors, namely inherited wealth, play a much greater role in generating social and economic inequalities than does natural talents and abilities.[241] In fact, Jacobs argues that social science evidence rigorously rejects the idea that natural endowments lead to inequalities and, rather, all inequalities need to be understood as a result of social and economic factors.[242] If natural talents alone do not result in social and economic equalities, as Jacobs contends, than the difference principle arguably serves no purpose. That is, there is no need for a mechanism to counter the accumulation of wealth by the mythical natural aristocracy. Without a distributive element, the focus of background fairness returns to fair equality of opportunity. In order to assess whether the basic institutions of a society are truly arranged such that offices and positions are available under fair equality of opportunity, Jacobs provides an alternative tool for assessing regulatory policies in his three-dimensional model of equal opportunities which he refers to as status equality.

2.4.3 Status Equality

In order for procedural justice to operate in a manner that leads to fair outcomes, Rawls argued that whatever social and economic inequalities that flow from offices and positions only exist if those offices and positions are open to all under conditions of fair equality of opportunity. While this proposition is still an exemplar summation of an egalitarian perspective of justice, Jacobs criticizes Rawls for supplementing fair equality of opportunity with the difference principle.[243] Jacobs explains that if the concern is really about ensuring that every individual has an equal opportunity to meaningfully participate in a competition then what background fairness

[241] Jacobs, *supra* note 165 at 49.
[242] *Ibid* at 50, 56.
[243] *Ibid* at 50–51.

really requires is that the initial starting points for individuals entering a competitions be fairly situated. While wealth can act as a proxy for starting positions, fundamentally it is still just a proxy. The real currency of background fairness is status equality. Status equality does not mean people necessarily start with the same wealth or resources, or even of the same functionality or ability to affect outcome, but rather that they enjoy the same *moral* status.[244] Unlike social status – which may refer to an individual's position within social stratification – moral status talks about a person's place in the moral universe. Deeply rooted in ethical philosophy, the notion of moral status states that all individuals, regardless of individual characteristics such as gender or race, share a common humanity and thus, regardless of social class, should have equal prospects of achievement.[245] The corollary to this is that no individual has a higher moral claim to an office simply due to their membership in a particular group. Status equality thus speaks to an individuals' ability to access any position of power including those where the law is administered or created such as law schools, legislatures, policing, judicial offices, and regulatory bodies. Status equality also speaks to one's standing before the law. For example, Jacobs expresses how actions like racial profiling is antithetical to status equality because it uses race as a proxy for criminal misconduct. By categorizing individuals as more or less likely to commit a crime based on their race, racial profiling places people on different standings within a police investigation and thus subjects some to a lower moral status. [246] Perhaps the best example of status equality before the law is the principle of the presumption of innocence.[247] Regardless of class, race, or gender all accused stand in the same position at the outset of trial. Though some may be able to afford a better lawyer, everyone is always entitled to this presumption of innocence.

Status equality is thus understood as the regulatory mechanism necessary to ensure a meaningful equality of opportunity within a competition. When parties to a competition are not situated fairly, the competition itself can be critiqued. Jacobs, however, notes that certain goods and resources should not be the subject of a competition and points to health care and elementary level education as being two such examples.[248] In these situations society accepts

[244] *Ibid* at 31.
[245] Rawls, *supra* note 123 at 73.
[246] Jacobs, *supra* note 165 at 36–37.
[247] *Ibid* at 30–32.
[248] *Ibid* at 13.

that everyone is entitled to a basic set of benefits and therefore resources should not be allocated according to a competitive framework. Nevertheless, resources are limited and thus begs the question of how limited resources should be distributed to the population, if not by competition. Canada, for example, has a health care system that provides universal coverage for medically necessary health services.[249] These services are provided on the basis of need as opposed to ability to pay. Questions of distributive fairness also often crystalize in situations where one group of persons are forced to shoulder a disproportional burden for the benefit of others. One practical application of this was demonstrated by Jacobs in his examination of the use of quarantine during the 2003 Severe Acute Respiratory Syndrome (SARS) global health outbreak.[250] When examining how various jurisdictions balanced health security with individual liberties, he noted that there was often an unfair distribution of burdens among the population. For example, in Toronto there was concern about the lack of compensation and benefits available for those who became sick because of the outbreak – particularly with regards to frontline workers.[251] In an attempt to redistribute the burdens associated with health security, the federal government removed the two-week waiting period for unemployment benefits so that quarantined persons would not be forced to break quarantine in order to pay for their bills. They also set up a fund to reimburse frontline medical workers who lost income due to quarantine. However, there was no reciprocal fund for non-medical workers. Similarly, he noted that the widespread encouragement of the use of masks in Hong Kong and Shanghai was an attempt to distribute burdens among entire population not just those who had a trace contact with a SARS patient.[252] These concerns with distributive justice are mirrored in the 2020 Covid-19 pandemic where, for example, essential workers bore a disproportionate share of the health risks of the pandemic because of their inability to self-isolate. Recognizing that many of these essential workers, including grocery store employees and personal support workers, were often minimum wage earners the Ontario government issued pandemic pay wherein they provided a top up of $4.00 per hour for essential

[249] Health Canada, *Canada's Health Care System* (2011) , online: < https://www.canada.ca/en/health-canada/services/health-care-system/reports-publications/health-care-system/canada.html>.
[250] Jacobs, *supra* note 165 at 30.
[251] Lesley A Jacobs, "Rights and quarantine during the SARS global health crisis: Differentiated legal consciousness in Hong Kong, Shanghai, and Toronto" (2007) 41:3 Law and Society Review 511 at 538.
[252] *Ibid* at 533.

workers.[253] By increasing the wage of essential employees, the government was engaging with distributive fairness concerns by compensating these workers for the disproportionate burdens they bear on behalf of society as a whole.

In these situations, where benefits should not be subject to a competitive model, we can return to Rawls' difference principle to provide guidance as it is one formulation of distributive fairness that allows for an objective assessment of distribution. Here Rawls asks whether the resulting inequalities act in a way to make the least advantaged better off. As an analytic tool, we can apply the difference principle by looking at whether the beneficiaries of any distributive program expect that their life prospects will be improved. As such, it can be argued that Canada's health care system conforms to justice as fairness since providing services to those according to need, makes the least advantaged – e.g. the sickest – better off. Likewise, increase pandemic pay to frontline workers makes minimum wage workers who are shouldering a greater portion of burdens better off. Thus in the context of benefits that should not be subject to competition, Rawls difference principle can be used to critique the application of government policies.

2.4.4 Conclusion

Background justice speaks to whether the background institutions are arranged such that individuals are able to fully participate and engage with society. Rawls identified two principles that underpin justice as fairness: equality of opportunity and the distribution of benefits. Equality of opportunity, requires that all offices and positions be open to everyone regardless of personal characteristics. The problem with ending the analysis here, however, is that wealth will accumulate over time among the natural aristocracy, making equality of opportunity nothing more than a formal rather than meaningful state of affairs. Thus, according to Rawls, background fairness requires that the distribution of benefits – or burdens – be arranged in a manner that everyone benefits.[254] This ensures that equality of opportunity remains meaningful. Jacobs, however, argued that Rawls overemphasized the idea of natural endowments, which are more

[253] Office of the Premier, *Pandemic Pay Provides Support for Frontline Workers Fighting COVID-19* (Toronto, 2020), online: <https://news.ontario.ca/opo/en/2020/04/pandemic-pay-provides-support-for-frontline-workers-fighting-covid-19.html>.
[254] Rawls, *supra* note 123 at 61.

of a myth and the product of social inequalities. Thus within the context of a competition meaningful equality of opportunity requires that we examine whether all participants enjoy the same standing – or moral status – within a competition.[255]

To Jacobs background fairness, or an individual's starting position within a competition, hinges on the moral status of the participants at the outset of a competition rather than a mechanic for distributing benefits. Focusing on material inequalities at this stage is misguided, since wealth is simply a proxy for status.[256] That is resources can certainly level the playing field – expensive lawyers during a trial for example – but the real issue is whether the participants have equal moral standing. On face value focusing on status equality as opposed to wealth seems to overlook the massive inequalities that are allowed by the free-market and the ensuing advantages they offer.[257] It is hard to argue that, in the real world, a self-represented litigant who cannot afford a lawyer is situated fairly against a multi-national company with a nearly unlimited legal budget. However, this concern is better dealt with in the third dimension of equal opportunities, being stakes fairness. As will be discussed below, stakes fairness becomes the mechanism for the redistribution of wealth over the long term to ensure a genuine equal opportunity within a competition. This analysis thus provides two practical ways to critique access to justice initiatives from a background fairness perspective. In the context of a competition we can ask whether all participants enjoy the same standing and in the non-competitions ask if the initiative makes the least advantaged better off.

2.5 Stakes Fairness

2.5.1 Introduction

Inevitably when speaking of justice people will look to the final outcome of a competition or proceeding as a determinant of fairness. In a 2012–2013 study about perceptions of justice, individuals were approached in random spots around the Greater Toronto Area and asked how they define justice.[258] In response, people often identified areas of substantive justice as being

[255] Jacobs, *supra* note 165 at 45.
[256] *Ibid* at 34.
[257] Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1975) 9 Law & Society Review 95.
[258] Farrow, *supra* note 79 at 971–972.

fundamental. Statements regarding native rights, women's rights, and workers' rights were commonly cited. Justice was also seen to encompass other substantive justice concerns such as helping people achieve a basic standard of living with respect to food, shelter, security, as well as the opportunities for a good life for both oneself and their children. These comments speak to how individuals want justice to be about just outcomes and displays that the outcomes of a particular problem are as important for a conception of justice as are the procedures or starting positions. Interestingly, an examination of outcomes is commonly ignored or glossed over in much of the access to civil justice literature. This, to a degree, is not surprising because, as noted by Roderick A. Macdonald, access to civil justice originated as a critique of the civil litigation process.[259] As such, there is a presumption that the rule of law, and justice by extension, is firmly established within the legal system and the only problem was with the processes and barriers that made it difficult to bring an issue to the court or dispute resolution body.[260] More recently, however, there has been a refocus on the more substantive aspects of justice as authors try to bring to light the experiences of individuals within the legal system and the ongoing marginalization of certain communities by legal actors.[261] These authors make clear that any modern examination of access to civil justice cannot ignore the substantive outcomes that are a result of the processes they may be critiquing.

There is, however, an inherent difficulty in trying to measure outcomes. In order to assess whether an outcome is objectively "just" a measure requires a predetermined conception of the right decision which may not be possible given the divergent moral, religious, and philosophical beliefs in a pluralistic society. For this reason Rawls argued that pure procedural justice – wherein the outcome is just by virtue of following the procedures – is preferable to justice that requires a "right" decision independent of the procedures followed.[262] Jacobs notes that these types of competitions do not have preconceived winners or losers and the winner is a function of a set of

[259] Roderick Macdonald, "Access to Justice in Canada Today" in Julia Bass, WA Bogart & Frederick Zemans, eds, *Access to Justice for a New Century - The Way Forward* (Toronto: The Law Society of Upper Canada, 2005) 19 at 104–105.
[260] Mosher, *supra* note 213 at 843–844.
[261] See e.g. Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32:1 Windsor Yearbook of Access to Justice 149; Buhler, *supra* note 209.
[262] Rawls, *supra* note 123 at 87–88.

rules.[263] In order for the outcome to be considered fair, the rules have to comply with the principles of procedural fairness and background fairness. The problem with ending the analysis here is that it precludes any assessment of the outcomes. Even under perfect conditions of pure procedural justice, an outcome may be critiqued as being patently unfair. As an example of this, Jacobs asks us to imagine if a divorce settlement were structured in such a way that one of the parties was awarded all assets of the marriage and the other nothing.[264] Jacobs suggests that most people would view this distribution as being unfair since the "loser" received nothing. As well as receiving nothing, this arrangement would undoubtedly impact other spheres of the "loser's" life such as their housing, education, and work. Thus, even under conditions of pure procedural fairness, the outcome of any given competition can give rise to egalitarian concerns when the competition is arranged such that the winner takes everything, and when legitimate success in one competition unfairly influences other competitions.[265] Stakes fairness, Jacobs' third dimension of his three-dimensional model of equal opportunities, addresses these two concerns and provides a useful analytical tool for measuring the outcome of competitions.

2.5.2 Amount at Stake

Under principles of stakes fairness, winner take all competitions are rarely if ever fair. As such stakes fairness argues that the outcomes of a competition need to be constrained and distributed more widely among the participants to ensure a more equitable division of burdens and benefits. [266] Jacobs illustrates this insight with the example of a professional boxing match. These competitions are rarely arranged in such a manner that the winner takes all: while the winner of the fight may be awarded a much higher prize, the loser is still given part of the purse. [267] This arrangement reflects intuitive notions of how benefits should be distributed. There are several reasons why a competition organized in a winner take all manner may be viewed as unfair. First, if multiple parties have to extol great amounts of time, effort, and resources just to enter into that competition it may be opposed to egalitarian principles that they walk away with

[263] Jacobs, *supra* note 165 at 39.
[264] *Ibid* at 16.
[265] *Ibid* at 38.
[266] *Ibid*.
[267] *Ibid* at 15.

nothing should they lose. In instances like this, some of the benefits need to be distributed from the winner to the loser in order to compensate everyone for their investment. The boxing match example above is a good illustration of this. Often combatants train for many hours a day for months before a fight and it would inequitable for them to receive nothing for this investment. In other situations the difference in performance between the winner and loser is completely subjective or absolutely marginal. Think of the two piano players mentioned at the beginning of this chapter: if it is not possible to objectively claim that one interpretation of Chopin is better than the other then it would be inequitable for one pianist to horde all benefits simply on the subjective opinion of one influential critic. Perhaps a clearer example of this concern could be found in the Olympics. Canada, like most countries, will award their athletes with cash for winning a medal in any given Olympic event. While the monetary amount awarded for bringing home a gold medal is much higher than for a silver or bronze there is still some reward given to an athlete placing second or third. From a stakes perspective, this could be justified as being fairer than a winner take all arrangement, since the difference between the competitors' performance at this stage is often negligible to the point where it seems arbitrary to award one athlete a gold and another a silver.[268] A third reason a winner take all competition may be viewed as unfair from an egalitarian perspective is when the benefits of the competition are so high that they have little rational connection to performance. Think of how executive compensation is often grossly out of proportion with the average earnings of their employees or how executives are often rewarded for failure.[269] In these instances there is a clear disconnect between performance and reward, and stakes fairness would argue that executive pay should be constrained so that other participants in the competition – e.g. the employees and the community – may receive some of the benefits.

[268] In the 2008 Olympics, for example, swimmer Michael Phelps beat Milorad Cavic in the 100 meter butterfly by 0.01 of a second.

[269] Mark Thompson, "CEOs Are Being 'Rewarded' For Failure", *CNN* (21 April 2016), online: <https://money.cnn.com/2016/04/21/investing/executive-pay-reward-for-failure/>; Roland Jones, "CEOs Lay Off Thousands, Rake in Millions", *NBC News* (1 September 2010), online: <http://www.nbcnews.com/id/38935053/ns/business-us_business/t/ceos-lay-thousands-rake-millions/#.X4DZQu0pBpg>.

On first inspection the redistributive component inherent to stakes fairness arguably sounds like a reframing of Rawls difference principle. However, Jacobs contends that they are fundamentally different. The primary distinction between stakes fairness and the difference principle is that the difference principle is used to justify infringements to equal opportunities whereas stakes fairness regulates what equal opportunities requires.[270] That is, Rawls recognized that there are inequalities in society and asked when these inequalities can be justified; the difference principle allows for inequalities to exist provided they are to the benefit of the least advantage. In this way the difference principle is independent of equality of opportunity and, arguably, in tension with it since there may be times when unequal opportunities actually benefits the least advantaged. In these instances, according to Rawls' hierarchy, equal opportunities would trump the difference principle.[271] In contrast, stakes fairness, examines outcomes and comments on whether they support or undermine fair equality of opportunities: it is an integral part of the equal opportunities analysis rather than a free standing justification for infringement and, as such, can be used as a practical regulatory tool. For example, individuals who lose their employment not only lose financially but also lose other benefits associated with working such as social status, social networks, and self-worth.[272] In order to mitigate problems associated with unemployment governments have enacted numerous programs such as employment insurance, workfare, income support, or family benefits. While there are all sorts of justifications for these policies, Jacobs makes an argument that many of these programs can also be justified using stakes fairness. Under this analysis, governments redistribute benefits and constrain what is at stake within the labour market by enacting policies that redistribute some of benefits attained by those who win to those who do not in the form of income support programs.

2.5.3 Influence on Competitions

Along with concerns over a winner takes all competition, stakes fairness is also concerned with the effect of one competition over other opportunities. The simple premise here is that success or failure in one competition should not make one more likely to succeed or fail in

[270] Jacobs, *supra* note 165 at 41–42.
[271] Rawls, *supra* note 119 at 61.
[272] Jacobs, *supra* note 165 at 162–168.

another opportunity.[273] The classic example of this is that financial wealth should not translate into academic achievement. The underlying rational for this principle is that the participants of each competition should only be judged on criteria that are relevant to that specific competition. To return to the example just mentioned, an individual's financial success has no rational connection to the academic merits of their dissertation and thus the student's net worth should not be a factor in determining whether they should be awarded a doctorate. This principle of relevant criteria is reflected in the common law of evidence which precludes the crown from leading evidence of past crimes in criminal trials against the accused if their sole purpose is to prove the accused committed the current offence that they are charged with. This type of character evidence is generally seen as irrelevant to the current offence. In other words, just because an accused robbed somebody in the past does not mean they robbed this particular person: evidence of the past robbery does nothing to substantiate the current accusation. Jacobs acknowledges that this aspect of stakes fairness appears to overlap with concerns of background fairness since it can be characterised as being concerned with an individual's standing within a competition.[274] Background fairness notes that one's success in a competition should not be influenced by arbitrary characteristics like race, gender, or social status. Likewise stake's fairness is concerned with the influence of arbitrary factors, namely success or failure in another competition. These arbitrary factors may affect an individual's starting position of any given competition such that they are not fairly situated in the sense that they do not have an equal opportunity for success. However, Jacobs contends that stakes fairness is an appropriate place to examine the impact of competitions on each other since the underlying concern of stake's fairness is on regulating the outcomes.

2.5.4 Conclusion

Stakes fairness provides a way to examine the outcomes of any given competition and to assess whether these outcomes are fair. Stakes fairness contains two aspects. First, it holds that competitions arranged in a winner take all manner are almost universally unfair and that the

[273] *Ibid* at 38.
[274] *Ibid* at 43.

benefits and burdens of these types of competitions need to be distributed more widely among participants in order to ensure an equitable outcome. Second, stakes fairness also holds that success or failure in one competition should not impact the prospects of success or failure in another opportunity. This final dimension of Jacobs' model of equal opportunities provides a more comprehensive regulatory device for assessing access to justice initiatives as it allows for a critique of substantive justice.

2.6 Conclusion

The primary purpose of this chapter was to provide a theoretical framework that can be used to practically assess access to justice policies. Noting that Canada is a pluralistic country with divergent moral, religious, and philosophical beliefs it looked towards a political theory of justice that would be able acceptable to reasonable people from any tradition. John Rawls proposed such a theory in his articulation of justice as fairness. Justice as fairness is summed up in two interrelated principles: first, each person has the same claim to an equal set of basic liberties, and second, social and economic inequalities can only exist if they are attached to offices and positions open to everyone equally and if they benefit the least-advantaged members of society. The first principle, dealing with the same claim to an equal set of liberties speaks to the constitutive stage of arranging in institutions and thus precedes regulation. That is, basic liberties are to be found in how society arranges its fundamental institutions. Since this project is looking to engage with the access to civil justice conversation and not reimagine Canadian society, it accepts that Canada's institutional arrangement as set out in the common law, the Constitution, and the *Charter of Rights and Freedoms* satisfies this first principle of justice as fairness.

In terms of translating these principles into a practical regulatory device, one needs to focus on the second principle. The first dimension of the second principle, being offices and positions being subject to equal opportunity, is easily connected with procedural fairness. Here we are concerned with ensuring process and procedures maintain fair equality of opportunity. Rawls notes, that ideally procedures should be arranged in such a way that a just outcome is a function of following the established rules and termed this pure procedural fairness. The reality,

however, is that pure procedural fairness is more of a theoretical objective than a practical reality since in any given competition someone will have or think they have a higher claim to justice. Thus, in order to assess whether procedures are fair such that everyone believes that they have an equal opportunity, we can look to normative concerns of the participants including whether they were given an opportunity to tell their side of the story, whether they believe the decision maker was impartial, and whether they were treated with respect. Jacobs notes that while the specific requirements of procedural fairness will depend on the nature of the competition and what is at stake what is important is that everyone has a fair chance and equal opportunity of engagement.

The second dimension of the second principle, being inequalities benefiting the least-advantaged – or the difference principle – is connected with background fairness. Basically Rawls recognized that socio-economic factors play a significant role in determining individual opportunities especially when examined over generations. The difference principle aims to limit the impact of arbitrary characteristics such as social status or natural talents on competitions, while allowing for some inequalities to exist. Thus the difference principle plays a distributive role in allocating benefits and burdens throughout society. Jacobs, however, critiques this arguing that Rawls overemphasizes the idea of natural talent which should be properly understood as a function of socio-economic factors. To Jacobs, if background fairness is fundamentally about an individual's starting position within a competition then one should be concerned about their moral status. That is, one can critique whether the parties are fairly situated such as they enjoy the same moral status before the law. With that said, however, the difference principle can still be used as an analytical tool in those instances when opportunities should not be subject to competition such as primary education or health. Here we can ask whether any inequalities arising out of the distribution of benefits or burdens goes to assist the least advantaged. Finally, Jacobs introduced a third dimension called stakes fairness which provides a tool to assess the fairness of the outcomes of any given competition. Under principles of stakes fairness winner take all competitions are rarely fair. Rather the benefits of the competition need to be distributed more widely among participants to an equitable outcome. Moreover, stakes fairness argues that success or failure in one completion should not influence other opportunities. Stakes fairness

thus becomes a fundamental component of the justice as fairness framework, because it prevents wealth from accumulating in one group over time, which would in turn undermine background fairness.

While this chapter intended to engage with Rawls and Jacobs in order to provide some depth to a theory of justice, it did not seek to resolve all the critiques that may be levelled against their ideas. Indeed, the purpose was to find a practical theoretical framework for assessing access to civil justice initiatives. I believe Rawls' justice as fairness coupled with Jacob's equality of opportunity, provide an effective tool to critique real world access to civil justice initiatives. Interestingly, Sen criticised Rawls' version of justice as being transcendental and remote from comparative questions.[275] Sen notes that because the community of reasonable individuals who determine the original conception of justice all come from within the society, it does not allow that society to examine other conceptions of justice. This accusation may be true when applied to the original position but if that position, which is simply a heuristic anyway, is bracketed and accepted for the purpose of utility then, as will be demonstrated in the following chapters, the principles underlying Rawls' justice as fairness provides an effective framework for comparing policy decisions.

[275] Sen, *supra* note 131 at 70.

Chapter 3

Research Design and Methods

3.1 Introduction

The primary purpose of this project is to examine the numerous access to justice initiatives within Ontario from a justice as fairness perspective. While a Rawlsian theory of justice provides the framework for analysis, benchmarks are needed in order to assess whether these initiatives do in fact improve individual access to justice. In other words, this project needs a base line understanding of the extent in which individuals are struggling with the justice system in order to measure improvements. To accomplish this task, this project embarked on a study of how Ontarians who are active on social media negotiate their legal problems. Specifically, it examined whether these individuals struggled with the justice system and, if so, to what extent. It also examined whether people try to avoid the legal system and seek out alternative paths to justice, and the type of assistance, information, and advice people received from social media. In sum this project studied how ordinary Ontarians understand and interact with the legal system. The study of how ordinary individuals – as opposed to lawyers or judges – perceive the law and how they choose to interact with it is referred to as legal consciousness.[276] When "law" is spoken of in this context it refers to both the formal doctrines and legal institutions that make up the legal system as well as the informal relationships or common understandings that develop within a community.[277] In other words, one's understanding of the law is broader than simply what a statute or regulation dictates. For example, while the police may have the strict legal authority to intervene in a neighbourhood conflict, an individual might refuse to contact them for assistance because they believe that it is inappropriate for a police officer to be called to intervene in what they see as a private neighbourhood dispute.[278] Ewick and Silbey argued that legality – what is "legal" and what is "illegal" – is a structural component of society consisting of cultural schemas and resources that shape social relations such that one's understanding of the

[276] Lesley A Jacobs, Nachshon Goltz & Matthew McManus, *Privacy Rights in the Global Digital Economy: Legal Problems and Canadian Paths to Justice* (Toronto: Irwin Law, 2014) at 44–46.
[277] *Ibid*.
[278] Patricia Ewick & Susan S Silbey, "Common Knowedge and Ideological Critique: The Significance of Knowing That the 'Haves' Come Out Ahead" (1999) 33 Law & Society Review 1025 at 1029–1030.

law – both formal and informal – is produced in what people do and what they say.[279] That is, one's understanding of legal rights, obligations, and remedies develops outside of the formal legal system and arises from lived community relationships such as the interactions between neighbours, family members, colleagues, and businesses. In his book *Privacy Rights in the Global Digital Economy*, Jacobs demonstrates how ordinary people may understand a right independent of doctrinal law.[280] After interviewing Canadian youth about privacy rights in the context of social networking and online gaming, Jacobs found that even though none of the youth had knowledge of the statutes and regulations that make up the doctrinal law of privacy, they still believed that they had a right to privacy and that this right had something to do with the protection and control of personal information and identity.[281] This knowledge arose not from the formal institutions – few of those interviewed were even aware that Canada has a privacy commissioner – but rather in interaction with the modern digital economy.[282] Insights gained from the study of legal consciousness is of vital importance to establishing access to civil justice benchmarks because an individual's understanding of their rights and the remedies that flow from these rights will inevitably influence how an individual tries to resolve their legal problems. This in turn will help determine whether an initiative does in fact improve an individual's access to civil justice.

3.2 Understanding Legal Consciousness

Theorists typically attempt to understand a community's legal consciousness through extensive ethnographic interviews. From these interviews theorists will identify common or overlapping points of data and use inductive reasoning to build meta-narratives that invoke normative claims about the law and the legal institutions. In doing so, theorists are better able to appreciate how individuals understand and interact with the law in their day to day lives. While legal consciousness must be understood in the context of a community, scholarship – especially outside of the East Asian context – has almost entirely focused on the individual as a legal actor

[279] Ewick & Silbey, *supra* note 109 at 22–23.
[280] Jacobs, Goltz & McManus, *supra* note 276.
[281] *Ibid* at 53–60.
[282] *Ibid* at 56.

as opposed to a collective or corporate legal consciousness.[283] In essence, legal consciousness is often used as a lens to explain social phenomena.[284] One of the first scholars to explore legal consciousness was David Engel who wanted to understand how a small rural county in Illinois understood personally injury litigation.[285] His driving question was why this particular county had lower rates of personal injury litigation in comparison to other forms of litigation and in comparison to other counties. To examine this phenomena Engel analyzed a sample of cases files from the local county court, interviewed the parties involved in a sub-sample of these case files, and interviewed seventy-one "community observers" that included judges, lawyers, teachers, ministers, farmers, and numerous other assorted professions including a beautician, and a funeral parlour operator.[286] From this dataset Engel found a common set of values among the residents of the county that focused on independence and self-reliance and he theorized that these values informed their decisions not to pursue personal injury problems in the formal legal system.[287] Not long after Engel's project, Sally Engle Merry conducted a study that examined the legal consciousness of working class Americans from two small New England towns.[288] To do this she observed mediation sessions of lower court hearings and interviewed one hundred and twenty four litigants to examine how people understand, engage with, and resolve four types of personal-plight problems: neighbor, marital, family, and boyfriend/girlfriend. From this examination she concluded that working class Americans are not litigious by nature. Rather working class Americans share a belief that the rule of law organizes society and that they, along with all Americans, are entitled to ask the court for help to enforce their legal rights.[289]

Perhaps one of the most important, and comprehensive, studies in this tradition is Patricia Ewick and Susan Silbey's *The Common Places of the Law: Stories from Everyday Life.*[290] Here,

[283] Lesley A Jacobs, "Corporate Legal Consciousness in Investor-State Dispute Settlement and the United Nations Responsibility to Respect Human Rights: New Challenges for Global Governance" in *Good Governance in Economic Development: International Norms and Chinese Perspectives* (Vancouver: University of British Columbia Press, 2020) 92 at 93.
[284] Jacobs, *supra* note 251.
[285] Engel, *supra* note 109.
[286] *Ibid* at 557.
[287] *Ibid* at 562.
[288] Merry, *supra* note 109.
[289] *Ibid* at 172–182.
[290] Ewick & Silbey, *supra* note 109.

Ewick and Silbey were interested in how people constructed legality outside of the formal setting generally. To do this, they conducted interviews with 430 New Jerseyans randomly selected from four different counties of New Jersey.[291] As such their sample included wealthy, poor and middle income individuals. It included men and women, young and old, racial minorities, and a diversity of professions and educations. Not surprisingly, the authors did not find a single uniform understanding of law amongst those interviewed; however, they did find three common narratives throughout the interviews, each of which "… invokes a different set of normative claims, justification, and values to express how the law ought to function."[292] The first narrative they call the "before the law" narrative; it sees the law as "an objective realm of disinterested action" and generally distant from the lives of individuals.[293] People who expressed this narrative had little or no interaction with the formal legal system. The second narrative the authors' call "with the law." Here the legal system is seen as a game where deceit is expected and those wise to the rules win. The third narrative is called "up against the law" and understands the law as arbitrary and capricious, and the product of unequal power between players. While the authors identified these three overarching narratives, they further observed that individuals do not ascribe to solely one narrative and often express differing, sometimes contradictory, views depending on the specific experience.[294]

Another important contribution to the study of legal consciousness was a work by David Engel and Frank Munger entitled *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* which examined how the then newly enacted *Americans with Disabilities Act* impacted the day to day lives of Americans particularly within the employment context.[295] For this study the authors interviewed sixty intended beneficiaries of the newly enacted statute. The interviewees consisted of both men and woman from three age groups: high school seniors with no employment experience, twenty something adults with some

[291] *Ibid* at 23–28.
[292] Patricia Ewick & Susan S Silbey, "Common Knowledge and Ideological Critique: The Significance of Knowing That the 'Haves' Come Out Ahead" in Herbert M Kritzer & Susan S Silbey, eds, *In Litigation: Do the "Haves" Still Come Out Ahead?* (Stanford: Stanford University Press, 2003) 273 at 275.
[293] *Ibid.*
[294] *Ibid* at 283.
[295] David M Engel & Frank W Munger, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities* (Chicago: University of Chicago Press, 2003).

employment experience, and middle aged individuals with substantial employment experience.[296] The authors invited the interviewees to narrate their life stories such that they could trace and compare the emergence of identity from the interviewees' interactions with others over a period of years and thus understand how that emerging identity impacted the individual's legal consciousness.[297] Here legal consciousness is not perceived as a fixed orientation but as a process which is evolving and being redefined. The authors argue that one's understanding of legal rights is fundamentally connected to identity and that their relationship with each other is recursive in the sense that identity, on one hand, determines when and how rights become active but, on the other hand, rights also help shape identity.[298]

Returning to personal injury claims, David Engel and Jaruwan Engel conducted another interesting study examining how people in a northern province of Thailand dealt with personal injury claims in the context of a rapidly changing economy.[299] For this work they conducted ethnographic interviews with more than 100 people in the province of Chiangmai who suffered serious injuries. They also conducted a survey of tort cases litigated in the local trial court over a 35 year period. Through this work, Engel and Engel argued that a community's legal consciousness is not static and can change depending on experiences. Among their many findings, they noted that the younger generation of respondents held different views of personhood and the community than the older generation and that these views impacted their understanding of justice norms and procedures.[300] In brief they concluded that while the older generation was hesitant to use the formal law, due to their connection with traditional customary village practices, they still believed that the formal law was a possible method of resolution if customary practices failed to resolve the problem. The younger generation, however, did not consider the formal law a realistic path to justice because they believed the institutions would not assist them and that, in any event, their injuries were caused through their own fault.[301]

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[296] *Ibid* at 8.
[297] *Ibid* at 7–12.
[298] *Ibid* at 241–245.
[299] David M Engel & Jaruwan S Engel, *Tort, Custom, and karma* (Stanford: Stanford University Press, 2010).
[300] *Ibid* at 155–157.
[301] *Ibid*.

Two other recent studies conducted by Lesley Jacobs provide insight into legal consciousness from a Canadian perspective. The first study examined the impact of quarantine on individual rights during the Sever Acute Respiratory Syndrome (SARS) global health crises.[302] Noting that three jurisdictions – Hong Kong, Shanghai, and Toronto – responded to the crises in very divergent manners, Jacobs sought to examine how actors in each of these cities perceived and balanced individual rights against public health security concerns. For this study, Jacobs utilized a diverse range of sources including archival reviews of policy statements, legislation, directives and press releases; print media; interviews with public health officials; surveys; testimony and reports from commissions; and published accounts of personal experiences. Importantly, Jacobs did not assume that differently situated communities within any one jurisdiction would share a uniform legal consciousness and, as such, he examined and compared the perspectives of three groups of actors: senior public health officials, front line hospital workers, and contacts of SARS patients. Indeed, Jacobs found that the legal consciousness of these differently situated groups were divergent and complex. For example, senior public health officials in Toronto differed the most from both their counterparts in the other jurisdictions and from front line hospital workers which helps explain why Toronto, unlike the other cities, moved to large scale quarantine very quickly and did so without consulting agencies tasked with protecting individual rights such as the Human Rights Commission or the Privacy Commission. Jacobs concludes that it is unlikely that the approach different jurisdictions take to public health security vis-à-vis individual rights will converge during a future epidemic.[303] The second study by Jacobs, which was referred to in the previous section, examined privacy rights in the global digital economy.[304] For this study, Jacobs interviewed fifty-six youth aged eighteen to twenty-four to identify patterns in their understanding of privacy rights.[305] While the youth came from a diverse background, and included an equal number of men and women, all respondents were users of the social media site Facebook. From these interviews Jacobs was able to identify two themes regarding privacy rights. First, the youths interviewed understood privacy to be in relation to

[302] Jacobs, *supra* note 251.
[303] *Ibid* at 545–547.
[304] Jacobs, Goltz & McManus, *supra* note 276.
[305] *Ibid* at 53.

personal information and identity as opposed to, for example, bodily integrity which is how privacy was often framed by the courts in the pre-digital era, and a right to privacy was commonly understood to be about the ability to protect that personal information.[306] Thus, a privacy right violation occurs when personal information is accessed without permission. Despite the fact few youth had knowledge of privacy legislation, this understanding of privacy and the right to privacy is very similar to the doctrinal right to privacy that exists in Canadian legislation. The second theme Jacobs identifies is in regards to how youth mobilize and enforce their privacy rights. Though the youth identified multiple paths to justice, including self-regulation and abandonment, they most commonly relied on their service provider's (e.g. Facebook's) complaint resolution process in order to resolve their problems.[307] Despite the fact that most youth's understanding of privacy aligns with formal legislation, few thought of turning to any of the government agencies tasked with protecting privacy rights. Jacobs concludes that this demonstrates a need to strengthen informal paths to justice by providing youths the support mechanisms needed to resolve their problems.[308] Like earlier studies, these two Canadian examples display how legal consciousness can be used as lens to better understand social phenomena, however, they also display how legal consciousness can be used to inform policy decisions.

As well as identifying the legal consciousness of a particular community, all of these studies contribute to a broader understanding of legal consciousness generally. Together these studies show that legality exists within and among the social relations of a community as opposed to emanating from the formal institutions. A community can possess multiple layers of legal consciousness which can differ and sometimes contradict depending on the situation and the interacting parties. They also show that legal consciousness is not static over time; rather it evolves with life experiences and is shaped by cultural factors including, but not limited to, the formal law. Finally, they show that differently situated groups within a community may possess very divergent forms of legal consciousness. Drawing inspiration from these studies, this project

[306] *Ibid* at 53–56.
[307] *Ibid* at 56–60.
[308] *Ibid* at 60–62.

looks to understand how Ontarians experiencing different problem types interact with and utilize the law in order to assess whether access to justice initiatives meet their needs.

3.3 Methodological Framework

As a study of social structures, legal consciousness scholars focus not on the obvious actors of the legal system – being the lawyers, judges, politicians, and bureaucrats – but on the passive participants and non-participants of the system; the so called "ordinary" people.[309] This community of ordinary people can be defined in numerous ways; geographically, demographically, socio-economically or a combination thereof. It is really up to the researcher to identify the common schema that bring a community together.[310] Researchers will engage with these individuals and collect narratives about their experiences and interactions with the law. The focus is not necessarily on the individuals' interaction with the institutions, but on how they address and resolve their personal difficulties. As such the individual is the basic unit of analysis, and the researcher identifies common or overlapping themes from their data pool in order to develop narratives that explain the community's legal consciousness.

While ethnographic interviews are the standard method for exploring the legal consciousness of a particular community, the study of legal consciousness need not be limited to interviews. Many of the theorists mentioned above combined their interviews with other techniques. For example, Engel conducted quantitative analysis of court cases to find patterns and trends within litigation.[311] Merry engaged in observational methods wherein she sat in on adjudicative hearings or mediation sessions to witness behaviour and dialogue among the various participants.[312] Jacobs' analysis of the SARS crisis drew primarily from a plethora of other non-interview sources including surveys, testimonials, and newspaper reports.[313] As noted by Jacobs: "Evidence of this legal consciousness comes not only from people's statements about what their beliefs and attitudes are but also from what they do."[314] Such alternative data sources are

[309] *Ibid* at 44–45.
[310] Ewick & Silbey, *supra* note 278 at 1027–1028.
[311] Engel, *supra* note 109 at 557.
[312] Merry, *supra* note 109.
[313] Jacobs, *supra* note 251 at 517.
[314] *Ibid*.

particularly important for the study of legal consciousness due to some of the challenges inherent to ethnographies. Recruiting respondents, for example, can be difficult especially if one wants to target a specific population. How exactly does a legal consciousness scholar find a pool of respondents who have experienced a particular legal problem but have not engaged with the formal system at all? Some possible solutions – such as posting recruitment ads – come with their own difficulties including high costs and potential sampling errors.[315] Moreover, once respondents are recruited the ethnographer needs to invest extensive time in developing and maintaining a relationship with the respondent while ensuring they do not unduly influence the interview.[316] However, in recognizing that any source material that evidences a community's legal consciousness can be used as a data set, researchers are provided with opportunities to address some of the challenges inherent to ethnographic interviews.

One source of data that has yet to be examined by legal consciousness scholars are conversations posted to social media networks which, like letters to the editor, provide a forum for people to express their views and opinions.[317] There are several advantages in utilizing social media conversations as a data source for legal consciousness research. First, by examining online postings, a researcher is able to draw information from a far larger pool of data than they would be able to if they had conducted individual interviews. Part of this, as noted above, is due to the fact that interviews are extremely time intensive requiring the time not only to conduct, but also to plan, schedule, transcribe, code, and follow up on. Thus, apart from Ewick and Silby who spent three years interviewing their sample of 430 respondents, all of the legal consciousness studies discussed above have a relatively small sample size ranging from fifty-six respondents to one hundred and twenty.[318] Online postings, however, can often be pulled relatively easily and do not require the time to schedule, conduct, and transcribe. Thus even a modest and unfunded study can draw from hundreds of data points. This larger sample size arguably allows the researcher to make claims that are more representative of the community than a study based

[315] One type of sampling error that might occur with recruitment ads is non-response bias wherein a researcher receives a disproportionate response from certain types of individuals such as those who feel aggrieved.
[316] James P Spradley, *The Ethnographic Interview* (New York: Holt, Rinehart and Winston, 1979).
[317] Although legal consciousness scholars have yet to examine conversations posted to social media platforms, many other researchers have. See section 3.6 below.
[318] Ewick & Silbey, *supra* note 278 at 1027.

solely on a dozen or so interviews. More importantly to the legal consciousness researcher, however, is the fact that social media provides the researcher with an opportunity to examine the conversations of individuals who have had no interaction with the formal legal system. As noted in chapter 1, most people with legal problems never seek legal advice and even fewer people have their problem formally adjudicated by a court or tribunal.[319] Obvious methods of recruiting respondents with legal problems – for example, through court dockets[320] or through legal clinic case files[321] – necessarily preclude those who have not entered the system. This can be problematic if the researcher wants to include the beliefs and attitudes of those members who have had no formal contact with the legal system in their study. As such, in order to find individuals who have no ties to the legal system but who have encountered legal problems, these researchers must engage in creative methods such as purchasing telephone lists of potential recruits,[322] or randomly approaching individuals on the street[323] which are both time consuming and costly. Social media, however, grants the researcher easy access to public forums where individuals who have not engaged with the formal system openly discuss legal problems and, in doing so, reveal aspects of their legal consciousness.

3.4 Reddit Sample

This project leverages the advantages of this relatively novel data set by engaging in an extensive analysis of discussions posted on the website Reddit in order to find patterns in how Ontarians understand and interact with the law. Reddit is a moderated online news aggregator and discussion board. Registered members are able to post content as well as "upvote" or "downvote" other members' content. The more upvotes a post receives, the higher up on the webpage it will appear. According to Reddit etiquette one should upvote content that they believe contributes to the conversation and downvote content that does not contribute or is off-

[319] Farrow et al, *supra* note 51 at 9.
[320] See e.g. Merry, *supra* note 109.
[321] See e.g. D James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, "The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future" (2012) 126 Harvard Law Reivew 901.
[322] David Northrup et al, *Design and Conduct of the Cost of Justice Survey* (Toronto, 2016).
[323] Farrow, *supra* note 79.

topic.[324] The amount of upvotes a user receives is tracked and is known as "karma." A user's profile will display how much karma a user received which is further divided into "post karma" – being the amount of votes received for posting content – and "comment karma" – being the amount of votes received for commenting on other people people's posts – and thus acts as a proxy for positive site activity.[325] The website is divided into almost innumerable "subreddits" or communities each focusing on their own topic. For example the subreddit "/r/Ontario" caters to content about the province of Ontario while subscribers to the subreddit "/r/Music" post links to various music videos on video streaming sites and the subreddit "/r/Funny" – one of the most popular subreddits – is dedicated to posts that make an attempt at humour. These subreddits are moderated by individuals who are responsible for ensuring that postings on the subreddit are related to the topic as well as for creating and enforcing rules regarding the content. For example, it is common to have rules prohibiting the posting of personal information or obscene material. Any user that has met a minimum karma requirement can create a new subreddit on whatever topic they want and recruit additional moderators who in turn determine and enforce its rules. At the time of writing, Reddit is the seventeenth most visited website globally and the fifth most visited website in both the United States and Canada.[326]

Discussions on Reddit begin with a user posting some content; such as a question, a statement, or a link to a webpage. Other users will then comment on these posts and some of these comments gain even further comments creating a conversation tree. If a comment is responding to the original post it is shown as a level 1 comment. Comments that respond to level 1 comments are shown as level 2 comments, comments responding to level 2 comments are shown as level 3 and so on. Just as the posts themselves are "upvoted" and "downvoted" so are the comments. Thus the highest rated comments will appear higher in the conversation suggesting that the community deems these comments to contribute the most to the conversation. Interestingly, it not uncommon for individuals to seek legal advice and to post questions about the law in certain subreddits. For example, people commonly ask about their

[324] Reddit, "Reddiquette", (2020), online: *Reddit Help* <https://www.reddithelp.com/en/categories/reddit-101/reddit-basics/reddiquette>.
[325] Reddit, "What is Karma?", (2020), online: *Reddit Help* <https://www.reddithelp.com/hc/en-us/articles/204511829>.
[326] Alexa Internet Inc, "reddit.com Traffic Statistics", (2019), online: <https://www.alexa.com/siteinfo/reddit.com>.

legal rights and entitlements in any given dispute. Even more interesting is the extensive conversations that these questions and comments garner and the possibility that they might provide insight into how individuals interact with and understand the law. I am interested in seeing how these advice seekers formulate their problems: do they see them as legal in the sense that they expect a court to be able to grant them a remedy? Or are they considered best resolved outside of court? What facts do they emphasize and understand to be material to their problem? How do they relate the problem to the community as a whole? I am equally interested in how people respond to these questions. Do they provide them with legal information? Do they suggest paths to justice through formal or informal means? Is the legal advice provided accurate and correct? Answers to such questions will help this project understand how members of specific online communities position themselves and their experiences vis-à-vis the law and in doing so may assist policy makers understand how to better address their problems. For example, if there are complaints about the affordability of lawyers, the complexity of litigation, or the inability to get a problem before a tribunal, then policy makers might need to continue to focus on institutional redesign in order to improve access to justice. However, if problems with legal remedies tend to be formulated as community problems that deemphasize legal intervention, then again policy makers might want to focus on improving legal education or preventative law.

In order to conduct this study, the first issue I needed to address was which subreddits were the most appropriate communities to draw data from. As noted above, there are innumerable subreddits that could be studied, however, three constraints limited my choices. First, and obviously, the topic and moderators for the subreddit had to allow for conversations regarding legal problems to take place. A subreddit devoted to music, for example, could not be used as there would be no discussion regarding legal problems. Second, the subscribers to the subreddit had to reside primarily, if not entirely, in the province of Ontario. If the subscriber base is outside of Ontario then it would impossible to make any claim that their conversations grant insight into the legal consciousness of Ontarians. Finally, there has to be a sufficient number of subscribers to the subreddit such that the subreddit is active and vibrant. This ensures that there are enough recent conversations about legal problems to gather a dataset from. Based on these

constraints I chose to examine nine location focused subreddits and two advice focused subreddits (see Table 3.1).

Table 3.1 **Characteristics of Ontario-Based Subreddits**

Subreddit	Number of subscribers *	Topic as descried by the moderators
Location focused		
/r/Toronto	147,751	News, People, Places, Events, Articles, and Discussion on Toronto; the largest city in Canada, and the provincial capital of Ontario
/r/Ottawa	50,598	News, events, discussions, and what not from Ottawa, ON.
/r/Ontario	48,883	A subreddit to discuss all the news and events taking place within the province of Ontario, Canada
/r/Hamilton	15,479	Hamilton, Ontario, Canada
/r/LondonOntario	12,404	Subreddit for news, discussions, and anything else related to London, Ontario
/r/Waterloo	11,043	The Reddit of Waterloo includes news from throughout the Region of Waterloo in Ontario, Canada. Posts of interest to residents of Cambridge, Kitchener, Waterloo, and the surrounding townships are welcome.
/r/KingstonOntario	5,415	A SubReddit for people who live in or care about Kingston, Ontario
/r/WindsorOntario	3,754	Official subreddit for Windsor Ontario, all are welcome!
/r/ThunderBay	2,083	N/A
Advice focused		
/r/askTO	18,491	A subreddit for people to submit questions to Torontonians and about Toronto and receive constructive responses
/r/LegalAdviceCanada	8,932	A place to ask simple legal questions. Advice here is for informational purposes only and should not be considered final or official advice. See a local attorney for the best answer to your questions

* as of March 9, 2019.

This list of chosen subreddits is not a comprehensive collection of all possible subreddits that meet my three criteria, however, it does provide a good foundation for examination. Most of the subreddits focus on a major urban centres throughout Ontario and together represent all major regions of the province (southwestern, central, eastern and northern). The subreddits for

other urban centres could have been chosen, however, many of them do not have enough subscribers and activity to allow for sufficient data collection. For example, /r/CornwallOnt, the subreddit devoted to the eastern Ontario town of Cornwall, only had 154 subscribers at the time of data collection. Similarly there are other urban centres whose subreddit has a sufficiently large subscriber bases that would be perfectly adequate to examine; however, they are often geographically near another centre that is already on the list and I needed to ensure that all regions of the province were represented. For example, the subreddits for both Burlington and Mississauga have a large subscriber base, however, they neighbour the much larger cities of Hamilton and Toronto, both of which are already represented in the list. In regards to the advice focused subreddits, there are many other potential subreddits that could have been examined, however, they did not have a geographic connection to the province of Ontario. For example, the subreddit /r/legaladvice is primarily American and has very little Canadian, let alone Ontarian, content. Thus, while seemingly helpful, these subreddits were actually problematic because they could not provide insight into the legal consciousness of Ontarians. There is not a subreddit devoted specifically to legal problems within the province of Ontario, however, there is one – being /r/LegalAdviceCanada – that is devoted to legal problems within Canada and is quite vibrant. Further, this subreddit organises its posts by province and thus can be easily filtered for Ontario content. There are also some subreddits devoted to general advice that meet my criteria. One such subreddit is /r/askTO which allows people to submit questions to Torontonians about the City of Toronto and often includes posts from individuals seeking legal advice on various topics. While user profiles are not linked to any geographic area, the subreddits I examine are. For example /r/Ontario is described as a subreddit to discuss all the news and events taking place in the province of Ontario, Canada. Moreover, submission guidelines state that all posts have to be related to Ontario in some way. By focusing on subreddits that have an explicit link to the province of Ontario I am ensuring that those participating in the conversations analyzed are almost entirely from the perspective of residents of Ontario. Tourists or other prospective visitors may have a presence on some of these forums, but they are not likely to engage with legal discussions. Even in the unlikely event that an individual from a non-Ontario jurisdiction seeks legal advice from a forum devoted to Ontario matters, the responding subscribers would

certainly situate their problem within the legal context of Ontario. Given these constraints it is safe to presume that the strong majority, if not entirety, of those seeking legal advice and/or information on these subreddits are residents of Ontario, Canada.

3.5 Who are the Redditors?

According to a 2020 report by Ryerson University's Social Media Lab, 15% of all Canadian adults who are online use Reddit.[327] While this provides a potentially massive population to draw data from, one difficulty of Reddit is the lack of demographic information that is available about individual users. Users are identified by a self-created username, which is often nonsensical, and their user profile does not provide any personal data such as age, gender, ethnicity, income, or education level. However, a general profile of the typical Reddit user can be created by examining recent surveys of Reddit users. In 2016 Pew Research Centre conducted a survey of 288 American Reddit users to support a study of news consumption during the 2016 presidential election campaign. [328] This survey examined users by sex, age, education, ethnicity, income, and political affiliation. Although this survey examined American Reddit users, the findings were similar to two other more recent Canadian user surveys. In 2019 the subreddit /r/Canada conducted a survey of its membership which received 1,532 responses.[329] This survey examined membership by sex, age, household income, education, religious affiliation, ethnicity, language spoken, sexual orientation and political leanings. Similarly the subreddit /r/Ontario conducted an annual survey in 2019 survey which had 912 respondents.[330] It too asked, among other things, about its memberships' age, gender, religious beliefs, education, personal income, political affiliation, and ethnicity. Based on these three surveys, the typical profile of a Reddit user would be someone who is young (under 40 years of age), white, and male with at least some college education (See Table 3.2).

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[327] Anatoliy Gruzd & Philip Mai, *The State of Social Media in Canada 2020: A Canada-Wide Survey About Social Media Adoption and Use in Canada* (Toronto, 2020) at 15.
[328] Michael Barthel et al, "Seven-in-Ten Reddit Users Get News on the Site: Interest in Democratic presidential candidate Bernie Sanders was clear among Reddit users well in advance of primary season", (2016), online: <https://www.journalism.org/2016/02/25/seven-in-ten-reddit-users-get-news-on-the-site/>.
[329] r/canada, "2019 Survey", (2019), online: *Reddit* <https://www.reddit.com/r/canada/wiki/2019survey>.
[330] r/ontario, "Ontario 2019 Survey Results", (2019), online: *Reddit* <https://www.reddit.com/r/ontario/comments/f3tsh1/official_rontario_2019_survey_results/>.

Table 3.2 **Demographic Makeup of Redditors**

		Pew Research Center Survey n=288	**/r/Canada Survey n=1,532**	**/r/Ontario Survey n=912**
		% of users	% of users	% of users
Sex	Men	67	84	78.6
	Women	33	10	17.5
Age	Young Adult	64 (Age 18-29)	84 (Age 15-39)	73.8 (Age 13-35)
	Middle Age Adult	29 (Age 30-49)	13 (Age 40-54)	22.1 (Age 36-55)
	Mature Adult	7 (Age 50+)	3 (Age 55+)	4.1 (Age 56+)
Education	College Degree	42	-	66.4
	Some college	40	85 (Did not distinguish between attainment and enrollment)	16.7
	High School or less	18	15	13.5
Income (Personal or Household)	Low	30 (under $30k USD) *personal*	21 (under $50K CAD) *household*	22.8 (under $30k CAD) *personal*
	Middle	34 ($30k USD - $74,999 USD)	40 ($50k CAD - $99,999 CAD)	38.1 ($30k CAD - $79,999 CAD)
	High	35 ($75k USD and above)	41 ($100k CAD and above)	27.9 ($80k CAD and above)
Ethnicity	Caucasian	70 (White/Non-Hispanic)	79.6 (European/White)	77.7 (Caucasian)
	Black	7 (Black non-Hispanic)	0.5 (Black)	1.8 (Black or African Canadian)
	Latin American	12 (Hispanic)	0.5 (Latin American)	0.9 (Hispanic or Latino)

Source: https://www.journalism.org/2016/02/25/seven-in-ten-reddit-users-get-news-on-the-site/; https://www.reddit.com/r/canada/wiki/2019survey; https://www.reddit.com/r/ontario/comments/f3tsh1/official_rontario_2019_survey_results/.

In terms of political beliefs all three of the surveys indicated that the typical Reddit user tends to be more liberal than the general population. The Pew Research Centre found that 47% of American users of Reddit identify as liberal compared to only 24% of the general population.[331]

[331] Barthel et al, *supra* note 328 at 7.

Similarly, the /r/Canada survey found that its members tend to be more liberal than the general population. Among its membership 51% voted for the Liberal Party of Canada in the 2015 federal election compared to only 39.5% of the general population. [332] Likewise 22% of the /r/Canada membership voted for the New Democratic Party of Canada – a leftist social democratic party – compared to 19.7% of the general population, and only 17% voted for the Conservative Party of Canada versus 31.9% of the general population.[333] Finally, the /r/Ontario survey also sees a more liberal leaning membership. Among its members, only 10.7% said they would vote for the Conservative Party of Ontario during the next provincial election whereas, a poll conducted around the same time as this survey found that 29% of the general population planned to vote for the Conservatives in the next provincial election.[334] In terms of religious beliefs, these surveys also indicate that most Reddit users are either atheist or agnostic. While the Pew Research Centre did not track religious belief of American Reddit users, the /r/Canada survey found that an overwhelming 73.6% of its users identified as having no religious affiliation and the /r/Ontario survey found 40.9% of its membership identified as atheist, and 25.1% agnostic.

This standard profile of a Redditor being a young, white, liberal leaning, male is much different than the general profile of users of other social media platforms. For example, there are more female users than male users on Facebook, Instagram, Pinterest, Snapchat, and TikTok with Pinterest having the widest gender gap among all social media platforms.[335] And while most social media tends to be adopted by younger age groups, Facebook is ubiquitous among all age categories.[336] Likewise, while only 4% of Black Americans use Reddit, 77% of them use YouTube, and 24% use WhatsApp.[337] This displays that Reddit, like any other social media platform, cannot claim to be representative of the general population. However, from a legal consciousness

[332] r/canada, *supra* note 329; CBC/Radio-Canada, "Canada Votes", (2015), online: *CBC News Interactives* <https://www.cbc.ca/news2/interactives/results-2015/>.
[333] *Ibid.*
[334] r/ontario, *supra* note 330; Robert Benzie, "Poll Puts Leaderless Liberals Ahead of Doug Ford's Conservatives", *Toronto Star* (15 January 2020), online: <https://www.thestar.com/politics/provincial/2020/01/15/poll-puts-leaderless-liberals-ahead-of-doug-fords-conservatives.html>.
[335] Gruzd & Mai, *supra* note 327.
[336] *Ibid*; Andrew Perrin & Monica Anderson, "Share of U.S. Adults Using Social Media, Including Facebook, is Mostly Unchanged Since 2018", *Pew Research Centre* (10 April 2019), online: <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/>.
[337] Pew Research Cente, "Who uses YouTube, WhatsApp and Reddit", *Pew Research Centre* (12 June 2019), online: <https://www.pewresearch.org/internet/chart/who-uses-youtube-whatsapp-and-reddit/>.

perspective, social media is still a useful subject for analysis since it can provide insight into how a particular population – namely social media users – understand and interact with the law which in turn can be used as a lens to explain specific phenomena.

Although these surveys assist in creating a general profile for the typical Reddit user, they do not necessarily reflect the actual sample studied. Certain subreddits, for example, may attract a differing subscriber base than others. For example, in one study that examined political interactions on Reddit during the 2016 U.S. presidential elections, the researchers identified the political leaning of Reddit users based on their posting behaviour.[338] In this study they were able to identify far more active users supporting Donald Trump than users supporting Hillary Clinton. The subreddit /r/The_Donald had 117,011 users who actively posted, versus 13,821 users who actively posted on /r/HillaryClinton and /r/HillaryForAmerica. Clearly those users posting in support of Donald Trump would not be characterized as liberal leaning. Similarly, while anywhere from two-thirds to four-fifths of Redditors are male, it is possible that there is a greater gender balance among those participating in the conversations that I examined. In a 2018 study, researchers examined millions of comments and inferred a gender to the author of those comments based on the posters' username to see if, among other things, the proportion of female participants varied substantially by topic.[339] The study found that gender participation rates do in fact vary greatly between subreddits, although this could not be used as evidence of any particular gender-based interest due to numerous other factors that affect participation such as the commenting culture of a particular subreddit.[340] The vast amount of comments that both of these studies needed to analyze in order to make their conclusions about demographics with confidence highlights the difficulty in using Reddit for any kind of demographic analysis.[341] As noted above, a Reddit user's profile does not provide any personal data such as age, gender,

[338] Gianmarco De Francisci Morales, Corrado Monti & Michele Starnini, "No Echo in the Chambers of Political Interactions on Reddit" (2021) 11:1 Scientific Reports 1.
[339] Mike Thelwall & Emma Stuart, "She's Reddit: A Source of Statistically Significant Gendered Interest Information?" (2019) 56:4 Information Processing and Management 1543.
[340] *Ibid* at 1555–1556.
[341] The study downloaded 3,683,577,011 separate comments. From these there were able to infer genders for 180,545,882 comments.

ethnicity, income, or education level. Trying to infer such characteristics based on the user's behaviour is a subject better left for a separate study.

Due to these constraints my study forgoes any comprehensive demographic analysis. This inability to examine legal problems within a demographic context is unfortunate given how cognisant the access to civil justice conversation is about the impact certain socio-economic characteristics have on legal needs, particularly in regards to vulnerable communities. With that said, I do not see this lack of demographic data as debilitating to my research aims. This project is seeking to explore the legal consciousness of Ontarians who use Reddit and experience particular legal problems: it is not seeking to compare and contrast the legal consciousness of different demographic groups within this community. This approach is akin to any other study that focuses on how a specific community experiences the law.[342] For example, a study focussing solely on racialized youth may be enriched if their findings were compared against the behaviour of non-racialized youth, however, that type of omission would not invalidate the findings themselves. Thus, the findings reported on in the following chapters should not be interpreted as applying broadly to everyone, rather they should be understood as evidence of how Ontarians who are active on Reddit experience a legal problem. In other words, although I am not making claims for universal applicability, my finding are none-the-less indicative of more general behaviour particularly when socio-economic factors – or the lack thereof – are taken into account.

3.6 Data Collection

Once the appropriate subreddits for examination were identified, I began to pull conversations from these communities in order to conduct my analysis. This led to the second issue that this project needed to address; being how to identify and pull relevant conversations from the hundreds of thousands of available posts and organize them such that they are

[342] This approach is also akin to other studies that have examined Reddit, wherein specific subreddits are analyzed as a community, with no mention of the particular demographic makeup within that community. See e.g. Christina Derksen et al, "'What Say Ye Gout Experts?' A Content Analysis of Questions About Gout Posted on the Social News Website Reddit" (2017) 18:1 BMC Musculoskeletal Disorders 1; Evelina Lundmark & Stephen LeDrew, "Unorganized Atheism and the Secular Movement: Reddit as a Site for Studying 'Lived Atheism'" (2019) 66:1 Social Compass 112.

conceptually comparable. As noted above, Reddit has yet to be studied as a subject of legal consciousness research, however, it has been used as a source of data for many other types of research. Like other studies that have engaged in a content analysis of Reddit, this project scrutinized Reddit in order to extract relevant conversations for analysis. However, the exact data collection process among these studies differed depending on the nature of the phenomena examined and the particular needs of the research. For example, one study collected all posts that were published on Reddit over a nine month period in order to understand the context in which not safe for work (NSFW) posts – being those posts that are labelled as containing content that should not be viewed in a professional setting – were operating. [343] Since Reddit users can attach one of three labels to their posts – NSFW, original content, or spoiler – the researchers were able to leverage this inbuilt mechanism of the Reddit platform to filter those posts that are marked as NSFW from those that are not. Most other studies, however, do not benefit from such inbuilt mechanisms and therefore need to filter potential data by other means. One way to do this is to utilize the Reddit search engine. The researchers of one study examining the public discourse surrounding non-invasive prenatal testing were able to find relevant conversations by inputting the search term "NIPT" into the Reddit search engine.[344] Other studies, however, benefit from the existence of small communities that are dedicated to their research aims. For example, in researchers were able to pull all questions posted to the subreddit /r/Gout, a support group for sufferers of the medical condition gout, over the course of a year in order to examine patient needs about gout.[345] Other projects may instead choose to focus on a particular window of time in which content is published. In one study that examined the subreddit /r/Atheism the researchers wanted to see how the culture of that community converges with formal atheist cultures. [346] To do this the researchers collected posts from the subreddit's "front page" – being the first 25 posts at any given time – on four separate occasions over the course of two days in order to see how quickly content moved on and off the front page. Although each of these studies

[343] Enrico Corradini et al, "Investigating the Phenomenon of NSFW Posts in Reddit" (2021) 566 Information Sciences 140.
[344] Alessandro R Marcon, Vardit Ravitsky & Timothy Caulfield, "Discussing Non-Invasive Prenatal Testing on Reddit: The Benefits, the Concerns, and the Comradery" (2021) 41:1 Prenatal Diagnosis 100.
[345] Derksen et al, *supra* note 342.
[346] Lundmark & LeDrew, *supra* note 342.

engaged in a content analysis of conversations posted to Reddit, they each possessed a unique approach to their data collection method that were tailored to better capture relevant conversations.

Due to the nature of my project, I needed to find conversations that dealt with legal problems. One way to group and compare these conversations is by legal problem type. For example, one may examine the rate at which individuals with employment law problems are directed to seek legal advice versus those with housing problems. This type of grouping makes conceptual sense for those embedded in the legal system because each problem type has its own governing law, its own set of remedies, and its own specific adjudicative mechanisms. However, grouping conversations by problem type may be considered artificial by anyone outside of the legal system as people generally do not experience legal problems in isolation.[347] Legal problems often multiply and are interconnected to other non-legal problems that are not easily separated from each other. For example, an individual suffering from a gambling addiction may, as a result of that addiction, lose their employment due to absenteeism, face eviction for failure to pay their rent, and find themselves estranged from friends and family. In Ontario, this scenario may be divided into two legal categories and two non-legal categories. The law will not concern itself directly with the gambling addiction nor the estrangement despite them being closely connected to the legal problems. The legal problems themselves will also be separated with the Landlord Tenant Board dealing with the eviction issue independently, and one of numerous forums dealing with the employment problem depending on how it is framed.[348] Despite this artificial siloing, there is conceptual sense to grouping conversations by problem type even to those that have no formal contact with the legal institutions. Whether the individual recognizes it or not, the fact remains that their behaviour is somewhat constrained by the legal frameworks in which they live. In Ontario, if a tenant decides to withhold rent from a landlord, the landlord must apply to the Landlord Tenant Board to evict the tenant. If they do so the tenant must also apply to the Landlord Tenant Board for a remedy. Moreover, grouping conversations by problem type

[347] Currie, *supra* note 44.

[348] For example, if the issue is framed as a wrongful dismissal it will be overseen by the civil courts. However, if it is framed as a discrimination issue – due to an employer's failure to accommodate – it may be heard by the Human Rights Tribunal.

recognizes that differing problem types raise differing concerns. For example, a dispute with an employer will raise different concerns (e.g. unjust dismissal or non-payment of wages) than a dispute with a landlord (e.g. eviction or illegal entry). By grouping conversations by problem type I am not presuming that all Ontarians possess the same legal consciousness, rather I am recognizing the legal constraints and boundaries that are imposed on all Ontarians. One final advantage to this method of grouping is that it continues in the tradition of legal needs scholarship which has consistently shown that problem type is the most determinative factor – even more so than demographic factors such as income, gender, or education – on how individuals respond to legal problems.[349] By examining the legal consciousness of individuals experiencing different problem types, this project helps to provide a theoretical underpinning to this branch of legal needs research.

For this project I focused on three types of legal problems; housing, employment, and family. I chose to focus on three so that, on one hand, I would have a basis of comparing differently situated groups of people, but also so that I would maintain a manageable dataset. I began the project anticipating that I would need about two hundred conversations per problem type in order to have enough data points to be able to draw themes and connections. Adding a fourth or fifth problem type would increase the scope of this project significantly and become unmanageable for the given timeframe. In order to pull conversations relevant to my inquiry, I performed a series of keyword searches in each of the nine geographic based subreddits and the two advice based subreddits identified in table 3.1. Reddit utilizes Boolean logic to pull data and therefore I needed to create a search phrase of keywords and operators that that would be specific enough to capture a wide set of housing, employment, and family problems but would not exclude problems due to a poster's lack of legal terminology. This is because I wanted to capture conversations that, while legal in nature, were not necessarily framed by the participants as such. For housing problems, this was relatively simple. I searched each of the identified subreddits for posts containing the following terms: "tenant OR landlord OR lease Or tenancy." All of these are well known general terms that capture a wide variety of housing problems, yet

[349] See e.g. Herbert M Kritzer, "To Lawyer or Not to Lawyer: Is that the Question?" (2008) 5:82 Journal of Empirical Legal Studies 875; Pascoe Pleasence & Nigel J Balmer, *How People Resolve "Legal" Problems* (Cambridge, 2014); Genn, *supra* note 40; But see Pleasence & Balmer, *supra* note 43.

do not require the participants to have explicit knowledge of the law. I chose not to use more specific terms such as "eviction" or "discrimination" as this would only capture a very specific type of legal problem and also have the unintended consequence of filtering nuanced legal problems by imposing a specific conception of law on the respondents. For employment problems, the search was a little more difficult as there are no terms – like lease or tenancy – that are commonly used to refer to the employment relationship specifically. As such I needed a greater set of terms and searched the phrase: "employer OR boss Or manager OR employee OR labour OR employment OR work OR job." These terms were general enough to provide a wide variety of conceptions of legal problems without limiting to preconceived ideas. Not surprisingly among the search results for both housing and employment were a plethora of posts that were not relevant to my project. As such, while gathering the data I was required to perform a cursory filtering of posts. I did not include in my data collection newspaper articles, or posts on how to find a job, or those looking for a rental apartment.

Family law problems turned out to be the most challenging set of problems to search. Like the prior two problem types, I believed that a good way to capture relevant conversations was to use the typical parties to a dispute as keywords. My first search of "husband OR wife OR partner OR spouse OR marriage OR 'common law'" was too broad and included an overwhelming amount of irrelevant posts. I found that in order to find relevant results I needed to also include keywords that referenced specific legal problems. Eventually, my search settled on the following phrase: "(husband OR wife OR partner OR spouse OR "common law" OR child OR son OR daughter OR kid OR family OR ex) AND (divorce OR custody OR support OR separate OR access OR restraining OR guardian OR property OR house OR agreement). Although this search is arguable more specific than the previous two, it is still general enough that the results did not require evidence of explicit knowledge of the law.[350]

After conducting the keyword search in each subreddit, I gathered the first twenty conversation for analysis, manually filtering out the irrelevant conversations. Interestingly, some of those subreddits with fewer members were unable to provide twenty relevant posts. This

[350] For example, while the term "divorce" has a specific legal meaning and a divorce application has specific legal consequences, it is also a term used in common parlance.

problem occurred much sooner with employment problems where I could not find twenty relevant conversation in /r/Hamilton (a community of approximately 15,000 members) than with housing problems where I was unable to find twenty relevant conversations in /r/WindsorOntario (a community of approximately 3,700 members). In terms of family problems it occurred almost immediately with /r/Toronto, the largest sub-reddit examined, only providing nine results. Fortunately, by analyzing eleven different subreddits I was able to gather sufficient data for each problem type. Even with the limited results in some subreddits I was able to gather a total of 193 conversations for housing problems, 142 conversations for employment problems and 106 conversations for family problems.

3.7 Analysis and Coding

The analysis and coding of the data took place concurrently. As noted above, my main objective was to find benchmarks for assessing whether current access to civil justice initiatives actually meet the legal needs of Ontarians from a justice as fairness perspective. I engaged in a mixed methods approach where I drew on elements of both qualitative and quantitative content analysis. My original protocol for each problem type was fairly simple and reflected a modified grounded theory approach in the sense that I was not exactly sure what the legal needs landscape of Redditors looked like and I wanted categories to emerge from the patterns that I identified.[351] With that said, I did enter this research with pre-existing theoretical constructs which drove much of the coding. Having studied existing legal needs research extensively, I was already interested in particular themes such as differing paths to justice. Thus my original protocol included a set of categories to capture preliminary information such as the date the legal question was posted and the number of comments it garnered as well as a set of categories examining the nature of the problem including the status of the poster (e.g. landlord or tenant), specific problem category (e.g. eviction, rent increase, or repairs), and suggested path to justice (e.g. negotiate, litigate, or walk away). However, recognizing the reflective nature of qualitative content analysis, I did not finalize the protocol prior to analysis, and allowed categories to emerge throughout the

[351] Barney G Glaser & Anselm L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Hawthorne, N.Y.: Aldine Publishing Company, 1967); Barney G Glaser, *Basics of Grounded Theory Analysis* (Mill Valley, CA: Sociology Press, 1992).

analysis.[352] As such new categories were added to the protocol dealing with, *inter alia*, the type of external information referred to, the seriousness of the problem, the nature of advice given, and the quality of advice given (see Appendix A). As these categories were added I periodically returned to conversations previously analyzed to ensure completeness.

As I coded each of the conversations, I concurrently took note of themes that began to repeat themselves. I also examined language construction to see how individuals position themselves vis-à-vis the problem, the legal institutions, and each other. In doing so I began to cluster conversations into similar thematic categories. For example, I began to see that Redditors were very much aware of the Landlord Tenant Board and understood it as a primary path to justice. Likewise, I saw that many Redditors viewed family problems as being particularly antagonistic. I then conducted a second cycle of coding where I grouped these clusters into more even precise themes and patterns so that I could develop meta-narratives of how Redditors with housing problems, employment problems, and family problems, understand and interact with the law. Here I did not presume that these three groups would share the same legal consciousness and used their divergent problem set as a basis of comparison. From this second analysis, I was able to develop a baseline understand of the extent in which Redditors struggle with their problems and how they resolve them.

3.8 Research Ethics

Whenever research involves human participants concerns over ethics are rightly of paramount importance to any researcher. Ethical concerns arise from the researcher's moral obligation to respect a participant's autonomy, to protect their welfare, and to ensure they are treated fairly.[353] Generally, this means that a researcher has a duty, among others, to protect the privacy of the participants. In the case of this project, the data was obtained from publically accessible discussion forums and thus privacy concerns with using this data are tempered since it is arguable that participants do not have a reasonable expectation of privacy over

[352] David L Altheide & Christopher J Schneider, *Qualitative Media Analysis*, 2nd ed (Los Angeles: Sage Publications Inc, 2013).
[353] Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada & Social Sciences and Humanities Research, *Tri-Councel Policy Statement: Ethical Conduct for Research Involving Humans* (Ottawa: Secretariat on Responsible Conduct of Research, 2018).

conversations that they post to a public forum. However, simply because data is publically available does not mean its use is necessarily ethical, especially if the data includes identifying information since individuals may not want their identity associated with the research.[354] In such cases privacy concerns can be addressed by ensuring that the data is either anonymized or anonymous. Anonymized data means that all personal identifiable information is irrevocably stripped from the data, whereas anonymous data means there was no identifiable information in the data to begin with.[355] By using such data the research guarantees that there is no opportunity for the research to violate the privacy of any individual since the risk of identification is very low.

This project created a database using conversations posted to an online public discussion board. The conversations pulled to create the database contained no identifying information and all contributors were completely anonymous. When coding the data, in order to further ensure anonymity, the usernames of participants were completely scrubbed and the conversations were simply identified by an alphanumeric (e.g. Housing 001). Moreover, I did not engage with or seek to contact any of the posters or commentators. Since the process of data linkage and the dissemination of results does not generate any identifiable information the Office of Research Ethics at York University determined that an ethics review was not required for this project.

3.9 Conclusion

The methods outlined in this chapter provide a framework for this project to examine the legal consciousness of Ontarians who use Reddit and, in doing so, assist in the development of benchmarks to assess whether current policies and initiatives reflect the legal needs of the population. Specifically, by examining hundreds of conversations about housing, employment, and family law problems posted to various Ontario based subreddits, this project was better able to understand how a population active on social media interacts with the law and the type of assistance they require. The findings presented in chapters 5 to 7 provide a baseline

[354] Danah Boyd & Kate Crawford, "Critical Questions for Big Data: Provocations for a Cultural, Technological, and Scholarly Phenomenon" (2012) 15:5 Information Communication and Society 662.
[355] Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada & Social Sciences and Humanities Research, *supra* note 66 at 59.

understanding of the current legal needs of Ontarians which in turn can be used to assess whether Ontario's access to civil justice movements does in fact address the needs of the population. Chapter 8 then uses the benchmarks established by this research to inform future access to civil justice landscape policy in Ontario. However, prior to engaging in this analysis it would be helpful to first have a context of the existing initiatives and programs that purport to improve access to civil justice. In Ontario there is no central agency tasked with improving access to civil justice. Rather, there is a multitude of government and non-government organizations that have sought to address failings in the legal system through variety of policy initiatives and programs. The next chapter provides an overview of the access to civil justice landscape in Ontario in terms of both government policy and non-government programs.

Chapter 4

The Access to Justice Framework

4.1 Introduction

The Canadian legal community has recognized for some time that access to civil justice is in a state of crisis where most people are unable to have their legal problems resolved in a fair, timely, and cost-effective manner.[356] The former Chief Justice of Ontario summed up the problem as follows:

> Unfortunately, though, for a large number of ordinary Ontarians, the civil justice system is growing more and more remote. In this ever-expanding group are those who find that the civil justice system is too expensive and too slow to provide them with any real help. Still others decide in advance that the costs, delays and complexities of a lawsuit (or even just early legal advice) are so overwhelming that they should not even bother to seek recourse in the court system. So they simply walk away from their rights; they never walk through the door of a lawyer's office.[357]

The inability for individuals to resolve legal problems is of concern from a justice as fairness perspective because it means that a growing class of people are excluded from a system of rights allocation that is meant to resolve conflicts and ensure cooperation for mutual advantage. In other words, those who are unable to resolve their legal problems are not only burdened with the reality associated with unmet legal needs – including financial costs, stress and health problems, and strained family relations – but also are denied a basic right of democratic citizenship.[358]

Recognizing the grave repercussions of an inaccessible justice system various government and non-government actors have instituted programs and policy initiatives in an attempt to improve peoples' access to civil justice. Traditionally – as evidenced by such programs as legal aid and pro-bono – the focus of these initiatives was with affordable and timely access to either the court system or to legal advice generally.[359] More recently, however, the focus of these initiatives

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[356] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101.
[357] Honourable Warren Winkler, *Access to Justice: Remarks to the Canadian Club of London* (London, 2008), online: <https://www.ontariocourts.ca/coa/en/ps/speeches/accessjustice.htm>.
[358] Canadian Forum on Civil Justice, *Everyday Legal Problems and the Cost of Justice in Canada: Survey* (Toronto, 2016); See also Roderick A Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor Yearbook of Access to Justice 287.
[359] Macdonald, *supra* note 14 at 504–505.

has expanded to include non-formal paths to justice and therefore seeks to improve access to a broad range of institutions, knowledge, and resources; all of which can assist individuals with reaching a fair resolution of their legal problems.[360] This chapter will examine those programs and policy initiatives that have been implemented over the last decade in order to assess the current access to justice framework in Ontario from a justice as fairness perspective. Specifically this chapter will map out how both government and non-state actors approach access to justice, and comment on whether their approach reflects justice as fairness in terms of their impact on procedural fairness, background fairness, and stake's fairness.

4.2 Government of Ontario Policies

4.2.1 Introduction

The provincial governments play a key role in Canada's access to civil justice movement. Under the *Constitution Act, 1867* the provinces are given exclusive jurisdiction to legislate in the areas of civil and property law.[361] This means that both the statutory and regulatory framework that governs the formal rights, remedies, and procedures of most civil legal problems are governed by provincial legislatures and executives.[362] The provinces are also granted exclusive jurisdiction over the administration of justice, which includes the rules of procedure that govern how rights and claims are brought to the formal system and how they are litigated in the Ontario Court of Justice, the Superior Court of Justice, the Small Claims Court, and the Unified Family Court. As such, any changes to the laws that would impact how a civil legal problem is resolved would have to originate at the provincial level.[363] Similarly the administration of the courts is also a provincial matter.[364] As such, filing fees for both the courts' and the sheriffs' office are set by provincial regulation. Perhaps more important from an access to civil justice perspective is that the regulation of legal services is governed by provincial law societies which are creatures of

[360] Trevor C W Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) at 6–9.
[361] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92.
[362] There are exceptions and nuances to this seemingly simple division of powers. Bankruptcy and insolvency problems, for example, fall under the exclusive jurisdiction of the Federal Government. Likewise, the authority to legislate on matters pertaining to marriage and divorce is also granted to the Federal Government.
[363] *Constitution Act, 1867*, supra note 361, s 92.
[364] *Ibid.*

provincial statute. Under Ontario's *Law Society Act,* for example, only those who are licensed can practice law and the statute delegates authority to the Law Society of Ontario to determine who can be licensed.[365] Likewise the primary vehicles for delivering public legal assistance are provincially established corporations. Legal Aid Ontario, for example, is an independent but publicly funded non-profit corporation established by provincial statute.[366] Their mandate, as governed by statute, is to promote access to justice for low-income Ontarians through, *inter alia,* the provision of legal aid service.[367] Thus, any changes to how both private and public legal services are offered will inevitably involve the provincial governments. For all of these reasons, the provinces have a major role in ensuring access to civil justice and a review of their policy perspectives is fundamental to understanding the access to civil justice framework in that province.

4.2.2 Current and Recent Ontario Government Policy Perspectives

Recognizing the central importance of access to civil justice to democratic governance and the rule of law successive Ontario governments have implemented policy initiatives ostensibly with the intent to improve access to civil justice for Ontarians. However, like any government policy, there is a political dimension to these initiatives and how the government frames access to civil justice reflects the political priorities of the government. In Ontario, elections are typically contests between the centre-left Ontario Liberal Party and the centre-right Progressive Conservative Party of Ontario, with the socialist Ontario New Democratic Party playing second fiddle.[368] Due to the electoral system, minority governments are rare. In 2018, the Progressive Conservative Party, led by Doug Ford, won a majority government ending fifteen

[365] *Law Society Act,* RSO 1990, c L.8, s 27 [*Law Society Act*].
[366] *Legal Aid Services Act, 2020*, SO 2020, c 11, Schedule 15 [*Legal Aid Services Act, 2020*] While a creature of provincial statute, it is worth noting that Legal Aid Ontario receives significant funding from the Federal Government to help administer its criminal law and its immigration and refugee programs. See e.g. Legal Aid Ontario, *Annual Report 2018-2019* (Toronto, 2019).
[367] Legal Aid Ontario, "About LAO", (2021), online: <https://www.legalaid.on.ca/more/corporate/about-lao-landing-page/>. The current mandate of Legal Aid Ontario is arguably more closely aligned to the now revoked *Legal Aid Services Act, 1998* than it is to the new *Legal Aid Services Act, 2020*, which removed explicit reference to low-income Ontarians from the stated objectives of the Corporation. See *Legal Aid Services Act, 2020*, supra note 366, s 17; *Legal Aid Services Act, 1998,* SO 1998, c 26, s 4 [*Legal Aid Services Act, 1998*].
[368] In the forty two elections held in Ontario, the NDP only formed the government once from October 1990 to June 1995.

years of Liberal Party governance. While this change in government did signal a shift in policy, there are also clear similarities between how these governments approached access to civil justice. This section will examine three key policy documents in order to get a sense of prevailing trends and themes in government policy over the last decade and a half. Specifically it will examine the *Smarter and Stronger Justice Act, 2020* introduced by Premier Ford's Conservative Party, the 2017 *Putting Justice Within Reach* policy paper of Premier Kathleen Wynn's Liberal party, and the *Access to Justice Act, 2006*, implemented by Premier Dalton McGuinty's Liberal party.

On July 8, 2020, the Progressive Conservative Party of Ontario passed the *Smarter and Stronger Justice Act, 2020* which contained eighteen schedules that amended a total of eighteen separate pieces of legislation relevant to access to civil justice.[369] It also revoked the *Legal Aid Services Act, 1998* – the governing legislation for publicly funded legal services – and established a new framework for the provision of publicly funded legal services. Given the extensive nature of the bill and the disperse nature of amendments, it is difficult to concisely summarize its impact on access to civil justice. For example, while schedule 5 amended the *Courts of Justice Act* so that deputy judges who are removed from office following a complaint are no longer entitled to compensation for legal costs incurred in relation to that complaint, schedule 11 amended the *Juries Act* so that the addresses of potential juries are not included on panel lists. Despite the disparate and technical nature of these amendments, several key themes emerge that characterize the government's current approach to access to civil justice including: the need to modernize an out-dated and archaic legal system; the need for a more efficient and affordable legal system; and a need to better protect honest and law-abiding citizens.

The current Conservative government's approach to access to civil justice is, arguably, not that different than the policies of the previous Liberal governments. In 2013, Premier Kathleen Wynne became leader of the Ontario Liberal Party and premier of Ontario; a post she held until the election of Premier Doug Ford in 2018. In many respects her government was a continuation of the previous three liberal governments of Premier Dalton McGuinty in which she was a

[369] Bill 161, *An Act to Enact the Legal Aid Services Act, 2020 and to Make Various Amendments to Other Acts Dealing with the Courts and Other Justice Matters*, 1st Sess, 42nd Parl, Ontario, 2020 (assented to July 8, 2020), SO 2020, c 11 [*Smarter and Stronger Justice Act*].

prominent member holding several cabinet posts. In 2006, McGuinty's Liberals passed the *Access to Justice Act, 2006.*[370] Like the more recent *Smarter and Stronger Justice Act, 2020,* it too amended numerous and disparate pieces of legislation in order to improve access to the justice system. For example, while it amended the *Law Society Act* to allow for the regulation of paralegals, it also amended the *Limitations Act* to allow for the extension of a limitation period – the period in which a party is allowed to file a lawsuit – by agreement. Many of these changes were justified as being needed to modernize the legal system and make it more efficient. This piece of legislation represented the centrepiece of Ontario's access to justice policy until 2017 when the Ontario Ministry of the Attorney General released a policy paper entitled *Putting Justice Within Reach: A Plan for User-Focused Justice in Ontario.*[371] Specifically, the paper proposed leveraging technology to make the legal system more efficient and affordable to users. While this policy paper still centred on the themes of modernization and efficiency found in the *Access to Justice Act, 2006* it represented a significant shift in perspective by emphasizing the need for a "user-focused" justice system.

The access to justice policy of both the Conservative and Liberal governments can be characterized by themes of modernization, efficiency, and user focus. The primary difference between them is really one of nuance. Both parties would claim they support a modern, efficient, and user-focused system and often employ similar language. However, the exact meaning of modernization, efficiency, or user focus differs slightly with each government. The next sections will examine these themes in greater depth and critique them from a justice as fairness perspective.

4.2.3 Modernization

Calls to modernize the legal system have been a persistent focus of civil justice reform efforts since the dawn of the access to justice movement.[372] While it is often framed in terms of

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[370] Bill 14, *An Act to Promote Access to Justice by Amending or Repealing Various Acts and by Enacting the Legislation Act, 2006*, 2nd Sess, 38th Parl, Ontario, 2006 (assented to 19 October 2006) SO 2006, c 21 [*Access to Justice Act, 2006*].

[371] Ontario Ministry of the Attorney General, *Putting Justice Within Reach* (Toronto, 2017), online: <https://www.ontario.ca/page/putting-justice-within-reach-plan-user-focused-justice-ontario>.

[372] See Cappelletti & Garth, *supra* note 2.

legal processes and procedures, appeals for modernization may also be directed towards other aspects of the legal system. [373] For example, when the Action Committee on Access to Justice in Civil and Family Law released its landmark report on access to justice reform, it identified the delivery of legal services, the substantive family law, and court and tribunal infrastructure all as being in need of modernization.[374] As a method for improving access to justice, modernization draws its legitimacy from a narrative that emphasizes antiquated and outdated systems.[375] These systems are seen as being barriers to justice in of themselves and, as such, changing them will necessarily improve access to justice.[376] Such was the narrative that Supreme Court Justice Rosalie Abella drew on in a speech advocating for the need to modernize the legal profession:

> "And yet, with all these profound changes over the last 114 years in how we travel, live, govern and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil trials almost exactly the same way as we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Can we say that about any other profession?"[377]

The evident problem with this narrative is that it risks conflating modernization with access to justice. While old processes may indeed act as barriers to justice, the new processes that replace them are not necessarily more accessible by definition. For example, there is a deep concern that vulnerable communities, who often struggle to access reliable internet, will face additionally challenges as more court process shift to online formats.[378] Perhaps more problematic is that this narrative adopts an instrumentalist perspective which fails to engage with substantive issues of justice. For example, while some advocate for the greater use of video conferencing technology in the courtroom due to the perceived need to modernize the trial process, such technology

[373] See discussion in 3.2.3 below.
[374] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101.
[375] See e.g. Adrian Clarke, "Why Blockchain Belongs in the Courtroom", *Entrepreneur* (15 November 2018), online: <https://www.entrepreneur.com/article/322880>; Glenn Kauth, "Ontario Lagging in Court Technology", *Law Times* (31 December 2012).
[376] For a discussion that critiques the assumption that technology necessarily enhances access to justice see Jane Bailey, Jacquelyn Burkell & Graham Reynolds, "Access to Justice for All: Towards an 'Expansive Vision' of Justice and Technology" (2013) 31:2 Windsor Yearbook of Access to Justice 181.
[377] Rosalie Silberman Abella, "Our Civil Justice System Needs to Be Brought Into the 21st Century", *The Globe and Mail* (24 April 2020), online: <https://www.theglobeandmail.com/opinion/article-our-civil-justice-system-needs-to-be-brought-into-the-21st-century/>.
[378] Bailey, Burkell & Reynolds, *supra* note 376 at 199–200.

potentially undermines the civil justice system by impeding assessments of credibility, and by threatening the solemnity associated with the trial process.[379] There is no doubt that modern processes, such as those made possible by technology, can and have improved the user experience for many; however, this does not mean that modernization is synonymous with improved access to justice. As discussed below, much of government policy as it relates to modernization is predicated on this false parallelism.

I. Access to Justice Act, 2006

The first and most prominent narrative evident in both the Liberal and Conservative governments' approach to access to civil justice is that Ontario has an outdated justice system that is in desperate need of modernization. When Michael Bryant, the former Attorney General of Ontario, introduced the *Access to Justice Act* into the legislature back in 2005 he stated that it would not only modernize the justice system generally but also the court system specifically.[380] What Bryant meant exactly by modernization is a little unclear. Generally the Attorney General equated modernization with making processes more open and transparent. This is particularly evident in regards to Schedule B of the *Access to Justice Act*, which amended the appointment process under the *Justices of the Peace Act.* Bryant stated that these changes would "Modernize the justice of the peace system in Ontario..." by ensuring "… a more open and transparent appointment process for justices of the peace…"[381] In other circumstances, however, the Act equates modernization with changes that allow for more flexibility within system processes. The Attorney General claimed that schedule B would also modernize access to justice because it allowed for the appointment of per diem justices of the peace. "These improvements would introduce increased flexibility for the court in scheduling justices of the peace."[382] Finally, modernization also meant integrating digital technology into the legal process. Most significantly

[379] Amy Salyzyn, "A New Lens: Reframing the Conversation About the Use of Videoconferencing in Civil Trials in Ontario" (2012) 50:2 Osgoode Hall Law Journal 429.
[380] Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 11 (27 October 2005) at 494 (Hon Michael Bryant), online: < https://www.ola.org/en/legislative-business/house-documents/parliament-38/session-2/2005-10-27/hansard>.
[381] *Ibid* at 495.
[382] *Ibid.*

schedule F enacted the *Legislation Act, 2006* which established an electronic database of both source law and consolidated law for the province of Ontario and declared that all current consolidated laws published on that site were official versions of law.[383] According to Bryant this legislation would "…modernize the law-making system by bringing the way laws are published and interpreted into the electronic age."[384] This theme of modernization becomes much more pronounced and single focused in the 2017 policy paper *Putting Justice Within Reach.*

II. Putting Justice Within Reach (2017)

Putting Justice Within Reach is premised on the notion that the justice system is archaic and out of date. In its mission statement Yasir Naqvi, the then Attorney General, stated "Ontario undoubtedly boasts one of the best legal systems in the world, but the reality is that as the digital world has grown around us, many of the processes that guide our legal system have remained stuck in another time."[385] The access to justice solution presented in this paper was to incorporate digital technology into all aspects of the legal system. The paper outlines three waves of changes that will make "…a more modern, user-focused, adaptive system."[386] The first wave, which the paper claims is mostly complete, involves "…moving old-fashioned, in-person court processes to online services."[387] Thus, for example, people can pay their traffic tickets online, fill out their jury questionnaires online, and file for divorce online. The second wave seeks to "…bring our courts into the 21st century."[388] Here the paper suggests that courts adopt digital tools that will allow the sharing of information between lawyers, litigants and the court. The paper envisions an "electronic courtroom" that has one secure point of access for all court documents. The paper advocates for greater use of remote appearances and states that all courthouses should be equipped with Wi-Fi infrastructure. The third wave becomes a little speculative as it suggests working with private sector start-ups to incorporate artificial intelligence into the dispute resolution process and boasts partnerships with various actors in the legal tech sector.

[383] *Legislation Act, 2006*, SO 2006, c 21, Schedule F.
[384] Legislative Assembly of Ontario, s*upra* note 380 at 495.
[385] Ontario Ministry of the Attorney General, *supra* note 371 at 3.
[386] *Ibid*.
[387] *Ibid*.
[388] *Ibid*.

III. Smarter and Stronger Justice Act, 2020

The Conservative government's approach to access to civil justice also emphasized themes of modernization. The government backgrounders that accompanied the introduction of the *Smarter and Stronger Justice Act, 2020* into the legislature characterizes the justice system as woefully outdated and in desperate need of modernization. According to Ministry of the Attorney General "The *Smarter and Stronger Justice Act*, if passed, would simplify a complex and outdated justice system…"[389] Here it is interesting to note that the Conservative government conflates outdatedness with complexity and modernization with simplicity or convenience. The Minister is quoted as stating "We have heard loud and clear from people across Ontario that the justice system has grown too complex and outdated…"[390] and, according to the news release, the proposed amendments would "…simplify a complex and outdated justice system." [391] Specific Acts are also seen as being outdated. "Ontario's class action legislation has not been significantly updated in more than 25 years. The current system is outdated…"[392] And again "The Legal Aid Services Act is outdated and does not reflect the type of modern and efficient legal aid system Ontarians expect."[393] The solution is to simplify services by removing outdated processes. [394] For example, the government touts its proposed changes to the *Estates Act* which would simplify the process of applying for probate for small estates.[395]

Despite claims that the entire justice system is outdated some of the amendments proposed to the eighteen various Acts are cosmetic rather than sweeping. For example, the only amendments made to the *Limitations Act, 2002* was to remove obsolete references to other

[389] Ontario Ministry of the Attorney General, "Simplifying a Complex and Outdated Justice System to Better Serve People", (2019), online: <https://news.ontario.ca/en/backgrounder/55021/simplifying-a-complex-and-outdated-justice-system-to-better-serve-people>.
[390] Ontario Ministry of the Attorney General, "Building a Stronger Justice System to Grow Safer Communities", (2019), online: <https://news.ontario.ca/en/release/55024/building-a-stronger-justice-system-to-grow-safer-communities>.
[391] *Ibid*.
[392] Ontario Ministry of the Attorney General, "Better, More Affordable Justice for Families and Consumers", online: *2019* <https://news.ontario.ca/mag/en/2019/12/better-more-affordable-justice-for-families-and-consumers.html>.
[393] Ontario Ministry of the Attorney General, *supra* note 389.
[394] *Ibid*.
[395] Ontario Ministry of the Attorney General, *supra* note 392.

Acts.[396] In other instances, the amendments are more substantive, however, they are extremely procedural and legalistic. The *Class Proceedings Act, 1992,* for example, was amended to allow for, *inter alia*, the dismissal of proceedings for delay for multi-jurisdictional proceedings, or the distribution of certain types of awards on a *cy-pres* basis.[397] Interestingly, perhaps the most impactful of proposed amendments in terms of modernization was eventually severed from *Stronger Justice Act, 2020* and became a schedule attached to the *COVID-19 Response and Reforms to Modernize Ontario Act, 2020*.[398] This schedule, which was originally attached to the *Stronger Justice Act, 2020,* amended the *Commissioners for Taking Affidavits Act* to allow for the virtual commissioning and notarization of documents.[399] Here the government again characterizes the current system as terribly outdated. "Ontario's current system of verifying documents through notaries and commissioners is stuck in a pre-technology stone age."[400] In this context, modernizing the legal system means making it more convenient through greater use of digital technologies and formats. "People expect the same level of convenience when they interact with our legal system, and notarizing documents is an excellent example of where we can modernize an out-of-date process..."[401] Thus in the context of the *Smarter and Stronger Justice Act, 2020* modernization principally refers to simplification and convenience.

IV. Modernization and Justice as Fairness

Successive governments have directly equated modernization with improving access to civil justice. However, what is meant by modernization has changed over time. In the mid-2000s modernization was primarily equated with making systems more transparent and open. Three governments later, modernization shifted to mean embracing and implementing digital technology. By the year 2020, modernization primarily spoke to simplification and convenience.

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[396] *Smarter and Stronger Justice Act, supra* note 369.
[397] *Ibid.*
[398] Bill 190, *An Act to Enact One Act and Amend Various Acts in Respect of COVID-19 and Make Other Amendments,* 1st Sess, 42nd Parl, Ontario, 2020 (assented to 12 May 2020), SO 2020, c 7.
[399] *Ibid,* s 6.
[400] Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, No 143 (19 February 2020) at 6967 (Hon. Doug Downey), online: <https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2020-02-19/hansard>.
[401] *Ibid.*

Arguably each one of these formulations of modernizing the legal system can improve various aspects of access to civil justice. For example, making the appointment process for Justices of the Peace more transparent may positively impact a user's trust in the legal system and further support a user's belief that the adjudicator is neutral and free of bias. Given that a user's perception of issues like trust and neutrality act as a proxies for measuring procedural fairness, a positive impact on these perceptions would thus increase access to procedural fairness. Similarly, implementing various technologies into the legal process, such as secure data points for the sharing of information between lawyers, courts and litigants, may help to reduce the cost of litigation. If this cost reduction is passed onto the litigant, procedural fairness may be increased since litigants who were formerly priced out of the legal services market would have a greater opportunity to meaningfully participate in the proceedings if they could now afford legal representation. Finally, improving convenience would also increase both procedural fairness and background fairness for similar reasons. For example, by allowing for the virtual commissioning of documents, those in rural areas presumably would not have to expend additional resources to receive the same level of service as those in urban areas.

There are, however, several problems with how the government has presumed modernization would inevitably lead to improved access to justice. First, these conceptions of modernization are generally made primarily for the benefit of the system and not the user. That is, the focus of these amendments is not on resolving or preventing legal problems but on the operational aspects of the legal system. While improving operations is important, it primarily benefits court staff, lawyers, and judges, and often has little direct impact on the user. For example, amendments to the *Justices of the Peace Act* that allow for the appointment of per diem justices of the peace grants greater flexibility in court scheduling, but does not directly impact a user's experience; litigants should receive the same level of procedural fairness regardless of whether the justice of the peace is a per diem justice or full time justice. Likewise, amendments to the *Class Proceedings Act* that allow for the dismissal of multi-jurisdictional proceedings for delay might help to clear court backlogs of dormant cases, but will not get a litigant to court quicker since all this amendment is doing is cleaning up lists of cases that are not being schedule for a hearing anyway. Arguably these types of amendments may be necessary to

modernize the justice system, but given their technical and system centred nature they cannot be said to greatly improve procedural fairness for the user in any meaningful way.

Another problem lies with how the government presumes that incorporating technology into the legal process is synonymous with improved access to civil justice. Digital tools that allow for the user to engage with the system in a more cost-effective or convenient manner – such as those that allow for the e-filing of court documents or for the virtual commissioning of documents – certainly have the potential to positively impact procedural fairness by improving the ability of individuals to meaningfully participate in the process. However in order to have an impact two criteria must be met. First, people need to have access to reliable internet in order to benefit from these technologies and, second, people also need to have the legal knowledge and capability to engage with these tools. The second of these points will be examined in greater detail in section 4.3.2 below, however, in regards to the first point many communities in Canada do not have access to fast, reliable, and affordable internet. For example, in many remote communities – being the ones that are furthest away from a physical courthouse and thus the ones that would benefit most from digital solutions – fast, reliable, and affordable internet access is simply not available.[402] Poverty, too has an impact on individual access to internet service wherein those in the lowest income bracket tend to have less access to the internet. [403] In such instances, government policy in favour of more integrated technology might actually have a negative impact on background fairness since members of certain communities will not have the same access to the legal system as other communities with greater internet access. Thus, rather than providing greater access to civil justice, digital solutions on their own have the potential to perpetuate exclusions by making it even more difficult for those with limited or no internet access to access the legal system.[404] In order for technology to have a positive impact on access to civil

[402] Canadian Radio-Television Comminications Commission, "Broadband Fund: Closing the Digital Divide in Canada", (2020), online: <https://crtc.gc.ca/eng/internet/internet.htm>.
[403] Statistics Canada, "Household Access to the Internet at Home, by Household Income Quartile and Geography", (2017), online:
<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=2210000701&pickMembers%5B0%5D=3.2>.
[404] Patricia Hughes, "Advancing Access to Justice Through Generic Solutions: the Risk of Perpetuating Exclusion" (2013) 31:1 Windsor Yearbook of Access to Justice 1.

justice, it needs to be coupled the investment in affordable internet infrastructure otherwise modernizing the court process is moot to many users of the system.

4.2.4 Efficiency

A second theme that runs through the last fifteen years of government thinking on access to civil justice is that of efficiency. Efficiency is fundamentally tied to the cost of offering a good or a service. Within the context of civil reform programs efficiency based arguments play a central role in driving policy for numerous reasons. From a supply side perspective, increasing fiscal pressures means that governments are continuously looking for ways to reduce their own costs and increased efficiencies offer one way to do this.[405] From a demand side perspective, increased efficiencies are often seen as a way to decrease the cost of law to the consumer, while at the same time increasing the flexibility and responsiveness of the service provider.[406] Like modernization, increased efficiencies may have a positive impact on access to justice if those efficiencies are actually passed onto the user. However, efficiency based arguments often prioritize cost saving measures over other normative concerns such as equity, fairness, or the public interest. In these situations, justice is characterized as being no different than any other marketable product, which is clearly problematic.[407] Unlike other goods and services, justice aims to resolve disputes, set society-wide expectations, allocate rights equitably, and distribute benefits fairly and inefficient process may be required in order to accomplishing these goals. [408] In other words, efficiency, from a civil justice reform perspective, should not be an end in itself, but rather a means to help achieve access to civil justice.[409] As discussed below, this perspective is often absent from government policy which tends to see increased efficiencies as the end goal.

I. Access to Justice Act, 2006

At the time that the *Access to Justice Act, 2006* was being read in the legislature, efficiency was characterized as one of the pillars of a well-functioning legal system. During the Act's second

[405] See e.g. Trebilcock, *supra* note 9.
[406] Farrow, *supra* note 33 at 203–212.
[407] *Ibid* at 203.
[408] *Ibid* at 287.
[409] *Ibid* at 284–292.

reading it was noted that "The people of Ontario deserve a justice system that is fair, efficient and accessible."[410] Like modernization, efficiency can have multiple meanings, however, the *Access to Justice Act, 2006,* uses the term in its ordinary meaning: being "productive with minimum waste or effort."[411] To this end, it was argued that the amendments proposed to the *Provincial Offences Act* would help ensure that the administration of justice worked as efficiently as possible by reducing the time police needed to attend court and by reducing the case load of provincial court houses.[412] Likewise the amendments to the *Limitations Act* would remove obstacles to the efficient resolution of legal disputes by giving businesses the ability to enter into agreements to lengthen limitations periods.[413] Further displaying how this government equated access to justice with efficiency, the *Access to Justice Act, 2006* amended several pieces of legislation to impose obligations of efficiency on various institutions. Schedule A, for example, amends the *Courts of Justice Act* to include five goals of administration of the courts, one of which was to "promote the efficient use of public resources."[414] Likewise Schedule B amends the *Justice of the Peace Act* to impose a duty on the Associate Chief Justice Co-ordinator of Justices of the Peace of "maintaining the high quality of the justice system and ensuring the efficient administration of justice."[415] Finally, Schedule C, amended the *Law Society Act* to impose principles that the Law Society must abide by when carrying out its functions including the "duty to act in a timely, open and efficient manner."[416]

II. Putting Justice Within Reach (2017)

Eleven years later, the government policy paper entitled *Putting Justice Within Reach* continued to focus on the theme of efficiency. The press release announcing the paper's launch declared that "Ontario is modernizing the justice system to make it more accessible, efficient and

[410] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 38th Parl, 2nd Sess, No 36B (13 February 2006) at 1789 (David Zimmer), online: < https://www.ola.org/en/legislative-business/house-documents/parliament-38/session-2/2006-02-13/hansard-1>.
[411] *The Oxford Canadian Dictionary,* 2nd ed, *sub verbo* "efficient".
[412] *Supra* note 410 at 1790.
[413] *Ibid* at 1789.
[414] *Access to Justice Act, 2006, supra* note 370, Schedule A, s 14.
[415] *Ibid,* Schedule B, s 12.
[416] *Ibid,* Schedule C, s 7.

responsive to the needs of people across the province."[417] Here efficiency is characterized as a by-product of modernization wherein outdated processes are by definition inefficient. The opening line to the policy paper reads as follows: "Ontario's legal professionals are talented, experienced and knowledgeable, but the tools and systems they work with in courts and throughout the broader justice system are often outdated and inefficient."[418] The paper claims that by introducing digital systems the waste and inefficiencies within the legal system will be reduced and thus access to justice improved. In positioning efficiency as a by-product of modernization, this policy paper begins to conflate efficiency with other related, but not synonymous, concepts such as affordability, ease of use, simplification, and faster resolution. For example, the paper seeks to automate information sharing in order to "…save everyone time, paper, and money."[419] To do this, the government promises to develop a secure database for the sharing of electronic documents thus"…reducing the need for millions of paper documents and unnecessary trips to the courthouse."[420] Similarly, the paper proposes instituting various digital platforms for the filing of online documents to give "…Ontarians a simpler and quicker option to file their applications and submit documents."[421] Finally, the paper proposes developing Online Dispute Resolution platforms that would allow for low cost and intuitive "…online alternatives to resolve disputes without needing to go to a courthouse."[422] The paper also notes that disruptive technologies, such as artificial intelligence, could be used to improve efficiency within the system and proposes partnering with the legal tech community to develop novel technologies that would enhance access to justice by saving time and reducing costs.

III. Smarter and Stronger Justice Act, 2020

The Conservative government of Premier Doug Ford continued to place a pronounced emphasis on the role of efficiency in improving access to justice. As noted above, the *Smarter*

[417] Ontario Ministry of the Attorney General, "Ontario Making it Easier to Access Justice Services Online", (2017), online: <https://news.ontario.ca/en/bulletin/47228/ontario-making-it-easier-to-access-justice-services-online>.
[418] Ontario Ministry of the Attorney General, *supra* note 371 at 9.
[419] *Ibid*.
[420] *Ibid* at 10.
[421] *Ibid* at 7.
[422] *Ibid* at 14.

and Stronger Justice Act, 2020 amended eighteen separate pieces of legislation all in the name of improving access to justice. Most of these amendments were rationalized on grounds of efficiency. For example, requiring case management masters to reapply for their position every seven years was seen as placing an administrative burden on the government and the proposed changes to *the Courts of Justice Act* that would remove this requirement was said to be necessary to make the appointment process more efficient.[423] Similarly, changes to the *Estates Act* "…would also increase efficiency by allowing local court registrars to do the required estate court records searches rather than a central court registrar."[424] Likewise various amendments to the *Class Proceedings Act* "…would make class actions more fair, transparent and efficient for people and business in Ontario…"[425] The most obvious example of this government's emphasis on efficiency's role in improving access to justice, however, is in regards to the administration of publicly funded legal services.

The *Smarter and Stronger Justice Act, 2020,* revokes the *Legal Aid Services Act, 1998* and replaces it with the *Legal Aid Services Act, 2020.* One of the primary justifications cited for this new piece of legislation was that the old legislation was out of date and inefficient. As noted by the backgrounder accompanying the Act's introduction into the Legislature: "The Legal Aid Services Act is outdated and does not reflect the type of modern and efficient legal aid system Ontarians expect."[426] Likewise, access to justice would be improved by removing "…barriers to efficient service delivery for both LAO [Legal Aid Ontario] and its service providers…"[427] Efficiency in this context is about delegating authority to Legal Aid Ontario. Part III of the old Act deals with the delivery of publicly funded legal services and outlines, among other things, three programs to support the delivery of public legal assistance: the duty counsel program, the legal clinic program, and certificate program.[428] The new Act, which continues Legal Aid Ontario as a non-profit corporation, addresses the delivery of publicly funded legal services in Part II; which is notably smaller at 13 sections compared to the 28 sections of the old Act that dealt with the

[423] Ontario Ministry of the Attorney General, *supra* note 389.
[424] Ontario Ministry of the Attorney General, *supra* note 392.
[425] *Ibid*.
[426] Ontario Ministry of the Attorney General, *supra* note 389.
[427] *Ibid*.
[428] *Legal Aid Services Act, 1998,* supra note 367, ss 12-39.1,

delivery of services.[429] Here, instead of detailing the various programs that Legal Aid Ontario must offer, the new Act simply states that Legal Aid Ontario may provide – subject to regulations – any legal service it considers appropriate.[430] In other words, the new Act removes any statutory obligation for Legal Aid Ontario to fund legal clinics and to provide specific programing. Similarly, Part IV of the old Act, which is 11 sections long, addresses processes for recovering the cost of legal aid services from contributing clients.[431] The new Act reduces this entire Part to one section simply stating that Legal Aid Ontario can set out rules requiring contribution.[432] Owing to this focus on delegation, the proposed new *Legal Aid Services Act, 2020* is much more concise than the old one; it consists of a mere 48 sections – excluding transitional sections – compared to the old Act's 97 sections.

IV. Efficiency and Justice as Fairness

Efficiency has been a consistent theme underlying access to civil justice policy of all three governments. While there has been some nuance with how each government seeks to improve efficiency, the focus has typically been about processes rather than substantive law or fair outcomes. Equating improved access to justice with more efficient processes is an intuitive and practical approach to the problem. Indeed many commonly cited barriers to justice such as high costs and delays can either be directly attributed to or exasperated by inefficient processes. If those processes can be streamlined such that a user can resolve their legal problem in a more affordable and quicker manner, than procedural fairness has been improved since that user has been given a more meaningful opportunity to pursue their claims and entitlements. Efficiencies, however, do not necessarily correlate to such improvements if they are made for the sole benefit of the system. For example, if efficiencies are designed so that the court can produce the same workload with a smaller budget than the user does not benefit and there can be no claim to improved access to justice. Peter Kormos, the NDP justice critic at the time of Premier Dalton McGuinty's Liberal government, criticised the *Access to Justice Act, 2006* for its focus on

[429] *Legal Aid Services Act, 2020, supra* note 366, ss 3-15.
[430] *Ibid,* s 3.
[431] *Legal Aid Services Act, 1998, supra* note 367, ss 27-33.
[432] *Legal Aid Services Act, 2020, supra* note 366, s 9.

efficiency. He saw this piece of legislation as being more about saving the government money than improving access to justice for the users of the legal system. Speaking about changes to the *Provincial Offences Act*, he stated: "This has nothing to do with access to justice; it has nothing to do with justice at all. It's an efficiency measure designed to reduce the caseload."[433] Similar concerns can be raised about most of the government policies that focus on efficiency: efficiencies framed either as very general duties to use resources more efficiently, or very technical and legalistic changes that seek to reduce caseload are likely to benefit judges, court staff, lawyers and bureaucrats more than the user. For example, the Conservative government of Premier Doug Ford claims that changes to the *Class Proceedings Act* will mean that "…people receive compensation sooner, and businesses experience fewer financial and reputational risks."[434] Yet many of the changes, such as granting courts power to dismiss dormant cases, encouraging preliminary motions to narrow issues, and instituting stricter tests for certification, are process based changes whose primary impact will be the reduction of a court's case load rather than quicker resolution. Similarly, the same government claims that by delegating authority to Legal Aid Ontario, the new *Legal Aid Services Act, 2020* will improve the efficiency of service delivery and thereby improve access to justice.[435] Yet the way in which this Act delegates this authority is by removing any statutory obligation to fund such programming as community legal clinics, and by changing its mandate away from assisting low-income and of disadvantaged communities. Some within the legal community worry that budgetary pressures will mean that Legal Aid Ontario will choose to no longer offer the services that they were previously obligated to provide.[436] If this worry turns out to be accurate, than the *Legal Aid Services Act, 2020* would have the opposite effect of improving access to justice since institutional resources are being diverted away from programs intended to help the least advantaged members of society.

[433] *Supra* note 410 at 1802 (Peter Kormos).
[434] Ontario Ministry of the Attorney General, *supra* note 392.
[435] Ontario Ministry of the Attorney General, *supra* note 389.
[436] Anita Balakrishnon, "Behind Closed Doors, Ontario Legal Clinics Face High-Pressure Negotiations Amid Provincial Plan", *Law Times* (12 March 2020), online: <https://www.lawtimesnews.com/practice-areas/human-rights/behind-closed-doors-ontario-legal-clinics-face-high-pressure-negotiations-amid-provincial-plan/327425>.

4.2.5 User Focused

Re-orienting the justice system so that it is guided by a more user focused perspective has been a strong theme reverberating within Canadian access to civil justice policy for years. A user focused perspective, however, could mean one of two things. Firstly, it may mean that the justice system should be reformed to become more responsive to the needs of the users. Under this heading, it is often argued that reform must make it easier for people to access the formal justice through such mechanism as simplifying rules of procedure, or diverting certain claims to specialized adjudicative forums. The Action Committee on Access to Justice in Civil and Family Matters explained this approach as follows:

> Too often, we focus inward on how the system operates from the point of view of those who work in it. For example, court processes — language, location, operating times, administrative systems, paper and filing requirements, etc. — typically make sense and work for lawyers, judges and court staff. They often do not make sense or do not work for litigants. The focus must be on the people who need to use the system.[437]

An alternative way to understand a user focused system is one that takes into account public conceptions of fairness and includes them in program and policy development. A significant step in understanding a user focused system from this perspective was signalled by the Canadian Forum on Civil Justice when they published their findings from the *Civil Justice System and the Public* research project in 2006.[438] This project examined how information was communicated between the public and the civil justice system and how it could be improved with an aim of bringing a public voice into civil justice reforms. The project identified six themes about the state of communication including the experience of the user. Here, the project concluded that "An understanding of the lived-experiences of communicating about the civil justice process is essential to developing initiatives to improve communication and effective systemic reforms to civil justices rules and procedures."[439] This approach is arguably broader than simply making the formal system more accessible since it could be applied to initiatives that focus on both the prevention and the resolution of problems that do not make it to the formal system.[440] As will be

[437] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101 at 7.
[438] Billingsley, Lowe & Stratton, *supra* note 114.
[439] *Ibid* at 33.
[440] This interpretation of a user focused system is discussed further in chapter 8.

discussed below, government policy has yet to adopt this broader perspective of a user focused system.

I. Access to Justice Act, 2006

A user focused perspective is important because it reorients the purpose of policy initiatives to assist those with legal needs rather than the bureaucrats, judges, lawyers, or court staff. While all three governments committed to a user focused system, each approached this theme from a slightly differently perspective. For example, the Liberal government of Premier Dalton McGuinty framed users of the justice system as consumers who, like shoppers at your local mall, are entitled to best value. Perhaps the boldest and most impactful initiative introduced by the *Access to Justice Act, 2006* was to amend the *Law Society Act* in order to allow for the regulation of paralegals.[441] This created an entirely new class of legal professionals that are now allowed to offer legal services on the open market. Despite the numerous ways such an initiative could be framed – to fill the unmet legal needs of Ontarians, for example – it was marketed as way to improve consumer choice. Michael Bryant, the attorney general at the time, introduced this initiative in the legislature by stating that "The regulation of paralegals would increase access to justice by giving consumers a choice in the qualified legal services they use, while protecting those who receive legal advice from non-lawyers."[442] Similarly, during the second reading of the bill, one Liberal MPP debating it stated as follows: "Let me say a few words about paralegal regulation. Currently in Ontario, paralegal services are not regulated. This puts consumers who use paralegal services at risk. This needs to be rectified now."[443] As noted in this quote, these consumers of justice – like consumers of other market goods – are entitled to consumer protection and the assurance that the services they purchase are not lemons. Other amendments made by the *Access to Justice Act, 2006* reinforces this framing of users of the justice system as consumers. For example, the *Law Society Act* was further amended to grant the Law Society more

[441] *Access to Justice Act, 2006*, *supra* note 370, Schedule C. In parallel legislation, the McGuinty government also amended the Human Rights Code to allow applicants direct access to the Ontario Human Rights Tribunal. This, arguably, evidences an even greater commitment to the user focused perspective. See *Human Rights Code Amendment Act, 2006,* SO 2006m c 30, s 5.
[442] Legislative Assembly of Ontario, *supra* note 380 at 494.
[443] Legislative Assembly of Ontario, *supra* note 410 at 1790.

powers to audit legal professionals and to regulate law firms for the benefit of the consumer.[444] Similarly, fines that could be levied against legal professions who committed misconduct were increased ostensibly to protect the consumers of justice.[445]

II. Putting Justice Within Reach (2017)

Nearly a decade later, the framing of the concept of user changed. Instead of focusing on consumer choice and protection, *Putting Justice Within Reach* was concerned with ease of access and convenience. Users were no longer portrayed as simply consumers but as individuals with legal needs that were struggling to access the system. In other words, this policy paper sought to make processes more user friendly and accessible to users of justice by making it more responsive to their needs. The government news release accompanying the announcement of this policy paper stated that its purpose was to "…improve the way people interact with the justice system."[446] The news release goes on to list eight bullet points of how it would do this; each one of which touted convenience. For example, civil claims could be filed from anywhere in the province, the status of traffic tickets could be viewed online, or child support could be updated online. By saving users a trip to the courthouse all of these initiatives make interaction with the justice system more convenient and therefore accessible. Likewise, the policy paper itself makes numerous claims of added user convenience. For example, changes to the jury process will make it "…easier and convenient for Ontarians to participate in the jury process."[447] Expanding online services for traffic tickets "…would create new digital services that will be more convenient and user-friendly."[448] And moving to online deliver of accident benefit disputes would help people "…resolve their accident benefits disputes more conveniently…"[449] While this paper emphasized convenience and ease of use it never once referred to users of the legal system as consumers displaying how the focus shifted from consumer choice and protection to accessibility.

[444] *Access to Justice Act, 2006, supra* note 370, Schedule C, s 43.
[445] *Ibid, s 22.*
[446] Ontario Ministry of the Attorney General, *supra* note 417.
[447] Ontario Ministry of the Attorney General, *supra* note 371 at 5.
[448] *Ibid* at 6.
[449] *Ibid*.

III. Smarter and Stronger Justice Act, 2020

The next change in government also signalled a nuanced change in how users of justice were portrayed. Like the previous government of Premier Dalton McGuinty, users of justice are viewed by Premier Doug Ford's Conservatives primarily as consumers in the sense that, as consumers, users of justice are entitled to choice in the market, and protection from dubious vendors. The framing of users of justice in this manner is primarily driven by a concern over the financial costs associated with legal needs. As explicitly stated in a backgrounder announcing their policy initiatives: "The *Smarter and Stronger Justice Act*, if passed, would help the government provide better, more affordable justice for families and consumers…"[450] Moreover, much of the market language used to justify the policy initiatives also signals a concern with this traditional and well known barrier to justice. For example, the government emphasised that the new *Legal Aid Services Act* would "put clients at the centre of the legal aid system by allowing legal aid services to be offered by a mix of services providers."[451] The implicit theory underlying these changes is that by increasing the supply of legal services the cost of legal services go down. In other words, consumers will inevitably benefit from greater choice in the market. The government made similar claims in regards to changes to the *Marriages Act*: "The proposed changes would provide Ontarians more choice by allowing more individuals to perform marriage ceremonies."[452] Concerns with the financial costs of legal problems is also evident elsewhere in the *Smarter and Stronger Justice Act, 2020*. For example, the government notes that "…the current legal process to apply for probate for an estate… is the same whether the estate is worth $500,000 or $15,000."[453] As such, the Government amended the *Estates Act* to make it easier, and ostensibly less expensive, to apply for probate for smaller estates.[454]

There is, however, an added layer with this government's access to civil justice policy that portrays users of the justice system as potential victims. In the one paragraph statement introducing the *Smarter and Stronger Justice Act, 2020* to the legislature, attorney general Doug Downey, states: "By making common sense reforms, updating old laws and simplifying complex

[450] Ontario Ministry of the Attorney General, *supra* note 392.
[451] Ontario Ministry of the Attorney General, *supra* note 389.
[452] Ontario Ministry of the Attorney General, *supra* note 392.
[453] *Ibid*.
[454] *Smarter and Stronger Justice Act, 2020, supra* note 369.

court processes, Ontario can support the growth of safer communities."[455] Often, when discussing community safety, the public and the government fixate on the criminal justice system. However, in the context of this piece of legislation much of the rhetoric about accountability and safety is directed towards the civil law system and the legal services market. This characterization of users as potential victims is particularly evident in the title – "Standing up for victims and law-abiding citizens" – one of the three backgrounders released to announce the introduction of the *Smarter and Stronger Justice Act, 2020*.[456] This backgrounder highlighted, among other things, changes to the *Law Society Act* that would increase fines for professional misconduct by legal professionals. "The proposed changes would provide the Law Society of Ontario with the tools it needs to sufficiently censure lawyers and paralegals who fail to meet those standards, especially in cases of professional misconduct, so Ontarians can feel confident when hiring a legal professional."[457] The obvious insinuation is that the legal market is currently not safe for users of justice.

The concern over safety and victimization is evident in the other backgrounders as well. In the backgrounder announcing some of the proposed changes to *Class Proceedings Act, the Estates Act,* and *The Marriage Act,* there were also allusions to public safety. Changes to the *Class Proceedings Act* were claimed to be necessary to ensure "…class counsels' fees are fair and reasonable, and allowing the court to withhold a portion of the fees until the court can review how class members were compensated."[458] Here plaintiffs of a class action lawsuit are thus characterized as potential victims of unscrupulous lawyers who need the court to protect their interests. Likewise, changes to the *Estates Act* "…would ensure there are safeguards in place to protect minors and vulnerable people who have an interest in an estate."[459] This need to protect vulnerable persons is not reserved just individuals but is also extend to taxpayers as a whole.

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[455] Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, 42nd Parl, 1st Sess, No 138 (9 December 2029) at 6725 (Hon. Doug Downey), online: <https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2019-12-09/hansard#para675>.
[456] Ontario Ministry of the Attorney General, "Standing Up for Victims and Law-Abiding Citizens", (2019), online: <https://news.ontario.ca/en/backgrounder/55019/standing-up-for-victims-and-law-abiding-citizens>.
[457] *Ibid*.
[458] Ontario Ministry of the Attorney General, *supra* note 392.
[459] *Ibid*.

Changes to *Legal Aid Services Act* would ensure "…accountable funding arrangements."[460] Likewise, changes to the *Courts of Justice Act* and the *Justices of the Peace Act* would ensure that the government is "No longer using taxpayer dollars to pay legal fees for judicial officials removed from office."[461] Thus, while the Conservative government of Premier Doug Ford reverts back to an older framing of users of justice as consumers who are primarily concerned with issues of affordability and ease of access, they also emphasise users as potential victims in need of protective.

IV. User Focused and Justice as Fairness

For government policy makers of both the Liberal and Conservative governments, a user focus system is one that characterizes users of justice as consumers and, as such, improved access to civil justice means fair and competitive markets, convenient access to legal services, and protection from unscrupulous behaviour. Addressing these concerns would have a positive impact on access to justice in several regards. First, if greater consumer protection translates into great trust of those offering legal services, than procedural fairness is improved as individuals would believe the lawyers are more concerned about their needs and treating them in a fair manner. Procedural fairness is also improved if market regulation translates into a more competitive and cost efficient market as legal services would become more affordable given people a greater opportunity to participate including the most disadvantaged. Greater consumer protection may also improve stakes fairness in two regards; first if it prevents unscrupulous lawyers from fleecing their clients than it helps ensure that the lawyers are not the only winner in any given legal competition and second if it prevents unreasonable fees being charged for legal services, it helps ensure that the cost of entering the completion is more proportionate to the amount involved. All of these potential impacts, however, are very speculative especially given that people with legal needs are not simply consumers and justice is not a commodity that can be bought and sold. Characterizing individuals as consumers is premised on the idea that individual are equal participants in the legal market, however, as shown by legal needs

[460] Ontario Ministry of the Attorney General, *supra* note 389.
[461] Ontario Ministry of the Attorney General, *supra* note 456.

scholarship most people with legal needs are not active in the legal market.[462] Simply readjusting some rules of the market will thus not serve those individuals.

4.3 The Wider Access to Justice Project: Non-Government Organizations

4.3.1 Introduction

In Ontario there is no central agency that administers a comprehensive system of public legal assistance. While Legal Aid Ontario is now the principal provider of provincial publicly funded legal services,[463] there is a diverse network of non-governmental organizations that are concerned with access to justice and have implemented their own initiatives in order to address what they believe are gaps in access to civil justice.[464] These initiatives have been introduced in an ad hoc and discrete manner by a wide variety of organizations and service providers and generally target specific communities. To illustrate, the Action Group on Access to Justice has identified fifty-four separate organizations in Ontario that are all actively involved in access to civil justice initiatives.[465] Similarly, the Law Foundation of Ontario, whose mandate is to improve access to justice for the people of Ontario, has awarded 644 grants between January 2012 and June 2019 to approximately 250 organizations across Canada to support projects that seek to advance access to justice. [466] These projects are extraordinarily diverse ranging from, for example, a $3,500 grant to translate a child protection booklet into the Mi'kmaq language, to an $850,000 grant to fund high school legal education programs. Other examples of access to justice initiatives that have received grants from the Law Foundation of Ontario include law reform research projects, funding for legal clinics to hire law students, and funding to develop workshops

[462] See Farrow et al, *supra* note 51 at 9.
[463] There are other government offices which will provide legal services to the public in limited and exceptional circumstances; the most notable are the Office of the Public Guardian and Trustee, who will provide legal services to mentally incapable people, and the Office of the Children's Lawyer, who will provide legal services to minors.
[464] For example, The Women's Legal Education and Advocacy Fund (LEAF) is a national non-profit organization that focuses on litigation, law reform, and public education to advance gender equality. Likewise the Ontario Justice Education Network is a province wide non-profit organization that seeks to develop education tools to increase the legal capability of young people. These are but two of the many organizations that have an access to justice mandate. See Women's Legal Education and Action Fund, "Our Story", (2020), online: <https://www.leaf.ca/our-story/>; Ontario Justice Education Network, "About Us", (2021), online: <http://ojen.ca/en/about>.
[465] The Action Group on Access to Justice, *Legal Organizations and Access to Justice Activities in Ontario* (Toronto, 2014).
[466] The Law Foundation of Ontario, "Grants Made", (2021), online: <https://lawfoundation.on.ca/grants-made/>.

to advise vulnerable groups of their legal rights. Due to the plethora of organizations and projects involved with improving access to justice in Ontario a comprehensive analysis of all initiatives is beyond the scope of this project. Instead, the next sections examine two themes that are common to many of these initiatives: the advancement of public legal education and information, and the provision legal assistance through alternatives to traditional legal services.

4.3.2 Public Legal Education and Information

I. PLEI and Access to Justice

For the purpose of this project, initiatives that focus on public legal education and information are broadly defined to include all those initiatives that are aimed at informing the public about their legal rights, obligations, and remedies, and how to make them effective. As such public legal education and information seeks to inform the public not only about the law on the books but also about the institutions and organizations, resources and procedures that are available to help resolve a legal problem: regardless of whether it includes the formal court system or informal alternatives. In essence public legal education and information can be thought of as a broad category of initiative that encompasses any legal education or information program that is directed towards people outside of the legal community. Recent literature has consistently cited public legal education and information as a potential method to make access to civil justice more meaningful for members of the public. For example, the *Report of the Legal Aid Review 2008* – the culmination of a comprehensive review of Ontario's main provider of public legal assistance – identified public legal education and information as one path to enhancing access to justice.[467] Likewise, the Action Committee on Access to Justice identifies legal education and information as one of its specific justice development goals.[468] Within the consumer framework, academics have noted that there is an overall lack of consumer education in Canada and that an increase of consumer education initiatives may address such problems as consumers being unaware of their rights and how to vindicate them.[469] Interestingly, consumer problems are

[467] Trebilcock, *supra* note 9.
[468] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101.
[469] Anthony Duggan, Azim Remani & Dennis Kao, "Middle Income Access to Justice: Policy Options with Respect to Consumer and Debtor/Creditor Law" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 485.

resolved at a much higher rate than other types of legal problems, which suggests that Canada's robust network of consumer protection organizations that provide consumers with information, education, and alternative paths to justice are effective.[470] Within the realm of employment law there is often a call for educational programs for both employees and employers so that both parties may better understand their rights and obligations towards each other and thus avoid costly legal proceedings.[471]

Typically public legal education and information is about helping people navigate the complicated legal system.[472] It is often perceived as increasing access to justice because it can assist people in resolving their legal problems more effectively. This intuition is confirmed by a seminal study conducted by Community Legal Education Ontario (CLEO) entitled *Evolving Justice Services Involving Public Legal Information in Canada*.[473] This five year study tracked 412 individuals who accessed legal information while dealing with a significant legal problem in order to measure the impact of legal information on resolving civil legal problems. It compared the experience – in terms of both quality of process and quality of outcome – of those who relied solely on public legal information with those who also received either summary legal advice or personalized legal representation. The study found that participants that relied solely on public legal information did achieve a baseline of justice process quality, however, did much less well in terms of justice outcome quality.[474] Interestingly, however, is the fact that there was no discernable difference in terms of process quality or outcome quality between those who accessed public legal information and received some summary advice at key junctures, and those that accessed public legal information and received personalized legal representation.[475]

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[470] Jacobs & Mcmanus, *supra* note 25.
[471] Judith McCormack & Azim Remani, "Middle Income Access to Justice: Policy Options with Respect to Employment Law" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 450.
[472] See e.g. Ontario Ministry of the Attorney General, "Family Law", (2020), online: <https://www.attorneygeneral.jus.gov.on.ca/english/family/faq.php> (Like many other organizations, the helpguides published by the Ontario Minsitry of the Attorney General, for example, are all geared towards navigating the court system).
[473] Lesley A Jacobs, *Evolving Justice Services Involving Public Legal Information in Canada* (Toronto, 2020).
[474] *Ibid* at 32–33.
[475] *Ibid*.

Public legal education and information, however, may also increase access to justice in more nuanced ways. For example, public education and information can encourage the resolution of issues at an early stage by equipping people with a better understanding of their substantive rights and remedies.[476] In doing so not only is the cost to the individual – pecuniary, health, and social – minimized but it may prevent further issues from being triggered.[477] For example, an unresolved employment issue may trigger, *inter alia*, problems with debt, housing, or family. By resolving the employment issue at an early stage those other problems may never arise. Others have argued that public legal education and information has a role in increasing public engagement and democratic participation.[478] That is, legal education and information empower people so that they can meaningfully participate in the legal processes that impact their lives. More recently, public legal educational and informational initiatives have been seen as a way to increase an individual's legal capability. Legal capability speaks to those abilities that an individual needs to deal effectively with law-related issues. It contains three components: knowledge of the law in everyday situations, skills to pursue legal resolution effectively, and competence to act and to continue to act until resolution is achieved.[479] Legal education and information can increase an individual's legal capability by providing them with a base knowledge of their rights and remedies for everyday situations and an understanding of how to make those rights effective. Given the potential for legal education and information to improve an individual's ability to effectively resolve their legal disputes it is not surprising that numerous access to justice initiatives focus on public legal education and information. While almost all of the 43 grants made by the Law Foundation of Ontario in 2019 included some element related to legal education and information, eight of them were made to support projects whose primary goal was to improve legal education and information for the public. These include, for example, developing a plain language guide for people living with disability on their rights and

[476] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101 at 7–8.
[477] Canadian Bar Association, *supra* note 55 at 53.
[478] See Leitch, *supra* note 108.
[479] Community Legal Education Ontario, *Don't Smoke, Don't Be Poor, Read Before Signing: Linking Health Literacy and Legal Capability* (Toronto, 2015) at 15–16.

responsibilities as tenants, and developing a public information portal that uses artificial intelligence to assist with consumer protection issues in the telecommunications field.[480]

II. PLEI Initiatives

The notion that public legal education and information can improve an individual's access to justice is not new in Ontario. CLEO, one of the main providers of public legal education and information in Ontario, is a community legal clinic that was established in 1974 in order to help people understand and exercise their legal rights.[481] Since then it has produced a wide variety of legal information materials and research relating to the provision of public legal education and information. During the digital era, public legal education and information focused primarily on making legal information more accessible through the use of digital technology. In 2005, for example, CLEO launched an online portal containing an extensive collection of information resources. In 2009, CLEO conducted a review of that website and after a final report released in October 2009 relaunched the portal in 2011 as "Your Legal Rights".[482] This website is a fairly comprehensive portal for legal information that allows users to browse legal information by topic such as consumer law, housing law, or wills and estates. Each topic has a section dealing with common questions and answers to everyday legal problems related to that topic, links to featured resources produced by other agencies, and contact information for related social services. Likewise, many government ministries and agencies also began providing legal information online with the intention that members of the public use the posted information to better understand their rights and remedies. As early as 2008 the Ministry of the Attorney General of Ontario had an extensive collection of online user guides to assist the public with navigating the legal system. Similarly, in 2011, Legal Aid Ontario also launched a website called LawFacts that provides free legal information on family, refugee, and mental health law.[483] Not long after this, in 2012 the Ministry of Government and Consumer Services launched Consumer Protection Ontario, an online portal containing a plethora of legal information regarding specific

[480] The Law Foundation of Ontario, *supra* note 466.
[481] Community Legal Education Ontario, "About CLEO", (2021), online: <https://www.cleo.on.ca/en/about/about-cleo>.
[482] Community Legal Education Ontario, "Your Legal Rights", (2011), online: <http://yourlegalrights.on.ca/>.
[483] Legal Aid Ontario, "LawFacts", online: <http://lawfacts.ca/>.

consumer issues such as joining a gym, renting a water heater, or taking a payday loan.[484] In 2017, CLEO launched the *Steps to Justice* website which provides comprehensive legal information on almost any legal problem an individual may encounter in their daily lives from "I want to buy a car from someone. What should I think about?" to "what relatives can be sponsored to become permanent residents?"[485] These initiatives exemplify an approach to legal education and information that focussed on making legal information more accessible to the public by making legal information available online.

III. Challenges with PLEI

One difficulty, however, with equating the availability of online legal information with improved legal education is that it presumes people have the capability to understand what they are reading and apply the information to their own context. While there has been little examination of how legal information impacts legal capability, CLEO identified two factors that may negate any positive impact of legal information: these are low education levels and social exclusion.[486] As noted by the Canadian Bar Association "[public legal education] is less helpful to the almost 48% of Canadians who lack the literacy skills to make use of this type of information."[487] The idea of legal literacy is paramount to public legal education and information as it speaks to the functional ability of individuals to recognize a legal right, connect it to a remedy, and realize a resolution process.[488] Legal literacy is understood to be part of a broader idea of legal capability which, as discussed above, speaks to the abilities an individual needs to deal effectively with legal problems.[489] Though efforts are clearly made to publish public legal education materials in plain language, much of the information made available online is still difficult to read or to place into a broader applicable context.[490] Therefore, simply making information available online may be too passive and unhelpful to those who are unable to

[484] Ministry of Government and Consumer Services, "Consumer Protection Ontario", (2012), online: <https://www.ontario.ca/page/consumer-protection-ontario>.
[485] Community Legal Education Ontario, "Steps to Justice", (2021), online: <https://stepstojustice.ca/>.
[486] Community Legal Education Ontario, *supra* note 479.
[487] Canadian Bar Association, *supra* note 55 at 47.
[488] Community Legal Education Ontario, *supra* note 479.
[489] *Ibid*.
[490] McCormack & Remani, *supra* note 471 at 459.

understand it.[491] Indeed, the *Evolving Justice Services Involving Public Legal Information in Canada* project discussed above found that legal information coupled with summary legal advice was far more effective in terms of both process quality and outcome quality than legal information alone.[492]

Another concern with public legal education is whether an individual would actually seek out legal information, especially if they are unaware of a legal right that he or she could act upon. As noted by Engel & Munger "Before the question of statutory violation can be raised, there must be a perception that the individual has been relegated to the wrong side of a social boundary."[493] Consumers, for example, may view a transaction as a simple purchase of a commodity rather than a legal agreement that has duties and obligations that flow from it.[494] If such individuals are unaware that there are legal rights attached to the transaction, then they will not proactively seek out materials prior to a problem occurring – if at all. This reality undermines one of the potential purposes of public education which is to prevent issues from arising or, if they do, to help resolve the issues early. Recognizing this difficulty, some organizations have attempted to provide legal information in a more nuanced way that will better align relevant legal information to an individual's specific legal need. For example, between 2015 and 2016 the Canadian Bar Association published a series of online documents called Legal Health Checks.[495] These documents are directed to the public and are all simple, one- or two-page checklists of questions/issues directly relating to a common life event or situation such as preparing a will or being a non-union employee. They are intended to encourage people to recognize potential legal problems early on and to take action to resolve them.

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[491] This was demonstrated by two recent studies that sought to better understand why individuals found court forms difficult to complete. Among the many interesting findings presented in these studies, the researchers found that the government published user guides which were intended to assist the public complete the forms were often as complicated and inaccessible as the form itself. See Amy Salyzyn et al, "Literacy Requirements of Court Documents: An Under-Explored Barrier to Access to Justice" (2016) 33 Windsor Yearbook of Access to Justice 263; Amy Salyzyn et al, "What Makes Court Forms Complex ? Studying Empirical Support for a Functional Literacy Approach" (2019) 14 Journal of Law and Equality 31.

[492] Jacobs, *supra* note 473.

[493] Engel & Munger, *supra* note 295 at 67.

[494] Duggan, Remani & Kao, *supra* note 469.

[495] Canadian Bar Association, "Legal Health Checks", (2016), online: <https://www.cba.org/CBA-Equal-Justice/Resources/Legal-Health-Checks>.

Halton Community Legal Services is another organization that has embarked on an innovative approach to public legal education and information. Rather than simply posting information online and letting the individual try to figure out for themselves what information is relevant, Halton Community Legal Services created the similarly named Legal Health Check-Up project.[496] This is a website that has users complete a simple questionnaire online which asks about their life circumstances and everyday events. One innovation feature of this is that the type of questions being asked require no knowledge of the formal legal system and is fairly easy to comprehend. For example, in relation to one's employment the survey asks, *inter alia*, "Does your employer or past employer owe you money?" or "Have you been hurt at work?" In terms of legal literacy, the Legal Health Check-Up project is aware that many individuals may not understand the legal elements in a problem that they face and therefore framed their survey questions in a manner that is not explicitly legal.[497] In contrast, the CBA Legal Health Check typically asks questions like "What paid statutory holidays are you entitled to?" or "Do you fit your province or territory's legal definition of a "spouse"?" both of which require a fairly sophisticated understanding of the formal law. Once completed the survey then asks if an intake worker can contact the respondent, if the clinic can send resources, and if the respondent would like to attend a free public legal education session. The novelty of approaching the provision of legal information in this manner is that the project is able to deliver information that is directly relevant to the individual's circumstance and to connect the individual to legal information they may not be aware that they need. Furthermore, instead of passively posting the survey online, Halton Community Legal Services partnered with seven intermediary community organizations that have connections to members of the community that are often difficult to reach.[498] They used these intermediaries to promote the project and provide assistance in filling out the survey. The success of this method in promoting the initiative is evident in that, at the time of writing, 2,491 surveys had been completed, and 926 requests for legal advice had been made.[499] These

[496] Halton Community Legal Services, "Legal Halth Check-Up", (2014), online: <https://www.legalhealthcheckup.ca/en/>.
[497] Ab Currie, "Extending the reach of legal aid: The Halton legal health check-up project", (2014), online: *A2J Blog* <http://www.cfcj-fcjc.org/a2jblog/extending-the-reach-of-legal-aid-the-halton-legal-health-check-up-project>.
[498] *Ibid*.
[499] Halton Community Legal Services, *supra* note 496.

methods employed by Halton Community Legal Services' Legal Health Check-Up program may help to address the difficulty individual's may have accessing and understanding legal information.

IV. PLEI and Justice as Fairness

As well as assisting people with navigating the complex legal system to resolve immediate problems, public legal education and information could be used to improve access to justice in two other ways: first it could be used as a way of to improve legal capability and second it could be used as a way to encourage early resolution of disputes. When viewed from a justice as fairness perspective, both of these outcomes can be seen as positively impacting access to civil justice. Legal capability speaks to most directly to the aspect of background fairness. As noted in chapter 2, background fairness contains two variables status equality and distributive fairness. In regards to status equality, improved legal capability is necessary to ensure that all individuals have a meaningful opportunity to participate in society. If an entire community or class of people are unable to act upon their legal rights or entitlements, then they are effectively second class citizens with a different standing before the law. Improving legal capability such that members of a community not only understand what their legal rights and entitlements are but also how to make them effective is one way to correct this differing moral standing before the law. Improved legal capability, however, also speaks to distributive fairness. This aspect of justice requires that resources be allocated and institutions arranged in a way to assist the most disadvantaged of society. Programs that seek to improve legal capability do precisely this. For example, the Law Foundation of Ontario, which provides grants to many of the public legal education and information initiatives noted above, is funded by the interest accumulated from lawyers' mixed trust accounts. This money could easily be used to further enrich lawyers or wealthy clients but is instead being used to assist the public-at-large thereby shifting resources to assist the least advantaged. Like public school education, which is viewed by liberal society as the great equalizer, public legal education and information allows the most disadvantaged within society the capability to compete within the legal system.

While legal capability speaks to background justice, early resolution primarily speaks to the third aspect of justice as fairness, being stakes fairness. In chapter 2 it was explained that stakes fairness is concerned firstly with how benefits and rewards are distributed within a competition and secondly with limiting the effects of one competition on another. In terms of the distribution of benefits within a competition, the main goal and benefit of resolving a legal dispute in the nascent stages is that it limits the costs associated with engaging in the competition. In instances where the upfront cost of engaging in a legal dispute is so prohibitive that it outweighs any possible benefit of winning, there are concerns with stakes fairness. Similarly, a drawn out litigation case will inevitably be far more expensive for the eventual loser not only in terms of upfront legal fees, but also due to the cost consequences of losing. Under Ontario's *Rules of Civil Procedure* there is a presumption that the party who loses a dispute pays the winner's legal costs.[500] These costs can be astronomical, and in some circumstances outstrip the amount of money in dispute. This rule is a classic example of a "winner take all" situation and one that raises concerns of stakes fairness. One can imagine a situation where a party has a valid claim, but at trial is unable to furnish sufficient evidence to meet the requisite standard of proof. Stakes fairness would question whether this person, who otherwise approached the case in good faith, should bear the heavy burden of the cost rule – especially if the other side was aware of these evidentiary limits and took strategic advantage of it. In these situations, early resolution of a claim helps to ensure that the costs associated with the legal competition are proportional to the benefit of engaging in it. Early resolution can also help to ensure that failure in one competition does not impact another competition. Legal needs research has shown that legal problems cluster and that they have a compounding effect on harm caused which may lead to social exclusion.[501] For example, if one is dismissed from their job without adequate notice, a protracted dispute over monies owning should not result in the individual taking on excessive debt and being evicted. Early resolution could prevent this from happening by mitigating the spin off costs associated with protracted legal disputes and in doing so helps to improve stakes fairness.

[500] Ontario, *Rules of Civil Procedure,* RRO 1990, Reg 194, r 57.01.
[501] See e.g. Currie, *supra* note 44 at 42.

4.3.3 Alternatives to Traditional Legal Services

I. Cost of Legal Services and Availability of Publicly Funded Legal Services

One of the most commonly cited barriers to justice is the cost of legal services. According to data from 2009 to 2014 the average rate for a Canadian lawyer ranged from $204 to $386 per hour.[502] This rate has not gone down in the intervening years nor is it expected to. A 2019 survey conducted by Canadian Lawyer magazine found that the national average hourly rate ranged from $195 per hour for a lawyer called to the bar within the previous year to $452 per hour for a call of more than 20 years.[503] Moreover, lawyers practicing in Ontario and in larger firms charge more per hour than lawyers practicing in other regions and in smaller firms, and despite recommendations for the profession to change billing practices to something more affordable – such as a flat fee structure – billable hours are still the standard practice with 88.6% of lawyers surveyed stating they use billable hours.[504] These astronomical costs means that private legal representation for a complex problem is simply unaffordable for most Canadians.

Unfortunately, publicly funded legal representation is equally out of reach for most Canadians. In Ontario, for example, the sole provider of publicly funded legal services is Legal Aid Ontario, a non-profit corporation established by the *Legal Aid Services Act, 1998* and continued by the *Legal Aid Services Act, 2020.* Legal Aid Ontario funds three programs; the certificate program, the duty counsel program, and the law clinic program. All three of these programs have strict eligibility requirements that ensure only a small minority of the population can access them. For example, under the certificate program – the largest of the three programs – one can apply to Legal Aid Ontario and, if they qualify, receive a certificate which can then be used to pay for the private legal services of any lawyer who accepts them. However most Ontarians are barred from this program due to two threshold requirements: financial eligibility and type of legal problem. In 2020, to qualify for a legal aid certificate a household's gross annual income had to be less than $17,731 per annum for an individual living alone and less than $48,173 per annum

[502] Noel Semple, "The Cost of Seeking Civil Justice In Canada" (2015) 93 Canadian Bar Review 639 at 650.
[503] Marg Bruineman, "Steady Optimism" (2019) April Canadian Lawyer Magazine 20, online: <https://www.canadianlawyermag.com/surveys-reports/legal-fees/steady-optimism-2019-legal-fees-survey/276027>.
[504] *Ibid*.

for a family of five or more individuals.[505] The threshold is slightly higher for cases of domestic abuse, wherein the cut-off ranged from $22,720 to $50,803.[506] These numbers mean that one has to be living at or close to the official the poverty line in order to meet the financial eligibility requirements for a legal aid certificate.[507] Further, Legal Aid Ontario will only provide legal certificates to problems related to criminal law, domestic violence, family law, refugee and immigration, and mental health consent and capacity issues.[508] This reality is particularly troubling given that recent empirical surveys have shown that nearly half of the adult population of Canada will experience a legal problem within a three-year period and that almost 60% of those problems experienced are related to areas of law that legal aid certificates will not cover – being consumer, debt, or employment issues.[509]

Another issue that make this program difficult to access is the fact that many lawyers will not accept legal aid certificates since the pay far below the market rates for a lawyer. The current rate for a legal aid certificate ranges from $109.13 to $161.05 per hour which is just over half the average market rate for a newly called lawyer.[510] Further, Legal Aid Ontario also regulates the maximum amount of time one is allowed to work on a file. For example, a lawyer is allowed to spend a maximum of four hours on the preparation and delivery of pleadings.[511] Likewise they are allowed to spend a maximum of seven hours on the production of documents for discovery, the inspection of documents, and the preparation for any motion associated with documentary discovery. [512] This means that if a particular case is complicated the lawyer is likely going to be forced to either rush their work or spend many hours on the file pro bono. Legal Aid Ontario's other two programs are just as exclusive for mostly the same three reasons. First, there are equally stringent financial eligibility requirements to receive services under both the duty counsel and legal clinic programs, second, the scope of services offered by duty counsel offices and legal

[505] Legal Aid Ontario, "Details on Legal Aid Ontario's Financial Eligibity Increase for 2019", (2019), online: <https://www.legalaid.on.ca/news/details-on-legal-aid-ontarios-financial-eligibility-increase-for-2019/>.
[506] *Ibid*.
[507] Statistics Canada, "Canadian Income Survey, 2017", (2019), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/190226/dq190226b-eng.htm>.
[508] Legal Aid Ontario, "Services", (2021), online: <https://www.legalaid.on.ca/services/>.
[509] Farrow et al, *supra* note 51 at 8.
[510] O Reg 107/99.
[511] *Ibid.*
[512] *Ibid.*

clinics are limited to specific areas of law most commonly criminal, family or immigration, and, third, limited funding and time pressures mean that lawyers providing services under these programs do not have endless hours to work on files.[513]

II. Growth of the Holistic Approach to Legal Services

The reality of legal needs coupled with the fact that publically funded legal services providers are unable to address those needs has resulted in a wide variety of organizations seeking alternative ways to provide legal services. One difficulty, however, lies in the fact that the provision of legal services is highly regulated. Under section 26.1 of the *Law Society Act* no person other than one who is licensed under that Act is allowed to provide legal services in Ontario.[514] The Act defines legal services as engaging in "…conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person."[515] This effectively gives a monopoly on the provision of legal advice to lawyers and, in limited circumstances, paralegals. However, there is no such limitation on the provision of legal *information*. Here the main distinction is that legal information is generally applicable and does not speak to the specific circumstances or objectives of any particular individual. This distinction opens the door for non-legal professions to provide legal information and is seen by some as a potential method of improving access to justice as the high cost of legal services are often cited as a barrier to justice.[516]

Though having non-lawyers provide legal information is not necessarily a new concept – it is common, for example, for court staff to explain what forms are needed in court – what is novel here is an emphasis on what can be called the holistic approach to the provision of legal services.[517] Increasingly there is an awareness that legal problems do not arise in isolation from

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[513] *Ibid;* Legal Aid Ontario, "Financial Eligibilty Test for Duty Counsel Services", (2016), online: <https://www.legalaid.on.ca/wp-content/uploads/Financial-Eligibility-Test-for-Duty-Counsel-Services-EN-1.pdf>; Legal Aid Ontario, "Financial Eligibility Test For Legal Aid Certificates", (2016), online: <http://www.legalaid.on.ca/en/publications/downloads/Certificate-Financial-Eligibility-Criteria.pdf>.
[514] *Law Society Act*, *supra* note 365.
[515] *Ibid*, s 1(5).
[516] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101.
[517] Macdonald, *supra* note 14.

other social problems.[518] Issues, for example, of mental health that may require a professional counselling may also be directly connected to issues with a legal element, such as housing, debt, or employment. In order to address these multi-faceted issues there has been a call to move towards a multidisciplinary service model where lawyers work side-by-side in the same centres as counsellors, teachers, nurses, mediators, and other professionals that are necessary to address all facets of an issue.[519] On their website *Your Legal Rights*, CLEO has published a series of education webinars aimed at community workers and advocates who work with low-income and disadvantaged communities.[520] Many of these webinars deal with specifically legal topics such as "A Primer on Probationary Periods," "How and When to Prove Abuse in Family Court," and "Consumer Protection: Debt Settlement Service Agreements." Other organizations are also providing legal training to non-legal professionals. For example, in 2010 the University of Ottawa launched the University of Ottawa Refugee Assistance Program. One of its program streams involves the delivery of full-day training session to front-line community support workers in order to train them on how to help a client prepare for a refugee hearing.[521] The Law Foundation of Ontario has provided grants to several organizations that are engaging in similar work. For example, the Bruyere Research Institute received a grant to conduct a feasibility assessment for a web-based Legal-Consult system between primary care health practitioners and legal workers to provide relevant legal information to patients with legal issues.[522]

One problem with this approach, however, is that non-lawyers offering legal information may accidentally start providing unauthorized legal advice. For example, in 2012 two employees of the FCJ Refugee Centre, an Ottawa-based organization that assists and provides services to refugees and others at risk due to their immigration status, received cease and desist letters from the Law Society of Ontario claiming the employees were providing unauthorized legal services.[523] In response the FCJ Refugee Centre obtained independent legal advice which opined that there

[518] Currie, *supra* note 44.
[519] Brenda Jacobs & Lesley Jacobs, *Multidisciplinary Paths to Family Justice: Professional Challenges and Promising Practices* (Toronto, 2010).
[520] Community Legal Education Ontario, *supra* note 482.
[521] Jennifer Bond, David Wiseman & Emily Bates, "The Cost of Uncertainty : Navigating the Boundary Between Legal Information and Legal Services in the Access to Justice Sector" (2016) 25 Journal of Law and Social Policy 1.
[522] The Law Foundation of Ontario, *supra* note 466.
[523] Bond, Wiseman & Bates, *supra* note 521.

was no unauthorized practice of law.[524] Whether an organization is providing legal information or legal advice depends on how individualized the provider frames the legal information and how similar the substance of the assistance is with the legal issue in question.[525] In order to ensure that organizations do not provide legal advice, and therefore unintentionally violate the *Law Society Act*, almost all providers of legal information will include a caution that services are not intended as legal advice. For example, all of CLEO's webpages include the following statement: "This site contains general legal information for people in Ontario, Canada. It is not intended to be used as legal advice for a specific legal problem."[526] The major problem with this approach from a justice as fairness perspective is twofold: first, the public may need and want more assistance than what legal information can provide, and second they may not understand the nuanced differences between legal advice and legal information. Consequently, people will view service providers who refuse to provide individualized direction as frustrating and evidence of an unwillingness to assist, thereby undermining procedural fairness.[527]

III. Summary Advice and Technology

As well as seeking to expand the capability of non-legal professions such as counsellors and health care workers to provide legal information, organizations are also examining alternatives methods for the delivery of legal services. For example, in 2017 Pro Bono Ontario launched a free legal advice hotline that offers summary legal advice on a range of civil law issues including employment housing and consumer issues.[528] Similarly in the same year CLEO launched the *Steps to Justice* website which includes a live chat and e-mail function to direct users to the relevant information and to provide support for users with additional questions. [529] While these types of initiatives may help alleviate some of the barriers associated with obtaining legal advice,

[524] *Ibid* at 17.
[525] Bond, Wiseman & Bates, *supra* note 521.
[526] Community Legal Education Ontario, *supra* note 481.
[527] Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants* (Windsor, 2013) at 117.
[528] Aidan Macnab, "Pro Bono Ontario Launches Telephone Hotline", *Canadian Lawyer Magazine* (16 November 2017), online: <https://www.canadianlawyermag.com/news/general/pro-bono-ontario-launches-telephone-hotline/274681>.
[529] Community Legal Education Ontario, *supra* note 485.

they are still limited by the *Law Society Act's* prohibition on non-licensees offering legal services and as such rely on volunteer lawyers who are limited to providing summary legal advice. This means that the lawyers cannot go on record for the user and generally will not attend hearings with them. [530] Summary legal advice is also generally limited to a single interaction of under an hour.[531]

Although still in the nascent stages, some organizations are beginning to leverage emerging technologies like artificial intelligence to provide alternatives to legal services. The Conflict Analytics Lab at Queen's University has developed a program called MyOpenCourt that analyzes a database of case law to help individuals with two commonly litigated employment problems: whether they are legally considered an employee and whether they are entitled to compensation for wrongful dismissal.[532] After the user answers a series of multiple choice questions – such as whether the job is supervised or whether one was terminated for cause – the program provides a legal opinion, explains the factors that helped make that determination, and provides a list of recent cases that are similar in facts to the users' situation. Currently, MyOpenCourt is looking to expand its predictive capabilities to other legal disputes such as motor vehicle injury disputes.[533] MyOpenCourt is not the only program that uses machine learning to analyze case law and make legal predictions. JusticeBot, for example, is a similar program in development by the Cyberjustice Laboratory at University of Montreal and McGill University that uses machine learning to analyze a database of case law in order to provide relevant information in response to individual's problem.[534] Currently, the project deals solely with landlord tenant issues but it seeks to utilize its algorithms in other legal fields. There are other projects in various

[530] Though allowed in some circumstances, summary legal advice is not specifically defined in either the *Legal Aid Services Act, 2020,* or in the *Rules of Professional Conduct.* Some organizations, however, provide an explanation. See e.g. Community Legal Clinic Simcoe Haliburton Kawartha Lakes, "Summary Advice", (2021), online: <https://www.communitylegalclinic.ca/services/summary-advice/>; Community Legal Education Ontario, "Legal Aid Ontario (LAO) - Family Summary Advice", (2021), online: <https://stepstojustice.ca/organization/legal-aid-ontario-lao-family-summary-advice>.

[531] See e.g. Pro Bono Ontario, "Contact the Free Legal Advice Hotline", (2021), online: <https://www.probonoontario.org/hotline/>; Community Legal Education Ontario, *supra* note 530.

[532] Conflict Analytics Lab, "MyOpenCourt", (2020), online: <https://myopencourt.org/>.

[533] Mark Witten, "Championing AI for Social Justice", *Research at Queens* (2020), online: <https://www.queensu.ca/research/features/championing-ai-social-justice>.

[534] Cyberjustice Laboratory, "JusticeBot: Using Artificial Intelligence to Increase Access to Justice", (2020), online: <https://www.cyberjustice.ca/en/projets/justicebot/>.

stages of development that seek to leverage artificial intelligence as a way of connecting people to legal information. Blue J Legal, for example, is another company that developed a legal prediction platform called Tax Foresight for tax law issues.[535] Like MyOpenCourt it too asks a series of fact specific questions and uses predictive algorithms to connect and compare those answers with courts decisions in order to provide a report that details the likely outcome of the case.[536] Unlike MyOpenCourt this program requires a subscription to use and is directed not to the public but to professionals and consultants. It is, however, another examples of how organizations are trying to develop affordable alternatives to traditional legal services by leveraging artificial intelligence. What has yet to be determined, however, is whether these programs run afoul of the *Law Society Act's* prohibition on non-licensees offering legal services. On one hand, the programs are clearly applying past legal principles to an individual's particular circumstances which, on the face of it, would seem to violate the *Law Society Act*. However, given the very limited scope of the prediction, and the generic questions asked, it would be hard to argue that the program is applying legal judgment to the situation: the programs is not advising the user on how to proceed with a case, nor is it asking about any issue beyond the immediate one. These programs are simply providing information on how courts have decided similarly situations in the past. Arguably, therefore, these programs may be better situated to assist a legal professional with research rather than the public wanting to know how to solve their problems. Used in this manner, these programs would not be violating the *Law Society Act* since the research would be supervised by a legal professional. In either event MyOpenCourt clearly believes that it is not offering legal advice as it states in the reports it generates that the prediction is not legal advice, and offers to connect the user with a lawyer to further discuss the issue.[537]

[535] blueJ, "Fortify Your Position in Minutes", (2021), online: <https://www.bluejlegal.com/>.
[536] Benjamin Alarie, Anthony Niblett & Albert Yoon, "How Artificial Intelligence Will Affect the Practice of Law" (2017) SSRN Electronic Journal 1.
[537] Conflict Analytics Lab, *supra* note 532.

IV. Alternatives to Traditional Legal Services and Justice as Fairness

Two trends have emerged among organizations looking to make legal services more available: first, a push towards providing more holistic legal services and second offering alternative methods of delivering those services. When viewed from a justice as fairness perspective both of these trends positively impact access to justice in ways very similar to the promotion of public legal education and information discussed above, albeit to a much lesser extent. First, in terms of procedural fairness, any initiative that increases an individual's ability to meaningfully participate in the proceeding can be said to increase procedural fairness. By equipping individuals with legal information and by reducing potential costs of seeking legal advice both of these trends provide individuals with a greater opportunity to meaningfully participate in their legal disputes.

In terms of background justice, the holistic approach to legal services acts in a way to increase the status equality of individuals by recognizing needs beyond the immediate legal issue that may impact their problem. These added factors provide a context to legal issue which, though strictly not relevant to the material issues, may still be determinative. By ignoring these non-legal factors individuals may be positioned differently before the law. For example, if two people are dealing with an identical wrongful dismissal claim based on absenteeism, however, one of them also has a problem with addiction the two are not entering the legal competition at the same starting point. The individual without an addiction may have fully understood their actions and chosen to engage in the absenteeism despite the consequences. The individual with the addiction, however, may not have been able to exercise the same level of discretion. In this situation, the addiction is actually being used as a proxy for willful employment misconduct and thus, the employee with the addiction is not afforded the same status before the law as the employee without the addiction. The holistic approach tries to correct such legal tunnel vision by ensuring those with the skill set to assist with those extra-legal needs are also able to recognize their impact on the legal sphere and provide the individual with relevant legal information. Alternative methods of service delivery can also be viewed as a way of increasing background justice by ensuring a fairer distribution of benefits and burdens. Given the cost of private legal services, coupled with the lack of publicly funded legal services, individuals with less personal

resources take on a far greater burden when involved in a legal problem. By making summary legal advice and predictive outcomes more available to those who otherwise could not afford legal services, this burden is slightly reduced.

Both the holistic approach and alternative methods of delivering legal services also improve stakes fairness for individuals with legal problems. By recognizing that legal problems cluster and often involve non-legal factors, the holistic approach acts to limit the effect of one competition on another. For example, if an individual speaks to a counselor regarding a mental health problem and the counsellor is able to provide them with information regarding their employment and housing rights the individual may be able limit the impact of the mental health problem on these other spheres. Alternative delivery models also improves stake fairness by reducing the cost of entering the competition and therefor ensuring that the cost of competing is not disproportionate to the benefits of winning.

While both trends have a positive impact on access to justice when examined from a justice as fairness perspective, this impact is unfortunately limited by the *Law Society Act*'s prohibition on non-licensees offering legal services. Legal information and summary legal advice can only go so far, and at some point individuals will need personalized legal assistance. Although the 2020 *Evolving Justice Services Involving Legal Information in Canada* project found that legal information couple with summary legal advice at critical junctures is, as an aggregate, as effective at ensuring process and outcome quality as is personalized representation, it is also found that the impact of legal information differs depending on problem type.[538] Moreover, certain factors namely education and income are likely to impact the effectiveness of legal information. For example, the project found that people with higher education seek out more sources of legal information, are less reliant on in-person/on-site legal information, are better able to differentiate between helpful and unhelpful legal information, and are better able to adjust their goals based the information.[539] Similarly, people from low-income households are more likely to find legal information unhelpful.[540] In other words, there is still circumstances where personalized representation is important.

[538] Jacobs, *supra* note 473 at 32–33.
[539] *Ibid*.
[540] *Ibid*.

The often quoted reason that legal services are limited to a regulated profession is to protect the public.[541] The notion is that the Law Society of Ontario is needed to ensure that, firstly, those who are offering legal services are appropriately trained, secondly, that practitioners who fail in their duties will be appropriately disciplined and educated, and finally that victims of professional malfeasance will be compensated.[542] These represent valid concerns, however, there are equally valid responses. In regards to training, it is arguable that non-lawyer professionals are often better positioned to offer legal advice within their areas of expertise than many lawyers. Counsellors working at a woman's shelter are probably better qualified to offer relevant legal advice to a client using the shelter than a corporate lawyer specializing in IPOs. Though lawyers are required by their code of conduct not to practice in areas they feel they lack competency, it seems almost ludicrous that the former is barred by statute from providing advice while there is no formal prohibition on the later.[543] When called to the bar lawyers are presumed to be competent in all areas of law despite the fact that the modern lawyer is increasingly specialized in their scope of practice.[544] In regards to the second and third concerns of discipline and compensation, the market place and private civil suits are often seen as sufficient protection for other areas of life: think for example of an auto-mechanic. If the mechanic offers poor services, basic economic theory states that the market will eventually drive them out of business or they will be sued by dissatisfied customers. On the face of it, there is no reason why this argument could not apply to non-lawyers offering legal advice. Cars are just as much of a mystery to many as is the law, and, like the law, poor service may result in disaster. Moreover, there is nothing preventing a complaint to the non-lawyer's employer, their own regulator body (e.g. the College of Nurses of Ontario), or to a consumer protection organization like the Better Business Bureau. Finally, and perhaps most grounded in reality, is the argument that some advice is often better than no advice. To a degree, the Law Society of Ontario, appears to be open to this last argument as it already exempts numerous classes of people from the prohibition on offering legal advice including Aboriginal Court Workers, legal clinic staff and volunteers, and family and friends

[541] See e.g. Law Society of Ontario, "About LSO", online: <https://www.lso.ca/about-lso>.
[542] *Ibid*.
[543] The Law Society of Ontario, *Rules of Professional Conduct* (Toronto: The Law Society of Ontario, 2013) at r 3.1.
[544] A holder of a Class L1 licence is entitled to practice law in Ontario as a barrister and solicitor: there are no explicit limitations on their scope of practice. See Law Society of Ontario, by-law No 4, *Licensing,* s 2.

of litigants.[545] Perhaps the list could be expanded to include individuals qualified in their field who offer legal advice relevant to their field and incidental to the main issue they are dealing with. This would, for example, allow a counsellor in a women's shelter to provide advice regarding preparing for a custody hearing. There have been some calls for such an expansion to the pool of people who can provide legal services, however, to date the Law Society of Ontario maintains a conservative approach to regulating the provision of legal services.[546]

4.4 Conclusion

Strategies for improving access to civil justice are both varied and dispersed. Typically, the government of Ontario is concerned with system design wherein they seek to modernize the institutions, improve efficiencies, and focus on user experience. Non-government agencies, however, often focus on public legal education and information initiatives, and alternatives to providing legal services. Most of these government and non-government initiatives are helpful in leveling the playing field to varying degrees but remain ad-hoc and disparate with some initiatives being more impactful than others. This, however, can be understood as an advantage rather than a disadvantage since it allows for a more nuanced and targeted approach to improved access. Particular communities have particular needs, and a one size fits all approach would risk ignoring many who are alienated from the system.[547] It also allows for the better leveraging of expertise since certain organizations have more experience with certain types of problems.[548] For example, nurses working in a community health organization may be better at assisting those with mental health issues than a group of lawyers trained in civil litigation. With that being said, coordination among these organizations is necessary to ensure that efforts are not duplicated and reform is effective.[549] While Ontario appears to be on the right path for improving access to justice and ensuring a more equitable and fair society for all there is still the question of whether these reform initiatives align with the actual needs of Ontarians. The following chapters will engage with this question by examining conversations about legal problems posted to the social media

[545] *Licensing, supra* note 163, s 30-34.
[546] Alison MacPhail, *Report of the Access to Legal Services Working Group* (Ottawa, 2012).
[547] Hughes, *supra* note 404.
[548] Jacobs & Jacobs, *supra* note 519.
[549] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101.

platform Reddit. These conversation provide a unique opportunity to better understand how Ontarians experience legal problems and, in turn, what type of reforms would best meet their needs.

Chapter 5

Housing Problems

5.1 Introduction

This chapter examines how Ontarians experience and understand housing problems in order to determine benchmarks for measuring access to civil justice initiatives within the context of residential tenancies. It does this by examining conversations about housing problems that are published on the website Reddit. For the purpose of this dissertation, housing problems refer specifically to those issues that arise out of either a residential tenancy agreement or the relationship between a landlord and their residential tenant. Problems that can be characterized as real property or mortgage problems are thus not included in this discussion since homeowners are situated in a different legal context than both landlords and tenants. Similarly, the variety of problems that a condominium owner may experience are also not included unless the condominium unit is being rented and the issue is specifically between the owner, as a landlord, and their tenant. This chapter begins with an examination of the legal framework that governs residential tenancies in Ontario in order to provide a context for later discussion. It then reports on several key findings about the conversations analyzed including the types of housing problems experienced and how people respond to them. The next section identifies three themes that emerged out of the conversations which reveal how Ontarians who are active on Reddit understand the legal framework that governs housing issues. Finally, the last section of this chapter examines those themes from a justice as fairness perspective with the objective of identifying benchmarks that can be used to assess access to civil justice initiatives.

5.2 Legal Context of Housing Problems

5.2.1 The Landlord Tenant Relationship

Individuals in Ontario who experience housing problems are situated in a unique legal context that is intertwined with principles of both contract law and property law. This context makes housing problems a unique type of legal problem for several reasons. First, the various rights and duties that exist are created by a lease agreement, which gives rise not only to personal

obligations enforceable under that agreement, but also to property rights that exist within the estate.[550] Specifically, the tenant is granted certain rights of use and enjoyment in exchange for the payment of rent. This context – where an individual has the right to use and enjoy a property that they do not legally own – in turn shapes the substance of disputes. Modern landlord and tenant disputes often have a personal dimension to them since the nature of the relationship necessarily involves some regulation of the tenant's private life. For example these disputes may involve questions of when a landlord can enter a tenant's personal living space, whether vital services such as heat or water can be withheld, or to what extent the landlord can limit a tenant's reasonable enjoyment of the property. These types of disputes that impact one's private life so intimately are rarely a concern in other types of commercial contracts, consumer disputes, or even personal injury litigation.[551] Further the range of remedies available for housing disputes are extensive and may involve orders of specific performance, damages, fines, abatements, or even eviction. These factors provide for a unique context in which legal consciousness can be examined.

It is worth reiterating that this project is not concerned with issues of real property or mortgages since homeowners are situated in a different legal context than both landlords and tenants and it should not be presumed that they would share a similar legal consciousness. Specifically, homeowners enjoy both legal title and the beneficial use and enjoyment rights to their property whereas landlords and tenants do not. The complex relationship between a landlord and tenant should be understood as follows: a landlord, who is the legal owner of a property, contracts with a tenant to rent that property or a portion of that property. In doing so, the landlord is granting the tenant beneficial rights to the use of that property in exchange for rent. What this means is that the tenant is entitled to free and exclusive access – they cannot be denied entry to the property, however, they can deny entry to others – as well as enjoyment of that property only subject to terms set out in the residential contract and obligations imposed by either the common law or legislation. Correspondingly, the landlord's use of that property is

[550] Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Clark, NJ: Lawbook Exchange, Ltd, 2012) at 1.

[551] Like all aspects of law there are exceptions and nuances. For example, foreclosures in mortgage litigation may raise concerns that are similar to residential tenancies.

limited to the extent of those beneficial rights granted by the contract as well as obligations imposed by either the common law or legislation. Typically this means, for example, that a landlord is prohibited from entering the property at certain times or dictating when a tenant can have visitors. Parallel to this, the tenant must pay an agreed to sum to the landlord and is prohibited from damaging the property.

5.2.2 Evolution of Landlord Tenant Law

Residential tenancies is an area of law that has a rich history and, in modern times, has become heavily regulated. Historically the landlord tenant relationship was purely contractual in nature and the courts, respecting an individual's freedom to contract, would enforce the contract as agreed to. The landlord, however, typically occupied a position of power and therefore was able to demand terms in a contract that were grossly in their own favour. Exasperating this situation was the fact that there were few implied obligations or common law protections that a tenant could rely on.[552] For example, in the common law there is no implied obligation on the part of the landlord to repair a rented property that is in disrepair.[553] Moreover there were no laws against renting out a dilapidated property.[554] Even where a property was unfit for habitation, it was decided that the tenant had no general right to terminate a lease unless the lease was for furnished accommodation.[555] Conversely, however, the landlord held an implied right to enter and inspect their property at any time to see if their tenant had committed the tort of waste.[556] Likewise, in the common law the residential tenant had no security of tenure, which meant the landlord required no grounds to remove a tenant after a fixed term tenancy ended. [557] In England this lack of security became problematic and a source for great social unrest during the First World War when a shortage of housing caused rents to rise such that tenants could not find accommodation.[558]

[552] David Yates & AJ Hawkins, *Landlord and Tenant Law* (London: Sweet & Maxell, 1981) at 277–278.
[553] Wonnacott, *supra* note 550 at 187.
[554] *Ibid*.
[555] *Ibid* at 278–279.
[556] *Ibid* at 189–190 (waste refers to the tort of intentionally destroying property).
[557] *Ibid* at 163.
[558] Yates & Hawkins, *supra* note 552 at 278.

In terms of remedies under the common law, a tenant could only pursue damages for breaches of conditions that were explicitly stated in the contract. Thus, if a tenant was induced to enter the lease by false statements on part of the landlord they had no remedy.[559] For example, if a landlord assured a tenant that the property was free of rats, the tenant could not sue the landlord if this proved to be untrue unless there was an explicit term in the agreement stating that the landlord would provide a rat free tenancy. Conversely a landlord had extraordinary powers and remedies to guarantee their interests. For example, a landlord was entitled to the remedy of distress wherein they would be allowed to enter the premises the minute rent was due and not paid in order to take possession of goods to the value of the rent owed.[560] Early statutes only strengthened the landlords' rights; for example, legislation was passed that mandated double or triple damages if a tenant tried to remove goods to avoid distress.[561] This historically one sided relationship between landlords and tenants has led to a highly regulated area of law among the common law countries.

In Canada the relationship between landlords and tenants falls under the constitutional jurisdiction of the provinces.[562] Each province has enacted legislation that regulates the context of the relationship in terms of obligations and entitlements. In Ontario the governing legislation is the *Residential Tenancies Act, 2006* (the "Act").[563] The stated purpose of the Act is to protect tenants from unlawful rent increases and unlawful evictions, to balance the rights of landlords and tenants, and to provide for the adjudication of disputes, which reflects a resolve to correct the sordid history of landlord tenant law.[564] The Act is an extensive document divided into nineteen parts dealing with every aspect of the landlord tenant relationship, including rules relating to the tenancy agreement itself, procedures for terminating a tenancy (including eviction), and constraints on when and how rent can be increased.[565] It does this while imposing numerous obligation on the landlord (e.g. the duty to repair) and on the tenant (e.g. the

[559] *Ibid* at 113.
[560] Wonnacott, *supra* note 550 at 117–118.
[561] *Ibid* at 119–120.
[562] *Constitution Act, 1867*, supra note 361, s 92.
[563] *Residential Tenancies Act, 2006*, SO 2006, c 17 [*Residential Tenancies Act*].
[564] *Ibid,* s 1.
[565] *Ibid,* ss 10-19, 37-94, 105-136.

responsibility for cleanliness) and creates numerous offences that are punishable by heavy fines.[566] It also establishes a forum – the Landlord Tenant Board – for the adjudication of disputes and grants this forum the exclusive jurisdiction to determine all applications made under the Act.[567]

5.2.3 Prevalence of Housing Disputes in Ontario

Within the context of all civil legal problems in Ontario, housing problems are not as prevalent as other civil legal needs. According to the 2014 Cost of Justice survey – the most recent and extensive survey of Canadian legal needs – only about 2.5% of all civil legal problems in Canada are classified as a housing problem making it the tenth most common legal problem type out of the fifteen examined.[568] However, the Landlord Tenant Board, the administrative tribunal who has exclusive jurisdiction to adjudicate on disputes covered by a residential tenancy agreement, is by far the busiest adjudicative forum in Ontario.[569] According to their 2017-18 Annual Report, the Landlord Tenant Board received 80,791 new applications in in that year.[570] This is a massive amount of applications compared to other adjudicative tribunals in Ontario. For example, the Social Benefits tribunal has about one eighth of the Landlord Tenant Board's caseload having received 10,124 new applications in 2017-18 and the Human Rights Tribunal of Ontario has an even smaller caseload receiving a 'mere' 4,425 applications that year (See Table 4.1). Even the Superior Court of Ontario – Ontario's trial court of inherent jurisdiction – has a smaller caseload when each branch of that court is examined individually. While the Superior Court as a whole received 184, 282 new cases in 2018, this figure comprises of the new cases received by six separate branches of the court as follows: (i) the civil branch received 73,312 new files, (ii) the criminal branch received 3,209 new files, (iv) the family branch received 46,621 new

[566] *Ibid,* ss 20-36, 233-240.
[567] *Ibid,* ss 168-182.3.
[568] Farrow et al, *supra* note 51 at 8.
[569] *Residential Tenancies Act, supra* note 14, s 168(2).
[570] Social Justice Tribunals Ontario, *2017-2018 Annual Report* (Toronto, 2018), online: <https://tribunalsontario.ca/documents/sjto/2017-18%20Annual%20Report.html>.

files, (v) the small claims court received 59,782 new files, and (v) the Divisional court received 1,358 new files.[571]

Table 5.1 **New Applications by Forum**

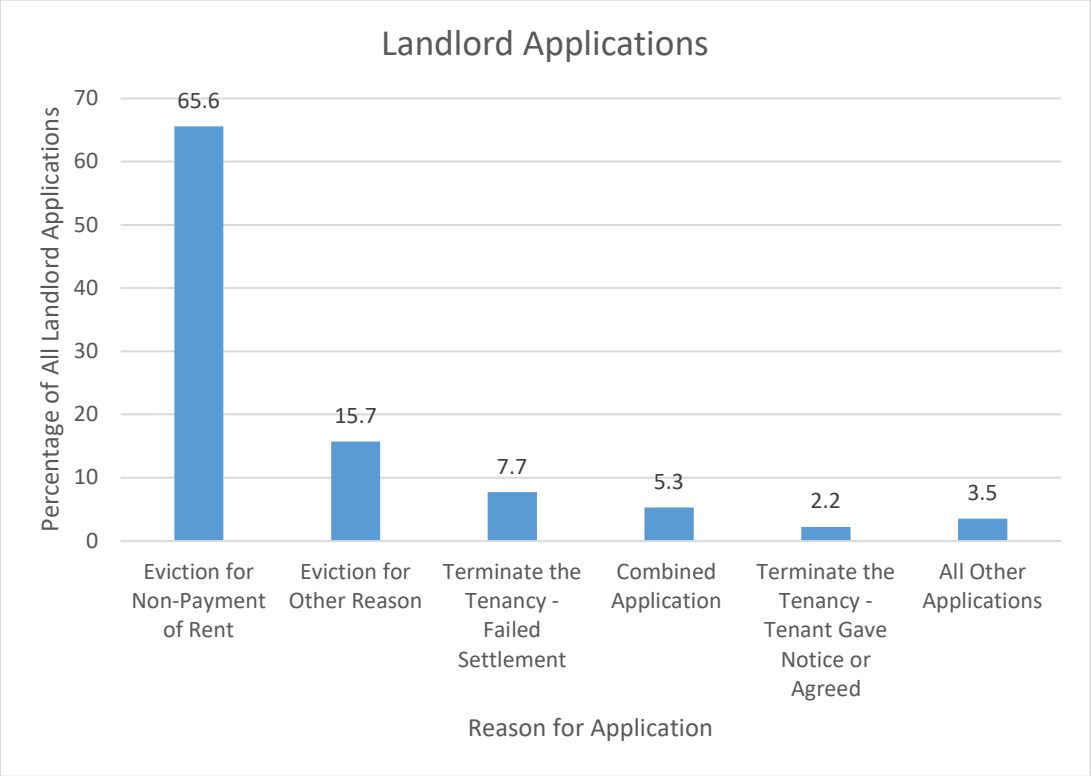
Select Ontario Adjudicative Bodies	New Applications Received		
	2017-2018	2016-2017	2015-16
Landlord Tenant Board	80,791	81,432	80,214
Small Claims Court	59,782	59,856	59,885
Social Benefits Tribunal	10,124	10,430	11,318
Human Rights Tribunal	4,425	3,585	3,357

Source: https://tribunalsontario.ca/en/archived-reports-plans-standards/; https://www.ontariocourts.ca/scj/news/annual-reports/

As stated above, housing problems are objectively not a common civil legal problem compared to other problem types; rather they are the tenth most common civil problem out of fifteen. However, counterintuitively, the Landlord Tenant Board is the busiest adjudicative forum in Ontario. This suggests that people with housing problems are much more likely to mobilize their rights and utilize the formal system than people with other problems. This conclusion, however, does not capture the nuance of the nature of disputes that make it to the Landlord Tenant Board. The vast majority of applications filed in the Landlord Tenant Board is done by landlords and the applications are almost always in regards to eviction. Specifically, 89.8% of all new applications received in 2017-2018, were initiated by the landlord; of those 65.6% had to do with evictions for non-payment of rent, 15.7% were for evictions due to other reasons, and 7.7% were evictions due to a failed settlement (see Figure 4.1).[572] Even applications filed by landlord that were not strictly categorized as eviction applications often include a request for eviction in combination with other remedies.

[571] The Superior Court of Justice, *Enhancing Public Trust: Report for 2017 and 2018* (Toronto, 2018), online: <https://www.ontariocourts.ca/scj/news/annual-reports/#2017-2018 >.
[572] Social Justice Tribunals Ontario, *supra* note 570.

Figure 5.1 **Basis for Landlord Applications**



Source: https://tribunalsontario.ca/documents/sjto/2017-18%20Annual%20Report.html

In summary over 80% of all applications filed with the Landlord Tenant Board are initiated by landlords seeking to evict their tenant. While it would thus not be unreasonable to characterize the Landlord Tenant Tribunal as an eviction court, perhaps this characterization should not come as a surprise. We know from legal needs scholarship that most disputes do not go to formal adjudication.[573] In Canada, only about 7% of people with a civil legal need end up attending at court or a tribunal.[574] If this finding holds true for housing problems, then only a small percentage of all disputes would go before the Landlord Tenant Board and it is not surprising those that do go before the Landlord Tenant Board would be eviction matters. This is because other disputes, such as those involving repair, entry, or maintenance, can be resolved through negotiation, whereas under the Act a landlord cannot evict a tenant without an order from the Landlord Tenant Board. The question thus becomes whether this context impacts the legal consciousness of Ontarians with housing problems and, in turn, how this can inform access

[573] See e.g. Sandefur, *supra* note 72.
[574] Farrow et al, *supra* note 51 at 9.

to justice policies. Three questions are of particular interest. First, do people situate their housing problem within formal legal frameworks? If so, are people struggling to access the justice system? And finally, is there an alternative to traditional legal institutions being used to resolve their problems? In order to answer these three questions we first need to understand the context of the online discussions examined.

5.3 Context of Social Media Advice

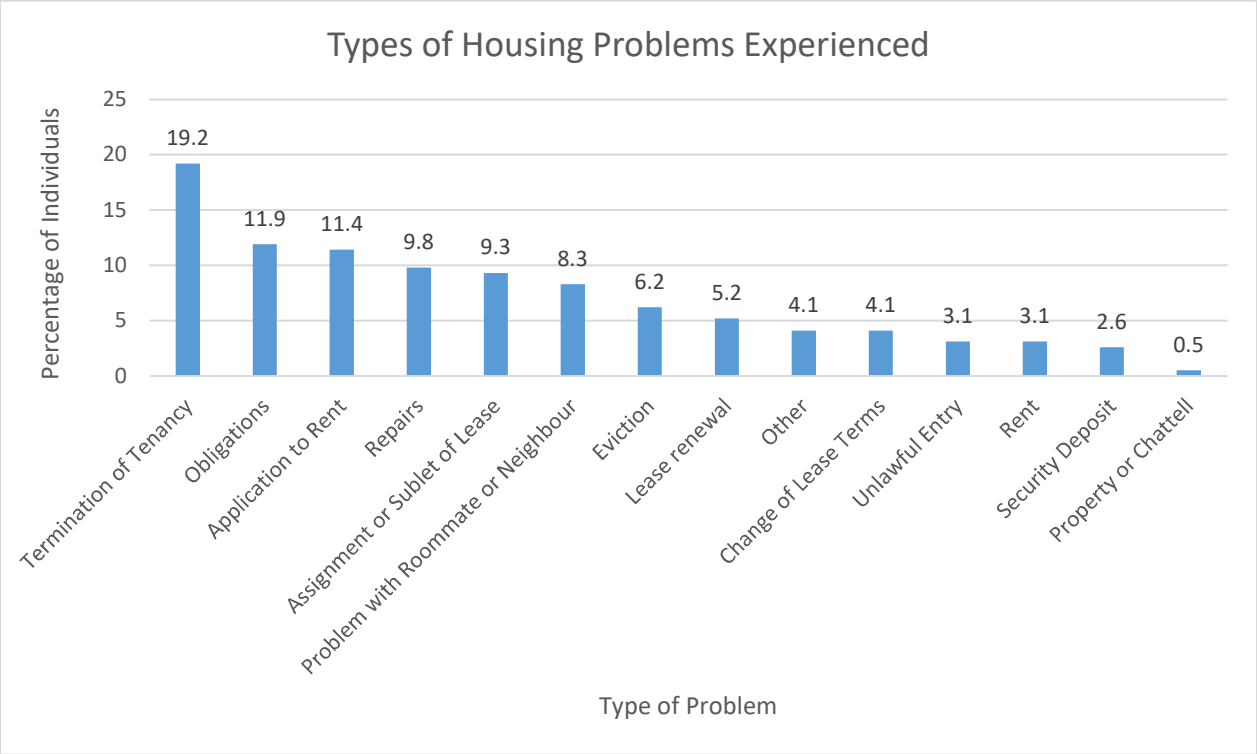
5.3.1 Types of Housing Problems

As noted in chapter three, this dissertation seeks to understand the legal consciousness of individuals with housing problems by examining conversations posted to the website Reddit. In total 193 conversations about housing problems were analyzed. Most of the conversations examined (71.5%) took place within the two years prior to data collection. This worth noting because the law is dynamic and constantly evolving such that older conversations may be subject to slightly different rules and regulations than are in place today. With that said, however, the general structure of landlord tenant law has remained consistent since the *Residential Tenancies Act, 2006* was passed in 2006 allowing this dissertation to situate all conversations analyzed within the same legal framework. Prior to examining the patterns and narratives that emerge out of these conversations, the context of these conversations within the online community need to be understood.

The first observation of note is that tenants are overwhelming the ones asking about legal problems. Of all posts collected 93.3% are from tenants and only 5.2% are from landlords. Another observation of note is that Redditors ask about a wide variety of problems, and no single problem type dominates the discussions (See Figure 4.2). The most common type of housing problem discussed is in regards to the termination of a tenancy by the tenant (19.2%). This type of problem includes, for example, questions about the notice period that a tenant is required to provide, or questions about legitimate grounds for the termination of a tenancy by the tenant. The second most common type of problem discussed include questions about who is obligated, for example, to maintain the lawn, remove snow, or deal with pests (11.9%). The third most common category of problems discussed are in regards to applications to rent (11.4%). Here

questions were about issues such as whether a landlord can refuse a rental unit because the tenant owns a cat, or whether a landlord can deny a tenant from taking a copy of the application to rent home to review.

Figure 5.2 Types of Housing Problems Experienced

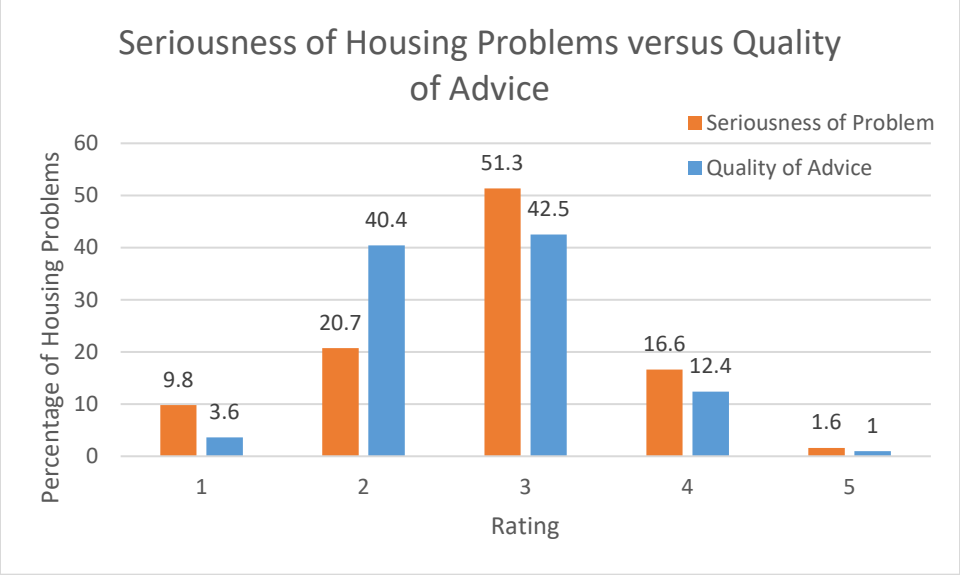


5.3.2 Seriousness of Problems and Quality of Advice

Typically these posts involve specific fact scenarios and were rarely about legal rights or obligations in the abstract. This leads to one of the more interesting phenomena that will be discussed further in chapter 8 wherein Redditors are using this platform to solicit – or crowd source – both legal research and legal advice from an anonymous, and likely unqualified, community. In order to better understand not just the type of problems discussed on Reddit but how serious these problems are to the individual, each conversation examined was assigned a rating ranging from 1 to 5 reflecting the seriousness of the problem. Problems given a rating of 1 meant that the problem was mundane or inconsequential, such as the landlord refusing to pay for lightbulbs. A rating of 2 meant that the problem required some attention but had little potential to escalate, for example, noisy roommates. A rating of 3 meant that the problem could

likely be resolved through negotiation, however, it still involved the loss of some money and/or had the potential to escalate. A rating of 4 was given to problems that were difficult to resolve and required professional help. These included problems that dealt with the loss of a significant among money or those that would likely have to go to a hearing. A rating of 5 was reserved for life changing problems that required immediate professional help. These problems may, for example, involve the loss of housing or risk to an individual's personal safety. Examining all problems, one can see a fairly normal distribution with a slight pull towards less seriousness problems (See Figure 4.3). Most problems were rated as either a 3 (51.3%) or a 2 (20.7%), however, there were still many problems that were given a more serious rating. These numbers show that Redditors will turn to crowd sourced legal advice for all manners of problems, including ones that are considered more serious.

Figure 5.3 **Seriousness of Housing Problems versus Quality of Advice**



Similarly, the quality of advice given by Redditors was also measured. Here each conversation was assessed as a whole meaning that some conversations contained individual comments that were quite helpful, however, the conversation was given a lower rating because those comments were buried among other less helpful ones. Conversations rated at a 1 meant that, overall, the advice given was terrible, mainly incorrect, and/or misleading. A rating of 2 was given to conversations that contained some good advice, but that advice was either lost in the

clutter of other confused responses, conflicts with other incorrect advice, or did not really address the issue. A rating of 3 was given to conversations that generally provided correct advice, but was not necessarily helpful in terms of next steps. A rating of 4 was reserved for conversations that provided good advice that was both accurate and helpful in terms of next steps, and a rating of 5 was reserved for excellent comprehensive advice that reviewed options and provided supporting authority. For context, one could expect a competent lawyer acting in the best interest of their client to provide advice at a minimum rating of 4. Not surprisingly, most advice given by Redditors would not meet the quality of advice expected from a legal professional. Only 13.4% of all conversations provided advice rated at either a 4 or a 5 (See Figure 4.3 above). Overall, the quality of advice provided was quite low with the mean rating for all conversations examined being 2.7.

5.3.3 Source of Legal Information and Legal Advice

As well as overall quality, other aspects of crowd sourced legal advice can be measured and help provide a more nuanced understanding of the nature of advice given: namely whether a primary source of law was cited, whether the commentators directed the poster to legal information, and whether the commentators suggested the poster seek professional advice. Out of all conversations examined only 29.0% make specific reference to a primary source of law. When a primary source was referenced it was almost always to the *Residential Tenancies Act, 2006*, as opposed to any other piece of legislation, regulation, or adjudicative decision. While it was fairly uncommon to refer to a primary authority, it was much more common for discussants to refer the poster to a secondary source of legal information. Of all discussions examined 59.6% percent referred the poster to an outside source of legal information. By far the most common source of legal information cited was the Social Justice Tribunals website (54.8%) – the official website of the Landlord Tenant Board (See Figure 4.4).[575] Interestingly, other potential excellent sources of legal information from organizations that specialize in community legal education such

[575] In 2010 the Ontario government began to reorganize its adjudicative tribunal system by creating "clusters" of tribunals. Each tribunal in a cluster maintains its statutory mandate, but work together on logistical and procedural features. The Landlord Tenant Board, along with seven other tribunals such as the Human Rights Tribunal of Ontario, are grouped together as the Social Justice Tribunals of Ontario. See Sossin & Baxter, *supra* note 34.

as Community Legal Education Ontario's (CLEO) website or the Steps to Justice website were not commonly cited.

As well as directing the poster to various sources of legal information, it is not uncommon for commentators to advise the poster to seek advice from a professional. Almost half (45.6%) of all conversations suggested that the poster speak to a legal professional or other organization with expertise. Posters were most frequently directed to speak to the Landlord Tenant Board with 24.4% of all conversations suggesting this path to justice (See Figure 4.5). Posters were also directed to seek advice from a legal professional in about a third of the conversations. Specifically, they were told to seek legal advice from a legal clinic in 17.1% of conversations, a lawyer in 11.4% of conversations, or a paralegal in 5.7% of conversations. Occasionally the discussants suggested that the poster seek advice from other organizations such as the police or fire department (7.3%), or a tenants' association (5.2%).

Figure 5.4 **Sources of Legal Information**

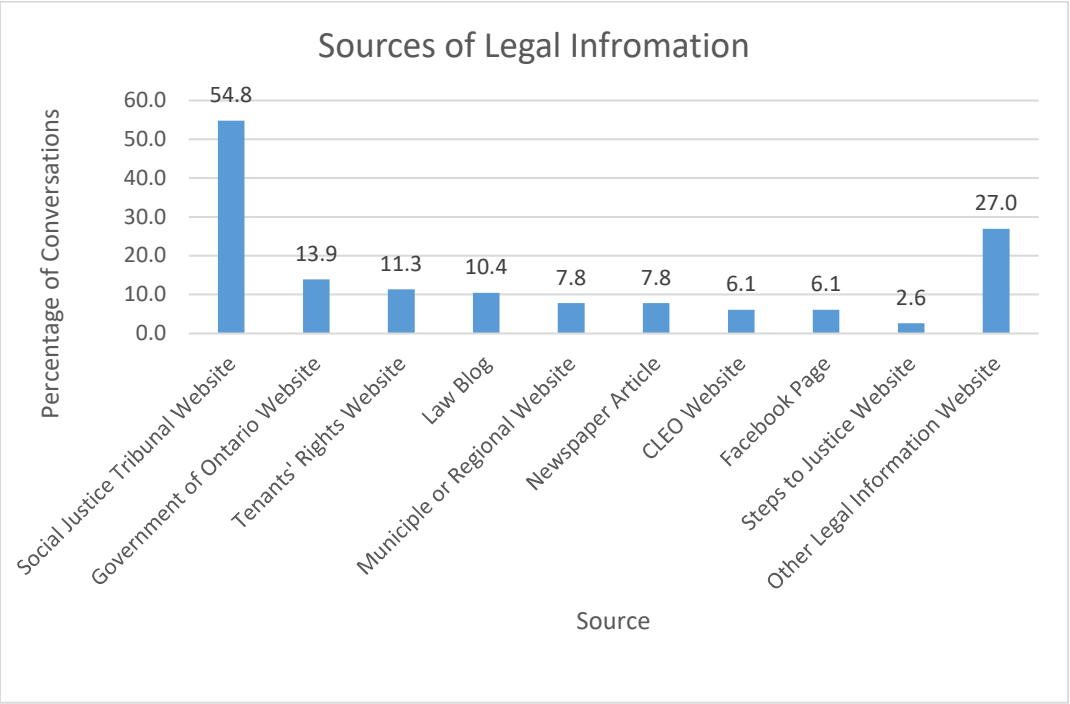
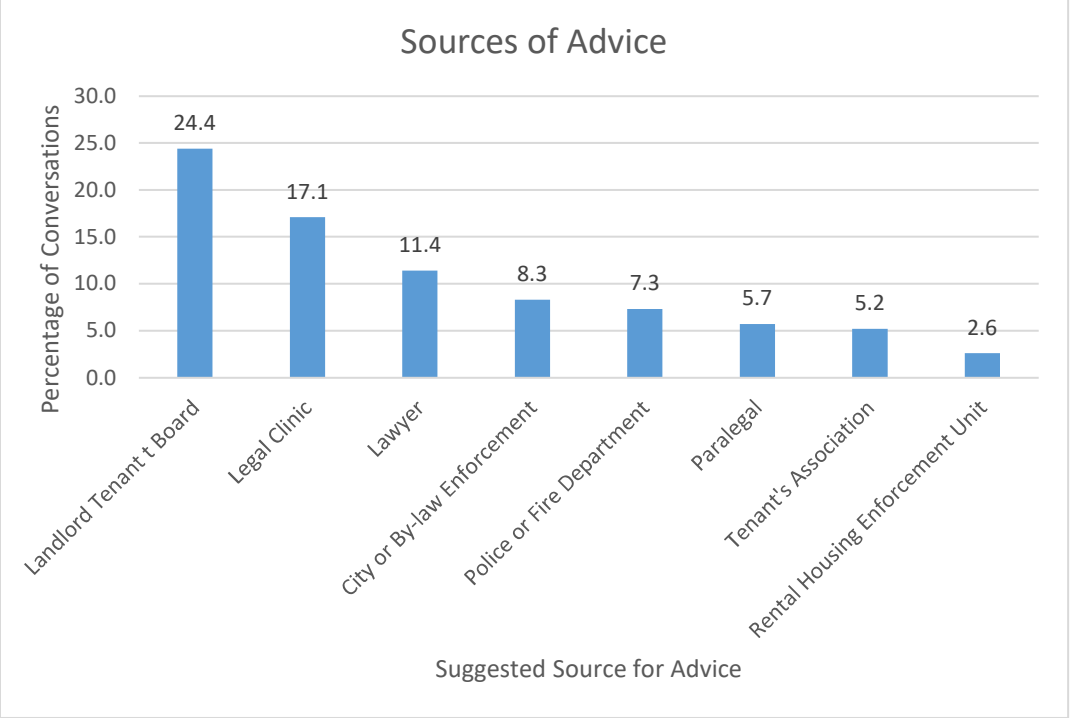


Figure 5.5 **Sources of Advice**



5.3.4 Summary

This section examined the context in which legal advice for housing problems is sought on Reddit and provides some interesting findings of note. First, people who post about housing problems on Reddit are overwhelming tenants; landlords rarely use Reddit to crowd source legal research or legal advice. Further, Redditors experience a wide variety of problems and commonly express concern over such divergent issues as whether they can assign a lease, whether a landlord has an obligation to spray against pests, and how much notice they must give before terminating a tenancy. Most problems discussed tend to be moderately serious and likely could be resolved through negotiation, however, Redditors also ask about very serious problems that require legal intervention. When providing advice, Redditors will most often direct others to information posted on the Landlord Tenant Board's website or direct them to speak to the Landlord Tenant Board personally. While these illustrate the scope and content of legal conversations occurring on Reddit further insight into the nature of housing problems in Ontario can be gained by examining the narratives related in these online conversations.

5.4 Legal Consciousness of Ontarians with Housing Problems

5.4.1 Introduction

As noted above, almost all of the individuals posting about housing problems on Reddit were asking about a real life concern that directly affected them. Though most of the problems discussed were not urgent in the sense that they involved potential homelessness or a risk to personal safety – although there were examples of this – almost all of them had the potential to escalate to something much more serious if ignored or handled improperly. These problems, therefore, did require attention and were recognized as such by the posters. The advice offered by the Reddit community seemed to be given in earnest – even if it was not always helpful or correct. However, unlike generic legal information that can be found online, this crowdsourced legal research and advice was directly relevant to that problem identified and was bespoke to the unique fact situation of the poster. In examining how the poster frames their question and the type of advice given in response to those question, we can gain insight into how this community understands and interacts with housing problems. It is worth noting that the

language contained in some of the conversations discussed below can be quite strong and should be contextualized within the real life frustration and stress of those experiencing such legal difficulties. With that said, three themes became evident after analyzing 193 conversations; first, fairness is fundamentally important to the landlord tenant relationship, and many people see their problem arising as a result of unfair situations; second, though people almost always situate housing problems within the formal legal frameworks, people have incredible difficulty understanding the scope and nuances of this framework; and finally, while the community sees the formal system as a legitimate path to resolution, they find the system difficult to access and often suggest alternative methods of resolution.

5.4.2 Justice requires fairness

The conversations reveal that the idea of fairness is paramount to the landlord-tenant relationship. In this context fairness can mean one of two things: either it refers to individual compliance with the rules or to the broader legal structures that regulate the landlord-tenant relationship. Most commonly when Redditors refer to fairness it is in the context of the former and they express outrage when the other side does not appear to be following the rules. However, the concern for fairness is also reflected in conversations regarding the differing rights and obligations that are ascribed to landlords and tenants especially when they are perceived to either go too far or not far enough in protecting the tenant. Both of these perspective will be examined in this section.

I. Fairness as Rule Compliance

In terms of rule compliance, discussants express outrage when the rules are not followed or when a party tries to exploit loopholes. This commonly manifests itself when tenants perceive landlords as trying to take advantage of a tenant's ignorance of the law or inability to make their rights effective. This sentiment is perhaps best expressed by one tenant who was seeking advice when his landlord insisted he sign a termination agreement:

> What's even worse is this individual is well aware of the law, but is just negligent to the law and refuses to follow it. With an answer of "Sue me" to anything I said really shows what kind of person this is. This person can get away with how they are acting

> because they mainly deal with students who will not put up a fight, they just need a place to stay for school, but I am no student, and I know my rights and want to flex them. My landlord will learn one way or another.[576]

In another conversation the tenant asks if the landlord is allowed to raise their rent because their partner wants to move into their unit. In response one discussant states:

> Legally no. Some landlords try and get away with this shit and hope you don't know better. I remem[b]er looking for an apartment years ago and met a landlord that wanted to raise the rent by $200 when he found out that I would be moving in with my GF. When I asked why the increase in price he said that more people use more water and we'd have to pay to compensate.[577]

Later in the same conversation another discussant echoes this frustration "A landlord absolutely cannot tell you that you can't have pets. Or that you can't have a spouse move in. You have tenant rights, and regardless [o]f whatever bullshit clause they add into the lease agreement, your rights as a tenant trump their BS rules."[578] In another discussion regarding a landlord's ability to evict a tenant in order to circumvent rent controls, one discussant notes that this kind of eviction can be fought in the Landlord Tenant Board. In response another discussant states: "Sure, but most landlords will just do whatever they want, and hope the tenants don't know any better."[579] This concern over dubious evictions are repeated again and again as are other examples of how landlords try to "get away" with illegal behaviour.[580] This includes unauthorized entry,[581] withholding security deposits,[582] and downloading the cost of repairs onto the tenant.[583] However it is not just tenants that see fairness as being paramount to the legal framework. Landlords also express frustration when they perceive a tenant as taking advantage of loopholes to avoid the payment of rent,[584] avoid what they perceive to be a legitimate eviction,[585] or avoid responsibility for damages to a unit.[586] This attitude is succinctly expressed by one discussant:

[576] Housing 121.
[577] Housing 032.
[578] *Ibid*.
[579] Housing 064.
[580] Housing 121.
[581] Housing 036, Housing 125.
[582] Housing 002, Housing 058, Housing 105, Housing 185, Housing 188.
[583] Housing 029, Housing 044, Housing 104.
[584] Housing 045.
[585] Housing 025.
[586] Housing 065.

"…the tenant can use several legal loopholes that won't allow the landlord to move the tenant out, allowing the tenant to further damage the property."[587]

Where the above concerns are grounded in a perspective that one party is consciously taking advantage of the other side's ignorance of the law or exploiting legal loopholes, there is also a perception that landlords do not understand their obligations and that they become landlords simply to make a "quick buck." In one interesting post, a landlord is asking for advice on how to evict a tenant who refused to leave after the lease agreement expired.[588] In response one discussant expresses the following: "After that he refused to leave and started paying monthly. Yes, that's how leases work. You're a landlord yet you don't seem to grasp how rental agreements actually work even at their most basic level, either get your shit together or stop renting properties."[589] In another conversation where the poster is asking about the legality of the landlord insisting on a non-standard lease, one discussant notes:

> Most small private landlords know very little about the laws, and even if they once did when they started renting their place out, they haven't kept up with changes. This is for a simple reason: they don't rent, they probably work for a living in an unrelated field, and they probably are only renting out one or two places.[590]

The corollary from the landlord's perspective is that tenants unfairly make claim to legislated rights in order to avoid obligations entered into fairly. In one post where a tenant is asking whether a landlord can include a provision in the tenancy agreement requiring the tenant to maintain the lawn and conduct landscaping, most of the commentators agreed that this was the landlord's responsibility and that the if the landlord wanted the tenant to do this work they would have to compensate the tenant.[591] However, one poster had a different perspective:

> So! Realistically, here's what you need to consider as far as the lawn and shrubs go; it isn't "Do I need to do this or not according to the RTA?" but rather "Do I want to do this as part of living here or would I rather live somewhere else?". If you don't want to do it, find another place to live. If you like the place you've found... well this is what the LL wants in exchange for them allowing you to live there and rent from them. You can either take it, negotiate it or leave it.

[587] Housing 065.
[588] Housing 025.
[589] *Ibid*.
[590] Housing 199.
[591] Housing 044.

> Again, it isn't a question of what does the RTA dictate but rather if the enforceable conditions in the lease are worth it for you in exchange for living there. As for everyone saying that the LL needs to be paying you for doing lawn care... those people are in La La Land and that is probably the dumbest thing I'll read in this thread. All I'll say is that anyone who tries that with me is never, ever going to live under my roof; there are more tenants out there that want nice properties than there are nice properties…[592]

The common theme floating throughout these conversations is that fairness matters to the landlord-tenant relationship. Fairness means following the rules, whether that is respecting tenant's rights, or respecting obligations agreed to. However, it is clearly evident that the rules are often not followed – whether out of malicious intent or out of ignorance – and that parties are able to take advantage of the other side: when this happens people are angry and outraged.

II. Fairness as Rights Ascription

As well as following the rules, fairness is often seen in the context of rights ascription. There is a common perception that tenants occupy a much weaker position than the landlord and are vulnerable to abuse. "Both parties need to know the law, obviously. However landlords are in a position of power over their tenants for the most part, so their ignorance has more negative effects than tenants' ignorance."[593] The law therefore exists as a way to balance this relationship in order to ensure the tenant is protected. "Landlord tenant laws are generally weighed to the side of the tenant since they have less power in the situation…"[594] The sentiment that the law is necessary to protect tenants and place them on an equal footing with landlords is repeated often:

> Because there are laws that are in place to protect the rights of individuals. Some might argue that laws aren't necessary, that the market will sort it all out, but it will do so at considerable expense and complication and fluctuation, none of which is desirable when we're talking about where people live.
>
> Without a base set of rules of engagement, every lease would be 10 or 20 pages long, and require lawyers to review, adding a significant expense to every rental. Yes, the tenant has a responsibility to read through the lease. But they shouldn't need to hire a lawyer and spend an extra month or two of rent to properly understand the deal, then decide they don't want to sign it.

[592] Housing 044.
[593] Housing 024.
[594] Housing 192.

> There's also a significant imbalance of power in the transaction to begin with. It would force tenants to accept terrible conditions or face homelessness.[595]

Where there is almost universal agreement that the law is weighed in favour of the tenants there is some disagreement about whether this is fair. Some see the laws as going too far and not protecting the interests of the landlord. As succinctly stated by one poster: "The reality is that Landlords have zero power in Ontario."[596] In another conversation about security of tenure after the expiration of a fixed term tenancy, one discussant sees the laws as going too far in protecting tenants:

> That's what I don't get. So this is really just a tenant board? How does it protect landlord? For anything else, both party can agree to a fix term but for this, you pretty much have to sign an indefinite term? I just find it really stupid that the tenant can just give 1 month notice without reason if he wants to leave but landlord has to negotiate with the tenant.[597]

Here the poster believes that the law unequally and unfairly distributes rights between the parties by disproportionally ascribing powers to the tenant to the detriment of the landlord.

Concern with the overall fairness of the legal framework is also evident when Redditors discuss the issue of who should bear the burden of various costs associated with the rental unit. This can take the form of who should pay when the rent is below market value,[598] who should pay for wear and tear of the apartment,[599] the cost of assigning the lease,[600] or of finding a new tenant.[601] In one post discussed earlier, a tenant is asking whether a landlord can shift the cost of increased utility bills onto the tenant.[602] In Ontario the cost of utilities like gas and electricity have dramatically increased over the last decade. Prior to this increase it was common practice to have these utilities included in the price of rent. Thus older tenancy agreements may include provisions that no longer reflect market reality. This was the case in one post where the poster states: "He later sat in my living room and started talking to me about how the home owner (they

[595] Housing 010.
[596] Housing 017.
[597] Housing 192.
[598] Housing 200.
[599] Housing 095.
[600] Housing 050, Housing 188.
[601] Housing 026.
[602] Housing 005

own a bunch of houses on the street) was bearing the burden of my gas bill, and that I should be paying this (its estimated to be about $100 per month)."[603] Expressing a similar concern over costs was a conversation about the legality of one's partner moving in and who should bear the increased costs associated with it. One discussant notes:

> Landlord here. The best thing to do is set the rent under the assumption that an additional occupant will move in; you want some headroom to account for the inevitable; people do this ALL the time; often they will fill out an application form as an individual knowing that more people will move in and share the rent. This increases utility use and wear and tear on the unit, and there is almost nothing a landlord can do about it. A good landlord knows this and prices his units accordingly. That being said, if multiple occupants move in such that the utilities become an undue burden on the landlord, he can apply for an increase in rent.[604]

Here the landlord recognizes that there will be increased costs during the lifetime of a tenancy and is advising how to ensure that the tenant is the one who bears the costs. This reflects a belief that fairness dictates that the tenant should bear associated costs such as utilities or wear and tear. This belief however is not universally held:

> If every other home owner in London wants to be a mini-Trump and get easy free $ and get their mortgage paid off I say its time to put in more restrictions. Landlords who are making a profit (like a business) should be required to do basic upkeep like caulking, paint, leaks.[605]

Attached to these direct costs are concerns over bad tenants who damage property or fail to pay rent. For example, one landlord was asking whether there was a "tenant registry" or whether they could create one.[606] This landlord is in essence trying to minimize the risk of renting, however, as pointed out by many discussants such a registry could lead to abuse or could be used by vindictive landlords to punish good tenants. As one discussant states. "The potential for abuse and the long term cost of that abuse far outweigh any of the potential benefits given here for such a registry."[607] These conversations show some real concern with the distributive fairness goals that underlie many of the laws. Often regulations such as rent control exist in order to

[603] *Ibid.*
[604] Housing 032.
[605] Housing 095.
[606] Housing 097.
[607] *Ibid.*

protect vulnerable tenants from unscrupulous landlords, however, not everyone agrees that shifting certain costs from one party to the other is fair.

5.4.3 Housing Problems are Legal Problems

The context of the conversations analyzed confirms that housing problems are very much viewed by Redditors as being more than simply a private relationship between the landlord and tenant, and that Redditors believe that these problems are legitimately regulated by legal authorities. This is evidenced by how the posters frame their problems and situate their questions within the formal legal framework. However, despite this construction, posters have difficulty understanding the exact nature and scope of their legal entitlements. In essence this finding speaks to the difficulty that individuals have with mobilizing their legal rights even if they are vaguely aware that they have them. Similarly, while the commentators also situate their advice within a legal framework, they too have difficulty grasping the nuances and specifics of the formal law which limits the potential usefulness of their advice: though the advice is often technically correct, it is generally basic and lacks any comprehensive engagement. This section will examine these three aspects of how Redditors construct the legality of housing problems.

I. Problems are Framed as Legal

While almost all posters are seeking legal advice, one can think of these problem as being framed in one of three ways: (i) what are my rights in this situation; (ii) what are my tenant's/landlord's obligations in this situation; and (iii) how do I make my rights effective or how do I enforce the other's obligations. For example, one poster asked about the legality of a security deposit as follows: "I am renting my home out, and the last tenants left it a mess. I had to pay to get it all fixed and cleaned up, but am wondering if I can ask for a security deposit for my next tenants, along with first and last month[']s rent, so I am not out this money."[608] Here it is evident that the poster is aware that there are certain rules that govern the legality of a security deposit and is simply asking what their rights are in this situation. Another typical example involves a tenant asking about their rights after given their landlord notice of their intent to move:

[608] Housing 002.

> So I'm moving out of my unit at the end of the month and I just received 3 maint[en]ance advisory. The landlord is bas[i]cally coming in to renovate my unit for the new tenant but is doing it 4 days straight before I move out (25th to 28th). Redoing the kitchen and bathroom, which I can only assume I won't be able to use either during that time. I'm also forced to find a place for my cat for a day because they'll be glazing the bathtub. Anyway, my question is whether it's legal for them to do this before I move out? I've tried looking at the tenancy act and can't really find anything about renovations prior to leaving.[609]

Here the tenant is clearly cognisant that there is governing legislation that may very well regulate this situation but is having difficulty finding what those legal rights are. One last example involves a dispute over rental payments.

> Hello all, so I am having issues with my property management and I don't know who to go to about this legally. I am being harassed about not paying rent in the month of April and we at my house have e-transfer proof and dates of it being sent and not rejected and the property management still says they didn't accept this. Who do I go to? [I] am not paying these people a free months rent because of their constant mess ups.[610]

Here the poster diagnoses their problem as being legal in nature and asking about legal procedure. They want to know how to give effect to their right to free enjoyment of the property in a way that conforms to the governing law.

The fact that the Reddit community situates their problems within the formal legal frameworks may be better evidenced by the amount of posts that directly reference either the Landlord Tenant Board or the Act. It is clear that those with housing problems are cognizant of the formal law's potential to resolve disputes as it is common for posters to specifically ask about how the Landlord Tenant Board would rule on a matter, or how the poster should proceed before the Board. For example, in one dramatic post where the poster discusses living under a "crackhouse" he states "We are looking to end our fixed term tenancy (that would be ending August 31st), but will have to apply to the Landlord and Tenant Board for an order. I am wondering what approach would be best. Which form should I use? What options do I have?"[611] Similarly another poster asks as follows: "I am currently renting from a property management company and they want to change the terms of our lease. In your experience, is the landlord and

[609] Housing 040.
[610] Housing 077.
[611] Housing 041.

tenant board fair?"[612] Both of these posts directly reference the Landlord Tenant Board and sees them as the necessary path to resolving their problems. Similarly, many posts reference the Act: "I am reading the Residential Tenancies Act, 2006 to get a better understanding of the situation, but I don't think I have a clear understanding of it."[613] Or "I confronted our landlord with the written letter citing the following maintenance section of the residential tendencies act noting that the back entrance was a common area/ fire exit…"[614] In directly referencing the Act, it is clear that these posters recognize it as the governing legislation.

II. The Scope of Legal Entitlements are Unclear

As noted above, almost all of the 193 posts analyzed could be categorized as either someone asking about their rights, someone asking about the other party's obligations, or someone asking how to enforce their rights or another's obligations. Regardless of how the problem is framed, there is a sense that one of the parties has legally imposed duties or protected rights that can be enforced even if the specific legislation or adjudicative body is not mentioned. The interesting nuance, however, is that there is not a comprehensive understanding of the exact scope of those rights/obligations or where they originate from. This is evidenced by Redditors' inability to locate the source of these rights, their failure to relate material facts, and their failure to specify the remedy they are seeking.

In regards to the inability to locate the source of an entitlement or obligation, Redditors will often reference their own lease agreements, but express confusion if it is silent on a specific issue. "I'm unclear on whether it is the landlord's or the tenants' responsibility to keep sidewalks/walkways/driveways clear of snow. The lease does not mention snow removal at all."[615] Another example involves a tenant taking on new roommates:

> Recently my old roommate moved out, and a couple moved in in their place. My landlord found out and is throwing a hissy fit, saying I can't have any more people living in my apartment than she allows. There's no mention of max tenants in the contract.

[612] Housing 054.
[613] Housing 182.
[614] Housing 093.
[615] Housing 061.

> Questions: As far as I can tell from what I've googled, there's no restriction on number of tenants as long as it doesn't compromise safety. Is this correct?[616]

Alternatively, the lease does make explicit reference to the issue but the poster suspects that the provision is unenforceable. In one posting regarding pest control a tenant asks: "Is it me who needs to pay for the pros to come in if need be, or my landlord? My lease says it's me, but I've been seeing online that it's the landlord's responsibility. If it's legally their responsibility that would override that clause, correct? I'm new to this stuff."[617] Sometimes the poster is questioning a provision in a lease because they think it is ambiguous and is curious about how it may be enforced.

> So I am moving out by the end of the month and the landlord wants the apartment professionally cleaned even though I told him I would clean up any issues he had with the place. The lease does mention professionally cleaned now I'm not sure if I have to hire someone to do the cleaning.[618]

In all of these examples, the poster is vaguely aware that they have certain enforceable rights but cannot exactly articulate or locate them.

More illustrative of how Redditors have difficulty with comprehending the scope of their legal entitlements, however, is how the poster frames their questions and the facts that they choose to either include or exclude. Narratives, for example, are often presented in a one sided manner that may not accurately reflect what is actually going on. In these situations, the poster neglects material facts that may impact their legal entitlements. For example, one poster relates a rather dramatic story involving renovations of their unit:

> Today I received a notice from [the landlord] that they are redoing all the plumbing and everyone must vacate/end tenancy and be out Mar 5. They are liter[al]ly given us tenants 7 friggen days to leave!! There will be no water, toilet, showers, for 15days they say, which is why they want us out. They say if we don't leave they will serve N13, but you have to leave because how can you live with no plumbing. How does someone find a place with 1st and last month rent in 7 days!! I'm so stressed I feel like I'm going to have a nervous breakdown.I have kids in school, pets, no vehicle and no money to just move in week. If I had a month notice or 60 day notice I could manage but not this.[619]

[616] Housing 031.
[617] Housing 022.
[618] Housing 010.
[619] Housing 060.

Based solely on this account, it appears that the landlord is in gross violation of the Act if, for no other reason, then by failing to give reasonable notice. However, one of the discussants responds to the post as follows:

> Hi. I live in the same unit. [The landlord] has done more then enough to help. It[']s funny in your post you don[']t mention the s[e]wage coming up from the bathrooms drains in the basements i.e why the water is being turned off or the offer to pay first and last to move. Or the fact you don[']t have to leave it[']s an option they are giving you so you don[']t have to live with out water.[620]

If this discussant is to be believed then it seems that the landlord is acting appropriately given that the renovations appear to be necessitated by emergency repair. However, there is still material facts that are missing. For example, it is unclear whether the landlord offered to pay for temporary accommodation; a fact that would impact the legal entitlements of the tenant.

As well as presenting a one-sided narrative posters often do not clearly indicate the specifics of their living situation which may impact whether their lease agreement is actually regulated by the Act and thus subject to the jurisdiction of the Landlord Tenant Board. Section 5 of the Act specifically excludes numerous living arrangements from the protections afforded by the Act including, for example, university residences, accommodation for penal purposes, hotels, emergency shelters, care homes and accommodation for farm help.[621] One exemption that is frequently applicable to these conversations, however, is when an occupant is required to share a bathroom or kitchen with the owner or with a member of the owner's family. In such a case, where a tenant shares a bathroom or kitchen with the owner, the relationship is exempt from the Act.[622] For example, one poster looking for advice related a situation wherein their landlord was basically harassing them and denying them the ability to peacefully enjoy their accommodation begins their question by stating as follows: "I currently rent a basement apartment. The owner of the home lives upstairs."[623] The poster fails to note whether this basement apartment is self-contained or not, which is integral information as it would determine whether the poster is actually entitled to protections under the Act. Similarly, whether the tenant

[620] *Ibid*.
[621] *Residential Tenancies Act, supra* note 14, s 5.
[622] *Ibid.*
[623] Housing 163.

is renting a condo unit or not may impact the legal advice as condo units would be subject to additional regulations under the *Condominium Act, 1998* as well the condo board's rules and by-laws.[624] One conversation, for example, where this may have been relevant involved a poster asking about additional paperwork they were given to sign.

> I was just curious about the laws surrounding landlords bringing additional paperwork for tenants to sign after the primary lease has already been signed? I have been renting the property since May and my landlord has brought me an additional contract for me to sign that seems to be putting additional responsibilities and liabilities on me that seem to already be outlined in the lease.[625]

While a landlord cannot normally alter the conditions of a tenancy, it may be legal if this paperwork was necessitated by the condo board changing some rules or by-laws.

As well as neglecting to detail relevant and material facts, posters often fail to state what remedy there are seeking. Do they want to remain in the tenancy or do they want to leave? Do they want compensation or do they simply want to be left alone? In one example, the tenant had four months left on their lease and requested permission to assign the remaining portion.[626] Under the Act a landlord cannot unreasonably refuse this request, however, in this situation the landlord maintained that the tenant must pay $800.00 to assign the lease. The tenant took this as a refusal and served the landlord with the required paperwork to end the tenancy based on an unreasonable refusal. The landlord then changed their position and agreed to the assignment. When asking whether their notice was still valid, it is clear that the tenant did not want to be liable for the four months of rent, however, they never indicated whether they wanted to go through with the assignment or simply end the tenancy. If they wanted to end the tenancy, then the dispute would probably be elevated to the Landlord Tenant Board and require a hearing. If, however, they are still willing and able to assign the lease then a hearing would likely be unnecessary. Another example where the poster failed to state what remedy they were seeking involved a landlord entering a unit without notice. The poster states:

> Our landlord has come into our unit several times before without prior written notice. We are fearful that something could have happened to our cat or the valuables in our

[624] *Condominium Act, 1998*, SO 1998, c 19.
[625] Housing 065.
[626] Housing 001.

> apartment. How do we proceed and if you have any advice for this situation it is much appreciated.[627]

Again, the poster does not state what they want to happen and the advice given very much depends on whether they want compensation, to terminate the tenancy, a guarantee that the landlord will provide them with notice before entry, or a guarantee that their landlord will not enter their unit again. The failure to articulate exactly what remedy one is seeking displays that Redditors are generally aware that they have legal rights, but are not quite sure of the scope of those rights or what those rights entitle them to.

III. Advice is Not Comprehensive

Many of the comments examined – particularly those which simply directs users to legal information – would not be considered "legal advice" in of themselves. However, other comments within the same conversation may apply individualized facts to legal principles and advocate the poster pursue a particular course of action. This means that many of the conversations examined, when assessed as a whole, would likely be deemed to be providing legal advice. Apart from being a violation of the *Law Society Act*, the main problem with such advice is that it often fails to acknowledge the nuances and complexities of the legal framework that governs housing problems. On one hand, the commentators were generally acutely aware of existing rights and obligations; although only about a third of the conversations made direct reference to a primary source of law most conversations were able to identify the scope of legal rights and obligations with confidence. For example, despite not referencing a primary source, commentators are correct when they note that it is the landlord's responsibility to remove snow and maintain lawns;[628] that a landlord cannot unreasonably refuse consent to an assignment or sublet of a rental unit;[629]and that a landlord cannot ask for a security deposit.[630] However, legal advice requires more than a basic understanding of the scope of one's rights, and the

[627] Housing 204.
[628] Housing 007, Housing 044, Housing 061, Housing 093.
[629] Housing 011, Housing 014, Housing 021, Housing 026, Housing 030, Housing 031, Housing 038, Housing 043, Housing 047, Housing 050, Housing 052, Housing 183, Housing 184, Housing 188, Housing 194, Housing 205.
[630] Housing 002, Housing 006, Housing 029, Housing 038, Housing 058, Housing 105, Housing 110, Housing 185, Housing 188.

commentators often fail to engage with the problem on a more robust level. Often the advice is unhelpful in terms of next steps or contains errors. For example, in one post a tenant states that their landlord is selling the house that they are renting and asks if either the landlord or purchaser can evict them. The top comments states as follows:

> Until you receive an N12, you do not have to go anywhere. After you receive an N12, you have 60 days (minimum 2 full months) to leave. You can leave earlier if you choose. If you receive the N12 for reason 1 (landlord's own use) you are entitled to one month's rent compensation. If for reason 2 (purchaser's own use) you will not be compensated. If you think the notice was given in bad faith, do not move out. The landlord will then have to take you to the Board and the case will be decided by an adjudicator.[631]

While this is not exactly incorrect it is missing several important nuances that may be applicable. First, a current landlord can only give notice to terminate a tenancy for personal possession if they are an individual and it is done in good faith – which would almost certainly not be the case if they are selling the house. Similarly, the purchasing landlord can only give notice to terminate the tenancy for personal possession if they are an individual, it is done in good faith, and the residential complex has no more than three units.[632] Finally, a landlord or purchaser may also give notice to terminate a tenancy if they wish to demolish the building, covert it for use other than residential premises, or do substantial repairs.[633] If they do this, however, the tenant is entitled to 120 days of notice, a right to first refusal to occupy the premise after repairs, and compensation in the amount of three months rent if certain conditions are met.[634]

Perhaps more important to this particular situation, however, is the fact that the commentator fails to explicitly state that there are only a few specific grounds in which a current landlord or a purchaser can evict a tenant without cause and that the simple purchase and sale of a property is not one of them. To be fair to the commentator – and typical of most posts – is the fact that the poster only provided a skeletal amount of details that makes comprehensive advice difficult to give. Further, these discussions are dynamic and while the top voted posted did not provide comprehensive advice, some of the other discussants picked up on these

[631] Housing 186 (An N12 is the form a landlord is required to serve on their tenant in order to end the tenancy for the landlord's own occupation or for a purchaser's own occupation).
[632] *Residential Tenancies Act, supra* note 14, ss 48-49.
[633] *Ibid,* s 50.
[634] *Ibid,* ss 50, 52-54.

oversights. For example, a later post in this conversation does note that the new owner cannot evict for personal reasons if they are a corporation and another commentator notes that a landlord can only end the tenancy for legitimate "without cause" reasons, one of which is for personal use. However, this dispersed type of advice that needs to be pieced together – and is still missing important considerations – makes it difficult for anyone to understand the full scope of their rights and entitlements.

A second problem with crowd sourced legal advice is that the good advice is often lost in a sea of off topic conversations or contradictory bad advice. In one post, for example, the tenant had found new accommodations and wanted to end their lease a month early, however, the landlord refused.[635] Further, the tenant relates that the landlord is holding a $500.00 security deposit and is not likely to return it. The top voted comment is simply "pay rent in both places" which is probably not in the best interest of the tenant and completely ignores the issue of the security deposit. Other discussants suggest just moving out, and foregoing the deposit since it is unlikely the landlord would pursue them. This, however, is terrible advice since it opens the door to many potential problems and costs down the road. Others suggest seeing if the landlord will release them if they find a replacement tenant. This is not a bad suggestion, but it does not really equip the tenant with a full understanding of their entitlements and again ignores the issue of the security deposit. The best advice was from one commentator who stated that the tenant can assign or sublet their unit and, if the landlord refuses, can use that refusal as grounds to end the tenancy. The commentator also advised that the tenant could apply to the Landlord Tenant Board to have the security deposit returned as it is an illegal charge. Thus, we do find some good advice in these conversations, however, it is often buried within the conversation and one cannot rely on the upvoting function as a way to filter out the bad advice.

Similarly, it is common to see long rambling conversations where discussants spend more time discussing social situations, or they use the conversation as an opportunity to complain or criticize rather than offer advice. For example, in one post a tenant relates how their rent cheque has bounced three times and they are worried that the landlord will not let them stay as tenants

[635] Housing 188.

once the lease expires.[636] Despite the obvious legal question inherent to this, much of the conversation was taken up with discussants commenting on whether this person is a good tenant or not and whether the landlord should be forgiving. In another example a tenant is being threatened with eviction unless he tears down a backyard hockey rink that he built.[637] After one discussant suggests contacting a paralegal firm, the discussion devolved into an argument about whether paralegals are qualified to give legal advice and whether they are as competent as lawyers. In one final example, the conversation began with a tenant asking about the legality of the landlord charging a deductible to repair appliances.[638] After the first few responses which tried to answer the question, the conversation devolved into a commentary on tenants who abuse a landlord's obligation to maintain the property. All of these examples show that while commentators and advice givers may have a general grasp on the legal regime in terms of rights and obligations, as a whole they fail to provide comprehensive advice on any particular situation.

A final example of how the community has difficulty understanding the nuances of the law despite the fact that the community clearly situates housing problems within the formal legal frameworks, is in regards to the suggested path to justice. While it was not uncommon for commentators to advise the poster to bring an application to the Landlord Tenant Board (12.4% of conversations) – thus displaying an awareness that the Landlord Tenant Board had jurisdiction to hear the matter – the commentators failed to explain the grounds that would give rise to a poster's right to bring an application nor the remedies that they could seek from the Landlord Tenant Board. For example, in one post noted above the tenant relates how, after requesting the landlord conduct some needed repairs, the landlord told the tenant that he should start paying the gas bill which was previously the responsibility of the landlord.[639] The landlord continued that if the tenant refused to accept this, then he could recover this money by either shutting off the gas, eliminating their parking, or evicting them – all of which are prohibited under the Act. The top advice for this stated: "I would make a recording of your next interaction with him. Sound like you're going to make a deal, and ask for confirmation. Then take him to the LTB."[640] But on

[636] Housing 023.
[637] Housing 088.
[638] Housing 029.
[639] Housing 005.
[640] *Ibid*.

what grounds? The Act outlines specific situations in which a tenant may apply to the Landlord Tenant Board for relief.[641] In this case the tenant may be able to bring an application for an order determining that the landlord has breached an obligation to repair the unit, an order determining that the landlord has interfered with the reasonable enjoyment of the rental unit, or an order that the landlord has threatened the tenant during the occupancy. In the event that the landlord actually shuts off the gas, then the tenant may also apply to the Landlord Tenant Board for an order that the landlord has withheld the reasonable supply of a vital service.[642] Similarly, discussants rarely advised what remedy a poster should seek from the Landlord Tenant Board. The Act provides the Landlord Tenant Board with the power to order numerous remedies in the event of a breach of an obligation including an order to complete repairs, an order to not engage in further activities against the tenant, an order that the landlord pay a fine, an order to terminate the tenancy, or an order that the landlord pay to the tenant out-of-pocket expenses.[643] Perhaps the most important power, however, is the power to order a rent abatement, which can be used as a form of restitution for almost any breach. Out of all the conversations where a commentator advises the poster to bring an application to the Landlord Tenant Board, only four mention that the Board can grant a rent abatement. This seems to be woefully negligent given that almost every tenant application to the Board for a breach of an obligation should include a request for a rent abatement. The failure of these discussants to pinpoint the exact ground to bring an application and to advise on specific remedies illustrates that even where an individual is aware of the legality of a problem, they still have difficulty understanding and framing the issue in a way that conforms to the legislative framework.

After examining conversations posted to Reddit, it is clear that Ontarians situate housing problems very much within the formal legal framework. They understand that there are rules imposed by legislation and that the Landlord Tenant Board is the legitimate forum for resolving those problems. None-the-less, Redditors still have difficulty understanding the scope and nuances of this framework: they have difficulty framing their problems and they have difficulty providing legal advice. As will be discussed in Chapter 8, this awareness of one's legal rights and

[641] *Residential Tenancies Act, supra* note 14, s 29(1).
[642] *Ibid,* s 29(1).
[643] *Ibid,* ss 30(1), 31(1).

entitlements coupled with the inability to effectively articulate them within a legal context has the potential to create a disconnect between the formal actors within the justice system and the users.

5.4.4 The Board Cannot Resolve All Problems

As noted above, housing problems are understood by Redditors as being situated within a legal framework governed by the *Residential Tenancies Act, 2006*. Redditors will make reference to this law in order to ground their rights and enforce obligations. Within this construction, the Landlord Tenant Board is viewed as the primary forum for resolving disputes and righting wrongs. However, it is also evident from the advice posted in Reddit that some Ontarians believe that the Landlord Tenant Board is plagued with numerous short comings that make it difficult, if not impossible, to resolve a problem through them. There is also a small but vocal narrative that individuals should take responsibility for their own problems and not delegate them to the legal authorities. Both of these narratives do not necessarily see the Landlord Tenant Board as an optimal path to justice.

I. Barriers to Formal Resolution

Discussants frequently identify objective barriers such as delays and costs as reasons why the Landlord Tenant would be unable to assist with a poster's problem. For example, in one discussion regarding who has the obligation to keep the entrance way free of snow, one discussant states "LTB is backed up to over a year currently as the Ford government didn[']t bother appointing members. It will be 12 months at least to hear your case." To which another discussant responds "Yea, might be easier for the 4 of you to just buy salt and shovel it."[644] In another post, where a tenant is asking about how he can enforce his landlord's promise to paint and fix the walls of his rental unit one discussant notes the potential risk of taking this dispute to the Landlord Tenant Board:

> I believe there is like $190 application fee for filing through LTB. I was filed against last year, and the property managers expected me to pay this fee. When I protested their filing, they offered to split the difference. When they didn't show for the hearing, it

[644] Housing 093.

> was assigned to them. But if this person files about unpainted walls and the LTB says we can't enforce that, it will cost them the application fee.[645]

In the same conversation, in response to a post stating that the Landlord Tenant Board can be used to resolve all manners of disputes not just "serious" ones, another discussant warns against using the Landlord Tenant Board stating "The Tenent board is a paper tiger nothing more and has been a disaster for both landlords and tenents."[646] Comments such as these display a concern with the ability of the Landlord Tenant Board to actually resolve any particular problem. Therefore, while it is still considered a legitimate forum to resolve grievances, there are also concerns that objective barriers such as delays and cost prevent individuals from accessing the Landlord Tenant Board.

There are also other subjective barriers that impact the ability of individuals to utilize the Landlord Tenant Board. Housing problems may be intertwined with other non-housing problems related to, for example, poverty, human rights, family, and/or personal safety, and the Landlord Tenant Board is not equipped to resolve all of these interconnected problems. Individuals are reluctant to use the Landlord Tenant Board to resolve these types of problems either because they do not see them as housing problems or because they are aware of how limited the Landlord Tenant Board's ability to resolve non-housing problems are.

For example, in one conversation the poster relates that they are having difficulty finding housing and pleads with the community for help.[647] The poster explains that they do not have much money for rent given that they are on the Ontario Disability Support Program,[648] and acknowledges that they are unlikely to find a one bedroom apartment on their budget. However, they would prefer not to live with a stranger due to mental health reasons. They also suggest that landlords may not give them adequate consideration during a viewing because they are transgendered and landlords are confused by how they look. Finally, they do not have any family connections who could co-sign or guarantee a lease. In this situation there is a potential legal issue that could be brought to the Landlord Tenant Board regarding discrimination during the

[645] Housing 095.
[646] *Ibid*.
[647] Housing 128.
[648] The Ontario Disability Support Program is a social service wherein the government will provide some financial assistance to people with disabilities to help pay for living expenses.

rental application process. However tied to this are also issues of mental health, poverty, and family that the Landlord Tenant Board clearly is unequipped to assist with. Not surprisingly not a single commentator suggested calling the Landlord Tenant Board or bringing an application to them. In another example the poster explains that they have been ordered by the Landlord Tenant Board to make a rental payment to the landlord by a certain date otherwise they will be in breach of the order.[649] The poster further explains that the landlord is insisting that payment be made by way of email transfer and asks if the landlord can refuse other methods of payment. At first blush this seems to clearly be a housing problem involving non-payment of rent. However, as one reads through the conversation it becomes evident this problem is firmly rooted in the greater dynamic of poverty. The poster is a recipient of Ontario Works – a social assistance program that provides income support to people in financial need – and as such is without savings. Further, because the landlord is in a different city and will only accept money transfers as payment, there is an issue with the timing of the rental payments. It seems that the tenant is consistently late, because his rent is due a day or two after he receives his Ontario Works payment and money transfers take a few days to process. In this instance, the community could have advised the poster to return to the Landlord Tenant Board and request that an order be made in regards to the method of payment, however, they instead advised him to direct Ontario Works to pay the landlord directly thereby expediting future payments.

II. Individual Responsibility

A second category of commentary that does not see the Landlord Tenant Board as a reasonable path to justice are those that insist on individual responsibility. These posts see the terms of the lease as paramount regardless of context and are inflexible about interpretation or negotiation. For example, in a conversation asking if the term "professional cleaning" in a lease means that the poster has to hire someone to clean their unit, one poster says "You agreed in the lease to have it professionally cleaned so, yes, you have to hire someone to do a professional cleaning."[650] The veracity of this statement, however, is debatable since there is no governing

[649] Housing 062.
[650] Housing 010.

body that certifies cleaners as professionals and, in either event, the provision likely runs afoul of the Act. Similarly, in a different conversation, the poster is asking how they can end their tenancy a month early because they found a new place to live and a discussant says "you signed a contract - you need to abide by the terms - don't expect to get out of it without paying..."[651] These types of posts offer no assistance to the posters and fail to acknowledge that a landlord and tenant can always negotiate amendments to a lease. In a variation on this theme, some discussants simply blame the poster for the problem. In one conversation where the poster wants to know if noisy neighbours can be grounds for terminating a lease one discussants states: "But you placed yourself into this situation. OP [original post] *really* should have talked to their current LL before impulsively signing a new lease."[652] In another conversation, after reciting a laundry list of grievances against their roommates – including drug use and noise – the poster asks how to terminate the tenancy. One discussants observes:

> "So you've moved into a multi tenant student dwelling and you are upset because your fellow students are slobs. And you believe this to be the fault of the landlord? You have signed a contract with the landlord and you are responsible for it. Have you tried speaking with your fellow roommates? You're a big boy now. Man up.[653]

These individual responsibility posts tend to be peppered throughout the hundreds of comments and, as such, are often outliers in terms of advice within an individual conversation. However, they appear with enough frequency to indicate that there is a shared perspective among some in the community that individuals create their own problems and those individuals should simply accept the consequences as they are.

Conversely there is another category of posts where the discussant offers personal assistance to the poster. In one conversation a discussant offered to help draft a letter to a landlord who was harassing the poster.[654] In another conversation a discussant offered to rent a room in their house to the poster who was having difficulty finding a place to rent.[655] In a third, a discussant offers to let the poster – who is subjected to continual harassment – to sleep on

[651] Housing 188.
[652] Housing 086.
[653] Housing 087.
[654] Housing 121.
[655] Housing 132.

their couch.[656] Another discussant offered to fix the poster's leaky toilet.[657] Similar to offers of private assistance it is also not uncommon for discussants to take a personal interest in the outcomes of the posters problems and ask for follow-ups displaying, in some instances, a solidarity among the community.[658] These conversations provide an added nuance to how housing problems are understood by Redditors. While Redditors typically situate their housing problems within the formal legal framework many see the Landlord Tenant Board as either inaccessible or not the best way to resolve the problem.

5.5 Impact on Ontarians' Access to Justice

5.5.1 Introduction

The above section examined how Redditors understand the legal framework that regulates housing issues and how they interact with that framework. In doing so, it identified three themes that emerged from online conversations posted to social media. This section will use those themes to inform a discussion on justice as fairness with the objective of identifying benchmarks that can be used to assess access to justice initiatives. As discussed in chapter 2, justice as fairness contains three dimensions: procedural fairness, background fairness, and stakes fairness. Each one of these dimensions will be discussed in turn from the perspective of an individual experiencing a housing problem.

5.5.2 Procedural Fairness

From a justice as fairness perspective, procedural fairness is fundamentally concerned with ensuring that offices and positions are open to everyone under conditions of fair equality of opportunity. In order to ensure equality of opportunity is maintained over time, Rawls argues that society must distribute goods according to principles of pure procedural fairness. Under pure procedural fairness the outcome of any distribution is considered just by virtue of following the rules and not by any independent criterion of justice. What this means for those with housing problems – if housing is understood to be a good subject to pure procedural justice – is that the

[656] Housing 163.
[657] Housing 123.
[658] Housing 200.

rules that regulate the rental market and the distribution of goods associated with housing are actually followed. Whether these rules themselves are fair, however, must be assessed in light of the entire system of distribution and is best critiqued under the principles of background justice which will be examined in the next section.[659] Assuming for a moment that the rules governing the rental market are indeed fair, than issues of procedural fairness are only triggered if the rules are not actually followed. Issues of pure procedural fairness would be most evident in cases of discrimination. That is, in Ontario the rules governing the rental of tenancies explicitly guarantees the right to equal treatment and prohibits discrimination on numerous grounds including race, sex, and religion.[660] If certain classes of people were denied tenancies solely based on one of these characteristics, then it would violate the principles of pure procedural justice. For the most part Redditors are silent on issues that would be of a concern from a pure procedural justice perspective. There was one post where an individual was having difficulty finding housing and speculated that it may be partly grounded in discrimination: if this individual is correct, then they have indeed experienced a failure of procedural fairness. [661] However, this was an isolated post and not the type of problem widely discussed among Redditors. A few other posts had analogous concerns about being denied a tenancy due to pet ownership.[662] This may also indicate some problems with procedural fairness since landlords are prohibited from including a "no pet" provisions in a lease agreement and, arguably by extension, denying a tenancy based on pet ownership. But again these types of problem were infrequently discussed. Given how few conversations touched on issues of pure procedural justice, one can conclude that Redditors generally do not have problem with the rules relating to the distribution of housing being followed.

Principles of procedural fairness, however, can also be applied to competitions that have an independent criterion for assessing fair outcomes. In other words these principles can be

[659] Rawls, *supra* note 123 at 88. (Rawls began to blend the concept of procedural justice with the difference principled by introducing the phrase "background procedural justice." See John Rawls, *Justice as Fairness: A Restatement*, Erin Kelly, ed. (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2003) at 51. The dissertation attempts to keep the two dimensions conceptually distinct).
[660] *Human Rights Code,* RSO 1990, c H.19, s 2.
[661] Housing 128.
[662] Housing 142, Housing 143

applied to a landlord tenant dispute where one can make an objective claim to being right. For example, if a landlord brings an application for an eviction due to non-payment of rent, the fair outcome is clearly that the tenant pay their rent owing or they leave the tenancy. If the Landlord Tenant Board made an order that the landlord was precluded from collecting rent owing, than the landlord could rightfully claim that the outcome is not just. In these types of disputes, Rawls argues that society should strive for perfect procedural justice, wherein the procedures are designed in a way that – if followed – they guarantee the just outcome. Since it is difficult, if not impossible to determine what an objectively fair outcome is in many circumstances, perfect procedural justice can be assessed by examining the normative concerns of the users. That is do landlords and tenants, for example, feel they are given an opportunity to participate in the proceedings, do they trust that the adjudicator and other members of the tribunal are treating them fairly, and do they feel that are they treated with respect.

In terms of perfect procedural justice, the legal regime that is tasked with resolving housing disputes receives a mixed grade. On one hand, it is evident that people are willing and able to utilize the system. The conversations examined indicate that Redditors who experienced a landlord tenant dispute generally do not have serious concerns with either trust or respect. The fact that so much of the advice provided centres on bringing an application to the Landlord Tenant Board or speaking to the Landlord Tenant Board attests to the fact that Redditors, for the most part, believe that the processes and procedures of the Landlord Tenant Board are fair. Unfortunately, some Redditors express concerns about being able to participate meaningfully in the proceedings due to issues of cost and delays. In regards to costs, the few posts discussing costs were in reference to high filing fees as opposed to the cost of legal representation making some feel that the board was only available for more serious concerns such as eviction. Delays in getting a hearing date were of a much more immediate concern and resulted in some Redditors disavowing the Landlord Tenant Board as a legitimate path to justice entirely. Moreover, while not explicitly stated, it is evident that the complexity of the legal regime also precluded participation. Redditors had a difficult time framing their rights and understanding procedures both of which make it very difficult to participate meaningfully in the competition. Thus, while

the Landlord Tenant Board, for the most part, is viewed as procedurally fair, there are some legitimate barriers to meaningful participation.

5.5.3 Background Fairness

The principle of background fairness is used to assess whether the rules that underpin the basic structure of society ensures a fair equality of opportunity exists over time. In other words background fairness is concerned with guaranteeing that equality of opportunity is meaningful rather than simply formal. Rawls argues that in order to ensure fairness overtime benefits and rights need to be distributed – through such means as taxes or laws regulating inheritance, for example – such that wealth and the accompanying political privileges do not accumulate within one community over generations. The mechanism that Rawls proposes to guarantee an ongoing fair society is what he calls the difference principle. Here any inequality can only be justified if it benefits the least advantaged members of society.

Within the housing context this means that landlords should only be allowed to accumulate wealth if, in doing so, they increase the supply of adequate and affordable housing for tenants. Historically, landlords have occupied a position of greater power in relation to their tenants which has allowed them to accumulate wealth while imposing grossly unfair terms on their tenant. In such cases there is clearly a problem with background fairness since the resulting inequality does not benefit anyone apart from the landlord. To prevent this state of affairs – and to ensure that the tenant has a fair opportunity to occupy and enjoy adequate housing – society needs to arrange housing rights in such a way that it equalizes the bargaining positions of the parties. Thus Ontario law has granted certain rights to the tenant – such as the security of tenure – and has imposed certain duties on the landlord – such as the duty to maintain the tenancy in a good state of repair and fit for habitation.

The consensus among Redditors is that the existing legal regime helps satisfy background justice by having laws that favour the tenant. While a minority of Redditors do see these laws as going too far and granting unfair advantages to tenants, a majority believe that this favouritism is legitimate since it is necessary to correct the power imbalance inherent in the landlord tenant relationship. One example of this is in relation to who should bear the maintenance costs

associated with renting a tenancy. Generally, Redditors believe it would be unfair for landlords to further enrich themselves by shifting these costs to the tenants. Indeed, this is recognized by the law which – for the most part – prohibits this behaviour. In this sense, the legal regime operates to promote background fairness by ensuring that vulnerable parties have an equal opportunity to access adequate housing. The greater difficulty from a background fairness perspective, however, has to do with the affordability of housing. Numerous Redditors related that they have difficulty affording rent or finding new affordable housing. This is problematic because it evidences growing inequality within the rental housing market. Indeed, Ontario has made attempts to regulate the rental housing market itself in order to encourage more affordable housing. For example, under the *Residential Tenancies Act, 2006*, a landlord is only permitted to increase rent under certain conditions. However, despite such regulations, it is evident from the conversations analyzed that many Redditors believe more needs to be done to in order to promote greater background fairness within the rental housing market.

While the difference principle is a helpful mechanic to determine a fair distribution of benefits, the principle of status equality can assist in determining whether individuals have an equal opportunity within a competitive framework. Status equality requires that the initial starting position of the competitors be fairly situated in the sense that all participants enjoy the same moral standing within the competition. In the context of a housing dispute the obvious concern would be whether landlords and tenants have the same standing before the Landlord Tenant Board. This is slightly different than the concerns about discrimination expressed within the context of procedural fairness. The issue under procedural fairness was whether the landlords were following the rules or not. Status equality, however, is about the rules themselves. Thus, if the Landlord Tenant Board maintained a presumption that the tenant was always at fault there would be no problem with procedural fairness – since the Board is simply following its own rules – but there certainly would be a problem with status equality since the tenant is not fairly situated within the competition. Among all the conversations analyzed there was no expression that one would win their dispute simply because they were either a landlord or they were a tenant. Nor was there expression that either party occupied a particular place of privilege at the outset of the competition. While there was some expression that the Landlord Tenant Board

treated tenants with more leniency, this was generally viewed as way to level the playing field for unrepresented tenants who had to face represented and institutional landlords rather than privileging tenants with a higher moral status. Therefore, while more needs to be done to distribute benefits more fairly within the rental market, Redditors do not raise any concerns with status equality.

5.5.4 Stakes Fairness

Stakes fairness provides a normative standard for critiquing the outcomes of any given competition. Specifically, stakes fairness has two aspects: the first has to do with constraining outcomes of a competition and the second has to do with limiting the effects of a competition. In regards to the first aspect, stakes fairness demands that the burdens and benefits of almost any given competition be distributed more widely among participants to prevent a winner take all situation. From a housing problems perspective this means that evictions – being the exemplary case of an outcome where a participant loses everything – be awarded sparingly. This is particularly true when other remedies, such as payment schedules, can address the concern of the claimant. Historically, the landlord tenant relationship was very much arranged in a winner take all fashion. As discussed above, the common law granted landlords immense powers to seize and sell a tenant's property as soon as rent became due and owing while tenants had no security of tenure. Although this legal framework has changed dramatically in modern times, the remedy of eviction is still commonly used by landlords; indeed, most applications that come before the Landlord Tenant Board are for evictions.

From the conversations analyzed, it is evident that there is concern among Redditors over the use of this remedy. Numerous conversations either discussed how a landlord threatened eviction or expressed worry that they would be evicted; sometimes for seemingly inconsequential matters like getting a cat. While the community was quick to assure the posters that evictions are a very controlled process that required approval by the Landlord Tenant Board, these conversations do display a concern over the potential for a dispute to turn into a winner take all situation. Perhaps more pressing, however, is the fact that few conversations were able to express with precision the specific remedy a tenant was entitled to. If a tenant is unable to

request a remedy than the competition turns into a winner take all by default; that is, even if the tenant "wins" they will not be awarded what they are entitled to by law.

The second concern of stakes fairness demands that the outcome of one competition not unduly influence another competition. In the housing context this means that losing an application at the landlord tenant board should not impact other spheres of life such as education or employment. In most contexts this does not seem to be an issue: losing a dispute over who is obligated to shovel snow in the winter, for example, should not impact one's success at their job. The conversations analyzed do not contradict this assertion. More serious disputes, however, may have massive impacts on other spheres of life. Indeed, it would be hard to imagine a situation when being evicted would not impact one's work life or schooling. It is evident from the conversations that Redditors are not overly concerned with their landlord tenant disputes spilling over into other aspects of life. The exception to this, however, is when housing problems are intertwined with other issues such as mental health, human rights, and poverty. This type of clustering of problems shows how some housing problems cannot really be resolved in isolation.

5.5.5 Conclusion

When analyzed from a justice as fairness perspective, the discussions posted to Reddit provide points of reference that can be used to measure access to civil justice initiatives. First it should be noted that Redditors who experience housing problems generally have access to a legal framework that, for the most part, complies with principles of justice. In terms of procedural fairness the rules are followed, and Redditors trust that the institutions act fairly. In terms of background fairness, Redditors feel that legal rights are fairly ascribed and that they do not suffer lesser standing when appearing before the Landlord Tenant Board. Finally, in terms of stakes fairness, most disputes are not arranged in a winner take all manner and individual disputes have little impact on other spheres of life. With that said, however, there are some serious concerns with accessing justice within a housing context. The main impediment to justice from a procedural fairness perspective has to do with institutional barriers such as cost, complexity, and delays that make it difficult to act upon one's rights and participate meaningfully in the proceedings. From a background fairness perspective the rental market is becoming more

unaffordable for many which is leading to a growing inequality. Finally, in terms of stakes fairness, the inability to articulate viable remedies within a dispute means that some competitions become all or nothing affairs. Moreover, housing problems cluster with non-housing problems making them difficult to resolve in isolation. These three concerns can thus act as benchmarks for measuring access to justice initiatives. Specifically, does the initiative reduces cost, complexity, or delay; does it reduces inequality in the housing market; and does it help individuals articulate remedies? Chapter 8 will continue with this discussion by examining specific initiatives that have sought to improve access to justice.

Chapter 6

Employment Problems

6.1 Introduction

Employment issues are the second category of legal problems that are examined by this dissertation. In Canada, there is a strict separation between the laws and procedures that apply to the unionized workplace and the non-unionized workplace. This distinction is reflected in the legal terminology used within academia and the profession, wherein labour law refers specifically to the unionized work environment and employment law refers specifically to the non-unionized work place. It is important to recognize this nuance not only because applicable laws and procedures will differ depending on the work environment, but so too will the non-formal laws in terms of work culture and norms. That being said, this classification of laws is fundamentally a legislated one and individuals may not appreciate how their problems fit into this formalistic system especially because many legal problems, such as wrongful dismissal, are not necessarily unique to a unionized nor a non-unionized work environment. Since this dissertation is concerned with the public's perspective of law – and not how the law is understood by lawyers – I did not impose constraints on the data collection process by filtering out labour or employment problems, and thus both work environments are represented in the data set. However, as noted below, the majority of conversations analyzed were from individuals situated in non-union environments and, as such, this paper uses the term "employment problems" to broadly mean all problems discussed on Reddit regardless of whether the workplace is unionized or not.

Like the previous chapter, this one will begin with a discussion of the legal framework that governs employment law in Ontario. It then examines the social media conversation collected and reports on key findings including the types of industries that Redditors work in and the specific types of employment problems experienced by them. The next section discusses three themes that emerged out of the conversations that reveal how Ontarians with employment problems understand those problems and relate them to the legal framework. The final section

examines those three themes from a justice as fairness perspective in order to identify access to justice benchmarks.

6.2 Legal Context of Employment Problems

6.2.1 Sources of Employment Law

Employment problems are situated in a unique and complicated legal context that makes this problem set particularly interesting from a legal consciousness perspective. Beyond the union/non-union dichotomy, another complication with the legal context has to do with legislative jurisdiction. In Canada, both employment law and labour law generally fall under the constitutional jurisdiction of the provinces. This is because the power to regulate contractual relationships between employees, employers, and unions is included within the power granted by the *Constitution Act, 1867* for provinces to exclusively make laws in relation to civil and property rights.[663] However, the *Constitution* also grants the federal government exclusive legislative authority to make laws in regards to specific industries such as banking, the postal service, or shipping.[664] This power has been interpreted to mean that the federal government, not the provinces, have the exclusive power to create laws in regards to employment and labour relations within these industries.[665] Thus while the power to legislate in employment and labour law matters generally falls within the legislative jurisdiction of the provinces, the federal government has jurisdiction over the workplaces of specific industries.[666] Apart from legislation, there are two other sources of law that govern the relationship between employees and employers. These are the employment contract – or in the case of labour law the collective agreement – and the common law. The interplay and application of these three sources of law is complex and confusing.

Modern employment law is grounded on notions regarding the freedom of contract wherein parties are free to enter into a contract of employment on whatever terms they deem

[663] *Constitution Act, 1867*, supra note 361, s 92.
[664] *Ibid,* s 91.
[665] *Toronto Electrical Commissioners v Snider*, [1925] AC 396, 2 DLR 5 (PC).
[666] For further discussion on the "double aspect" doctrine see also *Hodge v The Queen (Canada),* [1883] UKPC 59, [1883] 9 AC 117; *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11.

fit and, conversely, there cannot be an employment relationship without a contract.[667] Not surprising, this type of unregulated contractual relationship was rife for abuse especially during times of high unemployment when employers were able to unilaterally impose immensely unfavourable terms on individuals desperate for work.[668] After the Second World War, and encouraged by the union movement, various pieces of legislation were enacted federally and provincially to guarantee a statutory floor of certain fundamental protections such as maximum hours of work, health and safety standards, and minimum wage.[669] Today, there are numerous pieces of legislation that directly impact the work environment including, for example, health and safety legislation, insurance legislation, and tax legislation. However, the main piece of legislation that deals with the non-union employment relationship in Ontario is the *Employment Standards Act, 2000.*[670] This act sets out the basic rights of all employees – such as hours of work, minimum wage, and vacation – and procedures for terminating the employee contract. It also sets out a framework for the enforcement of rights under the Act and a list of prohibited offences as well as numerous other miscellaneous provisions. The main piece of legislation dealing with the unionized work environment in Ontario is the *Labour Relations Act.*[671] This act sets out among other things a procedure for establishing a union within a workplace, negotiating a collective agreement, and administering that collective agreement. It also prohibits various unfair practices on part of the employer or union, and establishes the Ontario Labour Relations Board to administer the Act. Federally the main piece of legislation that governs both work environments is the *Canada Labour Code* with Part I of the Code addressing the unionized environment and Part III addressing the non-unionized environment.[672] The basic principle governing how these pieces of legislation interact with the employment contract is that, unless explicitly allowed by

[667] *Kent v Bell*, [1949] SCR 745, 4 DLR 561 (the premise that one cannot enter into employment without a contract repudiates the old master-servant framework, wherein a servant could not refuse work mandated by their master and there were criminal sanctions for being unemployed).
[668] Douglass Brodie, *A History of British Labour Law 1867-1945* (Portland, Oregon: Hart Publishing, 2033) at 6–10. The power imbalance that permits employers to impose grossly unfair terms on their employees is an ongoing issue. See *Uber Technologies Inc v Heller,* 2020 SCC 16.
[669] See e.g. Craig Heron, *The Canadian Labour Movement: A Short History*, 2nd ed. (Toronto: James Lorimer & Company Ltd., 1996); H W Arthurs, "Fairness at Work: Federal Labour Standards for the 21st Century" (Gatineau, QC: Government of Canada, 2006).
[670] *Employment Standards Act, 2000*, SO 2000, c 41 [*Employment Standards Act*].
[671] *Labour Relations Act, 1995,* SO 1995, c 1, Sched A.
[672] *Canada Labour Code,* RSC 1985, c L-2 [*Canada Labour Code*].

the legislation, individuals cannot contract out of the rights granted by the legislation (e.g. minimum wage) and if there is a conflict between what is in the contract and what is granted by the legislation, the legislation will prevail.[673] Apart from this basic principle parties are generally allowed to negotiate the terms of an employment contract or collective agreement as they see fit.

Disputes, however, can arise when a term of employment is not expressly addressed either in the contract or in legislation. This is where the common law enters. The common law is derived incrementally from judicial decisions. Simply explained, when a court is asked to adjudicate a dispute, the court will render a decision based upon principles and customs that have been previously recognized by the court.[674] The common law, as it pertains to the employment contract, is premised on the principle that the court should give meaning to the intention of the parties.[675] Thus, if both the contract and the governing legislation are silent on an issue, the court will imply a term into the employment contract based on the unexpressed intentions of the parties.[676] In many instances, however, the courts imply terms into the employee contract, not so much based on the intentions of the parties, but rather as a matter of public policy. [677] This has resulted in numerous duties being imposed on the Canadian employment contract. For example, the common law states that in Canada all employees have a duty of obedience and competence to their employer and employers have a duty to prevent harassment and to provide a safe workplace for their employees.[678]

In many contexts, the employment contract is bare boned and made up almost entirely of these types of implied terms. Perhaps the most commonly litigated example of one of these implied terms is in regards to termination of employment and payment in-lieu of notice. In Canada, absent an expressed term stating otherwise, an employment contract is presumed to be for an indefinite period of time. Employers are allowed to terminate the employment of an

[673] *Employment Standards Act*, supra note 670, s 5; *Canada Labour Code*, supra note 672, s 94(3).
[674] See e.g. Moira McCarney et al, *Legal Research, Writing & Analysis*, 2nd ed (Toronto: Emond Montgomery Publications Limited, 2016).
[675] See e.g. *Lipari v Ecolosite Inc* (2005), 137 ACWS (3d) 1151, 2005 CarswellOnt 1023, (Ont Sup Ct).
[676] Geoffrey England, *Individual Employment Law*, 2nd ed (Toronto: Irwin Law, 2008) at 36–39.
[677] *Ibid*.
[678] *Ibid* at 58–60, 92–93.

employee, however, unless there is "cause" for such termination – the iconic example being theft – they must provide the employee with either notice before the impending termination or payment in lieu of this notice.[679] The policy reason for requiring an employer to provide a period of notice – or payment in lieu of – before ending the employment relationship is to give the otherwise innocent employee enough time to find alternative work. One major problem, however, is that the amount of notice an employer is required to provide to the employee is rarely expressed in the employee contract. In such circumstances the courts will determine what they believe a reasonable amount of notice is, depending on such factors as length of service, seniority, and character of employment.[680] Another commonly disputed term is in regards to whether the individual is an employee, in which case they are covered by legislated employment protections, or merely an independent contractor, in which case they are not. Here the courts will again determine the intention of parties by looking to factors such as whether the worker had control over which jobs they could accept, whether they used their own tools, and whether most of their work was done at the employer's premises.[681]

6.2.2 Paths to Resolution

One last factor complicating the legal context of employment law is the multiple methods of resolution that the law affords. For unionized environments, both the federal and provincial frameworks set out a standard grievance process and employees are generally bound to adhere to this process.[682] However, in non-unionized work environments there are multiple paths to justice. Typically, contract disputes – even for federally regulated industries – are resolved through the provincial civil court system. In Ontario this would be the Ontario Superior Court of Justice if the monetary complaint exceeds $35,000 and the Small Claims Court if the value is $35,000 or less.[683] However, both the *Employment Standards Act, 2000* and Part III of the *Canada Labour Code* establish mechanisms wherein an employee in a non-unionized workplace can make a complaint to the Ministry of Labour if they believe their employer has contravened the relevant

[679] *Ibid* at 289.
[680] See *Bardal v Globe & Mail Lt*d (1960), 24 DLR (2d) 140 (Ont HC).
[681] *Montreal (City of) v Montreal Locomotive Works Ltd* (1946), [1947] 1 DLR 161, [1946] 3 WWR 748 (PC).
[682] *Labour Relations Act,* supra note 8, s 48; *Canada Labour Code*, supra note 672, s 57.
[683] O Reg 626/00.

legislation.[684] If a complaint is filed under the *Canada Labour Code*, the employee is still entitled to pursue a civil remedy.[685] However, if a complaint is filed under the *Employment Standards Act, 2000*, the individual is generally precluded from seeking redress in the civil courts.[686] Thus, even at a preliminary stage an employee under the jurisdiction of the *Employment Standards Act, 2000* has to decide whether they wish to pursue a claim through the court system or through the Ministry of Labour. This is not a straightforward or easy decision to make. On one hand, if an employee chooses to make a complaint to the Ministry of Labour, an inspector will investigate the complaint and, if appropriate, make an order thus shifting the cost of prosecution and enforcement from the employee to the state. The complaint process is generally easy and does not require a fee. Conversely, an employee who chooses to litigate may have to pay substantial costs upfront including legal fees and court costs.[687] Moreover, resolution through the Ministry is potentially a much quicker path to justice than the courts since there is no need to engage in a lengthy discovery process or pre-trial procedure, and the inspectors have authority to order production of documentation without a court hearing.[688] This reality could be very persuasive especially if an employee is facing an uncertain financial future due to, for example, the termination of their employment or the unlawful withholding of wages. It may also be persuasive if the employee cannot afford a lawyer, and they find it intimidating or difficult to navigate a complicated court process on their own.

The cost of legal representation has been an ongoing concern for the legal profession for some time and is often perceived as one of the main barriers to obtaining legal representation and to litigating one's claim.[689] In order to address this, in 2002 the Law Society of Ontario changed their rules to allow lawyers to charge contingency fees for non-criminal, non-quasi

[684] *Employment Standards Act, 2000,* supra note 670, s 96; *Canada Labour Code,* supra note 672, s 251.01.
[685] *Canada Labour Code,* supra note 672, s 261.
[686] *Employment Standards Act, 2000,* supra note 670, s 97;
[687] In 2020 the cost to issue a Statement of Claim in the Superior Court of Justice was $229 and the cost to file a Trial Record was $810. See O Reg 293/92. In the Small Claims Court the cost to issue a Plaintiff's Claim was $102 and the cost to fix a date for trial was $290. See O Reg 332/16. In terms of lawyer's fees, data collected between the years 2009 and 2014 put the average hourly rates for a litigation lawyer between $204 and $386 per hour. See Semple, *supra* note 502.
[688] *Employment Standards Act, 2000,* supra note 670, s 91.
[689] See e.g. Macfarlane, *supra* note 527.

criminal, and non-family matters.[690] Under the typical contingency fee arrangement the lawyer will not demand an upfront retainer nor invoice for billable hours. Rather, the lawyer will take a percentage of the award or settlement secured in compensation of their services. In theory, this type of arrangement allows a plaintiff who cannot afford the upfront legal fees of a lawyer an opportunity to pursue their claim in court.[691] However, contingency fees add a whole new level of complexity to the decision of how to pursue one's claim.[692] For one, it is difficult for individuals without legal expertise to assess whether the contingency fee arrangements are fair and economically sound, and it arguably creates an incentive for lawyers to seek quick payouts on files.[693] This brings into question whether the individual is getting the best representation possible. Moreover, due to their inherent risk, contingency fees only make economic sense from the lawyer's perspective for high value cases which excludes an entire class of legal problems from using them. Connected with the issue of legal fees, and further complicating the decision on how to pursue a claim, is the issue of costs. Under the Ontario *Rules of Civil Procedure* the "loser" of the court case is generally required to pay for the "winner's" legal costs.[694] These costs can amount to tens of thousands of dollars and in some cases exceed the amount claimed.[695] This rule creates a huge risk to litigate and a disincentive to pursue claims especially in situations where an individual does not have the financial means to cover such an award or is not in possession of the best evidence to prove their allegations.[696]

[690] *Rules of Professional Conduct, supra* note 543, r 3.6-2.
[691] Trebilcock, *supra* note 16.
[692] In October 2020, in order to address some of the concerns over contingency fees, both the Ontario government and the Law Society of Ontario approved certain reforms to the contingency fee regime to take effect July 2021. This includes the requirement to disclose the maximum fee percentage charged, to provide fee related reporting to the client, and the requirement to use a plain language standard Contingency Fee Agreement form drafted by the Law Society of Ontario. See O Reg 563/20.
[693] Hutchinson, *supra* note 32.
[694] Ontario, *Rules of Civil Procedure,* RRO 1990, Reg 194, r 57.01.
[695] A good example of how excessive cost awards can be is illustrated in the case of *Fernandes v Peel Educational & Tutorial Services Ltd.* In this case, the plaintiff was a teacher suing a private school for wrongful dismissal. At trial the teacher was awarded damages approximating $175,000.00 plus costs of $130,000. The private school appealed and won. In reversing the decision the Court of Appeal awarded the school $30,000 for costs of the appeal, plus an additional $75,000 for costs of the trial. See *Fernandes v Peel Educational & Tutorial Services Ltd,* 2016 ONCA 468.
[696] Erik S Knutsen, "The Cost of Costs : The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36 Queen's Law Journal 113.

Despite all of these factors favouring the complaint process, there is still good reason to litigate an employment claim in court. Typically, awards granted by inspectors under the legislation are significantly less than those that are granted by the courts under the common law. As mentioned above, the entitlements guaranteed by legislation are viewed by the courts as a statutory floor meaning the courts will often grant significantly higher awards than the amount set out in legislation. For example, under the *Employment Standards Act, 2002* an employee is entitled to approximately one week of notice for every year of service to a maximum of eight weeks.[697] This simple formula is what the Ministry of Labour would use in calculating the amount owing under a wrongful dismissal claim. However, it is not uncommon for the courts to award a much higher notice period, with some cases awarding as much as twenty four months – or one hundred and four weeks – of notice.[698] This massive disparity between potential awards may help to push individuals to pursue their claim in court despite the added risk, cost, and delay.

6.2.3 Prevalence of Employment Disputes in Ontario

Employment problems are quite ubiquitous and make up about 16.4% of all civil legal problems experienced by Canadians.[699] Comparatively, family problems make up 5.1% of all civil legal problems, and housing problems make up only 2.6% of all civil legal problems.[700] Yet despite the fact that Canadians experience far more employment problems than either family or housing problems, the number of employment claims initiated in the formal institutions – being the Ministry of Labour or the Superior Court of Justice – is lower than either family or housing claims. In 2017-2018, the Ministry of Labor received 17,716 new employment standards claims, whereas the civil courts received 63,810 new family law applications, and the Landlord Tenant Board received 81,432 new applications (see Table 5.1).[701]

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[697] *Employment Standards Act, 2002*, supra note 670, s 57.
[698] *Dawe v The Equitable Life Insurance Company of Canada,* 2019 ONCA 512; For a discussion on the judicial trend in lengthening the period of reasonable notice see England, *supra* note 676 at 308–311.
[699] Farrow et al, *supra* note 51 at 8.
[700] *Ibid* (The statistic cited for family problems combines the 4.6% of problems related to a relationship breakdown with the 0.5% of problems related to other family problems such as guardianship).
[701] Ontario Ministry of Labour Training and Skills Development, "Annual Report 2018-2019", (2019), online: <https://www.ontario.ca/page/published-plans-and-annual-reports-2019-2020-ministry-labour-training-and-skills-development#section-7>; Ontario Court of Justice, *2017 and 2018 Family Court Statistics* (Toronto, 2018), online: <https://www.ontariocourts.ca/ocj/files/stats/fam/2018/2018-Family-RDP.pdf>; The Superior Court of Justice,

Table 6.1 **New Applications by Forum**

	Complaints/Applications Received		
	2018-2019	2017-2018	2016-2017
New Filings:			
Landlord Tenant Board	82,095	80,791	81,432
Family Law	63,810	66,624	68,383
Employment Filings:			
Ontario Ministry of Labour	17,716	16,642	16,813
Ontario Superior Court (Percentage of civil cases)	n/a	22,892 (estimate)	22,788 (estimate)
Ontario Superior Court (All contract cases)	23,977 (estimate)	22, 809 (estimate)	21,866 (estimate)

Source: https://www.ontario.ca/page/all-published-plans-and-annual-reports; https://www.ontariocourts.ca/scj/news/annual-reports; https://www.ontariocourts.ca/ocj/stats-fam/; https://tribunalsontario.ca/en/governance-accountability-documents/; https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011401.

While the Ministry of Labour publishes statistics in regards to the number of new claims received, the exact number of employment cases initiated in the Ontario Superior Court is more difficult to ascertain. The Ontario Superior Court publishes an Annual Report which includes statistics on new case proceedings, however, apart from family matters, they categorize all civil proceedings together. Thus, in 2018 there were 133,094 new civil proceedings initiated (including those initiated in the Small Claims Court) but this figure would include employment matters, debt matters, commercial contract matters, and personal injury matters among others.[702] If we assume that this number is somewhat representative of the actual types of claims experienced by the population, than 22,892 of these filings would be for employment law claims.[703] This is obviously a very rough estimate because most problem types are likely either over-represented or under-represented in the courts.[704]

Enhancing Public Trust: Report for 2017 and 2018 (Toronto, 2018), online: <https://www.ontariocourts.ca/scj/news/annual-reports/#2017-2018>; Social Justice Tribunals Ontario, *2017-2018 Annual Report* (Toronto, 2018), online: < https://tribunalsontario.ca/documents/sjto/2017-18%20Annual%20Report.html>.

[702] The Superior Court of Justice, *supra* note 571.

[703] Since family problems are not included in the Superior Court's calculation of new civil proceedings, they also have to be removed from the calculation of problem types experienced by Canadians. In such a case, employment problems make up approximately 17.2% of all non-family civil law problems experienced.

[704] Family law problems, for example, make up only 5.1% of all civil problems, but 32.4% of all civil law filings. See Chapter 7.

Another potential source of data is Statistics Canada which also publishes the total number of new cases initiated in the Ontario Superior Court of Justice and does so by type of action. Unfortunately Statistics Canada categorizes all contract based claims together such that landlord/tenant matters, mortgage foreclosure and liens, and other contract cases not specifically listed in other categories are included in the same category as employment claims.[705] According to Statistics Canada, 22,809 new contract cases – which includes employment cases – were filed with the Ontario Superior Court of Justice during 2017-2018. While all that can be concluded with certainty from this statistic is that the amount of employment claims initiated between 2017 and 2018 is less than 22,809, it is likely that most these claims are in fact employment related. First, there would be few landlord/tenant matters as the Ontario Superior Court of Justice is generally precluded from hearing these matters. Moreover, mortgage foreclosures would not make up a large proportion of this number since in 2017 there were only about 2,000 mortgages in arrears in Ontario at any given time and only a fraction of those would enter into default proceedings.[706] Finally, the collection of debts due and owing, perhaps the most common of contract based claims, is categorized by Statistics Canada under the heading of "collections" and therefore are not included in this number. Thus one can cautiously conclude that there are slightly more employment claims filed with the Ontario Superior Court of Justices than there are complaints received by the Ministry of Labour. In either event, even taken together, the number of claims received by the Ontario Superior Court of Justice and the Ministry of Labour is dwarfed by the number of applications received by the Landlord Tenant Board and the number of family law claims initiated. Given the ubiquity of employment problems, the number of cases filed with the formal institutions do not appear to be representative of the actual number of problems experienced. The next section will examining how those on social media situate their problems and the type of advice they receive. In doing so, it will provide valuable insight into the extent that the community understand the nuances of this complicated legal regime and how they navigate it.

[705] Statistics Canada, "General civil Court Case, by Type of Action, Canada and Selected Provinces and Territories", (2020), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510011401>.
[706] Canadian Bankers Association, "Number of Residential Mortgages in Arrears", (2020), online: <https://cba.ca/Assets/CBA/Documents/Files/Article Category/PDF/stat_mortgage_db050_en.pdf>.

6.3 Context of Social Media Advice

6.3.1 Types of Employment Problems

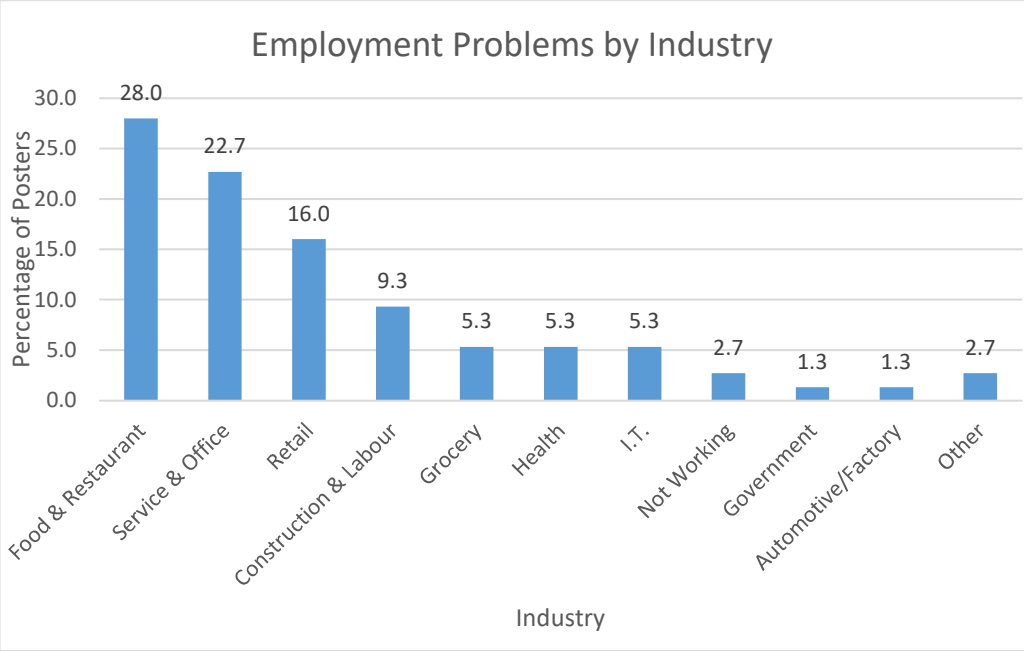
Due to the anonymity of Reddit, it is not possible to gather specific demographic information – such as age, gender, and income – from those posting about employment problems. However, there are numerous factors that can be ascertained which help provide context to how this community is situated. The first major point of note is that conversations posted to Reddit seeking legal advice for employment problems are almost exclusively posted by employees. Of the 141 conversations analyzed, only one conversation was posted by an employer and three were unclear. A second finding is that most of the people posting questions worked in non-unionized work environments. Of the conversations where union status could be readily determined, 94.3% worked in a non-union environment.[707] Granted this conclusion is made with less confidence than the previous data point given that union status is unknown for about half of the conversation, however, even if the unknown conversations mirrored the actual rate of unionization in Ontario – being about 25% – than we could still conclude that a majority of posters are employed in non-union work environments.[708]

In terms of where these individuals are employed, it is evident that not a single industry makes up the majority of posts. Again the specific nature of employment could only be identified in about half the posts, however, among those posts were the job was identifiable there a wide variety industries represented.[709] The most common industry that employs Redditors is the food/restaurant industry representing 28% of identifiable posts. The service/office industry followed with 22.7% and retail was the third most common at 16% of identifiable posts (See Figure 5.1). This finding is particularly interesting because these industries – especially food/restaurant and retail – are often minimum wage, precarious, and part-time employment. Other industries that are seen as providing more secure jobs with benefits – such as health care and government – are less represented among Redditors. Further, jobs with high rates of

[707] Of the 141 conversations analyzed, union status was evident in 70 of them.
[708] Statistics Canada, "Unionization Rate, Canada and Provinces, 2016", (2017), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/170908/cg-a004-eng.htm>.
[709] Of the 141 conversations analyzed, the industry the poster worked in was evident in 75 of the posts.

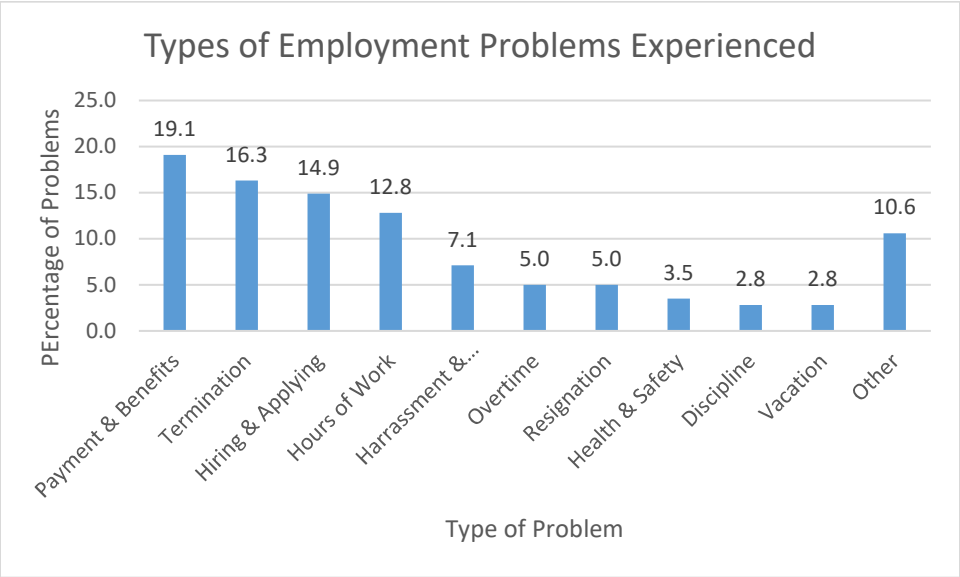
unionization – e.g. government, health care, and education – are also less represented. This suggests that those asking legal questions about employment on Reddit are not only less likely to be unionized but also less likely to enjoy better employment.

Figure 6.1: **Problems by Industry**



Similarly the specific type of problem experienced by Redditors was varied. The most common problem experienced was in regards to payment and benefits which constituted 19.1% of all problems analyzed. The next most common problem type was termination of employment (16.3%), followed by hiring and applying (14.9%), and hours of work (12.8%). However, there were numerous other types of problems discussed which displays that employment problems experienced by Redditors do not cluster around any one specific issue (See Figure 5.2).

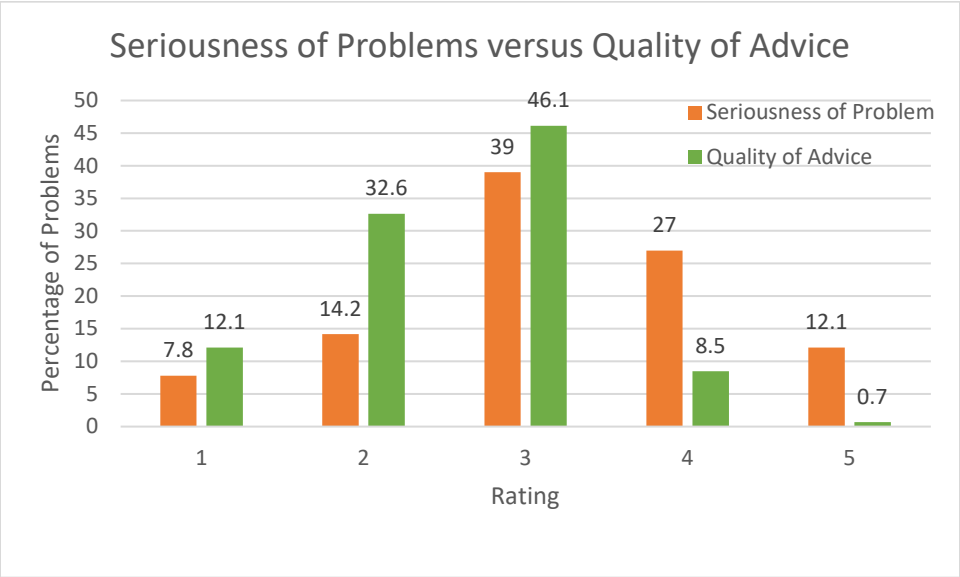
Figure 6.2: **Types of Employment Problems**



6.3.2 Seriousness of Problems and Quality of Advice

The seriousness of problems experienced follows a fairly normal distribution with a modest pull towards problems being more serious in nature. When analyzing conversations, a rating of 1 to 5 was applied to each problem posted, wherein 1 represented an insignificant or purely hypothetical problem and 5 represented an extreme or life altering problem. For example, if an individual was terminated from their employment they received a rating of 5 for the seriousness of their problem since termination is considered to be the "capital punishment" of employment. A rating of 2 indicated that the problem required some attention but had little potential to escalate. A rating of 3 meant the problem resulted in the loss of some money and/or had a potential to escalate but could likely be resolved through negotiation. Finally, a rating of 4 meant that the problem was very difficult to resolve and likely required professional help. Most problems were rated as either a 3, being 39.0% of all problems, or a 4, being 27.0% of all problems, though there were plenty of problems rated both higher and lower (see Figure 5.3).

Figure 6.3 **Seriousness of Problems versus Quality of Advice**

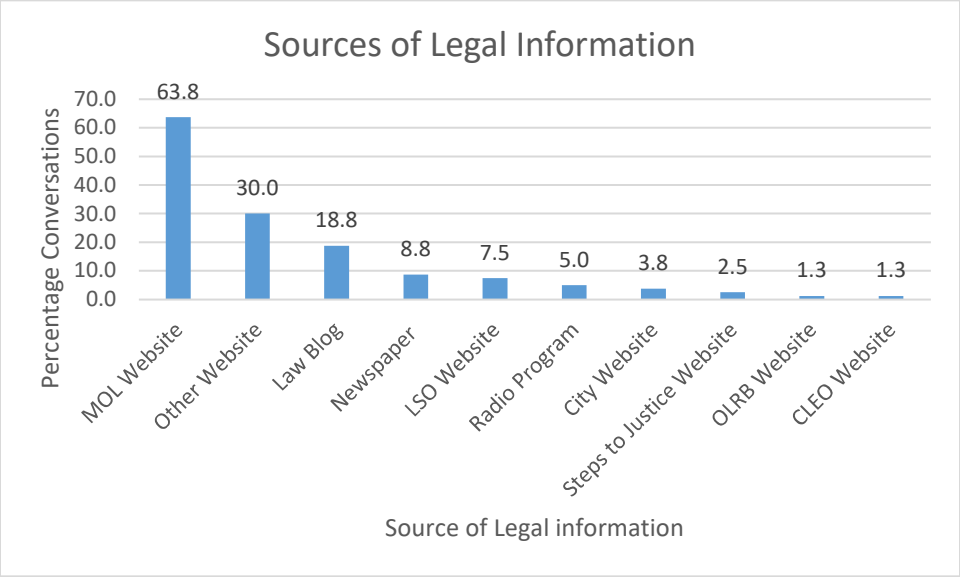


These numbers speak to the fact that, like housing problems, Redditors will crowd source both legal research and legal advice for all manners of problems, regardless of how serious they are. What may be troubling about this context is that the quality of advice given in response to these problems is often fairly poor especially for more serious problems. Like the seriousness of problems, a rating of 1 to 5 was applied to the quality of advice given by the commentators wherein a rating of "1" represented terrible advice that was mainly incorrect and misleading. A rating of 2 indicated some okay advice but it was either not useful, lost in clutter of confused responses, conflicted with other advice given, or did not answer the question directly. A rating of 3 meant the advice was generally correct and there was not much conflicting advice among the conversation but it was not practical in terms of next steps. A rating of 4 was good advice that was generally accurate and helpful in terms of next steps. For context, a rating of 4 is the minimum rating that one could expect to receive from a competent lawyer providing legal advice. Finally, a rating of 5 was reserved for excellent comprehensive advice that reviewed options and provided authorities. The majority of advice among the conversations analyzed received either a rating of 2, being 32.6% of all conversations, or 3, being 46.1% of all conversations (see Figure 5.3).

6.3.3 Source of Legal Information and Legal Advice

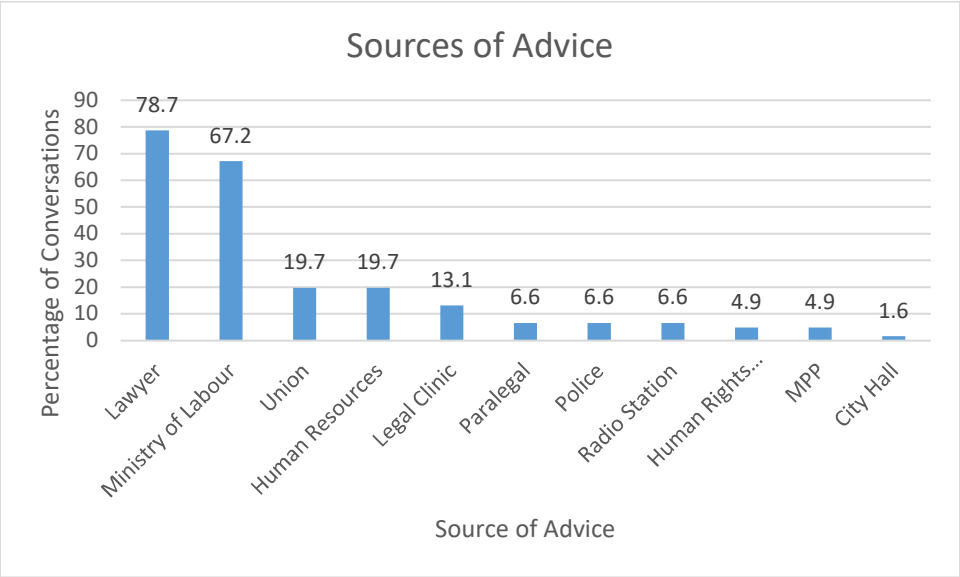
Given the general low quality of advice found on Reddit, wherein over 90% of conversations were rated at 3 or less, it is not surprising that few conversations made reference to the primary sources of law. Only 20.6% of all conversations referenced a legal authority. When they did reference the law, most of these referenced the *Employment Standards Act, 2000* (70%), whereas only a few referenced case law (35%), and even fewer regulations (10%). This failure to reference the formal law suggests two things which may help explain why the quality of advice given is generally poor: first people are not aware of these sources of law, and second much of the advice given was not based on authority, but rather on an individual's perception of how the law functioned, i.e. their own legal consciousness. While the quality of crowd sourced legal advice may be poor, the community was often able to point the poster in the direction of good quality legal information. More than half of the conversations (56.7%) did refer the poster to some external source of legal information. Though there were quite a few sources that showed up throughout the conversations the only source that appeared with any consistency was the Ontario Ministry of Labour's website (see Figure 5.4). As will be discussed further in the next section, this finding displays how engrained Ontarian's understanding of employment problems are within the regulatory framework.

Figure 6.4 **Sources of Legal Information**



Arguably the best "advice" that could be given online is to seek advice from an expert. This, however, was less common than might be expected and when it was advised there was a diversity of sources suggested. Out of all the conversations analyzed less than half (43.3%) suggested that the poster seek advice from a professional. Out of these, the most common suggestion was to talk to a lawyer (78.7%) followed by call the Ministry of Labour (67.2%) which reflects the two formal paths to justice that are available: being to litigate in court or to file a complaint with the Ministry of Labour (See Figure 5.5).

Figure 6.5 **Sources of Advice**



One of the more surprising findings was that paralegals were rarely mentioned in conversations about employment problems. Only 6.6% of conversations that recommended outside advice suggested talking to a paralegal even though paralegals are arguably a more accessible path to justice than lawyers. In Ontario, paralegals have jurisdiction to represent individuals in Small Claims Court. Thus, as long as the amount of damages an individual is seeking to recover is $35,000 or less than their claim falls within the jurisdictional limit of the Small Claims Court and they can be represented by a paralegal. Most of the problems examined would easily fall within this jurisdictional limit of Small Claims Court given that many of the posters worked in low wage industries. Moreover, the market rate for paralegals is likely far lower than that of

lawyers making them a more affordable path to justice for these types of problems.[710] There may be a few reasons as to why paralegals are rarely mentioned by Redditors. First, licensed paralegals – being a class of professional allowed to provide legal advice without the supervision of a lawyer – are relatively new in Ontario having only received accreditation in 2008. Coupled with this, is the fact that licensed paralegals do not exist throughout Canada and are unique to Ontario. Thus paralegals do not have the historic embeddedness in the legal system that lawyers do. Moreover, their scope of practice is more limited than lawyers and is rather nuanced. For example, they are generally precluded from representing individuals in criminal matters, unless it is for summary conviction matters that the *Criminal Code* explicitly allowed prior to September 18, 2019.[711] Paralegals are also precluded from practicing within the area of family law.[712] However, at the time of writing, the Law Society of Ontario is considering what they call a Family Legal Services Provider license which would allow paralegals who have completed a special training program and assessment regime to offer services within specific areas of family law.[713] This convoluted scope of practice may make it difficult to for the general public to understand when they are able to rely on advice from a paralegal.

6.3.4 Summary

The above section examined the context in which legal advice is sought on Reddit and provides several observations of note. First, the demographic data that can be determined from Reddit posts show that those who are seeking legal advice on this platform tend to work in precarious jobs in non-union environments. One reason for this might be because those with higher paying stable jobs may have better access to advice networks. It may also have to do with the relatively young age of the average users who may be more comfortable with using social

[710] Semple, *supra* note 502 at 650.
[711] In 2019, the *Criminal Code* was amended in a way that removed any explicit reference to paralegals or "agents" being permitted to represent accused persons in summary conviction matters. As such, the Law Society of Ontario, had to amend its by-laws – to a very awkwardly worded phrase – in order to allow paralegals the continued ability to represent persons in these summary conviction matters. See Law Society of Ontario, by-law No 4, *Licensing*, s 6.
[712] Law Society of Ontario, by-law No 4, *Licensing,* s 6.
[713] Family Law Working Group of the Law Society of Ontario, *Family Legal Services Provider Licence* (Toronto, 2020). For a discussion about the merits of said proposal see Noel Semple, "A Good Day for Self-Regulation: The LSO's Family Law Paralegal Proposal", *Slaw* (30 July 2020), online: <http://www.slaw.ca/2020/07/30/a-good-day-for-self-regulation-the-lsos-family-law-paralegal-proposal/>.

media. This section also notes that there is no specific problem type that dominates the discussions, but rather Redditors experience a variety of issues in which they require assistance. Likewise, Redditors crowd source legal research and legal advice for problems of all levels of severity, not just minor or trivial problems. This is alarming because the quality of advice given is generally poor and not commensurate with the severity of the problem. However, posters are often directed to good sources of legal information, namely Ministry of Labour's website. These observations help situate these conversations and their participants into a real world context. The next section will leverage these insight to examine the legal consciousness of the Reddit community.

6.4 Legal Consciousness of Ontarians with Employment Problems

6.4.1 Introduction

Like housing issues discussed in Chapter 5, those who have experienced employment problems do so in a real life context. Individuals that post questions on Reddit are doing so over concerns about events that are affecting their daily lives; they are not asking hypothetical questions out of pure interest. This context is important to remember because a community's legal consciousness is informed by the lived experiences of individuals. Thus, the types of issues Redditors experience and how they frame these issues provide insight into this community's understanding and interaction with the law. And so too does the broader conversation and the nature of advice given. This section will examine how Redditors with employment problems experience the law. Specifically it notes that Redditors are conversant of the legal regime that governs the employment relationship and understand that it can be leveraged to assist them with their problems. However, employment problems are not understood as purely private disputes to be adjudicated by the courts. Rather the employment relationship is one that is rightfully regulated by government agencies and it is these agencies that should be responsible for policing and enforcing the laws: not the individual employee. None-the-less, Redditors find the regulatory regime difficult to access, confusing, and generally not helpful. As such, they sometimes look to other methods of resolution.

6.4.2 Perspectives of Employment Law

I. Employment Problems are Regulatory Problems

Those posting to Reddit understand that their problems have a legal context. They clearly situate their employment relationship into a legal regime that imposes obligations on both parties and has certain rules of engagement which can be enforced. They also know that they have entitlements, which, if denied, can form the basis of a legal claim. However, Redditors understand this legal regime to be of a rights based regulatory nature as opposed to a contractual one. Legal questions are often framed in terms of whether the law prohibits or permits the employer's conduct as opposed to how parties should arrange their affairs. For example, it is common for Redditors to ask if specific work arrangements were legal. One Redditor working as painter wanted to know if it was legal for his employer to pay him according to a piece work scheme: "Piece work. Is this legal or is my employer bending the rules?"[714] The question was not whether this arrangement was beneficial or in their interest but whether the law prohibits this type of arrangement. Similarly, another Redditor wanted to know if it was legal to be paid less than minimum wage: "Is it legal for me to be getting paid below minimum wage? Started working at a [pizza franchise] recently and the owner said that he'll pay me in $9/hr cash for my work. Granted, I'm a student and I'm new, but I still don't think it's right for an establishment like [the pizza franchise] to be doing this type of stuff."[715] From a contract law perspective, remuneration is a central term of the employment contract and if individual believes that they are not being paid according to market rates, than they should not have agreed to the contract. However, instead of positioning this as a matter of offer and acceptance, the poster is expressing an opinion that the restaurant is committing a legal wrong by paying wages that are too low.

Like remuneration, questions about other terms of employment were framed from a regulatory perspective rather than a contractual one. One poster asked about unilateral changes made to their ancillary duties: "So my employer (full time regular, not a temp situation or anything like that), just informed us that we would not get paid unless we submit weekly timesheets when they are due. Is this legal?"[716] In this context, the term "legal" is referring to

[714] Employment 002.
[715] Employment 182.
[716] Employment 035.

whether the conduct (e.g. withholding pay) is prohibited by statute or regulation. This interpretation is confirmed later in the conversation when the poster thanks a commentator for providing the relevant statutory provision that prohibits this conduct. In another conversation, the poster has a similar concern regarding changes to expected hours of work:

> My company just swapped over to a new computer system that requires around 15 minutes to set up the desktop and load the programs that we need to do our jobs... They expect us to come in 15 minutes early on our own time to get our computers all set up, but still expect us to log in at the regular time. Essentially working an extra hour and 15 minutes for free every week with no compensation… My question is this legal? And if not what would be the best course of action to get these issues sorted out?[717]

One who sees the employment relationship from a contractual perspective may ask if such a change is a breach of contract and, if so, what damages flow from that breach. However, this poster is more concerned with whether the conduct was prohibited by statute as there is no mention in the post, nor in the conversation that follows, of the employment contract. These examples are typical of how Redditors frame their employment problem from a regulatory perspective. It is rare for Redditors to discuss the employment relationship in terms of the underlying contractual obligations nor position themselves as an equal party to a contract with the ability to negotiate conditions imposed. Rather, as discussed below, Redditors believe that, but for the laws regulating such conduct, employees are powerless to negotiate fair terms.

The framing of the employment relationship as a regulatory matter rather than a contractual one is also evidenced by the commentators' advice. Conversations that advised the poster to file a complaint with the Ministry of Labour are much more common (18.4% of all conversations) than those suggesting the poster contact their human resources department (8.5%), directly negotiate with their employer (4.3%), or sue their employer (0.7%). This is true even for problems that – on the face of it anyway – seem like they could be resolved fairly easily through negotiation rather than immediate escalation to the regulators. In one conversation, for example, the poster relates that they are not allowed to leave the retail floor for washroom or water breaks and the highest up voted comment was to quit and file a claim with the Ministry of

[717] Employment 186.

Labour: "Highly recommend you quit and file an employment standards claim."[718] Quitting one's job over such a policy seems drastic, especially prior to any attempt at negotiation.

Similarly, other problems would likely be best resolved through litigation, however, the commentators rarely consider this option. For example, one poster relates how their girlfriend's employer was habitually late paying her wages.[719] When the girlfriend demanded that she receive her pay on time the employer fired her. Four separate comments advised the poster to file a claim with the Ministry of Labour but not one comment suggested litigation. While the Ministry of Labour could assist with this situation, litigation is arguably a more expedient – and therefore effective – solution. The fact that none of the commentators suggested this option, is indicative of the fact that Redditors understand the employment regime to be regulatory in nature. Moreover, the Ministry of Labour is understood as a legitimate path to justice not just for disputes that directly arise out of the employment contract but also for concerns with the behaviour of colleagues. For these types of issues, commentators were more likely to suggest contacting the Ministry of Labour than they were to suggest speaking to human resources. For example, one poster explains that their employer gave their tip pool to another employee as punishment for being 30 minutes late.[720] While numerous commentators advised that the poster report the incident to the Ministry of Labour, only one comment noted that if the restaurant was part of a larger company – as many chain restaurants are – than the poster could contact the human resources department. Part of the reluctance to speak to human resources may be due to a general skepticism of corporate efficacy in these matters. In one post, for example, the poster relates that a friend was sexual harassed at work, and the human resources department refused to deal with the incident.[721] Several comments empathized with the poster noting that they too were in a similar position. One commentator succinctly observed "Remember HR is a management tool to simply prevent the company from being sued. If they can get people to simply go away without saying anything, some of them see that as a job well done."[722] These conversations show that when trying to resolve employment problems Redditors prefer to

[718] Employment 059.
[719] Employment 207.
[720] Employment 009.
[721] Employment 054.
[722] *Ibid.*

appeal to the regulatory enforcement mechanisms rather than other means such as negotiation, litigation, or internal company processes.

II. Employment Problems are Individual Problems

While most people believe that employment problems are firmly situated in a regulatory framework, there is a parallel narrative that sees employment problems not as a result of employer misconduct that needs to be regulated, but as the result of self-entitled employees either trying to avoid their job duties or trying to make trouble. In this narrative, even if there is a technical legal right, the proper thing for people to do is to quit complaining and do their job. Employment problems are not necessarily viewed as something that should be fixed, but as something that should be suffered through as it is just part of the job. In one case, where an employee is seeking advice in dealing with an abusive manager, one commentator sarcastically diagnoses the problem as being employed: "Sounds like you are 'at work' or 'working' or 'have a job'. Many others suffer from this. My advice is; wait for sweet, sweet death to take you away."[723]

Often breaches of the law are justified on the grounds that it happens to everyone. In response to a post asking about compensation for being required to attend at work fifteen minutes before the start of each shift, one commentator thinks this is perfectly acceptable. "Lots of workers have to be prepared to start their work day at 8 am on the dot. Preparing for your shift at 7:50 just means you'll be ready to start your work day at 8."[724] Alternatively, a breach is seen as being the fault of the employee and they are deserving of the consequences. For example, in one case the poster was suspended without pay for a month because their co-worker was playing on the poster's laptop during work hours. Some commentators did not see this punishment as disproportional at all:

> Yeah so you were suspended for allowing a co worker to use your laptop which was against the rules so you got suspended. [You're] making no money whatsoever. That's par for the course for a suspension. My advice: let your landlord know now that you will pay your rent late due to the job situation and go on craigslist and look for cash

[723] Employment 053.
[724] Employment 186.

> manual labor jobs to supplement the zero denero you're getting from your employer due to said suspension.[725]

In this narrative it is common to blame the employee for complaining and trying to learn about their rights. In one post, a delivery driver suspects that they are being paid less than minimum wage, however, they acknowledge they make good tips. One commentator responds: "You are just being a pedant when you say it's not them paying you. It's because of the job that you are getting those tips. I have no idea if what they pay is legal or not but at the end of the day you are still making out pretty good consider it's just a delivery job."[726] In another post, a student notes they are expected to show up for work five or ten minutes early and often need to stay another ten or fifteen minutes after their shift for which they are not compensated. "Showing up on time, 5 minutes early, and being ready for the start of your shift is not an unreasonable request; all this means is that your personal belongings are put away and that by 8 pm you are ready to start work." [727] Another commentator observes: "Fuck you're going to have a hard time as an adult."[728] And another "With this attitude, I wish you best of luck and I hope you mature very soon. Fuck man, it's 5 minutes who cares."[729] In both examples, there is a clear violation of the *Employment Standards Act, 2000* and likely a breach of contract, however, the poster is being criticized for complaining about the violation. Often the justification for this attitude is that people should be grateful for the privilege of having a job. "Laws are one thing, reality is sometimes another. If they are close, my advice is work hard and don't push your luck. Many millions (billions?) of people around the world would give up a limb for a job here..."[730] It should be noted that this parallel narrative does not displace the regulatory perspective. In any given conversation, these types of comments tended to be few and buried among dozens of other ones that were supportive of the posters predicament. However, they do appear with either frequency throughout the data to support a conclusion that some Redditors do not believe that the regulations are relevant to the reality of the working world.

[725] Employment 037.
[726] Employment 060.
[727] Employment 202.
[728] *Ibid.*
[729] *Ibid.*
[730] Employment 018.

Interestingly, the underlying sentiment of this "quit complaining" narrative is that the employee is the one who should bear extra labour costs for the sake of the team. This sentiment is explicitly articulated in one conversation where the poster asks if a manager is allowed to keep an employee working past their scheduled shift.[731] Here, one commentator remarks "I was just always taught to be a team player and sometimes that means working late."[732] The expectation that the employee bear the cost of additional labour is often expressed in a very hostile or belittling manner. In another case, where a retail worker was asking whether it is legal for an employer to require them to watch training videos on personal time without pay, one commentator sarcastically replies: "Six plus hours of videos for [a pet store], do you have a veterinarian license after you completed the videos? Where do you work, I'm going to bring in ill dolphins knowing you have the knowledge to fix them."[733] In another example, the poster wants to know if his wife's employer can schedule a meeting to end two hours before her shift begins.[734] When the poster expresses an opinion that it shouldn't be allowed because the location of the work site mean that his wife will be compelled to stay at the workplace for two unpaid hours, one commentator responded "It shouldn't be allowed because it doesn't make sense? I'm sorry but that is just ridiculous. I don't mean to sound like an ass but I'm tired and frankly if your SO [significant other] is making a fuss about working 8 hours a day than she's just seeming lazy."[735] The fact that this employee would be only paid for only six of the eight hours at the work site is not addressed by this commentator. These examples illustrate how some commentators are perfectly at ease with the employee being required to bear additional labour costs for the benefit of the employer.

Not surprisingly, this "quit complaining" narrative does not see the Ministry of Labour as a legitimate path to justice. Within this narrative employment problems are not situated in a regulatory framework per se, but in a private forum where problems need to be suffered in silence or dealt with directly by the employee. While this narrative may appear to emphasize the contractual nature of the employment relationship, it actually undermines it by discouraging

[731] *Ibid.*
[732] *Ibid*.
[733] Employment 010.
[734] Employment 036.
[735] *Ibid.*

employees to stand on their rights and is more akin to the old master servant paradigm. In one case where the poster is asking how they should go about recovering overtime pay due and owing, one commentator explicitly rejects the idea of invoking one's legal rights.[736] Rather they suggest to deal with it privately. "Look at this as an opportunity to negotiate a better deal. You could get a lot more future money than you could recover from the past. Approach your boss directly, and show you're a team player. I run a small business and the squeaky wheel gets the grease, so speak up, but be understanding and approach this as a negotiation, not an accusation."[737] Reflecting this individualist/personal responsibility notion is the perception that employees have a choice. One poster was asking whether it is legal for a for-profit company to employee unpaid volunteers.[738] Ignoring the question of whether it is legal or not, one commentator simply states: "If you want to get paid for your work, don't apply for these positions."[739] Another commentator concurs stating: "Volunteering is a choice and unlike interns it's usually very short term."[740] While this "quit complaining" narrative is less common than the regulatory narrative discussed above, it is pervasive: in any given conversation there may be a dozen comments providing legal advice about rights and entitlements, while there is often only one comment that reflects this "quite complaining" narrative.

III. Summary

Redditors that experience a legal problem believe that there is a legal regime that governs the employee-employer relationship that can assist them in resolving their problem. Generally, however, this legal regime is not understood to be overseen by the courts but rather it is administered by the Ministry of Labour who bears the responsibility for investigating complaints and punishing offending employers. While many problems examined could be understood as a breach of an obligation under contract – and be treated as such by the courts – employment problems are more commonly understood as a violation of rights and entitlements guaranteed by legislation. It is likely that most Redditors approach employment problems from this rights

[736] Employment 021.
[737] *Ibid.*
[738] Employment 040.
[739] *Ibid.*
[740] *Ibid.*

based regulatory perspective because of how they are situated. Two thirds of identifiable jobs were from either the retail, service, or restaurant industries: all of which are characterized as low wage and low skill industries, and often non-unionized. Other industries commonly represented by the community include grocery store employees and labourers, both of which are also typically low paid and low skill positions. These types of employees tend to have little bargaining power and thus, absent legal protections, are subject to the whims of their employer. When someone in this position is dealing with an employment problem, it is unhelpful to advise them to negotiate with their employer. Further, these low wage employees likely have little ability to independently resolve their problem through the court system. They do not have the savings to hire a lawyer, nor the aptitude to represent themselves. The regulatory regime, however, offers a path to justice where the cost of resolving the problem is borne by the state. Unfortunately, most Redditors have difficulty effectively accessing justice.

6.4.3 Inaccessible Justice

A fundamental facet to the legal consciousness of Redditors is how this community resolves their legal problems. As noted above, the most common suggested path to justice was to file a complaint with the Ministry of Labour. This displays that employment problems are situated firmly within a rights based regulatory system. However, it does not mean that justice is easily accessible. In fact, an overwhelming amount of conversations express dismay with the system and frustration about the inability to resolve problems. Three groups of people are commonly blamed for this difficulty in accessing justice: employers, the Ministry of Labour, and lawyers.

I. Employers Take Advantage of their Employees

There is a pervasive belief within the Reddit community that employers are adept at finding loopholes in the law, are flagrant in violating the laws, and are more than willing to take advantage of their employees. To a degree, this is not surprising given the above discussion as one would not need the Ministry of Labour enforcement regime if all employers abided by their obligations. However, the community seems to share a belief that abusive behaviour is rampant

amongst employers and the law does little to curtail it. For example, in response to one poster who alleged their wife was dismissed for being pregnant one commentator observes: “Shocking what employers still try to get away with these days, and even worse that a lot of them do get away with it.”[741] This sentiment is echoed in an eerily similar post where an individual was dismissed one week after disclosing she was pregnant. “Call me cynical, but employers who are willing to terminate women because they are pregnant will try to find a way to do that.”[742] The language in these posts generalizes the individual conduct of specific employers to employers generally and evidences a perception among Redditors that this kind of illegal conduct is rampant. Certain types of problems seem to be particularly prone to employer abuse. For example, there is a common perception that employers take advantage of their employees in regards to overtime hours. This perception is eloquently reflected in one conversation where a debate arouse as to whether it was worth complaining about $50.00 owed for overtime. In response to one commentator asking if it is worth involving the labour board over such a small amount, another commentator states: “$50 here, $50 at the next job, $50 at the next job. Not only that, but imagine the company takes $50 from each employee every few weeks. Lots of money they're stealing from employees.”[743] In another conversation, one poster notes as follows: “I'm going to be interviewing for a job that requires extensive hours, and I'm not about to get screwed over financially as a result. I plan on discussing this with HR, but I feel as though it is the norm for employers to not practice this regulation.”[744] These conversations indicate that overtime is perceived as being particularly prone to employer abuse. As well as specific problems being prone to employer abuses, specific industries are also seen as being prone to abuse. As one commentator observed “Small restaurants are notorious for labour violations.”[745] Another post sees small dental clinics as particularly problematic: “Unfortunately this is a battle (and a side of dental no one talks about) that you'll find at a lot of small individually owned dental offices, where the dentist's don't really know employment rules or just don't care.”[746] Each of these comments

[741] Employment 086.
[742] Employment 215.
[743] Employment 021.
[744] Employment 005.
[745] Employment 011.
[746] Employment 185.

make sweeping generalizations about employers and are indicative of a shared belief that employer abuse is widespread and common.

It is not surprising, therefore, that there is widespread suspicion over the employer's motives for particular conduct. In one case, a poster was seeking advice about how to proceed when dealing with a debilitating injury they sustained at work. They note that at the time of injury they were encouraged by their employer not to report to the Workplace Safety Insurance Board. One commentator observes "Most likely they're asking you not to report either because they aren't registered with WSIB or are knowingly endorsing bad safety practices."[747] In another post where the poster is asking how to pursue a claim for unpaid wages, a commentator expresses skepticism that the unpaid wages were the result of administrative error as claimed by the employer. "Just so you know, you shouldn't try to give them the benefit of the doubt. Contact the Labor Board today. The best way to reason this: they would've made it right by now if it was simple error."[748] Reinforcing this suspicion over an employers' motives is a general belief that employers do not care about their employees and only use them to achieve their own ends. In one conversation the poster expresses concern over their job security after their employer lost their biggest client. One commentator posts the sobering advice: "Look for a new job ASAP. Companies don't care about employees when they need to axe people to stay afloat and they sure aren't going to give you advance notice of any layoffs coming as they don't want anyone leaving them in a bind. I've been laid off twice."[749] The belief that employers only look out for themselves has been explicitly expressed in other posts. For example, one poster notes that they gave their employer their notice of resignation four weeks in advance, and the employer was complaining that they did not give it eight weeks in advance of resignation.[750] In response, commentators expressed a view that employers are only concerned about their own interests. "He's angry he won't have time finding a hard-working minimum-waged worker to replace you."[751] In the same conversation "Your boss is looking out only for themselves. Ignore the snide

[747] Employment 066.
[748] Employment 082.
[749] Employment 189.
[750] Employment 192.
[751] *Ibid.*

remarks, you've put in double the notice you needed to."[752] The Reddit community perceives employers to be manipulative entities, who flagrantly violate the laws for their own benefit. As such, employers are not only the cause of most employment problems, but they also contribute to the difficulty in accessing justice through their behaviour.

II. The Ministry of Labour is Ineffective

Despite the fact that problems are generally viewed as regulatory in nature and that commentators frequently advise the poster to turn to the Ministry of Labour for assistance, there is a common perception that the law is inaccessible. One might assume that if there was an office capable of investigating complaints – and thus shifting the burden of enforcing employment rights to a government regulator – many of these problems would be seen as easy to resolve: simply call the Ministry, an officer investigates, an order is made, and the Ministry enforces that order. However, this is not the case. While it is fairly common for individuals to advise those with employment problems to call the Ministry of Labour and to report the offence, it is also fairly common for others in the conversation to reject this as an effective path to justice. For example, in response to some commentators suggesting the poster contact the Ministry of Labour to complain over unpaid training, one commentator states emphatically: "I suspect if you complain you would be terminated. MOL is useless and would maybe award you a couple hundred bucks."[753] Later in that conversation another commentator concurs stating: "If you take them to MOL, they will hire a lawyer who will deny it was mandatory or they will minimize the training time to minimize the payout. What you need to do is to get them to admit it in writing or else they will get off with not paying you or not pay out the full amount."[754]

This theme, wherein the Ministry of Labour is viewed as ineffectual in protecting employee rights, is repeated over and over again. In another conversation regarding unpaid wages, the commentators do not have much faith the employee will be able to recover their loss. In regards to the Ministry of Labour's ability to assist, one commentator states: "I don't know if you are right or not legally speaking, but even if you are, the ministry of labour had a terrible

[752] *Ibid.*
[753] Employment 10.
[754] *Ibid.*

track record when it comes to recovering wages."[755] Likewise, in another conversation about a restaurant violating employment standards the poster notes: "The labour board has been called by at least 4 former employees in regards to being shorted on paycheques, not being given pay stubs, being fired for arbitrary reasons, etc. but nothing has ever actually become of these complaints."[756] In response to this post one commentator notes: "The labour board is a powerless entity. They are laughable. Scamming employers know this and aren't afraid of them."[757] The reason for this ineffectualness on part of the Ministry of Labour was succinctly explained in another conversation where one commentator argues that the problem lies not with the laws per se, but with enforcement. "The laws are all well and good, but a combination of a severe lack of enforcement and negligible penalties is in basics making them a paper dragon of a threat."[758] Here the problem is understood to be structural in nature. Other commentators agree seeing the problem lying with the fact that the system is too slow.

> FYI my fiancee worked at a startup for a crooked employer in Toronto. She was out of wages of over $10k. Went to the labour board immediately and filed a complaint and has since gone through all the appropriate channels… but almost two years later, still no sign of the money…. I don't think its worth the time spent dealing with the Labour board versus just finding another job.[759]

In another post regarding unpaid overtime, one commentator advises that the poster "…try to work things out with your employer personally, because taking it to the Labour Board is going to take years."[760] Even where the complaints involve the physical health and safety of an employee, the Ministry of Labour is seen as being too slow to respond. In one conversation discussed above, the poster alleges that a friend was sexually harassed at work and the human resource department ignored the complaint.[761] One commentator notes that "She can go to the labour rights boards (preferably with a lawyer). This will be slow, legalistic and may not got the way she

[755] Employment 029.
[756] Employment 032.
[757] *Ibid.*
[758] Employment 017.
[759] Employment 082.
[760] Employment 021.
[761] Employment 054.

wants anyway."[762] Thus, while filing a complaint with the Ministry of Labour is seen as the appropriate path to justice, it is often criticized as being ineffectual.

As well as the complaint process the Ministry of Labour is occasionally viewed as being problematic even when individuals are simply seeking advice or legal information. One poster seeking information on whether they would be eligible for employment insurance if they were forced to quit their job states: "The Labour Board has not been very helpful so far (at least by phone). Is there a route to access better advice from them than by phone?"[763] Likewise, in response to a poster seeking advice on unilateral changes made to their salary and their hours of work one commentator advises against calling the Ministry of Labour for assistance. "The Ministry of Labour will consistently give you the run around because it's usually case by case, and with cuts/ bureaucratic bullshit, they usually don't do much UNTIL a claim is made."[764] These conversations exemplify a common perception among the Reddit community that the very institution that is charged with protecting employee rights is ineffective and supports the on-going narrative that it is difficult to resolve employment problems and access the mechanisms of justice.

III. Lawyers are Prohibitively Expensive

If the Ministry of Labour is generally perceived as ineffective at resolving legal problems, then one may expect that the majority of Redditors would to turn to a lawyer. Indeed, the most frequently suggested source for advice is a lawyer. Despite this, however, there is a common perception that lawyers do not provide a path to justice because they are too expensive.[765] As succinctly explained by one commentator "The problem with employment law is that most employment cases just don't involve enough money to make seeing an employment lawyer practical." [766] This opinion is deftly illustrated in one situation where the poster was not paid for

[762] *Ibid*.
[763] Employment 049.
[764] Employment 203.
[765] There are studies that support the proposition that the cost of lawyers – or at least the perceived cost –is factor in why many people do not seek legal advice. See e.g. Pleasence & Balmer, *supra* note 43; Contra Kritzer, *supra* note 349.
[766] Employment 023.

three days of work.[767] The general consensus among the commentators was that the poster was out of luck. As stated by one of the comments "It would be vastly more worthwhile to hustle looking for a new job than to go to court over $300."[768] The original poster agrees with this sentiment stating: "thanks for all the input!... I think I might just cut my losses and continue the job hunt!"[769] This theme that the problem is not worth resolving is fairly common and the reason is often due to the perceived cost of legal advice. In one conversation, the poster claims to have been fired for no reason after inquiring into overtime that was owed.[770] In seeking advice the poster notes that "Going to a lawyer seems too expensive..."[771] however, they state that they are is still willing to pursue the matter through another route. The common response, however, was that the matter is not worth pursuing. One commentator states. "You won't see any money any time soon, better to spend your time looking for work." [772] Another commentator agrees saying "…you'll probably need a lawyer that will charge you 200$/hr. Honestly, if I was you I would just chuck it to shit luck and move on. It's not worth the time and money you'll waste for the off change [sic] that a court deems you are owed anything if they even get to that conclusion."[773] In another conversation the poster, who works part-time in a fast food restaurant, is asking advice about the legality of being required to work night shifts.[774] From this question a discussion ensues about pay in the event the poster's employment is terminated. One commentator notes that a lawyer would charge more than a part-time employee would be entitled to: "You're right that (and why) these issues are almost never litigated. You get a p/t employee making a couple hundred bucks a week; as a lawyer, I'd probably bill more than his best case scenario recovery before we even filed the statement of claim."[775] Even where the stakes are potentially much higher and worth pursuing there is a perception that the upfront cost of hiring a lawyer is prohibitive. In one of the cases discussed above, where the employer advised the employee not

[767] Employment 029.
[768] *Ibid*.
[769] *Ibid*.
[770] Employment 028.
[771] *Ibid.*
[772] *Ibid.*
[773] *Ibid.*
[774] Employment 206.
[775] *Ibid.*

to report an injury to the WSIB, the potential for losses include among other items wages, benefits, therapy, drugs, rehabilitation, and retraining. One commentator clearly recognizing the potential for loss emphatically states: "Holy shit. I would be consulting a lawyer on that one." To which the poster simple replies "Don't have the kind of cash for that unfortunately."[776] Thus, even in high stakes situations the cost of legal assistance is perceived as prohibitive.

Closely related to this perception that the cost of lawyers is prohibitive is a belief that lawyers are not worth the cost even if one could afford their rates. This is particularly worrisome because in many situations there is a sound economic argument for the investment in legal services since a lawyer may be able to recover more than the litigant is aware they are entitled to, prevent further losses from accruing, and recover more quickly than the litigant could on their own.[777] For example, in one case a poster claims that he was 'laid off' recently, however, the company is now recruiting for that position.[778] Most commentators advised filing a claim with the Ministry of Labour with one respondent going so far as to state "You may have a week or two of severance coming to you. Don't waste money with a lawyer. Call the Ministry of Labour."[779] What is not mentioned here is that under the *Rules of Civil Procedure*, a successful litigant is generally entitled to have their legal costs paid by the losing party.[780] Given this context, the poster should speak to a lawyer who would not only be able to claim greater damages under the common law, but also be able to recover a proportion of their fees along with other rights and entitlements that are not available through the Ministry of Labour such as punitive damages, damages for bad faith conduct, or damages for mental distress. In such a case, the poster would almost assuredly be in a better position at the end of the day by speaking to a lawyer than not. Beyond the upfront cost, however, the problem remains that the employee is assuming the risk of not only having to pay their own legal fees, but also the other side's legal fees should they lose their case.

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[776] Employment 066.
[777] There are empirical studies that support the proposition that those who are represented by legal counsel do better and are happy with their experience. See e.g. Rebecca Sandefur, "The Impact of Counsel: An Analysis of Empirical Evidence" (2010) 9:1 Seattle Journal for Social Justice 51.
[778] Employment 103.
[779] *Ibid.*
[780] *Rules of Civil Procedure,* supra note 28, r 57.01.

Since providing an upfront retainer is difficult for so many experiencing an employment problem – especially in instances where one loses their employment and regular income is no longer available – one might look to pro bono legal services or a contingency fee structure as a way to make legal services more accessible. Pro bono refers to a situation wherein a lawyer offers their legal services free of charge in cases of hardship or need.[781] While pro bono is highly encouraged by the Law Society of Ontario, it is not mandatory which means that pro bono services are purely available at the discretion of the individual lawyer.[782] Contingency fees on the other hand are a way of structuring legal fees such that the client does not pay any legal fees upfront, but agrees to pay the lawyer an amount out of any settlement or court award.[783] In this manner the risk is shifted to the lawyer, since payment is contingent on success. However, in compensation for this added risk the client would typically pay the lawyer much more under a contingency fee than they would under a standard fee structure. The Law Society of Ontario allows lawyers to provide services on a contingency basis for any legal problem except for family, criminal, and quasi-criminal matters, and therefore – like pro bono services – they are at the discretion of the individual lawyer.[784] Despite the potential for these two fee structures to make legal services more accessible, they are rarely mentioned in the conversations and the few times that they are, they are not positioned as a helpful solution to high legal fees. For example, in a rather convoluted story, where the poster claims to have been fired as a barista because their boss was late for work, the poster notes that they cannot afford a lawyer to pursue the claim and just wanted to share the story. One commentator suggested that there is a possibility of finding a lawyer who would take the case either pro bono or on a contingency basis to which another commentator responds: "The value of this case is far too low for most lawyers to do on contingency. He's looking at best of being paid 2 months of salary, which at near minimum wage

[781] For a general discussion of pro bono see Melina Buckley, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* (Ottawa, 2010) at 109–114.
[782] *Rules of Professional Conduct,* supra note 543, r 4.1-1 (According to this rule, a lawyer shall make their legal services available to the public in an efficient and convenient way. The commentary to this rule further states: "As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.")
[783] For general discussion of contingency fees see Semple, *supra* note 32.
[784] *Rules of Professional Conduct,* supra note 543, r 3.6-2.

on part time hours is pennies. As for pro bono, not likely needy or heart wrenching enough for that."[785] This commentator succinctly identifies the main problem with each of these alternative structures from a legal needs perspective; first lawyers will only accept a contingency fee structure if the payout is worth the added risk and, second, it is difficult to find a lawyer who would agree to provide services on a pro bono basis unless there were truly exceptional circumstances of hardship. These are both high thresholds and many of the employment problems collected would not likely meet either of them.

One other potential solution to high legal fees, might be found in the services offered by paralegals whose market rates are typically lower than lawyers and who are allowed to litigate claims under $35,000.00. This was recognized by a couple of commentators. For example one commentator stated: "Would strongly suggest looking into a paralegal. Just makes a lot more sense given the size of the claim."[786] Or in another conversation: "You can probably talk to a paralegal instead of a lawyer. They are cheaper."[787] In both of these examples, the commentators recognize that paralegals are a more affordable alternative to lawyers, however, apart from these two examples paralegals are rarely mentioned suggesting that the public, for the most part, is unaware of what a paralegal is or what they do.[788] This is confirmed in one of these few conversation that mentions paralegals when the original poster responds to the commentator suggesting they talk to a paralegal asking "Actually, one of the lawyers I talked to recommended that. What's the difference?"[789] The fact that paralegals are rarely discussed suggests that this relatively new class of legal professionals are still not within the general consciousness of the public.

IV. Summary

Redditors have a difficult time resolving their employment problems. Employers are perceived as manipulative and able to take advantage of loop holes in the legal system for their own benefit. The regulatory regime is often unhelpful as they are seen as ineffectual at protecting

[785] Employment 030.
[786] Employment 084.
[787] Employment 027.
[788] Employment 027, 084, 089, 203.
[789] Employment 084.

employee rights and slow to resolve the issue. Finally, the legal services of lawyers are often believed to be far too costly to warrant a retainer. Given this difficulty in accessing the formal system many Redditors have turned to alternative methods of resolving their legal problems.

6.4.4 Alternative Paths to Justice

With employment problems, the formal legal system offers two methods of resolution: either file an application with the Ministry of Labour or navigate the complex court system – ideally with the assistance of legal representation. As both of these methods have been heavily criticized by the Reddit community as being difficult to access, it is interesting to note what alternative paths to resolution are proposed. Overall, alternative paths are not frequently mentioned perhaps indicating how ingrained employment issues are within the formal system and how few practical options actually exist outside of the formal system. However, when alternative paths are mentioned it is commonly in reference to one of two possibilities: either unionize, or seek assistance from the community.

I. Unionization as a Path to Justice

Calls for unionization typically occur within the context of systemic employer and employee relations; that is, when employees identify ongoing and workplace wide policies that infringe on particular rights some commentators will express the need for a union. For these commentators the formal system is seen as failing to protect the employee's rights. "Unless you have a Human Rights complaint or are unionized or something, you probably won't get far."[790] In this context, some Redditors are quick to point out that an individual employee is powerless to protect their own interests and they need a union to do this.

> Fight for your rights! Join a union! It's even more important in a globalized world. You can not stand-up as an individual against a big corporation but an organization can. Also for a small cafe, if your boss fires you, because you want to get paid for overtime, what can you do, hire a lawyer, go to court...dream on, by the time you have paid all the fees you can not afford a coffee anymore. The only way you have is to bend over if you don't get support from a Labour Organisation.[791]

[790] Employment 038.
[791] Employment 004.

Often what drives the call for unionization is the worry that if an individual complains about a workplace policy, then they will be targeted by the employer for reprisal. In one case a poster relates how everyone in their workplace works an excessive amount of hours, but no one does anything about it.[792] In response one commentator notes: "What you need is a union. Sure, you can raise these issues with your boss by yourself or with a few co-workers, but you may just single yourself out as some sort of trouble-maker etc."[793] Unions are viewed as a way to readjust the power dynamic to make the relationship fairer. "If you're in the construction trades in Ontario, the only way you're going to get a fair shake is by joining your trade guild."[794]

Unions are also seen as the solution when the employer's actions are viewed as unfair, though not strictly illegal. For example, in one conversation where a grocery store clerk is complaining that the store's air conditioner is broken and the employer does not seem inclined to fix it, one commentator states: "Situations like this are what unions are for."[795] In response to this, the original poster questions what a union can do to which another commentator replies: "It is literally what unions are for. They fight the employer to protect non-legislated working conditions on behalf of the employee."[796] Finally, unions are also seen by some in the community as being desperately needed in particular industries notably food service and IT. For example, in response to a poster who was fired from their job as a barista one commentator says: "Seeing stories like this make me sick. This happens all the time in the service sector and is the exact reason the service sector NEEDS labour unions."[797] Similarly in a conversation about how employees in IT jobs work excessive hours, one commentator notes "Pay never seems to be an issue, as our trade is in demand. But the TFW [Temporary Foreign Workers] program and lack of unionization is quite worrisome."[798] Though the call to unionization is not universal within the community, unions are seen by many as potential path to justice that would do a better job of protecting rights and entitlements than the formal system.

[792] Employment 026.
[793] *Ibid.*
[794] Employment 002.
[795] Employment 196.
[796] *Ibid.*
[797] Employment 030.
[798] Employment 005.

II. Community Assistance as a Path to Justice

Redditors also find an informal path to justice through actions of solidarity with each other. This is expressed either in a call to publically shame and boycott the employer, or through offers of personal assistance. For example, in one conversation where a retail employee was fired after they refused to let their manager inspect their phone there were numerous commentators expressing outrage. "Please post your employer so we can publicly shame them. Losing your job over protecting your privacy is utter bullshit."[799] Another commentator agreed asking for details: "And the name of the retail company so we can all try to avoid giving them our business in the future is?"[800] In another example, in response to a story about an employee at a café being dismissed unfairly, several members of the community said they would boycott the location. "Which location is it so I know not to go there?"[801] Another commentator asks: "Just out of curiosity, what [café] is this? I want to know to avoid it whenever possible."[802] Publically shaming an employer and boycotting their business can be considered an alternative path to justice because it gives the employee an opportunity to redress the grievance outside of the formal institutions by punishing the employer for the wrong they feel they have suffered. Overall, the call to publically shame and boycott a business was not that common, only occurring in 7.1% of conversations. However, in all but two of these conversations the poster worked in either retail or the food service industry displaying that public shaming and boycotts are more commonly viewed as legitimate alternative paths to justice for these types of public facing industries.[803]

Solidarity among the community is also displayed through periodic offers of personal assistance. This took the form in offers to help the poster find employment,[804] directing the poster to existing opportunities,[805] offering services such as resume editing[806] or, in one case,

[799] Employment 027.
[800] *Ibid.*
[801] Employment 030.
[802] *Ibid.*
[803] Employment 027, 030, 059, 082, 101, 121, 182, 185, 195, 199.
[804] Employment 027, 030, 053.
[805] Employment 030, 055, 061, 081.
[806] Employment 053, 142.

donating work boots.[807] These too can be considered alternative paths to justice, because they provide the employee with opportunities to rehabilitate and move on after suffering a wrong. Like calls to name and shame employers, offers of personal assistance were not universal throughout all conversations, again only occurring in 7.1% of conversation. Interestingly, in all but one of these cases the poster was recently terminated or otherwise jobless showing that offers of assistance are deemed legitimate paths to justice in these desperate situations. Like calls to shame and boycott employers, offers of personal assistance are volunteered by the commentators rather than requested by the posters showing that it is not uncommon for members of the Reddit community to rally in assistance of fellow Redditors when there is a perceived injustice. In doing so the community is creating alternative paths to justice outside of the formal institutions.

6.5 Impact on Ontarians' Access to Justice

6.5.1 Introduction

Like the previous chapter, this final section will use the narratives identified above to examine whether the legal regime for employment problems is accessible from a justice as fairness perspective. Specifically it will examine how procedural fairness, background fairness, and stakes fairness are impacted by employment problems. In doing so, this section uses legal consciousness as a lens to identify benchmarks that can be used to measure access to justice.

6.5.2 Procedural Fairness

As noted in Chapter two, procedural fairness demands that the processes and procedures of the legal system be set up in a way that, if followed, guarantee a fair outcome. This could mean one of two things: it could either speak to the rules allocating benefits or it could speak to the rules for resolving disputes. Rawls argues that benefits should be distributed to individuals according to principles of pure procedural fairness wherein the outcome is just by virtue of following a fair set of rules. From an employment problems perspective, this means that the procedures for hiring or promoting a candidate – presuming they are fair – are actually followed.

[807] Employment 147.

For example, in Canada there is an entire framework of legislation that prohibits discrimination in the employment context on specific grounds including, among others, gender, place of origin, and age. If an individual was denied a job simply because they were from a different a country, then the rules for the distribution of employment opportunities are not being followed and there is a breach of procedural fairness. Another potential concern of procedural fairness within the employment context might be with nepotism. Though not strictly illegal within the private sector, many organizations have policies that prohibited individuals from hiring or promoting close relatives. If an organization began hiring people in breach of such a policy there would be a violation of procedural fairness.

Among all the conversations analyzed, there was little evidence that Redditors were concerned with either discrimination or nepotism in the job hiring or promotion process. Specifically, there were only two posts that raised this issue. In the first post, the poster alleges that the Asian restaurant community in a specific city engages in discriminatory hiring practices.[808] They note that they have extensive service experience, are able to speak several Asian languages, have an Asian last name, and often get interview offers over the phone, however, they are never hired after meeting the employers in-person: presumably because they are Caucasian. The individual further observes that many of his/her friends who are Asian are able to get jobs in these restaurants despite their lack of service experience. If the poster's allegations are correct than this is clearly an example of a breach of procedural fairness since these employers are not following rules that prohibit discriminatory hiring practices. In the second post that raised this issue, the poster relates that they are slightly senior and was asked about their age during a job interview.[809] The poster wants to know what impact this question may have in the event they are not hired. The concern here is that the question is irrelevant to the job and therefore might evidence discrimination based on age should the poster not be hired. If this is the case, than this is likely another example of a breach of procedural fairness. The Ontario *Human Rights Code* does allow for certain discrimination when hiring for special types of employment, however, given the fact that the poster states they were interviewing for a fortune

[808] Employment 124.
[809] Employment 183.

500 company this is not likely the case.[810] In either event, this post was the only one that expressed concern over potentially discriminatory questions during the interview process. Thus, while these two posts demonstrate that discriminatory practices still occur, they were outliers within the data set. For the most part, Redditors were not concerned with procedural fairness during the hiring process.

When speaking of resolving disputes – as opposed to the distribution of benefits – Rawls argued that procedural fairness demands that competitions be arranged according to principles of perfect procedural fairness. Within these types of competitions, a particular outcome often has an independent claim to being more just than any other outcome. In such cases, the rules for resolving the dispute need to be arranged in a way that they guarantee that the more just outcome is realized. For example, if an employee was fired from their job unfairly, the rules need to be arranged in a way that guarantees that this employee is compensated. One way to assess procedural fairness in this context is to look to the normative concerns of participants. That is, for example, do the parties believe that they had an opportunity to present their case, do they trust that the adjudicator treated them fairly, and do they believe they were treated with respect and dignity. From the discussions above it is evident that Redditors generally believe the procedures surrounding employment disputes are for the most part fair. For example, there were no complaints about adjudicator bias, nor were there complaints about being treated in a disrespectful manner. However, there were some serious concerns over the high cost of obtaining legal advice. In numerous examples, the high costs of seeking legal assistance meant that a Redditor was precluded from bringing a claim forward: they often did not have the resources to obtain legal advice, and even if they did, the amount in dispute did not warrant the investment. Legal costs, therefore, act in a way that prevents users from participating in the legal system by denying them an opportunity to present their case.

As well as costs, there was also concern with delays on part of the Ministry of Labour. Numerous Redditors expressed frustration at how their claims took years to work itself through the system. Not only is it frustrating to have an ongoing unresolved problem, but these delays impact assessments of trustworthiness: individuals question whether the system is actually

[810] *Human Rights Code*, RSO 1990, c H.19, s 24.

concerned with resolving their problem and whether the system will treat fairly throughout. Not surprisingly, therefore, some Redditors disavow the Ministry of Labour as a legitimate path to justice. These concerns over costs and delays reveal that there are some problems with procedural fairness within the employment sphere.

6.5.3 Background Fairness

Like procedural fairness, background fairness can be understood in two ways: either in terms of the distribution of opportunities or in terms of the rules governing a competition. From an employment context, the first aspect of background fairness would be concerned with the allocation of rights between the employee and employer. In Canada, an extensive network of legislation establishes a basic level of employment standards for most workers. While there are some Redditors who view these standards as irrelevant to the reality of the workplace, most see them as necessary to protect the employee from employer abuse. For example, numerous posts discussed employers paying less than the legislated minimum wage, dismissing individuals for being pregnant, and demanding individuals work more than their contracted hours. But for the rights established by legislation it is believed that these wronged employees would have no recourse. As such, Redditors generally understand the legal regime as operating in a way to satisfy background justice by providing employees with a base level of protection from employer abuse. Whether Redditors believe these laws go far enough is another matter and not evident from the conversations since Redditors typically focused on difficulties in enforcing existing rights.

In regards to the second aspect of background fairness, the issue is whether individuals have equal moral standing within a competition. In other words, does one's status as either an employee or an employer affect the outcome of the issue? Among the conversations analyzed, there was no expression that an employee or employer was particularly favoured once a dispute reached the formal forum. However, there is a clear issue of background justice in regards to one's choice of forum. To most Redditors the Ministry of Labour offers a fairly easy path to justice because it shifts the cost of investigation, prosecution, and enforcement to a government agency. The courts, on the other hand, are often perceived as completely inaccessible due to the high

cost of legal assistance especially when compared to the dollar amount in dispute. The problem with this arrangement is that the damages awarded by the Ministry of Labour are generally far lower than those awarded by the courts. Therefore, some Redditors perceive the Ministry of Labour as offering less justice. From a background fairness perspective this is problematic because employees who pursue a claim through the Ministry of Labour have a differing status than those who pursue their claim through the courts: that is one has a claim to better entitlements if they go through the courts. Often the determinant for the choice of forum is the ability to pay and low skilled, low waged employees have less ability to pay than those with resources. This effectively establishes two classes of people with differing entitlements.

5.5.4 Stakes Fairness

The third element of justice as fairness that needs to be discussed is stakes fairness which examines competitive outcomes. Here we are concerned that the outcome of a competition is, first, not arranged in a winner take all fashion and, second, does not unduly impact other competitions. From an employment problems perspective, a winner take all situation occurs when an individual's employment is terminated since the employee loses everything. Though there are no doubt situations where this result is justified, stakes fairness mandates that those situations be narrowly construed and termination be used as sparingly as possible. Overall, problems with termination of employment were the second most common problem type experienced by Redditors which suggests that this outcome is used far too often by employers. Indeed it is unlikely that most of the terminations related in the conversations would be determined by the courts as justified. For example, assuming that the Redditors' allegations are true, no court would find a termination justified simply because the employee was pregnant, or because they scheduled time off, or because they asked for wages that were due and owing. While these terminations were not sanctioned by the courts, the problem is the employee is the one that has to rectify the situation and, if unable to do so, the competition becomes a winner take all by technicality. Thus, the over use of this remedy, even if unsanctioned, is problematic from a stake's fairness perspective. In regards to the second aspect of stake's fairness, there is not much evidence from the conversations that employment disputes impact other competitions

unfairly. Generally the conversations isolated the problem to the workplace and did not discuss any overlap with other spheres of life. There is no doubt, however, that serious problems – such as losing one's job – would have an impact on other avenues including housing and family, however, Redditors did not express concern over this.

6.5.5 Conclusion

The conversations posted to Reddit provided helpful points of reference for assessing access to justice. Overall the legal framework surrounding employment problems complies with many of the principles of justice as fairness. For example, there is little concern about discrimination when it comes to job opportunities, the procedures for resolving disputes are perceived as fair and free from bias, and the allocation of rights and protections is viewed as appropriate. With that being said some of these findings, particularly in regards to discrimination, may be more of a reflection of the demographics of the posters., Moreover, the conversations make it clear that Ontarians do have a difficult time with accessing justice in many other respects. While the overall regulatory framework makes pursuing a complaint with the Ministry of Labour relatively easy, the process is too slow. Meanwhile, there is a perception that individuals are barred from participating in the parallel court system due to the high cost of legal services. There is also a major issue with background fairness wherein one's entitlements, and therefore status before the law, is dependent on one's ability to access the courts. Finally, there is a potential for employment problems to escalate into all or nothing competitions for the most vulnerable of individuals since they are the most likely to be unable to stand upon their rights. These concerns can thus act as benchmarks for measuring access to justice initiatives. For example, does the initiative act to reduce costs and/or delays? Does the initiative balance the entitlements available between the parallel paths to justice? Does the initiative make it easier for employees to access particular remedies? These issues will be discussed further in the final chapter.

Chapter 7

Family Problems

7.1 Introduction

Like the previous chapters, this chapter examines how Ontarians experience and understand a particular legal problem in order to develop benchmarks for measuring access to civil justice initiatives. Specifically, this chapter is examining conversations about family law problems posted to the website Reddit. Canadian family law is a complex area of law that applies to a wide variety of problems related to the family unit. Generally family law is understood to deal with that set of issues that arises when the marital relationship breaks down including separation, divorce, child custody, spousal support, and the division of shared property.[811] However, it can more broadly be understood to deal with all aspects of the family unit, including such issues as adoption, child protection, or elder care, and often intersects with other areas of law such as criminal law – in the cases of domestic violence for example – or immigration. Moreover, given the domestic nature of its subject matter, some may confuse family law with other distinct areas of law such wills, estates, and powers of attorney. Like the other problems types examined, this dissertation is concerned with how the public understands family law and is not trying to put artificial barriers around the problem type. However, as discussed below, the problems examined did required some anchor, even if tenuous, to what would legally be considered a family law problem. As such, problems that are not directly related to the family unit – such as wills and estates – are not included, whereas conversations about other problems that have this connection – like domestic violence – are included as they involve the family even if they may be technically situated in another category of law. Again the guiding principle is to see how the public understands these legal problems.

The first part of this chapter examines the legal framework that governs family law problems. The next section reports on key findings about the conversations posted to the website Reddit including the types of family problems experienced and where people turn to for advice. The third section discusses three themes that emerged out of the conversations which reveal

[811] Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 7th ed (Toronto: Irwin Law, 2017).

how Redditors understand the legal framework that governs family law problems. The final section then examines these three themes from a justice as fairness perspective.

7.2 Legal Context of Family Problems

7.2.1 Legislative Jurisdiction

Family law is a heavily legislated and regulated area of law. In contrast to employment law, for example, where most of the rights and duties arise out of the common law, almost every right, entitlement, duty, and obligation within family law arises out of statute. This is not surprising since the common law's position on marriage, divorce, and family property reflects historical beliefs that are rather anachronistic to modern views of the family.[812] For example, prior to the first divorce legislation being passed in 1968, divorces were rare and required the petitioning party to have their member of parliament bring a private members bill before the House of Commons.[813] Further, divorces were only granted on the basis of matrimonial offences, such as adultery or cruelty.[814] This meant that divorces were largely reserved for the wealthy who were willing to make their affairs public. Today, under the federal *Divorce Act*, a judge may grant an "over the counter" divorce simply on the basis of a marital breakdown, which can be established by the spouses living separate and apart for one year.[815] Similarly, the common law recognized few rights for unmarried cohabitating couples. There was no such thing as spousal support for common law couples until legislation was passed in the 1970s and the courts did not recognize equitable property claims of unmarried couples until the 1980s.[816]

Constitutionally, family law falls under the jurisdiction of both the provinces and the federal government. Under the *Constitution Act, 1867* the authority to legislate in regards to both marriage and divorce was given to the federal Parliament of Canada, whereas the provinces were given the authority to legislate in regards to the solemnization of marriage, and property and civil

[812] Family law, like the other categories examined, is a dynamic area of law and there are numerous ongoing reform efforts. See e.g. Law Commission of Ontario, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity* (Toronto, 2013); Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa, 2013).
[813] Payne & Payne, *supra* note 811 at 3.
[814] *Ibid*.
[815] *Divorce Act,* RSC 1985, c 3 (2nd Supp) at s 8 [*Divorce Act*].
[816] Payne & Payne, *supra* note 811 at 4.

rights.[817] As such, regulating the capacity to marry is an uncontested federal matter. According to the federal *Civil Marriage Act*, a marriage is the lawful union of two person, to the exclusions of all others.[818] The Act further requires that the two people about to marry consent to the marriage, that they are not under the age of 16, and that every previous marriage they have entered into be dissolved either by death, divorce, or court order.[819] Conversely, the solemnization of marriage is a provincial matter such that the provinces determine who may solemnize a marriage and the necessary requirements of the ceremony: for example under the *Marriage Act*, Ontario requires that the marriage be solemnized in the presence of two witnesses.[820] This simple division of powers, however, belies a much more convoluted relationship that directly impacts both legal procedures and individual entitlements.

7.2.2 Custody and Support

While divorce is clearly within the jurisdiction of the federal government, the jurisdictional authority over issues commonly surrounding divorce – namely custody and support – is not so clear. Legislating about the payment of monies for the support of either the spouse or child would logically fall to the authority of the provinces under their jurisdiction over property rights. Likewise legislating about child custody arrangements would also seem to fall to the authority of the provinces under their jurisdiction over civil rights. However, both custody and support has been interpreted as being ancillary to divorce. That is, in order for the federal government to be able to fully legislate on divorce, it must have the authority to legislate on custody and support as well.[821] As such the federal *Divorce Act* grants the courts the power to make custody and support orders that are necessarily connected to an order for divorce.[822] However, being an ancillary power, the court has no jurisdiction to issue such orders under the *Divorce Act* if the divorce itself is not granted.[823] Thus if the divorce petition is dismissed because

[817] *Constitution Act, 1867,* supra note 361, ss 91-92.
[818] *Civil Marriages Act,* SC 2005, c 33, s 2.
[819] *Ibid,* ss.2.1-2.3.
[820] *Marriage Act,* RSO 1990, c M.3, s 25.
[821] *Zacks v Zacks,* [1973] SCR 891, 35 DLR (3d) 420.
[822] *Divorce Act, supra* note 815, ss 15.1-15.2.
[823] *Papp v Papp* (1969), [1970] 1 OR 331, 8 DLR (3d) 389 (Ont Ct App).

the parties, for example, could not establish that they had lived separate and apart for a year, then the court could not make a support or custody order under the *Divorce Act*.

The provinces, however, do retain general jurisdiction to legislate in the areas of custody and support as part of the powers of property and civil rights granted by the Constitution. In Ontario, the *Children's Law Reform Act*, grants the court the power to make orders in regards to custody.[824] Likewise, Ontario's *Family Law Act* grants courts the power to make orders in regards to spousal or child support.[825] Unlike the powers granted under the *Divorce Act*, these powers are not ancillary to a divorce order and thus may stand on their own independent of a divorce order. However, under the doctrine of federal paramountcy a divorce order that includes any support or custody orders supersedes any existing provincial custody or support order.[826] A further complication to bear in mind is that a divorce granted under the *Divorce Act* is necessarily tied to marriage and, as such, common law couples can seek no remedy under the *Divorce Act*. This again reflects the historic reality that the common law granted few rights to couples that have been cohabitating but have not entered into a formal marriage. The provinces, however, under their authority to legislate in the areas of property and civil rights, have extended support obligations to common law couples. For the purposes of spousal support, Ontario's *Family Law Act* for example, defines spouse to include couples who have been cohabitating continuously for a period of three years or couples who are the parents of a child.[827] Thus, a common law spouse seeking support would have to make an application under the provincial legislation. Likewise, an application for custody under the *Children's Law Reform Act* is not limited to married parents and can be brought by any person. Under this Act, both parents are equally entitled to custody of a child and both may exercise parental rights.[828] However, a court may grant custody of, or access to, the child to any person or persons and determine the nature of these rights according to the best interests of the child.[829]

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[824] *Children's Law Reform Act*, RSO 1990, c C 12, s 28 [*Children's Law Reform Act*].
[825] *Family Law Act,* RSO 1990, c F 3, s 33 [*Family Law Act*].
[826] *Gillespie v Gillespie* (1973), 6 NBR (2d) 227, 36 DLR (3d) 421 (NB Sup. Ct. App. Div.).
[827] *Family Law Act*, *supra* note 825, s 29.
[828] *Children's Law Reform Act, supra* note 824, s 20.
[829] *Ibid,* ss 24, 28.

7.2.3 Division of Property

As well as custody and support, the provinces have also legislated in regards to how property should be divided upon a marital breakdown. There are two preliminary items of note in regards to these legislated property rights. First, Ontario legislation has not yet extended these rights to common law couples. While some may argue that this distinction appears discriminatory, the Supreme Court of Canada has noted that people may choose to marry or may choose to structure their relationship and financial affairs differently and, as such, it is not discriminatory to exclude common law couples who have chosen not to marry from these property rights.[830] With that said, common law couples who feel they are entitled to certain assets upon the relationship breakdown can find some remedy in the law of equity if they have improved the value of property that legally belongs to the other party.[831] Second, since the division of property is not considered ancillary to the powers of divorce, these property rights are wholly within provincial jurisdiction. A judge has no authority under the *Divorce Act* to make an order regarding the division of property. The basic rule regarding the division of property under Ontario's *Family Law Act* is that upon the dissolution of a marriage all property owned by both spouses is divided equally between the two parties.[832] However, there are nuances to this simple rule which complicates the valuation immensely. For example, there is some property, such as gifts and inheritances that can be traced, which are excluded from the calculation.[833] Likewise the matrimonial home is excluded from this valuation and calculated separately. Under the *Family Law Act,* the matrimonial home is the property that was ordinarily occupied as the family residence and both spouses are granted an equal interest in the property including an equal right to possession of that property.[834]

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[830] *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83.
[831] *Becker v Pettkus,* [1980] 2 SCR 834, 117 DLR (3d) 257.
[832] *Family Law Act*, *supra* note 825, s 5.
[833] *Ibid,* s 4.
[834] *Ibid,* ss 18, 19.

7.2.4 Domestic Contracts

Coupled with the rights and duties imposed by legislation, both married and unmarried couples are also entitled under the *Family Law Act* to enter into a domestic contract.[835] These contracts can be made in regards to, *inter alia,* the ownership of property, support obligations, a child's education, and access and custody arrangements.[836] Couples are thus granted some agency to arrange their own affairs within the relationship and decide what will happen to their affairs upon the dissolution of marriage or the ending of cohabitation. While such contracts are enforceable, they must be made in writing and signed by the parties and witnessed.[837] Further, courts have extensive authority to set aside provisions of these contracts on numerous grounds. Specifically, the *Family Law Act* grants a court the authority to disregard a provision if they believe they are not in the best interest of the child, if a party fails to disclose financial assets, if a party did not understand the nature or consequence of the contract, or as otherwise allowed by contract law.[838]

7.2.5 Judicial Jurisdiction

The overlapping jurisdiction of federal and provincial powers, particularly in regards to support and custody orders, results in a convoluted and confusing legal process wherein certain courts are unable to deal with certain family law matters. There are three different courts in Ontario that each deal with particular aspects of family law: the Ontario Court of Justice, the Superior Court of Justice, and the Family Court. The Ontario Court of Justice is a provincially created court and generally has jurisdiction to hear matters arising out of provincial legislation. This includes the *Family Law Act* and the *Children's' Law Reform Act* and therefore the Ontario Court of Justice can hear matters dealing with custody, access, child support, and spousal support arising under those acts. It can also deal with adoption and child protection matters which are governed by Ontario's *Child, Youth and Family Services Act*. However, being a provincial court, it has no authority to hear divorce matters. Thus, if one is married and one wants a support order

[835] *Ibid,* ss 52-54.
[836] *Ibid*.
[837] *Ibid*, s 55.
[838] *Ibid,* s 56.

along with a divorce order then they must go to the Superior Court of Justice as a provincial court cannot make an order in regards to divorce. However, if one is in a common law relationship and is seeking a support order, then they can bring their application to the Ontario Court of Justice. Moreover, the Ontario Court of Justice does not have the authority to make an order in regards to the division of the property upon the dissolution of marriage. Even though the power to order the equalization of family property would fall under provincial jurisdiction and is conferred to the courts by Ontario's *Family Law Act,* this type of order is necessarily attached to a divorce order. Thus, an individual seeking the division of family property has to apply to the Superior Court of Justice, because this remedy only available to married couples seeking a divorce.

The Superior Court of Justice is a court of inherent jurisdiction, which means it can hear any matter that comes before it unless legislation grants exclusive jurisdiction to another court or tribunal. As such the Superior Court of Justice can hear matters dealing with divorce, division of property, child and spousal support, as well as those dealing custody and access. It cannot, however, hear matters regarding child adoption and protection – except on appeal – since the *Child, Youth and Family Services Act, 2017* grants this power exclusively to the Ontario Court of Justice and to the Family Court.[839] Finally, in an effort to simplify this situation, the provincial government created the Family Court – also known as the Unified Family Court – as a branch of the Superior Court of Justice and gave it the jurisdiction to hear any and all matters relating to family law.[840] Currently, only about half of the locations where the Superior Court of Justice sits – being 25 out of 52 judicial regions – have a family court. [841] In those regions that do not have a Family Court, jurisdiction over family matters is still shared between the Ontario Court of Justice and the Superior Court of Justice.

7.2.6 Prevalence of Family Problems

Family problems make up a fairly small percentage (5.1%) of all civil legal problems experienced by Canadians especially when compared to other civil problems such as consumer

[839] *Child, Youth and Family Services Act, 2017,* SO 2017, c 14, Sched 1, s 2.
[840] *Courts of Justice Act,* RSO 1990, c C 43, s 21.1.
[841] Ontario Ministry of the Attorney General, "Understanding the Family Court System in Ontario", (2019), online: <https://www.attorneygeneral.jus.gov.on.ca/english/family/famcourts.php>.

problems (22.6%), debt problems (20.8%), or employment problems (16.4%).[842] Yet the amount of new court filings for family law matters is disproportionate when assessed as a percentage of all civil matter filings. In 2018, the Superior Court of Justice received 46,621 new family law filings.[843] In the same year, the Ontario Court of Justice received 17,189 new family law filings.[844] This means that family law matters made up 25.9% of all civil filings in the Superior Court of Justice and 32.4% of all civil court filings if the new filings from the Ontario court of Justice are included (See table 7.1).

Table 7.1 **Civil Applications Filed**

Court	Applications Received		
	2018	**2017**	**2016**
All Non-Family Civil Law Filings (Incl. Small Claims Court)	133,094	132,488	132,552
Family Law Filings:			
Ontario Court of Justice	17,189	18,346	19,314
Ontario Superior Court	46,621	48,278	49, 069
Total family law Filings	63,810	66,624	68,383
Total Family and Civil Filings	196,904	199,112	200,935

Source: https://www.ontariocourts.ca/scj/news/annual-reports; https://www.ontariocourts.ca/ocj/stats-fam/

This disproportionate use of the court system is also reflected in the amount resources set aside by public legal assistance for family law matters. In 2018-2019, well over half (57.4%) of all non-criminal certificates issued by Legal Aid Ontario were for family law matters. In dollar terms this

[842] Farrow et al, *supra* note 51 at 8. (In this context, family law problems include the 4.6% problems related to a relationship breakdown as well as the 0.5% of problems classified as other family problems such as child abduction or guardianship).
[843] The Superior Court of Justice, *Enhancing Public Trust: Report for 2017 and 2018* (Toronto, 2018), online: <https://www.ontariocourts.ca/scj/news/annual-reports/#2017-2018>.
[844] Ontario Court of Justice, *2017 and 2018 Family Court Statistics* (Toronto, 2018), online: <https://www.ontariocourts.ca/ocj/files/stats/fam/2018/2018-Family-RDP.pdf>.

means that $71.1 million dollars (or 68.1%) of the $104.4 million spent on non-criminal legal aid certificates went to family law certificates.[845]

7.2.7 Summary

This brief sketch of the legal regime displays that Canada has a convoluted and confusing family law system. Much of this is owing to the fact that Canadian family law encompasses issues that overlap both federal and provincial jurisdictions. While the federal parliament is able to legislate in regards to certain matters, such as divorce, the provincial parliament is able to legislate in regards to other matters, such as the division of property, and there are some matters that are within concurrent jurisdiction of both legislatures, such as support obligations. As well as impacting the substantive rights of families, this constitutional arrangement has significant procedural repercussions in which parties must apply to differing courts depending on the exact nature of their problem and where they live. One final nuance to family problems in Canada is that they take up a disproportional amount of court resources and public legal aid funding when compared to other civil law problems. This context makes family law a unique area of law and, as such, individuals who experience a family law problem will be situated differently than individuals with other types of legal problems. The next section will examine the content of conversations about family problems posted to Reddit in order to better understand the context of these problems.

7.3 Context of Social Media Advice

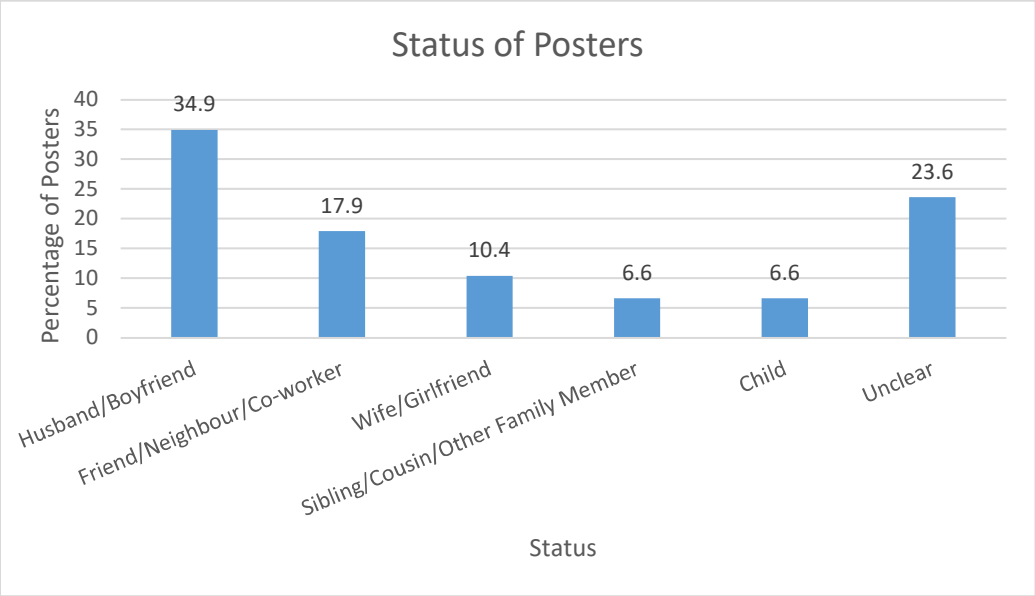
7.3.1 Party and Relationship Status of Posters

Like the other problem categories, it is difficult to gather specific demographic information about Redditors who post about family law problems since they are only identified by a self-generated username. Moreover, those posting questions are often vague about their own life circumstances failing to state who they are and the nature of their relationship. For example, many posters do not explicitly state whether they are formerly married or in a common

[845] Legal Aid Ontario, *Annual Report 2018-2019* (Toronto, 2019), online: < https://www.legalaid.on.ca/wp-content/uploads/LAO-annual-report-2018-19-EN.pdf>.

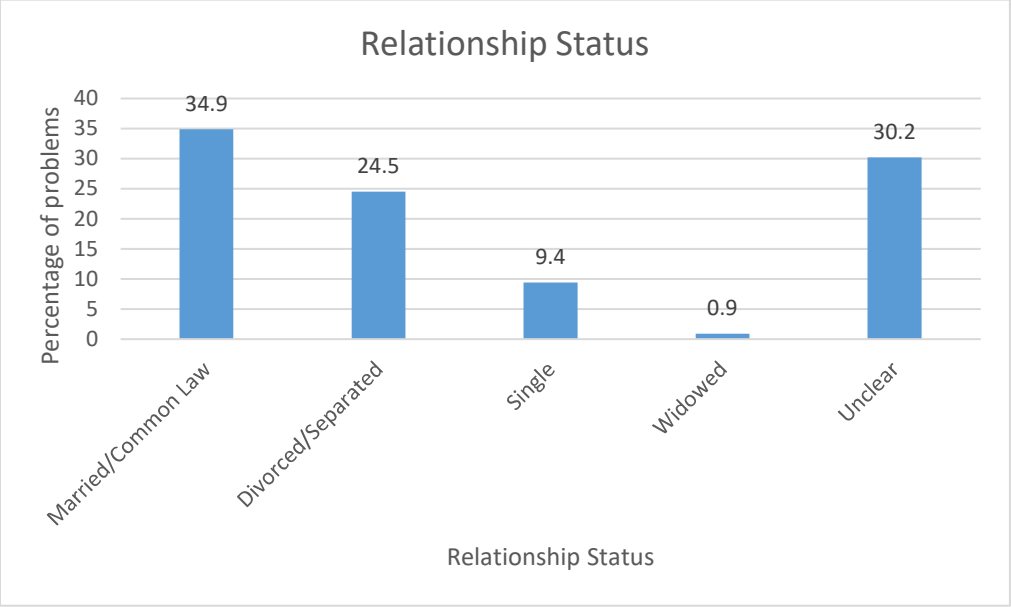
relationship, and when referring to their spouse they often use an ambiguous term such as "partner" which could be used to refer to either married or common law spouses as well as boyfriends/girlfriends. Likewise, it is sometimes difficult to ascertain if a poster has received a formal divorce order or are simply separated since they often refer to their spouse as simply "my ex" which could indicate a formal divorce or simply a separation. Thus, out of the 106 conversations analyzed there is a fairly high percentage of "unclear" posts for both the party status (23.6%) and relationship status of the posters (30.2%). Where these demographics can be identified, it was found that more questions were posted by the husband/boyfriend (34.9%) then by the wife/girlfriend (10.4%), perhaps reflecting the fact that the majority of Reddit users are male. There was also a fair number of people (17.9%) asking questions about someone they were not related to such as their friend, neighbour, or co-worker (See Figure 7.1).

Figure 7.1 **Party Status of Posters**



In terms of the relationship status of the parties in question, there were more problems involving married or common law couples (34.9%) than divorced or separated couples (24.5%) though both of these categories were fairly common throughout the data (see Figure 7.2.). Single people with family law problems were less common representing only 9.4% of conversations.

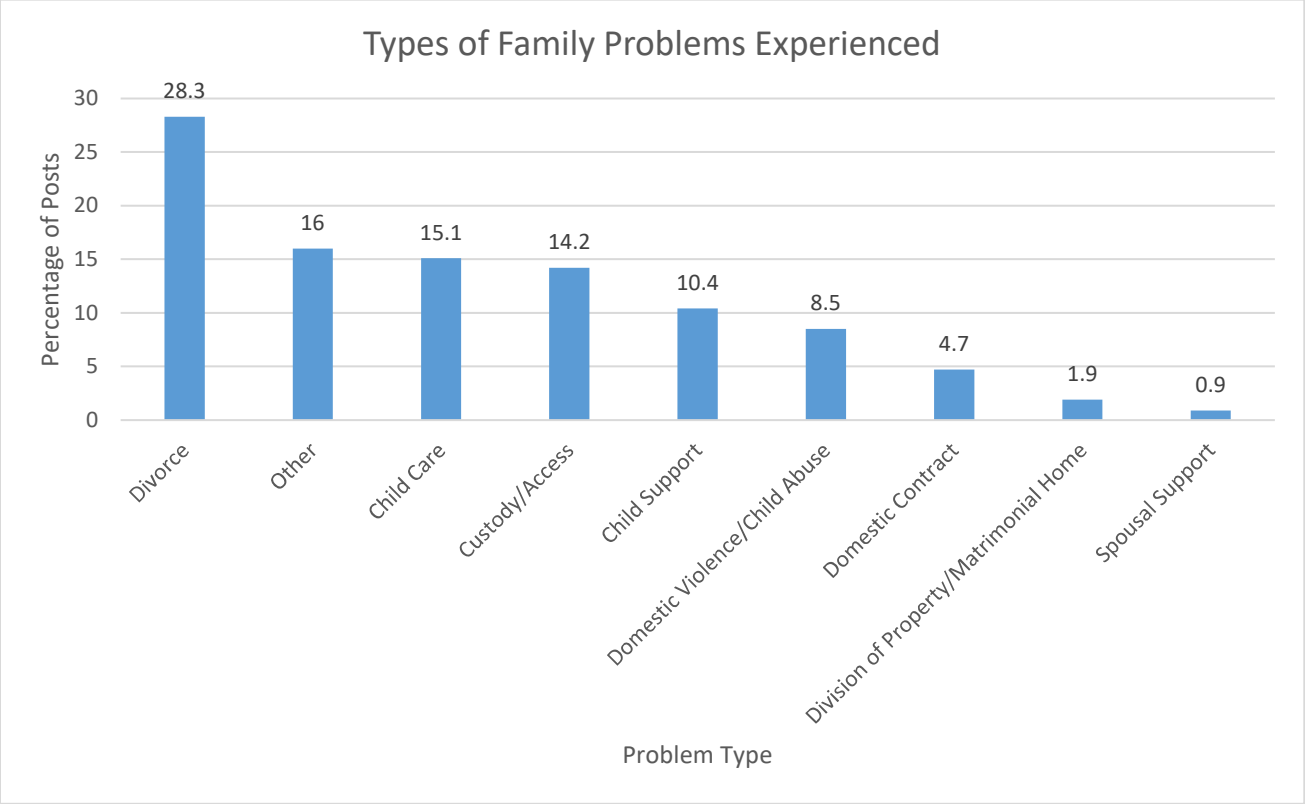
Figure 7.2 **Relationship Status of Posters**



7.3.2 Types of Family Problems

The types of problems experienced by Redditors were varied and, as a whole, did not coalesce around any particular problem type. Moreover, Redditors often experienced multiple problem types within any given conversation. In cases such as these, the problem was categorized according to the dominant or central problem as presented by the poster. For example, if an individual expressed concern about an impending divorce and then noted for context that they had a child and some savings, this would be categorized as a divorce problem. Conversely, if an individual expressed worry that they might lose custody or access of their child in an upcoming divorce this would be categorized as a custody/access problem. While both conversations involve issues of divorce as well as custody, the first conversation is centred on divorce procedures whereas the second focuses on custody and access issues. The most common problem that Redditors sought help for was in regards to divorce (28.3%). Questions about other types of problems such as custody or access (14.2%), or child support (10.4%) were also fairly common, whereas questions specifically about the division of property (1.9%) or spousal support (0.9%) were much less common (see Figure 7.3).

Figure 7.3 **Types of Family Problems Experienced**

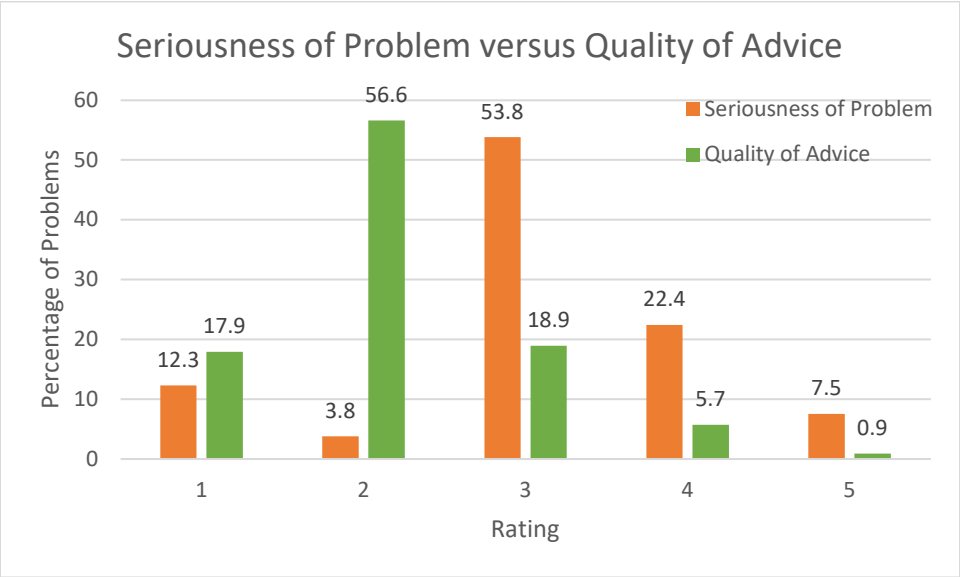


7.3.3 Seriousness of Problems and Quality of Advice

Like the other problem types examined, family law problems were assigned a rating for seriousness ranging from 1 to 5, wherein 1 represented an inconsequential or hypothetical problem and a 5 represented the most sever of family law problems. For example, if an individual expressed concerns about violence or if they had lost access to their children they would receive a rating of 5 as these would be considered the most impactful and extraordinary of family law problems. A rating of 4 was given to problems that are difficult to resolve and require professional intervention, such as an acrimonious divorce that involves children and/or significant property. A rating of 3 represents a fairly typical family law problem, in that it could be resolved through negotiation, but has some potential to escalate. In such cases, legal advice would help, however, it is not necessarily required. Posts that simply asked for a referral to a divorce lawyer, for example, were given a rating of 3 since, without further context suggesting that there are more complicating factors, a divorce can be negotiated without a lawyer, though it does have the potential to escalate. Finally, a rating of 2 would be assigned to a problem that requires attention,

but has little chance to escalate such as a simple amicable divorce. Like the other problem types examined, Redditors turn to crowd sourced legal advice for both serious and non-serious problems. Most of the problems (53.8%) analyzed were given a seriousness rating of 3. This reflects the fact that a noticeable portion of the posts were simply asking for a referral to a lawyer. Among the remaining problems, there was a stronger pull towards greater seriousness with more problems (29.9%) being rated at a 4 or 5 than problems (16.1%) that were rated less seriously at a 1 or 2 (see Figure 6.3).

Figure 7.4 **Seriousness of Problem versus Quality of Advice**



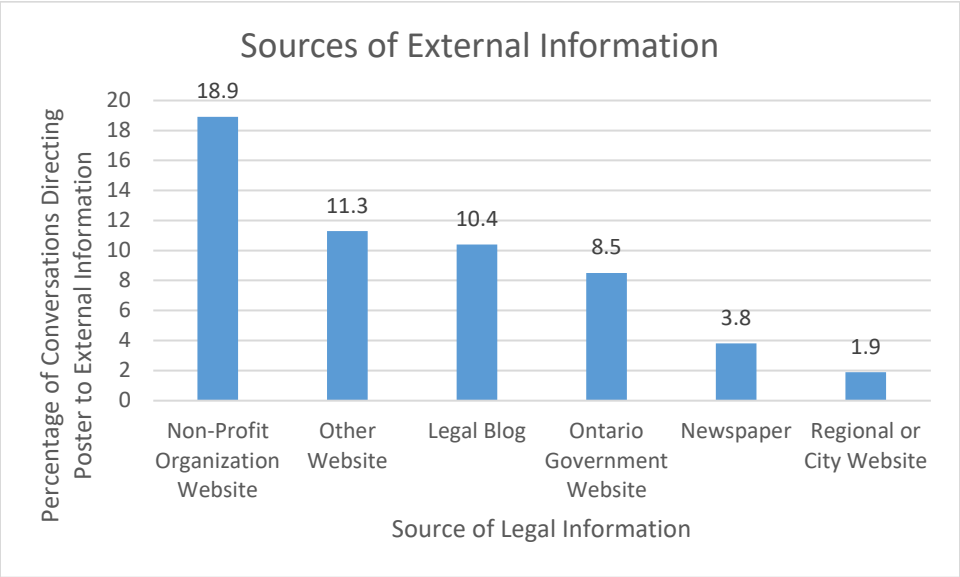
The advice given by Redditors for family law problems were generally of a poor quality. Like the seriousness of the problem, the quality of advice provided by Redditors was also given a rating between 1 and 5. A rating of 1 was given to conversations that contained mostly terrible or misleading advice. A rating of 2 was given to conversations that contained some correct or helpful advice, however, that advice was lost in a clutter of other unhelpful comments. A rating of 3 was given to conversations that contained mostly correct advice, however, it not very practical in terms of next steps. A rating of 4 was considered helpful in terms of quality and next steps, and would be the minimum quality of advice that one could expect to receive if they consulted a lawyer. A rating of 5 was reserved for conversations that provided excellent comprehensive advice that considered options and provided supporting authority. Advice that

simply told the poster to "talk to a lawyer" was given a rating of 2 since this comment is of no practical assistance. However, if the Redditor provided the contact information of a specific lawyer who could help, or suggested the poster obtain a free consolation from the Law Society Referral Service this was given a rating of a 3 since this at least provides the poster with some direction. As stated, most crowd sourced advice was of a poor quality. If a rating of 3 is required to be considered to minimally helpful, almost three quarters (74.5%) of the posts were below this threshold (See Figure 7.4). Likewise, only 6.6% of conversations contained advice that would equate to the minimum standard expected from a lawyer.

7.3.4 Source of Legal Information and Legal Advice

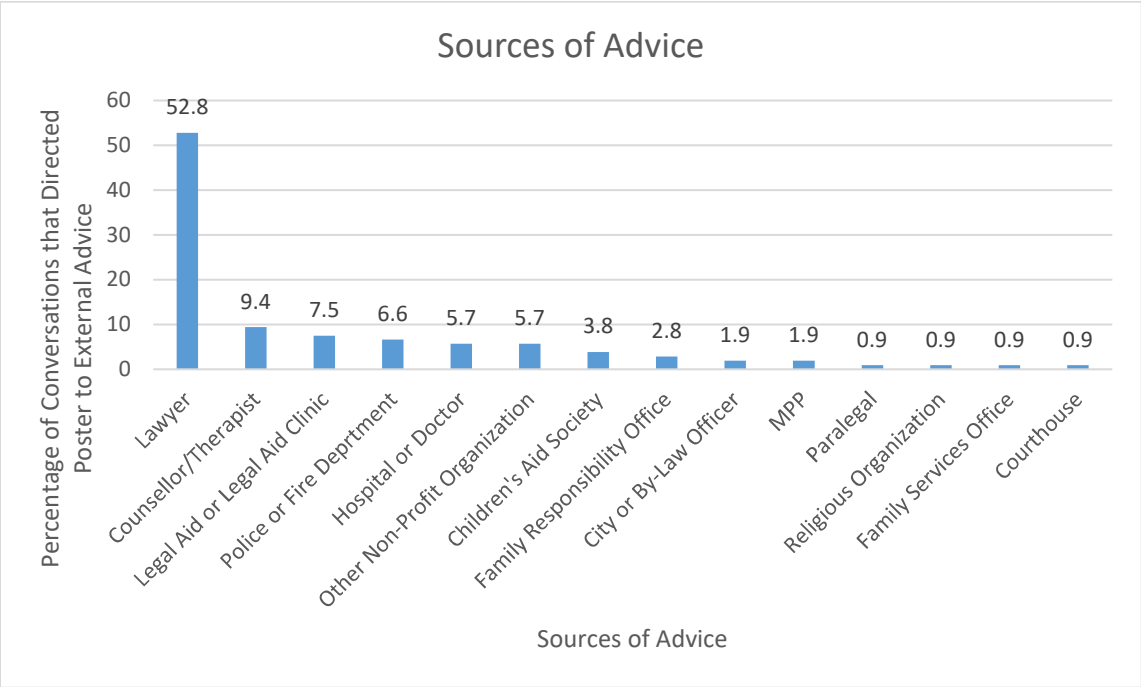
Reflecting this overall poor quality of advice is the fact that very few of the conversations cited a primary source of law, with only 6.6% of the conversations referencing a specific legal authority such as legislation or case law. In a similar vein, only about a third of the conversations (37.7%) directed the poster to an external source of legal information. The single most mentioned source of information was the government of Ontario's website which was referenced in 8.5% of the conversations (See Figure 7.5). Comparatively, a fairly large number of conversations directed the poster to the website of a non-profit organization (18.9%), however, these organizations were varied and included, for example, the John Howard Society, the Centre for Addiction and Mental Health, Steps to Justice, Legal Aid Ontario, and numerous local shelters among others. Similarly, legal blogs were referenced with some frequency (10.4%), however, there was no individual blog that stood out as being particularly common.

Figure 7.5 **Sources of External Information**



Although Redditors who commented on family law problems infrequently directed the poster to external information – and even fewer referenced legal authorities – a solid majority of conversations (70.8%) did direct the poster to seek professional advice. Most often the commentators directed posters to speak to a lawyer with just over half (52.8%) of all conversations suggesting this path to justice. Interestingly only 7.5% of conversations suggested speaking to a legal aid clinic despite that family law problems make up a significant majority of the legal aid budget for all civil law problems and thus represents a potential a source of assistance to some. Likewise only a tiny fraction of conversations suggested speaking to other agencies that are tasked with addressing various family law issues such as the Family Responsibility Office (2.8%) or a Family Services Office (0.9%). Paralegals were only referenced in 0.9% of conversations, however, this is not surprising since, at the time of data collection, family law was not within their scope of practice. Other potentially helpful sources of professional advice were also generally overlooked. For example, only 9.4% suggested speak to a counsellor or therapist even though they might be of assistance in numerous cases examined.

Figure 7.6 **Sources of Advice**



7.3.5 Summary

This section examined the context in which family problems are discussed on Reddit and provides some interesting insights into who experiences these problems, the types of problems experienced, and the nature of advice given. First, while more questions are posted by husbands or boyfriends than are posted by wives or girlfriends there is a comparable amount of questions posted by married or common-law persons as there are questions posted by divorced or separated persons. Second, the type of problem experienced is varied and tends to lean towards being more serious. Finally, the quality advice tends towards being of a poorer quality with many commentators simply suggesting the poster speak to a lawyer. The next section further explores the nature of problems experienced and advice given by examining the narratives related in these online conversations about family law problems.

7.4 Legal Consciousness of Ontarians with Family Problems

7.4.1 Introduction

Family law problems happen in a real life context and there is no reason to presume that people who experience these types of problems understand them and interact with them in the

same way that people who experience other types of legal problems. Indeed, given that the majority of family law problems – being support, custody, and division of property – are triggered by a relationship breakdown there is arguably a greater potential for intense emotional investment into the problem or psychological trauma emanating from the problem than in many other types of civil disputes.[846] This context should be borne in mind while reading the following section. After analyzing 106 conversations that involve issues of family problems, three themes became evident: family law problems are seen as being very legal in nature, family law problems are generally antagonistic, and finally these problems are difficult to resolve because the system is inaccessible.

7.4.2 Formal Nature of Family Law

I. Lawyers are Required for Most Family Problems

There is a core group of problems arising out of a relationship breakdown– notably acrimonious divorces, custody, support, and the division of assets – that are clearly understood as requiring the intervention of lawyers and the courts. As noted by one commentator in reference to these problems: "Lawyers, Courts and the law are required when there are disputes."[847] These problems are not seen as private family affairs. Rather they are recognized as having legal implications that are best resolved in the public courts with legal assistance. In cases of acrimonious divorces, for example, Redditors will frequently advise the poster to speak to a lawyer. In one conversation, the poster relates how his spouse is abusive and prone to angry outbursts, and now that the poster is living in the United States he would like a divorce finalized as quickly as possible. One commentator observes that "You can technically represent yourself in a divorce, but its a bad idea. You won't know what to do legally or how to do it, which means bad choices and her lawyers beating you up in court and with paperwork."[848] Other options such

[846] Though frequently criticized, law is often analyzed through the lens of neo-classical economics wherein the actors are framed as rational and self-interested operating in a market with predictable rules. See e.g. Christine Jolls, Cass R Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1997) 59 Stan L Rev 1471, online: <http://papers.ssrn.com/abstract=74927>. While an economic analysis of law may be helpful to better understand issues of commercial contracts or torts it seems crude to frame many family issues – like child custody – in terms of pure economics.

[847] Family 021.

[848] Family 203.

as mediation – whether religious or not – or counselling are rarely suggested. Even when a poster expresses a preference for one of these alternative paths to resolution, commentators consistently advise that they retain a lawyer. In one conversation, a friend of a divorcing couple is seeking a referral to a mediator, but notes that one of the spouses "…is carrying a lot of anger and is not going to be easy to deal with…"[849] In response, the commentators were quick to advise that the friend get legal assistance even though the couple wanted to mediate as oppose to litigate. "I would not go into mediation without an attorney behind me who would have given me the run-down on my rights and likely outcomes if it went to court (and I would want the soon-to-be-ex to have that too)."[850]

In a similar vein, some Redditors began the divorce process on their own but realised that they needed legal assistance once the relations became hostile. "i thought my ex and i were going to be able to do the amicable self-separation thing, but no. i need help. he is way more aggressive and has financial backing that i dont."[851] As well as high conflict divorces, divorces that are otherwise amicable but involve the division of property or custody of children are also believed to require the involvement of a lawyer. In response to one comment suggesting that a divorcing couple just negotiate a settlement, another Redditor was quick to reply: "Self-directed negotiation is good for some people, but if you have assets (anything greater than $100,000) and/or children, it's best to at least get a consultation with a lawyer first. Otherwise the deal that gets made might not be remotely legal."[852] In another conversation, the husband initiated formal divorce proceedings after being separated for about a year and the poster wanted advice on how to proceed. One Redditor notes that if it is a simple divorce, then it is likely the husband is just completing the paperwork and there is likely no need to go to court. However, "…if there are still outstanding issues about property and custody, then yes, she will go to court and she needs a lawyer."[853]

The belief that lawyers are necessary when the divorce is acrimonious or if there are issues of property or custody is reflected in numerous other posts that were simply seeking a

[849] Family 045.
[850] Family 045.
[851] Family 121.
[852] Family 103.
[853] Family 021.

referral for a lawyer. In one such case, for example, the poster had already completed a separation agreement but still saw a lawyer as being required to complete the process. “Long story short, wife and I are separating, and we co own a house. Need a lawyer to get the already drafted separation agreement signed, sealed, and delivered, so to speak.”[854] Similarly, another poster was asking for a referral in anticipation of a custody battle. “One of my good friends will need a lawyer asap, and I'm helping her with it because she's very upset. There are children involved and it will possibly be messy.”[855] These conversations display that family problems are not seen as simply private matters. Rather they are almost universally understood as having legal repercussions and as such require legal assistance.

The overarching theme evident in these conversations is that Redditors believe that lawyers and the courts are required for certain types of family law problems: most notably in instances of acrimonious divorces, the division of property, and child custody. This reflects a reality where Redditors have adopted a legal practitioner’s perspective of family law which is not necessarily the case for all legal problems. Indeed, while almost three quarters (74.7%) of the conversations about family problems advised the poster to speak to a lawyer, only 17.1% of conversations about housing problems advised the poster to seek legal advice from either a lawyer or paralegal. While employment problems, like family, had a high percentage of conversations that advised the poster to speak to a lawyer (78.7%), there was also a large proportion of conversations that advised the poster to speak to the Ministry of Labour (67.2%) showing that, unlike family problems, there is an equally valid parallel path to justice that does not necessarily involve lawyers or the courts.

II. Legal Advice Should Not Come From Reddit

Further evidencing how integrated issues of divorce, custody, property, and support are with the formal court system in the mind of Redditors is their reluctance to use Reddit as a source of legal advice for family law problems. Among the three problem types examined for this dissertation, family law problems turned out to be the most difficult type of problem in which to

[854] Family 051.
[855] Family 083.

locate data. After a search of the selected subreddits, I was able to locate 106 conversations regarding family law problems. This is compared to 193 conversations about housing problems and 142 conversations about employment problems. One reason that there are comparatively fewer conversations about family law problems posted to Reddit is due to the perceived legality of the problems: that is Redditors are less inclined to solicit anonymous legal advice for problems that they understand to have a legal dimension.[856] This theory is supported by the fact that posters simply asked for a referral to a lawyer and did not seek substantive legal help in nearly a quarter (24.5%) of all conversations about family problems analyzed. For example, in one typical post seeking a referral the poster states as follows: "I'd be grateful for recommendations for a local lawyer who deals with family law, in particular child custody. Asking for friend but throwaway account nonetheless. Thanks for any recommendations." [857] Apart from noting that child custody is in issue, there poster provides little information and does not ask for any assistance beyond a recommendation. Such posts – wherein the poster is simply asking for a referral – appears far more frequently in family problems than in the other two problem types examined.

III. Family Problems are Related to Other Problems

Despite this practitioner perspective of family law problems, this legal "siloing" of issues does not reflect how many people experience these problems. First, family problems often trigger additional problems that are not so easy to categorize. For example, in one case the poster explains that her ex-husband – who drives for a living – fell behind in child support payments resulting in the Family Responsibility Office – a government agency that enforces support orders – suspending the ex-husbands' driver's licence.[858] This enforcement mechanism had the perverse effect of taking away the ex-husband's only means of making a livelihood and, therefore, his ability catch up on his support payments. This in turn caused all sorts of difficulties for the poster

[856] These numbers correspond to what legal consciousness scholars know about advice seeking behaviour: people are much more likely to seek out formal legal advice if they understand the problem as being legal in nature. See e.g. P Pleasence, Nj Balmer & S Reimers, "What Really Drives Advice Seeking Behaviour? Looking Beyond the Subject of Legal Disputes" (2011) 1:6 Onati Socio-Legal Series 1.
[857] Family 066.
[858] Family 016.

who now lost what little source of income they were receiving. While the entire situation is clearly rooted within a pre-defined legal category – being child support – the immediate problem that needed to be addressed was how the ex-husband could regain his driver's license. In another example, the poster explains that his roommate was awarded visitation rights with his child on the condition that the child is provided with adequate living space within the apartment. [859] This meant that the poster had to leave the apartment immediately as the bedroom was needed for the child. Like the previous example, the whole situation is triggered by a predefined legal category – child custody – but the immediate problem of finding alternative housing on short notice is not so easily categorized within family law. Two final examples that may be a little more common illustrate how family problems trigger non-family problems. The first involves a poster who was seeking a recommendation for a children's therapist to help their son cope with a divorce.[860] The second involves a poster who was denied a car loan because his ex-wife was still on title to his house despite an existing separation agreement.[861] Both of these examples display how family problems can easily trigger other non-family law problems.

IV. Non-legal Family Problems

As well as acting as a trigger problem, many of the problems discussed were not legal problems per se, even though they related to the family unit. That is, many of these types of issues could not be brought to a court for a remedy but they were none-the-less pressing issues for the family involved. For example, the most commonly discussed problem type after divorce (28.3% of all problems) dealt with child care (15.1% of problems). This category is distinct from child custody, which has to do with a guardian's legal right for the care and upbringing of a child, and refers simply to the day-to-day reality of child care itself. For example, one post, written in the context of daycare closures due to COVID-19, was asking for advice on childcare options now that both parents needed to return to work.[862] Other problems categorized under child care dealt with issues surrounding education. For example, in one post a parent, whose child has mild

[859] Family 023.
[860] Family 042.
[861] Family 049.
[862] Family 007.

autism, wants to know which school in their region is the best for children with special needs.[863]

Other common non-legal family problems posted to Reddit include concerns over finances or health. For example, one father posts that he is moving cities to be closer to his child but cannot find affordable housing.[864] In another post, an abusive husband is seeking help on getting counselling noting that the only resources he can find require a court order to access.[865] In a third conversation the poster explains that his son received a concussion and his wife has been taking care of him while he has been out of school for many weeks, but now they need assistance since his wife's employment insurance is running out.[866] These strictly non-legal family issues show that family problems are not limited to the categories imposed by the law. To one who is fully situated within the Canadian legal regime it may seem strange to dwell on these types of non-legal problems, however, it should be remembered that the law is an evolving construct and that many remedies that can now be awarded by the court – such as those relating to the matrimonial home – were not historically available under the common law.

V. Summary

Family law problems, more so than any other problem type examined, are understood by Redditors as being firmly situated within the court system and, as such, require the intervention of lawyers. This reflects how the public has adopted a very legalistic way of categorizing problems that result from a relationship breakdown. With that said, family problems are much broader than those categories imposed by the law. Family problems often trigger other problems that are more difficult to categorize and it is common for Redditors to ask questions about family issues that do not have a strict legal element. Thus, the practitioner's perspective of family law, which has been adopted by Redditors and focuses on asserting individual rights upon a relationship breakdown, may in fact result in a view of family problems that ignores a whole set of needs.

[863] Family 072.
[864] Family 123.
[865] Family 025.
[866] Family 017.

7.4.3 Inherent Antagonistic Nature

I. The Other Party Lies and Manipulates

There is a common perception among Redditors that family law is an overly aggressive, antagonistic, and combative area of law. "Family law act of Ontario has effectively created a win or loose life situation in these cases. Don't believe me? Ask around... talk to ANYONE who's been there. The law in Canada effectively punishes one of the parents."[867] While the formal legal regime exists to resolves disputes – such that some level of conflict is arguably inherent to any legal problem type – there is clearly a sense within family law problems that the other side is not following the rules and in doing so is exasperating an already tense situation. People frequently expressed scepticism about the other side's position believing that they are manipulating the facts or simply lying. One poster who was looking for a referral for a friend who was going through a divorce notes that: "Her ex is feigning disability in order to avoid working and just milking her for everything he can."[868] In another post, the husband was refusing to add his wife's name on title, claiming it would cost thousands of dollars. The poster states: "I don't trust that he's telling the truth, so I was hoping someone could tell me if that explanation sounds right/legitimate or if I'm right to be suspicious of this explanation."[869] In a final convoluted example, the poster is asking about the legality of a signed separation agreement that she claims was signed under duress. In particular, she was concerned about the division of a piece of property wherein it was agreed that her ex-partner would pay her half the investment made into that property.

> "He is now selling property C, and I received papers in the mail for me to sign, to authorize the sale of Property C, which is (to my surprise) valued substantially higher than I previously thought, and this arrangem4nt is no longer 50:50. The ex-partner refuses to make it fair, and says "too bad, you already signed the agreement"…Plus it was made on incomplete information because we did not know the value of the property C."[870]

It is not clear from the post whether the ex-partner was aware of the value of the property or not at the time of the agreement, however, the poster is adamant that the ex-partner failed to fully disclose financial information. Moreover, there is a perception that the system tolerates this

[867] Family 050.
[868] Family 055
[869] Family 185.
[870] Family 204.

type of behaviour. Most often it is the lawyers who are blamed for facilitating these deceptions. "…the lawyers are the ones who win in a contentious divorce and I have no doubt that in some cases they make situations much worse than they need to be."[871] However, judges are also blamed: "The judge had clearly read only the first page of her suit of divorce, in which she alleged that I was an unemployable deadbeat who'd mooched off her for a dozen years and that I was verbally and financially abusive. The judge acted as though he'd read her allegations but none of my responses..."[872] In sum, the family law system in Ontario is seen as one that allows for and sometimes rewards deceptive behaviour.

Lying or misrepresenting the facts is arguably common to many types of legal disputes and was akin to how some employees presented the behaviour of their employers when trying to resolve an employment dispute. However, family law problems take this behaviour to a new level where psychological manipulation is – if not the norm – far too common. In one problem, an individual asks which parent is responsible for taking time off work when a child is sick and notes "I dont have him as much as she does. Its consistently her guilt ammo she throws at me so that I am forced to take time off. Its so she doesnt have to use her vacation or get docked pay. Im confused by this."[873] As well as emotional blackmail Redditors also accuse the other side of sabotaging relationships. In one post where the poster is looking for a referral for a friend, they claim that the ex-wife is trying to undermine the father's relationship with his son. "I believe she may be trying to play the victim and also trying to make him look bad in his sons eyes."[874] In another post regarding issues over a separation agreement, the poster expresses similar concerns. "Since then, she has done everything she can to alienate my daughter and my extended family. She's told my daughter, I lie, cheat, and steal. She tells friends and family that I'm a deadbeat and that I don't want to see my daughter."[875] These types of accusations appear frequently within the conversations examined.

[871] Family 045.
[872] Family 202.
[873] Family 004.
[874] Family 103.
[875] Family 201.

II. Aggressive Lawyers Are Needed

Given how poisoned some of these relationships are, it is not surprising that many people with family law problems look for lawyers who are aggressive and combative as they are perceived as the type of lawyer who will fight doggedly for their entitlements. As noted by one Redditor "the only time you ever want a lawyer you don't like much personally is when you are dealing with someone awful on the other side and need a complete bulldog."[876] When up against someone who does not play by the rules, it is often believed that success is dependent on being represented by a special kind of lawyer: one who is willing to fight. For example, one Redditor explains that their friend is going through a terrible divorce wherein his wife is trying to deny him access to their children, is falsely accusing him of spousal and child abuse, and has taken possession of his truck. "What's worse is his family can't afford to help him get a lawyer who'll fight and I'm currently on medical leave and don't have spare cash to help him (or I would)."[877] In another conversation, a poster notes that their friend may be starting divorce proceedings, however, the poster is worried because the friend is meek and the partner is uncooperative and berating. As such the poster is looking for "…a good and reputable firm but one that would be ruthless in advocating for everything they need/are supposed to/could get in the situation..."[878] Likewise, when referring lawyers to a poster, Redditors often position aggressive behaviour as a positive attribute. For example, one Redditor endorses the suggestion of another with the following comment: "I've known lawyers who dropped cases rather than come up against this guy. He's brutal, but if that's what you might be up against then I'd recommend him."[879] In another conversation, one Redditor recommends a firm for a divorce endorsing them as follows: "Mostly if not all female lawyers. Nobody unleashes the wrath of Satan more in a divorce case than pissed off chick lawyers."[880] While this comment clearly perpetuates an unfair stereotype, it is indicative of a commonly held belief that aggressive lawyers are needed to win in divorce cases.

[876] Family 059.
[877] Family 208.
[878] Family 084.
[879] Family 122.
[880] Family 187.

Even where people did not wish to engage in overly aggressive litigation, they often perceive combative lawyers as the norm needing to specifically request a lawyer who is more conciliatory. “Looking to get some assistance for some custody issues. Anyone recommend a lawyer that doesn't come off as combative. I want to cover my bases but I am not looking to cause her more hardship than needed to get to an agreement that works for the both of us.”[881] These conversations display a prevailing belief that aggressive pit bull lawyers are not only necessary for success, but are the norm within the practice of family law.

III. Lawyers are Often Viewed Negatively

While retaining a lawyer who is combative or ruthless may be viewed as a strategic advantage for the party that retained them, the overall role of lawyers within family problems is often – and perhaps unfairly – viewed very negatively. Redditors, frequently employ stereotypes about lawyers being greedy, self-serving, and immoral without providing context for such accusations. For example, when seeking a referral for a lawyer, one Redditor expresses a general disdain for family law lawyers as follows: “ahhh family lawyers....the absolute scum of the Earth...good luck man.”[882] Some of these criticism may be based on personal experience of dealing with a lawyer who is representing a party adverse in interest. One poster accuses their ex-partner’s lawyer of being ‘slimey’ basically on the grounds that the lawyer advances the other party’s position. “He makes enough to afford a good slimy lawyer who supports his BS lies.”[883] Clearly the poster believes the lawyer is acting unethically, however, this anger may be misdirected if the poster misunderstands the partisan nature of legal representation.

The most common accusation thrown at lawyers within these conversations is that they are greedy and self-interested. As explained by one commentator: “Beware. The system is built by lawyers for lawyers. When all is said and done there will be nothing left to divide and the lawyers will have new BMWs. It's like a big con and you and your spouse are the marks. If at all possible, please try to negotiate directly and keep the lawyers out.”[884] The same opinion was

[881] Family 059.
[882] Family 081.
[883] Family 102.
[884] Family 103.

expressed in numerous other conversations. “The only people who win when a divorce turns dirty are the lawyers.”[885] Here lawyers are seen as taking advantage of the system to enrich themselves. Similarly, in another conversation the commentator advises that the poster to draft their own separation agreement, and then have the ex-wife take it to a lawyer. At this point they note: “One of two things will happen. The lawyer will stir her up or things will go smoothly. Remind her before she goes to see a lawyer that divorce lawyers drive BMWs because normal people like the two of you start fighting. They have a vested interest in making a simple divorce into a nightmare.”[886] And again: “Try to go through mediation if possible though. The only people who win in a divorce with lawyers are the lawyers.”[887] Regardless of whether these accusations are fair, they display a pervasive and troubling view of lawyers as self-interested parties who take advantage of relationship breakdown for their own benefit.

IV. Summary

Family law problems are notable for the alleged level of antagonism that is commonly imbedded in the problem. Not only do parties often believe that the other side is misrepresenting facts, but they also commonly believe the other side is actively trying to assassinate their character. As such, aggressive and combative lawyers are viewed as necessary to ensure that one’s rights are protected. Yet at the same time, Redditors often see lawyers being greedy and self-interested. Part of this may be connected to the overall inaccessibility of the formal legal system.

7.4.4 Inaccessible Justice

I. Legal Services are Too Expensive

Mirroring the legislative framework, Redditors generally understand a core group of family problems to be properly situated within the formal legal system. As such, the courts and lawyers are viewed as the primary path to justice for these types of problems. Unfortunately, many people feel that this path is inaccessible and struggle to resolve their problems. The first

[885] Family 048.
[886] Family 048.
[887] Family 064.

commonly identified barrier with accessing justice is the cost of legal assistance. Time and time again, individuals express concern about the cost of receiving professional help for serious problems. In one conversation, for example, a poster was looking for assistance to enforce a child support order that was in arrears. Anticipating unaffordable legal fees, the poster specifically asked for a lawyer who would take the case pro-bono. "Do you know anyone who would be willing to take a pro-boo case? I am working an average job, have two children to feed who are both experiencing health issues."[888] Of interest is the fact that this poster feels they are working an "average job" meaning that, by extension, this poster believes that the average worker with a family is priced out of the legal market. In another case, which was discussed above, the poster felt cheated that her ex-husband was selling a property for more than it was valued in their separation agreement. She asks: "Is it worth going through a lawyer? They charge $500/hr just to look through all the documents, and I have no idea how much this kind of thing would be worth in the end. I don't have much money left, I wonder if I should get a line of credit for this."[889] Here the poster explicitly states that they would need to take on debt in order to obtain legal assistance, again displaying the perceived financial burden of legal fees.

Some Redditors provided helpful advice for those who worry about the financial cost of legal assistance. For example, in the conversation just discussed, one commentator expressed the opinion that legal advice is often worth the cost in the long run. "Lawyers will generally earn you more then you spend on legal fees and you should specifically ask them about how much they think you will win vs. spend."[890] While this might be true, it is still speculative especially for someone who does not have many assets to argue over. Moreover, it does not assist someone who cannot afford the upfront fees in the first place. In other conversations, a few Redditors pointed to the possibility of public legal assistance. However, this was not seen as an ideal solution either. As explained by one commentator:

> If you can't afford a lawyer then the family court has a Family Law Resource Centre that has all kinds of reading material on Ontario Family law and whatnot… Word of warning about the duty counsel at the FLRCs though: these lawyers take a Legal Aid rate for what they do and the bar association in your area may not make it mandatory

[888] Family 192.
[889] Family 204.
[890] *Ibid.*

> for members to give a certain amount of time to this kind of work. In those cases the lawyers staffing these things are the ones who need to make some cash. Think about it: why would you take less than a hundred an hour when through your practice you can charge many times that? So your FLRC counsel may be some altrustic lawyer who genuinely wants to help or they might be a loser who can't get clients because they are shit lawyers. Be careful with them.[891]

II. The Legal System is Difficult to Navigate

As well as the cost of legal fees, there is a recurring concern about the accessibility of the legal system as a whole. For example, some Redditors have expressed that they were unable to navigate the procedures on their own. One poster needed to update, calculate, and collect child support, however, they did not have full income disclosure to do this. "Need to get updated income disclosure, and agreement based on new amounts. I tried to do the motion to change on my own and was completely lost in the process."[892] Others have expressed how the system is intimidating and generally inaccessible. "Lawyers, Courts and the law are required when there are disputes. It can be very intimidating and difficult when one is distraught and I believe women often loose out in divorces for this very reason. It is slow and expensive."[893] Even the government organizations charged with assisting people with family law matters are criticized as being generally ineffective. In one of the few instances where Family Law Information Clinics – publically funded offices that exist in family courts throughout Ontario and provide legal information to self-represented litigants – are mentioned they were dismissed as unhelpful. "No offense, but in my experience FLIC is useless except for obvious things like what form must be filled for X."[894] Similarly the Family Responsibility Office, which assists families with enforcing child and spousal support orders, is viewed as uncooperative and difficult to deal with. "Keep the FRO (family responsibility office) out of it if you can. They are a nightmare to deal with."[895] Finally, judges themselves do not escape critique. Some find it problematic that they will not respect the wishes of the parties and arbitrarily impose their own arrangements. "Yeah, I think the problem

[891] Family 024.
[892] Family 192.
[893] Family 021.
[894] Family 016.
[895] Family 048.

is people believe in the myth of the 'iron-clad prenup' but there are so many circumstances where judges will disregard them. You get older and once you have a divorce or two under your belt, you realize they are a joke."[896] One poster even goes so far as to condemn the entire family court system. "There's no justice in family court."[897] Taken together, these comments show that there is a troubling perception among Redditors that family law is difficult to navigate and inaccessible for most people.

III. The System is Biased

As well as expressing concern about barriers to justice such as costs and complexity, there is also a persistent perception that the family law system is biased against men generally and fathers specifically. Some of the comments provide little or no context for this assertion. In one post looking for a referral to a divorce lawyer, the poster notes that the parties are civil and have a separation agreement already drafted. Yet, out of the blue one commentator states "Just give everything to her and call it a day. The family legal system in Canada is such that, if you're a dude, you're fucked. just give it all to her and move on."[898] When pressed whether this was actually the case in London, Ontario the commentator responds "Not just London. Canada as a whole. Women have all the rights."[899] Similarly, in another post asking for a referral for a divorce lawyer to "protect wife's rights and assets" one commentator states: "Canadian law already protects wife's rights and assets and prefers her for child custody automatically. It's the husband who needs to be worried about losing assets and custody."[900] While these types of comments seem like bald assertions, other Redditors ground their claims in personal experience with the system. In response to yet another post asking for a referral for a divorce lawyer, one commentator notes that they negotiated their own separation agreement, and then had lawyers review it. When told that a court application has already been filed, this commentator states: "Its unfortunate that the courts are already involved. It sucks, especially for the male party."[901] In another

[896] Family 053.
[897] Family 053.
[898] Family 081.
[899] Family 081.
[900] Family 050.
[901] Family 103.

conversation, a father is asking for advice on how to deal with a mother who will not abide by the custody agreement and whether it is possible for him to get full custody of their child. In response one Redditor states that in their experience the police do not enforce custody transitions and that "Courts are loath to deny a mother custody of her children. The bias is still strong."[902] Similarly, another Redditor perceives a double standard within the legal system where a father was asking about how to enforce a child support order when the mother refuses to pay. The Redditor notes "How does anyone pay anything if they aren't working? They don't. Quite a bummer. I can't help but feel if the roles were reversed, there would be a much bigger deal made of it."[903] While these assertions lack specificity they nonetheless are indicative of a common perception among Redditors that the family law system is biased against men.

Related to this perceived bias is a common concern among fathers that they will have their children taken away from them. This concern is often expressed at the outset of a separation before any formal proceedings are initiated. In one post a father states the he is currently in a common-law relationship with two children and is looking for a referral to a divorce lawyer. "I don't want to lose my kids I just want to get some good legal advice to know my rights and where I stand, not only to protect myself but the future of my kids as well."[904] Another father is looking for general advice in how to proceed with a common law separation. He notes that he is scared of litigation and states as follows: "I really don't want to lose my children and I don't want to move. Ideally, I would like to buy her half of the house because my only friends are on the street and our kids have their friends here too..."[905] As well as a concern about having access to their children post separation, some fathers express a concern for the safety of their children and worry that they will be powerless to do anything to protect them. For example, one father who is separating from his wife of four years was looking for advice on separation particularly because: "I have some serious concerns about my children's well-being if she ends up getting full custody, but I know that the system in Ontario is fairly heavy-handed towards the mothers, mostly leaving the fathers out to dry..."[906]

[902] Family 202.
[903] Family 209.
[904] Family 024.
[905] Family 215.
[906] Family 161.

Finally, some fathers feel compelled to agree to unfair living situations because their partner threatens to deny them access to their children. In one post, a father relates that at the time of separation his partner decided to move from New Brunswick to Ontario with their kids despite his reservations. While he was eventually able to get a job and also move to Ontario, he ended up living in a different city many hours away. The partner presented him with a separation agreement that included a term saying that he was responsible for all pick-up and drop-offs, which has now become unsustainable due to costs and time. "I realize signing an agreement that states this was a bad idea, but given the fact I just really wanted to see my children I was wiling to sign almost anything to get it sorted out."[907] In another post, the father relates a rather convoluted story wherein a year after having their first child, his partner moved to live with him in the United States. However after a couple of years she unilaterally decided to move back Ontario with their children. "We were living in my home state and she told me I could either live with them in Canada or probably never see my daughter again (she knew I suffered from depression and had told her our daughter was the only thing keeping me alive)."[908] Since then, she has kicked him out of their house and has denied him contact with the children. While these comments do not reflect the letter of law – which presumes an equal right to parenting – they do show a common perception that fathers have few rights when it comes to child custody that, unfortunately, manifests itself in real life situations.

IV. Summary

Arguably, access to justice for family law issues is in a worse state than the other problems examined. The inherent legalism embedded within family problems means there are few alternatives outside of the courts to resolve these issues; particularly given the antagonism inherent to many of the problems. The family law system is understood by Redditors as being very inaccessible predominantly for three reasons. The first reason has to do with the perceived costs of legal fees which prevent many from obtaining legal advice. The second reason is that the system is difficult to navigate on one's own: it is complex and intimidating, and the organizations

[907] Family 207.
[908] Family 218.

tasked with assisting self-represented litigants are less than helpful. The third reasons has to do with a perception of systemic bias against men and fathers who believe they have fewer rights particularly when it comes to the division of property and to child custody. Together these perceived barriers to justice evidence a troubling state of affairs for the family law system.

7.5 Impact on Ontarians' Access to Justice

7.5.1 Introduction

The preceding section examined that narratives that emerged from conversations about family law problems posted to Reddit. These narratives speak to three themes, first, the perceived legality of family problems, second the antagonistic nature of family law problems, and third the difficulty in accessing the formal justice system. This section examines how these themes inform access to justice from a justice as fairness perspective. Specifically, this section concludes that these themes evidence serious problems within the family law system in terms of procedural fairness, background fairness, and stakes fairness.

7.5.2 Procedural Fairness

Family problems are generally perceived by Redditors as being heavily imbedded within the formal system; arguably more so than any other type of civil law problem. This conception of family problems is not surprising since the legislative framework that governs most types of issues discussed on Reddit provide few alternative paths to justice outside the formal legal system. As such, it is particularly important to ensure that the processes and procedures that govern the resolution of these problems are fair. Chapter 2 explained that we are best able to assess whether these processes are fair by looking at the normative concerns of participants; namely whether participants felt they had a voice in the proceeding, whether they trust the system, whether they feel the system showed them respect, and whether they feel the system was neutral when making a decision. When examining how Redditors feel about these normative concerns it is evident that there are numerous failings of procedural fairness within the family law system.

The first and most obvious problem with procedural fairness has to do with the inter-relation between the high cost of legal assistance and the complexity of the proceedings. Time and time again Redditors expressed frustration at how expensive legal advice was. There was also numerous mentions at how difficult the system was to navigate, and how the agencies that were tasked with assisting self-represented parties were not helpful. The reason that this is a concern from a procedural fairness perspective is because Redditors who cannot afford legal advice and who feel incapable of navigating the system on their own are essentially denied opportunity to meaningfully participate in the proceeding: they are given no voice. Without a voice, there can be no trust that the adjudicator considered their position on the merits since they were unable to present it. In other words, the cost of legal assistance coupled with the complexity of navigating the system means that some Redditors are barred from even accessing the process. While both cost and complexity have been a traditional concern for access to justice scholarship, it is evident from these conversations that they represent still significant barriers to justice.[909]

As well as cost and complexity, the adversarial nature of family problems also impacts procedural fairness. The persistent belief that the other side is not only lying about facts, manipulating evidence, or sabotaging relationships, but is able to get away with it translates into two procedural fairness concerns: first, it evidences a lack of trust that the legal authorities – both lawyers and the judges – will treat participants in a fair manner that considers the merits of their argument. Second, it reveals a worry that participants will be unable to present their own side of the story. The complexity of the proceedings and the accompanying rules of evidence no doubt exasperate these perceptions since participants may not understand why irrelevant facts are deemed inadmissible in court.[910] For, example, the modern no-fault basis for a divorce means that the infidelity of one spouse is generally irrelevant – from a legal perspective – to the divorce itself. On one hand these types of rules may help to alleviate concerns that the other side is allowed to perpetuate "lies" since accusations of cheating or infidelity are inadmissible. On the other hand, a party may feel that these facts are material to the whole situation since it gives

[909] See e.g. Macdonald, *supra* note 14.
[910] Michelle Flaherty discusses this problem drawing from her experience as an adjudicator for the Human Rights Tribunal of Ontario. See Flaherty, *supra* note 110.

context to the other side's character and, despite the law's position, is really what is grounding the divorce. To be clear, this is not an argument in favour of changing the laws for no-fault divorce, it is simply an observation that by not allowing participants to present evidence that they believe is relevant to their situation, a party will feel they are denied a voice in the proceedings.

A similar example can be found in regards to the rules about financial disclosure. The law imposes numerous obligations on a party to disclose their finances so that the court may make an order about the division of property and support payments that reflects reality. However, the mechanisms available to enforce these obligations are complicated and difficult to execute making it seem that the formal system allows people to hide their assets. Individuals who believe that the system allows people to hide their assets this will not trust that the system is concerned about their needs. The concerns raised by the conversations about family law reveal that there needs to be more trust that the legal system will not be misled and that everyone will have an opportunity to tell their side of the story.

7.5.3 Background Fairness

Family law problems are situated in an interesting position wherein some problems are clearly located within the public sphere and others are not. For example, certain problems a family may experience – such as decisions regarding the religious or educational upbringing of a child within a stable relationship – may be seen as a private matter for the family and thus not properly the subject of political conceptions of justice. Here it would be wrong to try and apply a Rawlsian analysis of fairness to what is essentially the domain of the family institution. Other problems – such as the division of property after a relationship breakdown – may be situated within the public realm and properly subject to a competitive framework since society feels justified in intruding on the privacy of the family in order to assert individual rights and obligations.[911] Yet there is a third category of problems – such as parental access to a child after a separation or a child's access to basic educational or health needs – that may be situated in the public realm, but are too important to be the subject of competition since the wellbeing of a child

[911] "The predominant legislative trend has been towards the assertion of individual rights and obligations, rather than the assertion of any family right." Payne & Payne, *supra* note 811 at 2.

should not be determined through a win/lose model. In such situations, background fairness is concerned with distributing resources in such a way that it is able to maintain an equality of opportunity. In other words, the government needs to allocate benefits such that the least advantaged within society are better off. These types of concerns most frequently surfaced when Redditors discussed issues of child education and child care. For example, some Redditors were concerned about their autistic children receiving adequate assistance for education, and criticised the government for not providing sufficient funding for programs. Here there is a perception that there is failure of background fairness, since resources are not being deployed in a way that ensures that these autistic children are given an equal opportunity to receive the same standard of education as other children. In this way, certain family problems engage with questions of administrative programing, and reveal concerns over background fairness when public resources are not being distributed in a way that guarantees an equality of opportunity.

Many problems discussed on Reddit, however, are the result of a relationship breakdown and are therefore situated within a competitive framework. Even when the parties approach these problems from a collaborative perspective or express a desire for mediation they are still properly analyzed from a competitive model: collaboration or mediation may seek to temper the winner take all approach to litigation, but the basic rules governing resolution are the same. In these competitive situations, background fairness is concerned with ensuring that both parties enjoy the same standing or morale status within that competition. Jacobs makes a compelling case that post-divorce settlements should be viewed from a lens of status equality.[912] Here, for example, re-evaluating the contribution of domestic labour when dividing assets or determining income sharing is necessary to offset any disadvantage that one party may have when entering the labour market post-divorce due to a prolonged absence for such things as child care.

Concerns over status equality in regards to divorce can arise in numerous situations. In fact, much of the legislative history of divorce and separation has been driven by society's desire to alleviate the hardships historically experienced by woman and children following no-fault divorce proceedings. Redditors, however, are primarily concern with status equality as it pertains to child custody. While a parent's access to their child should not be subject to competition, the

[912] See Jacobs, *supra* note 165 at 242.

reality is that issues of custody - being the legal right to make decisions regarding care and upbringing of a child – will be litigated if both parents cannot agree on an arrangement. Redditors with family problems often express a perception that men do not enjoy the same status as women when litigating family problems and that the legal system typically favours women in regards to child custody issues. While the modern law has evolved such that both parents are now presumed to be equally entitled to custody, the perception of bias held by Redditors does find support in statistics that examine recent trends of child custody orders and living arrangements of children of divorce. In the year 2000, a Department of Justice report examining various statistics on family life in Canada, including those gathered by the National Longitudinal Survey of Children and Youth (NLSCY), found that in 1994-1995 mothers were granted exclusive custody of children in 79.3% of court orders, whereas fathers were granted exclusive custody in 6.6% of court orders, and 12.8% of cases granted shared custody.[913] A similar report released five years later compared data from the first cycle of the NLSCY, gathered in 1994-1995, with data from the third cycle, gathered in 1998-1998, and found a slight movement towards more shared custody orders, although mothers were still awarded sole custody in 77.7% of cases.[914] Unfortunately, there is not a more recent analysis of Canadian custody orders available, however, the 2011 General Social Survey examined the living arrangements of children of separated or divorced parents.[915] That survey found that 70% of children of separated or divorced parents primarily reside with the mother, 15% primarily reside with their father, and 9% of children divide living arrangements equally.[916] These numbers suggest that while there is some movement towards greater equality, mothers are still the predominant caregiver. Thus even if the law has evolved to presume equal entitlement of both parents, Redditors still perceive – perhaps correctly – that fathers are disadvantaged by the legal system when it comes to child custody

[913] Department of Justice, "Selected Statistics on Canadian Families and Family Law", (2000), online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/stat2000/index.html#a01>.
[914] Heather Juby, Nicole Marcil-Gratton & Celine Le Bourdais, "When Parents Seperate: Further Findings from the National Longitudinal Survey of Children and Youth", (2005), online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2004_6/index.html#a01>.
[915] The most recent cycle of the National Longitudinal Survey of Children and Youth was completed in 2008-2009, however, there is no report analyzing custody arrangements from that cycle.
[916]Maire Sinha, "Parenting and Child Support After Seperation or Divorce", (2014), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/pub/89-652-x/89-652-x2014001-eng.htm#a1>.

issues. This displays a failure of background fairness since both parties are not placed on equal standing when determining issues of child custody.

7.5.4 Stakes Fairness

Given the competitive reality of many family law problems, an examination of how Redditors perceive the outcomes of a relationship breakdown – or what is at stake in the competition – is necessary for a comprehensive assessment of access to justice. In this context, stakes fairness is concerned with two situations. The first concern has to do with post-separation settlements wherein one spouse takes everything and the other spouse is left destitute. These types of outcomes are understood by stakes fairness to be patently unfair. The classic example of this was the 1973 Supreme Court of Canada decision of *Murdoch v Murdoch* wherein the wife was awarded no property interest in a ranch purchased with the husband's money despite the fact that she worked on the ranch for 25 years prior to separation for no remuneration and in doing so directly contributed to its improved value.[917] The second concern of stakes fairness is triggered when a relationship breakdown negatively impacts a spouse's ability to compete in other competitions. For example, in cases where one parent is awarded child custody there will be increased costs for that parent; both direct costs – such as food, clothing, and child care – and indirect costs – such as missing work due to a child's illness and increased time spent on child care. These costs can have a major impact on the custodial parent's ability to compete within the labour market since, for example, they may no longer have the ability to undertake professional development or educational opportunities. Stakes fairness would understand this type of influence on completely separate spheres of life as being arbitrary and unfair.

Much of family law has evolved in a way that tempers many of the concerns raised by stakes fairness. For example, every province in Canada has enacted legislation establishing rights to the sharing of property between married spouses in order to avoid the unfortunate situation wherein one spouse takes possession of all the family assets and the other is left destitute after

[917] *Murdoch v Murdoch* (1973), [1975] 1 SCR 423, 41 DLR (3d) 367. The Supreme Court of Canada clearly felt that this outcome was unfair, and applied the doctrine of unjust enrichment to reverse their decision a few years later in the case of *Pettkus v Becker*, [1980] 2 SCR 834, 117 DLR (3d) 257.

a relationship breakdown.[918] Similarly, one could view spousal support programs as a way of limiting the impact of divorce on the employment sphere by compensating one spouse for time spent out of the labour market. Yet, among some Redditors there is still a perception that divorce settlements are winner take all competitions. To them the law is organized in a way that one of the spouses will lose everything while the other walks away with all the family assets. This perception is problematic because it encourages aggressive litigation techniques. Many Redditors expressed an opinion that if one does not retain a good lawyer to protect their rights and entitlements, they will be "taken to the cleaners." A good lawyer for most of those concerned is a "pit bull" who will fight aggressively and tenaciously for their cause. Other Redditors do not see the spouse as the problem, but the lawyers. Here divorce settlements are still viewed as winner takes all, but it is the lawyers who end up walking away with the bulk of the family assets. Again this view is problematic because it undermines the legitimacy of family law proceedings. The insight that is evident from these winner take all perspectives is not so much that the law needs to change, since much of the legal framework already works to temper a disproportional award, but people need better access to affordable legal advice that will utilize more collaborative approaches such that litigants are not inclined to pursue a winner take all strategy.

7.5.5 Conclusion

When viewed from a justice as fairness perspective, it is clear that Redditors with family law problems have serious concerns with accessing justice. In terms of procedural fairness, both the cost of legal services and the complexity of law prevent many from being able to meaningfully participate in the proceedings. Similarly, the overtly adversarial nature of family problems and the perception that the legal system allows this behaviour means that many do not trust that the system will hear their arguments and give their position due consideration. In terms of background fairness, there were very specific concerns with both distributive fairness and status equality. Distribution fairness was critiqued by Redditors in regards to ensuring equal opportunity for the education of autistic children, while status equality was critiqued primarily by those who perceived that the system is biased against fathers in regards to child custody disputes. Both of

[918] See e.g. *Family Law Act*, *supra* note 825, ss 4-28.

these critiques negatively impact background fairness. Finally, stakes fairness is threatened by the perception that family law settlements need to be a winner take all proposition. All of these concerns can act as benchmarks when assessing access to justice initiatives. That is, if both procedural justice and stakes fairness is impacted by antagonistic conduct, for example, does an initiative help reduce antagonism? Likewise, what can be done to ensure that fathers are not entering custody disputes at a disadvantage? The next chapter will discuss how these experiences of Redditors can be used as benchmarks for measuring access to civil justice initiatives in greater detail.

Chapter 8

Connecting Access to Civil Justice with a Public Perceptions of Justice

8.1 Introduction

This dissertation set out to identify meaningful and practical measures that can be used to assess whether programs and initiatives have positively impacted access to civil justice. By examining conversations about legal problems through a justice as fairness lens, the previous chapters identified specific concerns that people had when trying to access justice. I argue that these concerns should be used as benchmarks for measuring initiatives and programs. That is, both government and non-government initiatives that aim to improve access to civil justice should be assessed against how much they address these concerns. While this approach incorporates a user-focused orientation in that it defines a measurement framework in relation to the legal needs of the public, there is still a question of what future access to justice policy should look like. This final chapter of the dissertation argues that not only should access to civil justice policy be responsive to the needs of the public, but it should also include their perceptions of justice in its future development. I make this argument by explicitly incorporating the experiences of those who have had legal problems into the access to civil justice conversation in two ways: first, I collect those dispersed benchmarks identified for each of the problem types examined and organize them into three categories that can be applied across all problem types and used to inform the development of future policies. Specifically, I identify system design, rights allocation, and paths to justice as being the three categories of concern that access to justice initiatives not only need to be measured against but also respond to. Second, this chapter examines two methods of resolving problems that Redditors commonly engage in: being the crowd sourcing legal research and the crowd sourcing legal advice. I argue that despite legitimate concerns with such behaviour, the crowd sourcing of legal research and legal advice is a practical and effective method of addressing legal problems and that Reddit can be leveraged as an effective tool to improve access to civil justice from a justice as fairness perspective. In doing so this project recognizes the importance of including public perceptions of justice into the access to civil justice conversation.

8.2 Public Perceptions of Justice

Within the legal community there is a growing recognition that access to civil justice initiatives must refocus their attention away from designs that primarily benefit those working within the system and place the needs of the public first. In order to do this many organizations have begun to acknowledge the important role the public has in developing access to civil justice policies and initiatives. A significant turn in this direction was signalled by the Canadian Forum on Civil Justice when they launched their *Civil Justice System and the Public* research project.[919] Noting that previous studies on Canada's civil justice system typically were done without public input, the Forum sought to fill this gap through a national study on the state of communication between the civil justice system and the public. As noted by the Forum in their overview report of the project: "Ironically however, while recognizing the need for more public input into civil justice reform initiatives, most of these studies themselves involved minimal public participation."[920] Between 2001 and 2006, the Forum conducted 105 interviews with members of the public and 185 interviews with people working within the civil justice system across Canada.[921] Among the many objectives of this project was to bring a public voice into civil justice reform initiatives and to serve as an example for future study of civil justice reform.[922] Through this work the project was able to identify six principles of good communication practice for the civil justice system, one of which was the need to include the perspectives of litigants and front-line justice communities into policy and program development.[923]

Not long after this project concluded, the National Action Committee on Access to Justice in Civil and Family Matters – a national group comprising of leading members of the legal community – was established in 2007 by former Chief Justice Beverley McLachlin in order to provide leadership and to coordinate a national access to justice reform effort. To do this, they set up four working groups each tasked with identifying how to achieve better access to justice, along with the tools and the system changes needed to accomplish this.[924] Each group examined

[919] Billingsley, Lowe & Stratton, *supra* note 114.
[920] *Ibid* at 5.
[921] *Ibid* at 16.
[922] *Ibid* at 6.
[923] *Ibid* at 31–37.
[924] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101 at i.

one of the following key areas: court process simplification, access to legal services, family law and, finally, prevention, triage and referral.[925] The working groups themselves consisted of leading legal academics, members of the bench and bar, and government officials, however, there was a common recognition that access to civil justice policies need to take into account the perspective and experiences of the public. As noted by the Legal Services Working Group: "To find solutions, access to justice needs to be understood from the perspective of the people who experience legal problems."[926] The Court Process Simplification Working Group also acknowledged the role the public should play in developing access to justice policy. "Put simply, all players – including the Bench, the Bar, all levels of government, NGOs, public legal educators, the public, etc. – must actively support and participate in achieving the goal of improving access to justice in Canada."[927] The final report entitled *Access to Civil & Family Justice: A Roadmap for Change* incorporated the findings of each working group and identified nine goals for an access to justice roadmap, among which was a recognition that the public should play a central role in developing civil justice programming and policy.[928] Specifically, the Committee recommended the creation of local Access to Justice Implementation Commissions to promote, design and implement access to justice policies on a sustained basis.[929] The Committee stated that these commissions should include members of the public through representative organizations and use tools – such as social media – that allow for meaningful public engagement and feedback.[930]

In 2010, the Law Society of Upper Canada (now the Law Society of Ontario) collaborated with Pro Bono Law Ontario, and Legal Aid Ontario to undertake a joint research project in order to better understand how their services are received and how they could better address unmet civil legal needs.[931] The project involved both a telephone survey of 2,000 middle and low-income Ontarians, and three in-person focus group sessions of front-line legal and social service

[925] MacPhail, *supra* note 546; Court Processes Simplification Working Group, *Report of the Court Processes Simplification Working Group* (Ottawa, 2012); Prevention Triage and Referral Working Group, *supra* note 31; Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa, 2013).
[926] MacPhail, *supra* note 546 at 3.
[927] Court Processes Simplification Working Group, *supra* note 925 at 2.
[928] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101 at 10.
[929] *Ibid* at 20.
[930] *Ibid*.
[931] Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto, 2010).

providers.[932] This project was premised on the idea that receiving the opinions of those who face barriers is essential to enhance access to justice. As stated in the final report entitle *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project*: "Hearing directly from low and middle-income Ontarians and the legal service and information providers who assist them is an essential step in creating an accessible civil justice system in Ontario."[933] One of the recommendations made by the project was that organizations looking to start initiatives to improve access to justice understand and be mindful of the context their target audience.[934] Presumably this means seeking out and incorporating their perspective into the development of the proposed initiative.

A final influential organization that has also recognized the importance of public involvement in the development of access to civil justice policy is the Canadian Bar Association whose 2013 report *Reaching Equal Justice*: *An Invitation to Envision and Act* proposes a framework for improving access to civil justice in Canada.[935] The CBA calls for a "people centred justice system" that focus not on the needs the professionals, but on the needs of the user. "Over time, our justice system has developed to reflect the needs, approaches and imperatives of courts, court administration, tribunals and the legal profession…. But the civil legal needs research has demonstrated how far removed this approach is from what people actually want, need and expect from their courts and justice system."[936] In developing this framework, and reflecting its commitment to a people centred justice system, the CBA sought the input of 161 members of the public by engaging in thirteen community consultations along with a series of random interviews with people on the street.[937] The report concluded that one key strategy for achieving equal justice was to develop effective means for public engagement.[938] As noted by the report:

> The only way to ensure a people-centred justice system is to ensure that members of the public are engaged in its oversight. Many also want to be active participants in

[932] Environics Research Group, *Civil Legal Needs of Lower and Middle-income Ontarians: Qualitative Research with Stakeholders* (2009); Environics Research Group, *Civil Legal Needs of Lower and Middle-income Ontarians: Quantitative Research* (Toronto, 2009).
[933] Ontario Civil Legal Needs Project, *supra* note 931 at 14.
[934] *Ibid* at 55.
[935] Canadian Bar Association, *supra* note 55.
[936] *Ibid* at 62.
[937] *Ibid* at 17.
[938] *Ibid* at 130.

> preventing and resolving legal problems. The goal is to move away from traditional approaches that set lawyers and courts apart, denigrating any non-professional knowledge.[939]

And again later: "Increased public engagement is a necessary condition for reaching equal justice."[940] The report suggests that governments could better engage with public through such means as town hall meetings, or community roundtables.[941]

All of these leading organizations advocate for better public engagement when developing access to civil justice policy; yet, exactly how this should be done remains somewhat speculative. The Canadian Forum on Civil Justice engaged in extensive interviews with members of the public over a five year timespan where participants were primarily recruited through recruitment drives at courthouses and through legal aid clinics. The CBA also engaged the public directly through a series of community consultations over a four month period with members of marginalized communities recruited through legal aid offices as well as other community based organizations. In terms of ongoing public input, the Action Committee recommended establishing standing commissions that include members of the public through representative organizations, while the CBA recommended either town hall meetings or community roundtables. This dissertation adopted a more novel way to include a public perspective in the access to civil justice conversation by examining how those with legal needs talk about their problems online. In adopting this methodology, policy makers can develop a better understanding of the difficulties members of the public have when trying to resolve their legal problems as well as gain insight into what the public believes would be the most effective way to assist them. The next section shows how the public's perception of justice, as evidenced by online conversation, can be used to inform access to justice policy.

[939] *Ibid* at 62.
[940] *Ibid* at 128.
[941] *Ibid*.

8.3 Benchmarks: The Current State of Access to Civil Justice

8.3.1 Introduction

The fact that conversations about legal problems on websites such as Reddit are so common illustrates the prevalence of unmet legal needs amongst Ontarians. While these conversations can be seen as a troubling indicator of legal needs, they also present an opportunity to better understand the nature and scope of those needs which can then be incorporated into the access to civil justice dialogue. After examining hundreds of online conversations discussing legal problems, this project identified numerous themes that reoccur throughout the data. Individually these themes can act as benchmarks for measuring access to justice initiatives: that is, they be used to assess whether access to civil justice initiatives align with the actual legal needs of the public. However, these themes can also be grouped together and be used to inform policy decisions for the development of future initiatives. This section discusses the three categories of benchmarks that emerge out of the themes identified and discussed in the previous chapters. These are system design, rights allocation, and paths to justice.

8.3.2 System Design: Cost, Complexity, and Delay

System design refers to the processes and procedures inherent to the formal legal system. As a benchmark for access to civil justice, it is concerned with the barriers that make it more difficult for individuals to resolve their problems through formal means. As noted in previous chapters, concerns over system design have traditionally occupied much of access to civil justice thinking. Indeed, it was not until the 1990s that scholars began to look for access to civil justice solutions outside of the formal system.[942] Yet despite the long history of system centric thinking, it is evident from the conversations analyzed that system design is still a major concern for those with legal problems. Typically the concerns over system design are expressed in terms of high legal costs, complicated rules of procedure, and extensive delays: all of which make it more difficult to resolve one's legal problems.

[942] Macdonald, *supra* note 14.

The extensive costs associated with resolving legal problems is an obvious barrier to justice and one that has been identified over and over again in all three of the problem types examined. The issue of costs was most acute among those with employment and family problems who frequently stated that they were either unable to afford legal representation or that the seriousness of the problem did not warrant the cost of legal representation. The complexity of the legal system was also commonly identified as barrier to effective resolution, particularly within conversations about housing and family problems where Redditors did not have the benefit of a regulatory agency – namely the Ministry of Labour – to investigate their case. Finally, concern about system delays were common throughout all three problem categories, leading some to wonder whether it was worth pursuing a matter in the first place. For example, some Redditors noted that they have waited years for the Ministry of Labour to make a decision regarding a fairly nominal amount money. There were additional issues raised about system design in each problem category that, although unique to the category, are just as concerning (see Table 8.1). For example, unique to employment problems was a concern that the Ministry of Labour was ineffective at enforcing their own orders. Whereas unique to family law problems was a concern with the overly antagonistic process.

Table 8.1 **System Design**

Problem Type	System Design: Identified Issues
Housing	• Cost of filing fees; • Complexity of Landlord Tenant Board procedures; and • Delays with getting a hearing date.
Employment	• Cost of legal assistance; • Delays with the Ministry of Labour rendering decision; and • Ineffective enforcement on part of the Ministry of Labour.
Family	• Cost of legal assistance; • Complexity of court procedures; • Intimidating and overwhelming system; • Slow moving processes; and • Overly antagonistic nature.

From a justice as fairness perspective, these barriers arising out of system design are of a concern because they prevent individuals from meaningfully participating in the process. For example, complicated rules of procedure mean that Redditors who are unable to afford legal

assistance are also unable to frame their rights and advocate for their positions effectively. One practical result of these barriers is that the formal system becomes reserved for only certain people with certain problems: landlord initiated evictions, employees with sufficient resources to fight wrongful dismissals, or high-stakes acrimonious divorces. Although there is merit in diverting less serious matters to informal methods of resolution in order to save limited system resources, the efficacy of this practice is premised on the assumption that these disputes are being resolved effectively elsewhere. This is clearly not the case as Redditors discuss all sorts of serious problems that they were unable to resolve. For example, Redditors had expressed a preference to walk away from issues such as unpaid wages, unlawful entry, and child support rather than pursue them. If the system is to work for the user it has to be available to help resolve all issues. Thus initiatives that seek to make the formal system more accessible by, for example, reducing costs or delays, or by helping individuals navigate the system are clearly initiatives that align with the needs of the public and help improve their access to civil justice.

8.3.3 Rights Allocation: Distribution of Entitlements and Benefits

The concern over rights and entitlements within access to civil justice is obvious. In order to be able to resolve a problem a right needs to be legally recognized and enforceable. For example, if there was no duty for a landlord to maintain a tenancy in a state of good repair, than a tenant whose landlord refused to fix a mould problem would have few options other than fixing the problem themselves or breaking the tenancy agreement – potentially with legal consequences. In most legal relationships – such landlord-tenant, employee-employer, divorcees – many of the rights and entitlements exist by way of an agreement between the parties. However, the law – either legislation or common-law – is often needed to establish a base level of protection for vulnerable parties. As such regulatory frameworks have developed parallel to private agreements in many spheres of law in order to protect weaker parties from the more powerful player who would otherwise be able to dictate terms unilaterally to the detriment of the other. For example, with little creativity one can imagine numerous situations where an employer – but for the *Employment Standards Act, 2000* – would be able to unilaterally mandate that a precarious employee work overtime.

Ontario does well in regulating many of the legal issues examined on Reddit and allocating rights to ensure that the weaker party is provided with a base level of protection. Whether these protections go far enough can be debated – indeed, there was much discussion on Reddit as to whether the allocation of specific rights were adequate – rather the issue here is whether the rights ensure that the parties have equal standing before the law. In other words, there would be a concern with background fairness if one party was provided with certain legal rights and entitlements while the other had no reciprocal claim. For example, as discussed in chapter 5, under the common-law a landlord had amazing powers to enter a tenancy to inspect it for the tort of waste, but there was no reciprocal power of the tenant to compel a landlord to maintain the tenancy in good repair. Similarly, early legislation gave the landlord amazing powers to take possession of the tenant's possession when rent was unpaid, but the tenant had no reciprocal security of tenure. In such situations it is clear that the parties do not have equal standing before the law.

Among the conversations analyzed, the most pressing issue in regards to rights allocation is the perception that if an individual does not have a good lawyer than their rights are meaningless. This was most striking within conversations about family problems, but also evident in the other problems types examined. While the ability to retain a lawyer can be seen as a proxy for status equality, it can also be argued that rights which require legal representation in order to be effective are in fact illusory. If one's rights are dependent on having a lawyer then, simply put, those without lawyers do not have equal standing before the law. There are other specific situations, unique to each problem category, where the allocation of legal rights need to be re-examined in order to ensure status equality (see table 8.2). For example, issues of rights allocation is evident within employment problems, wherein employees have lesser rights when taking their claim to Ministry of Labour than if they took the same claim to a court. Another issues of rights allocation is evident within family problems, wherein shared custody orders are still in the minority and there is a persistent perception that fathers have lesser rights in regards to child access and custody.

Table 8.2 **Rights Allocation**

Problem Type	Rights Allocation: Identified Issues
Housing	• Unaffordability of housing in the rental market.
Employment	• Legal representation is required to make rights effective; and • The Ministry of Labour awards are less than the courts.
Family	• Legal representation is required to make rights effective; • Fathers perceived to have lesser rights in child access and custody matters; and • Inadequate childcare benefits.

On the face of it, many of the concerns over rights allocation appears to be very system centric since a fair allocation of rights is determined by one's standing before the courts. However, the recognition of rights and entitlements has a broader impact in two respects; first, the mere existence of these rights will prevent some problems from occurring, and second they act as a starting point for negotiations when engaging in informal means of resolution.

Related to rights allocation is a concern over the distribution of social benefits. Specifically, individuals with housing problems often raised concerns over the unaffordability of housing within the rental market and individuals with family problems often spoke of inadequate benefits for child care. Like rights allocation, the uneven distribution of social benefits impacts background fairness because it exasperates existing inequalities between social classes which may result in certain communities not being fairly situated before the law. However, Rawls' difference principle also speaks directly to these issues, wherein these kinds of inequalities can only be justified if the least advantaged is better off. It is hard to argue that those who cannot afford child care or adequate housing are better off with these inequities than without them, and therefore background fairness is negatively impacted by the current distribution of these types of social benefits. While these concerns may arguably be better situated in the realm of social policy, the access to justice community should still be concerned since many legal problems could be avoided with a more equitable distribution of these kinds of benefits. For example, many disputes over unpaid rent might be avoided if the rental market was not so unaffordable for many. Thus, initiatives that seek to either better distribute rights and entitlements, or make those rights and entitlements more effective can be understood as improving access to civil justice.

8.3.4 Paths to Justice: Effective Remedies and Outcomes

A final benchmark that emerges from the data that can be used to assess the efficacy of access to justice initiatives is whether they help the user find the most efficient and effective path to justice. Where system design is concerned with helping people access the formal system, paths to justice speaks more broadly to prevention and resolution of the problem itself and manifests itself in numerous situations. For example, one area where concerns over outcomes arose was in regards to the difficulty that individuals, particularly in the housing context, had in articulating legal remedies. In these situations individuals understood that they suffered a wrong and they had rights and entitlements, however, they did not know how to frame the issue legally. Another example, which was most evident in conversations about family law problems, were that disputes were highly antagonistic. Here individuals felt that unless they had a pit bull of a lawyer they would not be able to secure their legal entitlements. Concerns over outcomes was also evident when decisive claims – that is they types of claims that completely sever a relationship – are threatened or misused as was the case with some actions for wrongful dismissal or applications for evictions. Finally, numerous conversations showed that legal problems often cluster and do not happen in isolation. Here, one legal problem was often tied up with numerous interrelated problems making it difficult for the individual to resolve any of them.

Table 8.3 **Paths to Justice**

Problem Type	Paths to Justice: Identified Issues
Housing	• Inability to articulate legal remedies; • Problem clusters difficult to resolve; and • Evictions too frequently threatened.
Employment	• Dismissal too frequently used.
Family	• Disputes are too antagonistic.

All of these examples speak to situations that force a party into a winner take all situation. The inability to articulate a remedy means one cannot enforce their rights. Unjustified decisive claims means one risks losing everything over a dispute that should have lesser consequences. Problem clusters means that a problem in one sphere of life causes unnecessary loss in another

sphere. From a justice as fairness perspective, these types of competitions are patently unfair and inappropriate and, as such, solutions that seek to mitigate the winner take all scenario can be understood as improving access to justice. These could, for example, include initiatives that help the user frame their problem within its legal context, policies that constrain the ability of individuals to use decisive actions, and initiatives that encourage a holistic approaches to legal problems.

8.3.5 Conclusion

This section identified three categories of benchmarks that can be used to ensure that access to civil justice policies align with the actual legal needs of Ontarians. It argued that those initiatives which aim to improve system design, better allocate rights and entitlements, and provide easier paths to justice will go far in improving access to civil justice for those who experience housing, employment, or family law problems. Although each of these problem types contained issues unique to the legal framework in which they operate, elements common to all three problem types allow for this categorization and extension of these benchmarks to other problem areas. While the previous chapters shows that many of the access to civil justice initiatives within Ontario may have some positive impact on access to justice, the benchmarks outlined in this section illustrate that much more needs to be done. One possible tool that could be used to further improve an individual's access to civil justice is social media. Specifically, it is evident that people are using Reddit to crowd source both legal research and legal advice, and this may offer one practical solution to some of the difficulties they have with resolving their legal problems.

8.4 Solutions: Social Media as a Tool to Improve Access to Justice Tool

8.4.1 Introduction

Social media has become ubiquitous in the daily lives of many people. A 2020 survey conducted by Ryerson University Social Media Lab found that an overwhelming majority (94%) of Canadian adults have an account with at least one social media platform and that most of

these people access social media daily.[943] Although there are numerous platforms that compete for the attention of the public, eight of them – including Facebook, YouTube and Instagram – have achieved wide spread adoption in that more than 10% of the population uses that platform.[944] Reddit is another platform that has achieved a high level of adoption with the above mentioned survey finding that 15% of Canadian adults have a Reddit account; 81% of whom access the site at least weekly.[945] As well as being one of the fastest growing social media platforms,[946] Reddit is a particularly interesting case study because it allows for extended discussions on community forums and, as such, seems tailor made for public conversations about legal needs. Given the wide spread adoption of social media generally, and Reddit specifically, it is worth examining whether these platforms can be leveraged as tools to improve access to civil justice. One way to do this from a user focused perspective is to acknowledge how the public is using social media to address their legal needs. After analyzing hundreds of conversations on Reddit it is evident that Redditors use the platform as a tool to help resolve their problems in two ways: first as a way to crowd source legal research and second as a way to crowd source legal advice. As will be discussed below, organizations can leverage social media to improve the quality of crowd sourced legal research and legal advice and in doing so help to improve Ontarians' access to civil justice.

8.4.2 Crowd Sourced Legal Research

One insight that emerges when examining how people use social media to address their legal problems is that social media can be an effective tool to crowd source legal research. Legal research is the process one undertakes to answer questions of law. At its most basic it involves identifying relevant legal authorities that are applicable to one's situation.[947] Typically this means that a researcher locates and reads the governing legislation – both statutes and regulations –

[943] Gruzd & Mai, *supra* note 327 at 4.
[944] Out of all social media platforms, these three have the highest saturation rate with 83% of Canadian adults having a Facebook account, 64% having a Youtube account, and 51% having an Instagram account. See Gruzd & Mai, *supra* note 327.
[945] *Ibid* at 6.
[946] *Ibid* at 5.
[947] McCarney et al, *supra* note 674 at 1:12-1:14.

along with case law and tribunal decisions that have interpreted and applied not only that legislation but also the relevant principles of common law. Comprehensive legal research also requires the researcher to update the authorities in order to ensure that they are the current and have not been revoked or overturned. A helpful place to begin one's research is with the secondary sources that have already synthesized and summarized the relevant and applicable law. This is often the role that legal information plays: good legal information will succinctly explain the legal framework that governs an individual's problem and directs the researcher to primary and other secondary sources. The legal research process is difficult and time consuming, but Redditors are bypassing it by using social media to direct them to relevant legal information.

I. Challenges to Effective Legal Research

Although there is lots of legal information available online, effective legal research is still a difficult and nuanced task that many struggle with, even in the digital era.[948] One difficulty with legal research has to do with the overwhelming amount of information that is readily available. As succinctly stated by the Action Committee on Access to Justice in Civil and Family Matters: "It is not always clear to the user what information is authoritative, current, or reliable."[949] Indeed, if one searches online for legal information on any given topic one might come across numerous authoritative websites including CLEO's Steps to Justice, Legal Aid Ontario's LawFacts, the Law Society of Ontario's YourLaw, the CBA's Legal Health Checks, the National Self-Represented Litigants Projects' SRL Resources as well as various government websites, tribunals' websites, and the Ontario Courts website. One would also no doubt come across dozens of websites for lawyers and law offices that include help pages and blog's of varying quality: some of which are presented to look like public legal assistance. Links to numerous non-profit websites that offer assistance in particular areas of law would also be returned as would to links to reciprocal information for jurisdictions outside of Ontario. Needless to say, a search for legal information can quickly become overwhelming. Moreover, without some background knowledge of who these

[948] One reason individuals are often compelled to conduct research in regards to a legal problem as opposed to a medical problem, for example, is that professional legal assistance is either unattainable or perceived to be unattainable for most people. See section 4.3.3 above.
[949] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101 at 13.

organizations are and how they are situated within the legal framework, it may be difficult to determine which website is authoritative and trustworthy and which ones are less so.

As well as the sheer volume of legal information that is available, much of the legal information that is posted presumes a basic understanding of the legal framework, without which it is difficult to navigate. For example, a help guide about the division of matrimonial property after a divorce will not apply to a common-law couple who are separating. Thus, someone who is experiencing a relationship breakdown and is looking for legal information would first have to recognize that there is a differing legal status between married and common-law couples in order to know whether this guide is relevant to them. Similarly, they would need to recognize which jurisdiction they are subject to and which jurisdiction they are pulling legal information from: a law blog about divorce law in North Dakota will not apply to an Ontario couple seeking divorce. Finally, despite the plethora of legal information, one might have difficulty finding information that is actually relevant to one's own situation as legal problems are highly contextual and good research requires the ability to draw analogies from like situations.

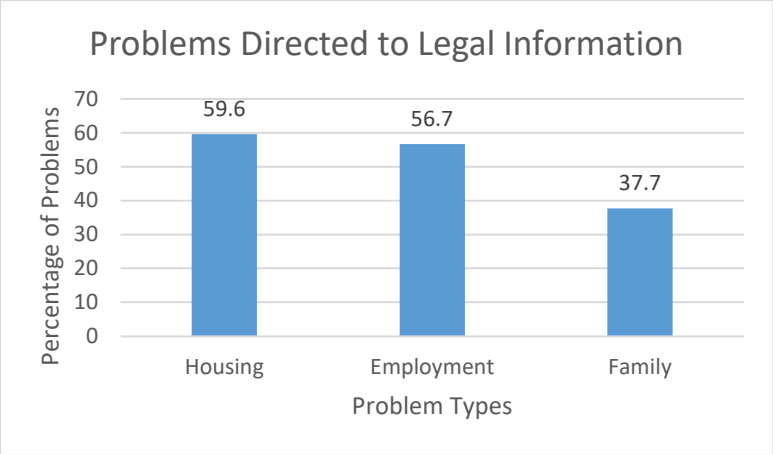
II. Redditors Experience with Legal Research

The first step of the legal research process is to locate relevant legal information; that is, unless one is already an expert in the field, researchers will first seek out secondary sources and commentaries that can explain the applicable legal principles and identify the legal authorities. It is clear that many Redditors struggle with this first step of the research process. Apart from the fact that the majority of conversations analyzed involve a Redditor asking about a legal problem, many of the Redditors explicitly state that they could not find relevant legal information. For example, one poster states as follows: "I hope there's some info out there. Google gave me nothing, and the tenancies act appears to have nothing about this either."[950] Similarly another poster states: "I just can't seem to find information around this regarding month-to-month leases."[951] Even where the Redditor was able to find information on their own, they often wanted confirmation that it was accurate. "As far as I can tell from what I've googled, there's no

[950] Housing 195.
[951] Housing 183.

restriction on number of tenants as long as it doesn't compromise safety. Is this correct?"[952] Given this context, it is not surprising that more than half of the conversations for both housing and employment problems directed the poster to some kind of legal information (see Figure 8.1).

Figure 8.1 **Percentage of Conversations Directing Poster to Legal Information**

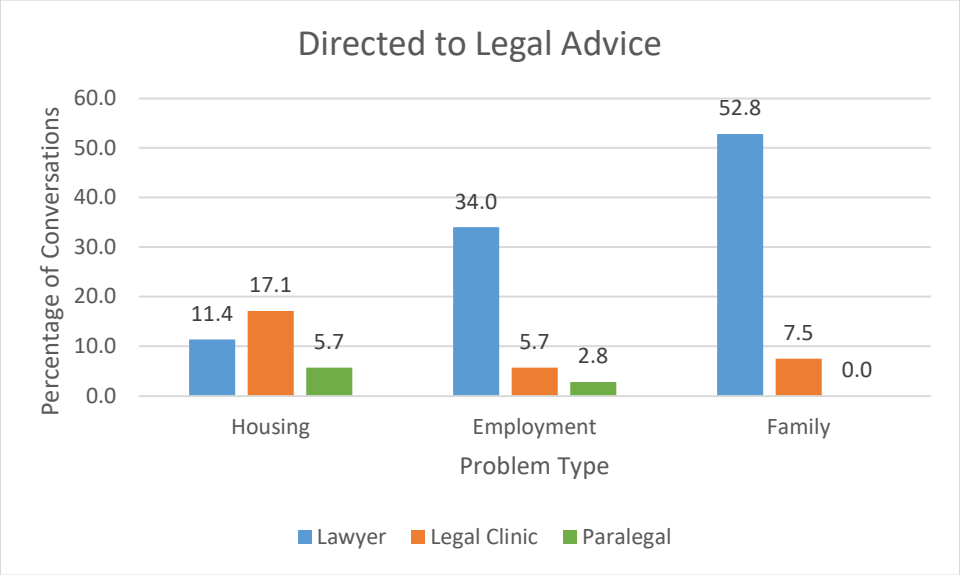


Family law problems, on the other hand, are notable in that unlike the other two problem categories examined less than half of the conversations (37.7%) directed the user to legal information. The reason for this is because Redditors are less willing to engage with family law problems than they are with other problems types. This manifests itself in two ways: first, people who post about family law problems are often simply looking for a referral to a lawyer rather than for legal information.[953] In one illustrative post, for example, the poster simple states as follows: "Can anyone recommend a really good divorce lawyer to protect wife's rights and assets? Literally asking for a friend."[954] In response to such questions, commentators will often provide referrals but will not direct the poster to legal information. Second, Redditors who respond to question about family law problems far more frequently limit their comments to "speak to a lawyer" than they do with other problems. Indeed, family law conversations directed posters to seek legal advice far more frequently than the other problem types (see Figure 8.2). With that

[952] Housing 031.
[953] The poster simply asked for a referral to a lawyer in nearly a quarter (24.5%) of all family conversations analyzed.
[954] Family 050.

said, using Reddit as a means to find legal information is still a common practice even for family problems.

Figure 8.2 **Percentage of Conversations Directing Poster to Legal Information**



III. Benefits of Crowd Sourcing Legal Research

The potential benefit of using Reddit to crowd source preliminary legal research is manifold. First, it allows the Redditor to cut through the noise of irrelevant, inaccurate, or poor information that pervades the internet and quickly locate relevant sources. For example, after being told that employees who work in information technology are exempt from overtime pay, one poster states that they cannot find this information among the Government of Ontario's numerous publications on employment standards.[955] The commentator responds by posting a link to the Ontario government's guide on exceptions to overtime pay and another Redditor replies with a link to the relevant regulation.[956] In directing those with legal problems to relevant and authoritative legal information, commentators can help the poster determine their next steps. For example, in one post asking about a landlord's responsibility for pest control, the poster is directed to some information on the City of Toronto's website to which the poster responds "I wasn't sure if that was only with respect to bed bugs, but I see now it says it's the

[955] Employment 200.
[956] *Ibid.*

landlord's responsibility for all pest control. Thanks!"[957] Similarly, in another post asking about an employer's obligation to provide transportation, the poster is directed to an employment FAQ on the Ministry of Labour's website that directly answered the question to which the poster responds: "Great link. Thanks."[958] Crowd sourced legal research also provides an opportunity to personalize a legal question with specific facts and context thus increasing the likelihood that the information provided is relevant. For example, one Redditor relates that their landlord owns two cats and does not clean up after them.[959] The first response to this post asks if they share a kitchen or bathroom with the landlord noting that this will impact their options.[960] A final benefit of crowd sourced legal information may be viewed from the supply side perspective in that it allows organizations that produce publically available legal information to connect with specific communities and distribute relevant legal information to a targeted audience.

IV. Public Legal Information and Social Media

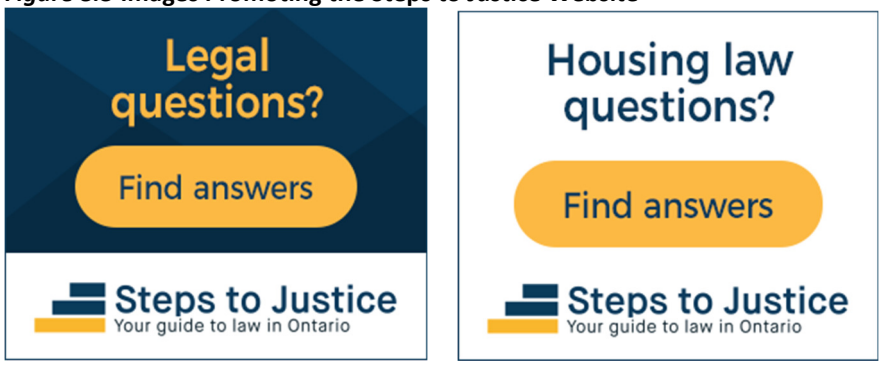
Perhaps one of the more impactful initiatives on improving access to civil justice is the proliferation of publically available legal information. As discussed in chapter 4, numerous organizations have gone to great lengths to develop legal information that is clear and insightful. However, as noted by the Canadian Forum on Civil Justice, "Information content that communicates clearly is an essential first step, but it is only effective if people know that the resource is available and how to access it."[961] Simply digitizing the legal information and posting it online will not resolve this issue. The veracity of this observation is evident in how few of the conversations referenced many of these great sources of legal information available online. For example, CLEO's Steps to Justice Website launched in 2017 is a fantastic resource of legal information that is easy to navigate and understand.[962] However, it was only referenced a total of four times in the 441 conversations examined. Similarly, the National Self-Represented Litigants Project, who has published excellent online resources for self-represented litigants, was

[957] Housing 022.
[958] Employment 045.
[959] Housing 208.
[960] *Ibid.*
[961] Billingsley, Lowe & Stratton, *supra* note 114 at 42.
[962] Community Legal Education Ontario, *supra* note 485.

not mentioned once in the conversations.[963] Clearly there is a disconnect between the availability of good quality legal information and the public's awareness of it.

In order to promote their resources some organizations have engaged with community intermediaries who are better equipped not only to introduce relevant legal information to the audiences that need it, but also to help them understand and navigate it.[964] Social media is just one more tool that these community intermediaries could use to promote legal information. CLEO, for example, recognizes this and encourages organizations and members of the public to embed and share their content and have even provided sample images for organizations to include in their own social media postings in order to promote their Steps to Justice Website (see figure 8.3).[965]

Figure 8.3 **Images Promoting the Steps to Justice Website**



Source: https://stepstojustice.ca/share/social

Many other organizations have also acknowledged the importance of social media in distributing legal information. For example, the Canadian Bar Association mentions social media as an example of a technological initiative that can provide the public with access to legal information.[966] Similarly, the National Action Committee on Access to Justice in Civil and Family Matters sees social media as a potential tool to engage with the public.[967] These organizations

[963] National Self-Represented Litigants Project, "Wlcome to the NSRLP", (2021), online: <https://representingyourselfcanada.com/>.
[964] Community Legal Education Ontario, *supra* note 479 at 40–42; See also Billingsley, Lowe & Stratton, *supra* note 114.
[965] Community Legal Education Ontario, *supra* note 485.
https://stepstojustice.ca/share/social
[966] Canadian Bar Association, *supra* note 55 at 76.
[967] Action Committee on Access to Justice in Civil and Family Matters, *supra* note 101 at 20.

recognize that using social media to refer people to legal information can help overcome some difficulties with connecting individuals with the information they need. Reddit, as one of the fastest growing social media platforms, should be used as such a space.[968]

Organizations could leverage Reddit to promote legal information in several ways. First, they could periodically post information about themselves along with a link to their website on selected subreddits such as /r/LegalAdviceCanada. This would act as an effective marketing tool as they would be able to target specific audiences. Second, they could monitor specific subreddits and respond to users who post legal questions. In their response they could direct the poster to legal information that is not only relevant but timely and up-to-date. Finally, they could create their own subreddit and use it as a forum to engage with the public. For example they could solicit feedback about information, respond to questions, or even post sample forms and pleadings that are commonly used in certain forums. By leveraging Reddit in this manner, public legal education and information organizations may be able to reach a wider audience and ensure that their legal information has a greater impact.

V. Crowd Sourced Legal Research and Justice as Fairness

From a justice as fairness perspective using social media to improve access to legal information can be an effective way to enhance access to civil justice. If people are able to access and understand legal information then, as discussed in chapter 4, both background justice and stakes fairness are improved. To briefly reiterate, background justice is improved because legal information can increase an individual's legal capacity. That is, it provides them with the information they need to act upon their legal rights and entitlements and make them effective. If an entire community or class of people are unable to act upon their legal rights or entitlements, then they are effectively second class citizens with a different standing before the law. Improving an individual's ability to act upon their rights helps promote status equality and thereby improve background fairness. The availability of legal information will also improve stakes fairness because it can facilitate early resolution making the cost of competition more proportional to the benefit of winning, and by limiting the impact of one competition on another. Social media can

[968] Gruzd & Mai, *supra* note 327.

support these improvements to access to civil justice by helping to ensure that the legal information is more effectively targeted to those that need it. With that said, however, individuals should still approach the provision of such legal information with caution as some commentators may link to sources that are either incorrect, out of date, or out of jurisdiction. For example in one post asking about breaking a tenancy agreement, someone directed them to an American source.[969] Fortunately, another poster identified the link as being American and provided a link to Ontario's governing legislation.[970] This concern, however, can be addressed if one takes certain precautions. Specifically, one should be critical at what they are looking at and confirm that the information is recent. One should also look at the organization and read their "about" page to make sure they are a legitimate organization situated in the right jurisdiction. If these cautions are applied, then social media may be an effective way to crowd source legal research and help promote the distribution of relevant and authoritative legal information.

Despite the concerns raised above, the access to civil justice community should encourage the use of social media for the crowd sourcing legal research. When using Reddit for crowd sourced legal research, the information referred to was consistently relevant and authoritative. In many instances the referral appears to have provided the poster with enough guidance to take next steps in resolving their problems. Moreover, if public legal education and information organizations became embedded within these communities, there is a real opportunity to promote their materials and increase public awareness of their resources. Crowd sourced legal research is therefore not only a method of resolution that the public wants to engage with, but it is also one that can provide practical solution for an individual's legal needs. The main drawback from an access to civil justice perspective is that people still want help understanding and applying the information. In other words Redditors are also crowd sourcing legal advice.

[969] Housing 009.
[970] Housing 009.

8.4.3 Crowd Sourced Legal Advice

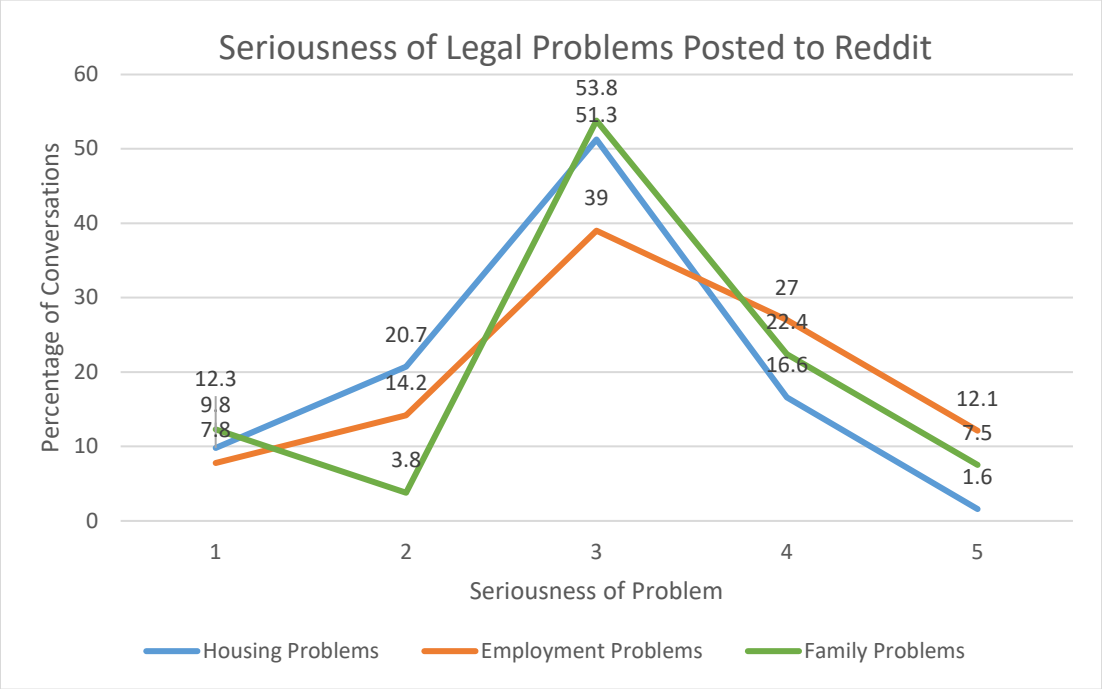
Another observation that becomes evident from reading about legal problems posted to social media is that many people use it to crowd source legal advice. That is, people are willing to post about their legal problems in a public forum and solicit legal advice from an anonymous community; most of whom are likely not legal professionals.[971] They do this despite the fact that common sense dictates that one should not take advice of any kind – be it medical, financial, or legal – from an unqualified, anonymous source. Not only could such advice potentially damage an individual's interests, that individual would have no recourse for compensation from the advice giver's negligence should the advice prove harmful. Yet despite the evident risks inherent in soliciting crowd sourced legal advice, many continue to do so for both serious and non-serious matters.

I. Seriousness of Problem versus Quality of Advice

As noted in the previous chapters, each conversation analyzed was given a seriousness rating from 1 to 5, wherein 1 represented inconsequential or mundane problems and 5 represented a life changing issue that required professional assistance to resolve. For all three problem types examined – being housing, employment, and family – most of the conversations were given a seriousness rating of 3 and thus could be categorized as mildly serious: that is, they warranted attention and had the potential to escalate, but could likely be resolved through negotiation or discussion (see Figure 8.4). While not as immediately serious as a category 5 problem, a category 3 problem should still be approached with thoughtful consideration given their potential to escalate; especially if an individual follows bad advice. There were also a fair number of conversations that could be considered more serious in nature for all three problem categories, further displaying that crowd sourced legal advice is not limited to problems of lesser importance.

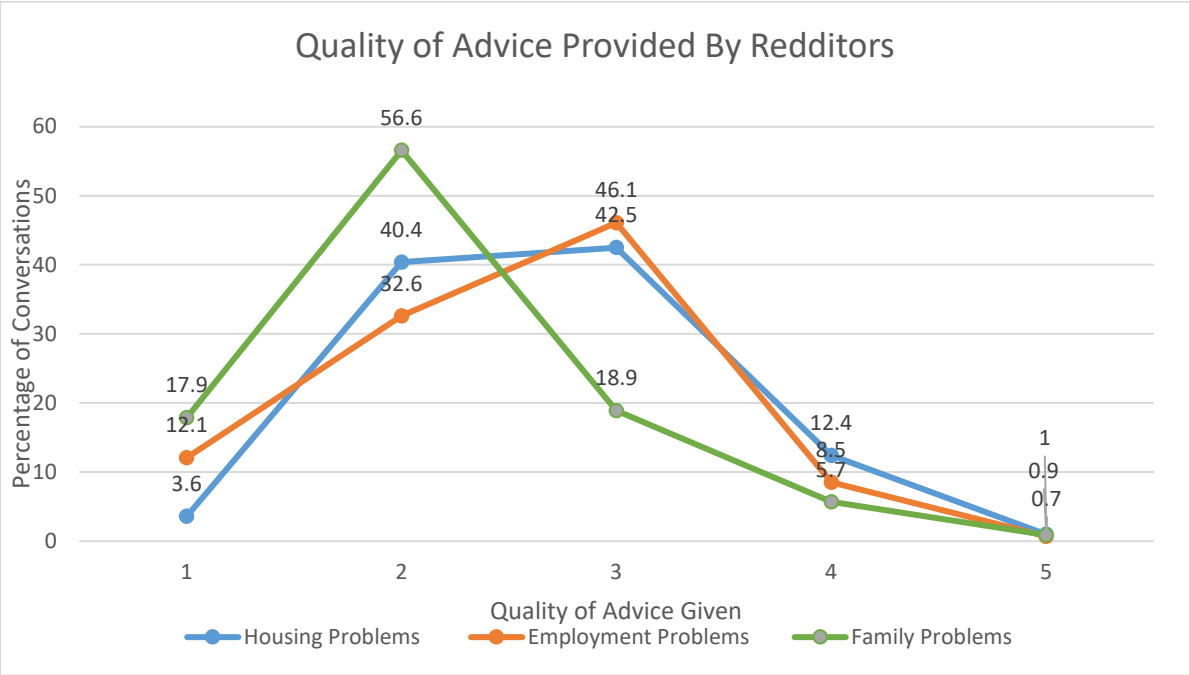
[971] There are about 55,000 licenced lawyers and about 9,000 licensed paralegals in Ontario wherein the /r/Ontario subreddit, for example, has approximately 134,000 members. Even if every single licensee was an active member of /r/Ontario, less than half of that subreddit's membership would be legal professionals. See Law Society of Ontario, "FAQs", (2021), online: <https://lso.ca/about-lso/osgoode-hall-and-ontario-legal-heritage/faq#how-many-lawyers-and-paralegals-are-there-in-ontario--5>.

Figure 8.4 **Seriousness of Legal Problems Posted to Reddit**



Despite the fact that many people solicit legal advice from Reddit, the quality of legal advice provided by Redditors is overwhelmingly below what one would expect from a competent lawyer or paralegal. Like seriousness, each conversation analyzed was given a rating of between 1 and 5 for the aggregate quality of advice provided. A rating of 1 meant that the advice was incorrect and/or misleading, whereas a rating of 5 was reserved for accurate and comprehensive advice that reviewed options, provided authorities, and was overall helpful in terms of providing direction to the poster. For reference, a rating of 4 is the minimum rating one would expect from advice given by a competent lawyer acting in the best interest of their client. As noted, the overwhelming majority of conversations for all three problem categories examined were rated at 3 or below (see Figure 8.5). Interestingly, while both housing and employment problems had a similar distribution, advice for family law problems were noticeably of a poorer quality advice. Specifically, family problems had far more conversations rated at either a 1 or a 2 and less conversations rated at a 3, 4 or 5 than either of the other two problem types.

Figure 8.5 **Quality of Advice Provided By Redditors**



While this divergence is notable, the reason that advice for family problems is of a poorer quality has more to do with how Redditors interact with family problems rather than with the substance of the advice itself: that is, the advice is of a poorer quality not because Redditors understand family law less than other problems, but because both posters and commentators do not wish to engage with the problem on Reddit. Redditors are far more likely to limit their questions to "anyone know a lawyer" and their advice to "speak to a lawyer" when discussing family law problems than they are with the other two problems categories. As noted in the previous chapters, conversations wherein advice was simply limited to "speak to a lawyer" was given a rating of 2 since these comments are of no practical assistance to the poster; even if they are technically correct. However, if the contact information for a specific lawyer was provided, than the conversation would be given a rating 3 since this at least provides the poster with some practical next steps. Thus, the high number of conversations dealing with family problems that were limited to advising the poster to speak to a lawyer somewhat skewed the overall quality of advice for that problem set.

II. Reasons for Crowd Sourcing Legal Advice

Despite the fact that legal advice provided on Reddit is typically of a poorer quality than what one would expect to receive from a legal professional people still crowd source legal advice from this online anonymous and unqualified community. There are two reasons as to why one might do this: either they feel comfortable with the risks or their desperation outweighs the risks. Understanding why someone might feel comfortable seeking advice from Reddit requires us to examine their advice seeking behaviour within the context of their general use of Reddit. As noted in chapter 3, Reddit is composed of innumerable subreddits each of which centers around a specific topic or theme. Individual users can subscribe to a subreddit in order to have posts from that subreddit appear on their news feed. Those members that subscribe to a subreddit form a community of users that in some instances are quite active: users frequently create new posts and respond to other users' posts in a way that promotes vibrant interaction and discussion between members. Members in turn develop reputations despite the fact that they are only known by a username. This reputation is encouraged by "karma" points: a system that measures how many upvotes one's posted content earns. This interaction and discussion removes some sense of anonymity among users and thus individuals may – rightly or wrongly – feel that they are seeking advice not from an anonymous stranger but from trusted members of a particular community to which they belong. While this may help to explain why individuals may feel comfortable seeking advice from what is objectively an anonymous source, it still does not address concerns regarding unqualified advice. Though it is true that most posters on Reddit are not legal professionals, this does not mean that any given poster is necessarily and completely unqualified in a particular subject area. For example, a human resource manager may have extensive experience with employment problems and could offer high quality advice on employment matters despite not being a lawyer. Likewise, an individual may have experienced a similar problem when dealing with their landlord, for example, and is able to share some insight into how they resolved it.

One major problem associated with crowd sourcing advice from anonymous and unqualified individuals is that the conversations often contain multiple and sometimes contradictory comments, such that good advice is mixed in with poor advice. Individuals reading

through these multiple contradictory comments may have difficulty deciding which to follow and which to ignore. Users, however, can assess the quality of advice from proxies such as the commentator's ability to source material, the level of detail provided, and even the proper use of grammar. Moreover, posts can be upvoted or downvoted, allowing the entire community – not just the individual user – an opportunity to assess the quality of advice. This function helps provide some authority to highly upvoted comments. Moreover, it is not uncommon for one poster to clarify or correct another poster's advice. Thus conversations that involve multiple users can actually be a positive thing as this allows for second opinions. At the end of the day, however, what might drive this behaviour is recognizing that advice is simply that: it is a non-binding recommendation that the user can take or reject. Moreover it is not exclusive: one can consider what they read on Reddit and still call a legal help line, speak to a lawyer or a paralegal, or conduct their own research.

Some users may feel competent enough to weigh the merits of the advice they solicit on Reddit, others however may not. For those that do not feel comfortable engaging in this critical exercise another explanation is needed for their behaviour. The above discussion presumes that the individual seeking advice is doing so by choice. The reality, however, is that some individuals are turning to Reddit because they have no other option and they are desperate. As stated in a post by one Redditor who was having difficulty finding housing, possibly due to discrimination: "I'm desperate for any type of help and it's weird coming to Reddit for this kind of thing by who knows, right?"[972] Another Redditor who suffered from a chronic disability and was having difficulty at work expressed a similar sentiment: "I don't know what i'm asking for specifically, but I've become very desperate."[973] This theme is pervasive in the data and reflects the reality about the availability of legal services in Canada. As discussed above, the cost of private legal services excludes all but the wealthiest of Canadians from the market while publically funded legal services are equally unavailable to most Canadians. Other potential sources of advice, such as courthouses or community organizations, are limited to providing legal information which requires a certain level of legal capability to utilize effectively. In such a context, it does not

[972] Housing 128.
[973] Employment 061.

matter that crowd sourced legal advice is anonymous or unqualified since the individual believes that they have nowhere else to turn.

III. Crowd Sourced Legal Advice and Justice as Fairness

Regardless of why an individual seeks crowd sourced legal advice, this kind of legal advice offers a possibility of improving access to civil justice. From a justice as fairness perspective crowd sourced legal advice may help to improve procedural fairness, background fairness, and stakes fairness among those who are unable to obtain legal advice from a qualified professional. As discussed in previous chapters procedural fairness is negatively impacted when one is excluded from meaningfully participating in a proceeding. In such cases, even though the individual is technically present and has a technical right to make submissions they are not able to effectively marshal an argument due to the complexity of both the substantive law and procedural rules. For example, if an individual does not understand – and therefore does not follow – the proper disclosure requirements for a piece of evidence they may not be able to rely on said evidence at a hearing. Lawyers and paralegals play a role in ensuring procedural fairness by assisting individuals with these complexities. However if said individual is unable to retain a legal professional because, for example, they are priced out of the market then crowd sourced legal advice could fill that gap and help the individual participate more fully in a proceeding.

In terms of background justice, the main concern is that people are situated fairly before that law. Crowd sourced legal advice could improve the status equality between several groups because its availability is less dependent on any individual characteristic than the availability of traditional legal services. In Canada, rural and remote communities are chronically underserved by legal services.[974] Likewise, legal problems generally categorized as poverty law problems – housing, income-maintenance, employment standards and consumer – are also desperately underserviced.[975] It is worth noting that these problems are disproportionately experienced by vulnerable communities to the extent that certain characteristics are predictors of legal

[974]MacPhail, *supra* note 546 at 18.

[975] For a discussion about geographic access to justice see Jamie Baxter & Albert Yoon, "No Lawyer for a Hundred Miles? Mapping the New Geography of Access of Justice in Canada" (2014) 52:1 Osgoode Hall Law Journal 9.

problems.[976] For example, being disabled is a predictor of having consumer, employment, debt, social assistance, and housing problems.[977] Finally, as discussed above, most Canadians are priced out of the legal services market. Thus one's ability to access traditional legal services is directly impacted by arbitrary characteristics including, social status, race, disability, and place of residence. Without access to these services, it is arguable that one has a lower standing before the law because one is less able to make their rights effective. Crowd sourced legal advice can assist those who would otherwise not have access to any legal advice due such arbitrary factors thus improving status equality.

Finally, crowd sourced legal advice may also help to improve stakes fairness by potentially reducing the cost of participating in a competition. Instead of spending hundreds, if not thousands, of dollars on private legal services – which in many of the situations examined exceed the benefits of winning – one could gain assistance that would allow them to enter the competition at little to no cost. All of this, however, is premised on the notion that the advice received through crowd sourcing is of a certain quality that, at minimum, would not damage the interests of the advice seeker. As demonstrated above, this of course is not necessarily the case.

IV. Regulating Crowd Sourced Legal Advice

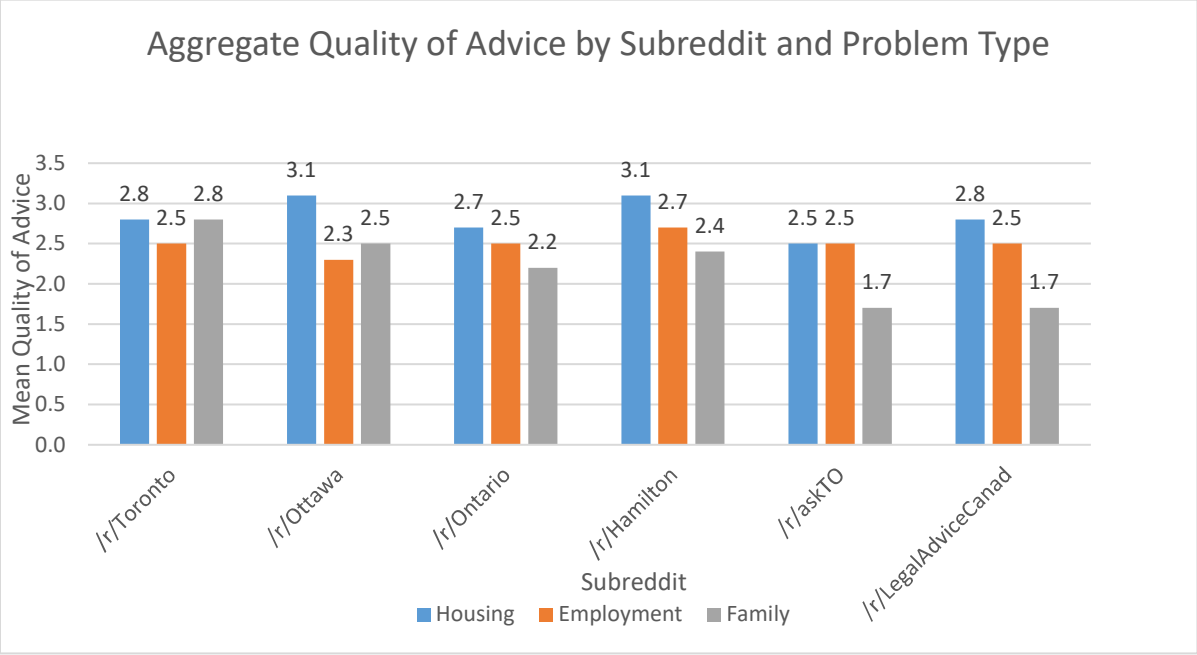
When it comes to crowd sourced legal advice, the very nature of it being anonymous and unregulated means that the responsibility of "regulation" falls to the individual user. An individual with a legal problem could benefit from crowd sourced legal advice provided they take into account three parameters or safeguards: first, one should limit their question to simple or straightforward problems, second, one should contextualize the advice in terms of source and community, and third one should assess the advice against other sources. In regards to the first parameter, the data presented in chapters 5, 6 and 7 shows that it is rare to receive high quality advice from Reddit. Within the employment context, for example, most advice (46.1%) was given a rating of a 3 meaning that it was generally correct and there was little conflicting information within the conversation. However, the advice was not practical in terms of next steps. Less than

[976] Currie, *supra* note 44 at 23–31.
[977] *Ibid*.

10% of advice given for employment problems could be rated 4 or higher whereas almost 45% of advice could be considered worse than a 3. Where one could argue that advice rated at 1 or 2 is never acceptable, a simple or straightforward problem might only need advice rated at a 3 and thus what one receives from crowdsourced legal advice may be sufficient. More serious or complicated problems that require better advice should not be crowdsourced due to the simple fact that very little of the advice given would meet the standard required for complicated problems.

The second parameter builds on the first, wherein the poster must be aware the context of the advice given. Generally all subreddits, give advice at comparable levels (see Figure 8.6). The quality of advice on the subreddit /r/LegalAdviceCanada, for example, was no better than the subreddits /r/Toronto, and /r/Ontario. In fact the quality of advice from some of the city subreddits such as /r/Hamilton and /r/Ottawa was slightly better than /r/LegalAdviceCanada. As aggregate the two advice based subreddits – /r/askTO and /r/LegalAdviceCanada – actually provided the worst advice.

Figure 8.6 **Aggregate Quality of Advice By Subreddit and Problem Type**



The point here is that no subreddit can claim that their advice is of notably better quality than other subreddits and advice seekers need to be aware of this. With that being said certain users within each community give better or worse advice. Thus someone seeking crowd sourced advice would be prudent to research the user who is offering advice and see where else they posted to get a better sense of an individual's authority to speak on a topic. The voting function in Reddit can also assist here. The community upvotes content it deems to positively contribute and downvotes content it deems otherwise. Thus an advice seeker might approach heavily down voted content with a little more caution.

The third and final parameter an advice seeker needs to be aware in order to protect themselves is that they are following crowdsourced advice at their own risk. Users still need to weigh the advice and compare it with other legal information they researched before they choose whether or not to follow it. Perhaps the biggest challenge for the advice seeker is not to simply seek out and follow the advice one wants to hear, but to give it a proper critique. This last parameter might be difficult for some to follow, however, the fact remains individuals are crowdsourcing legal advice. While it may not be ideal, the complete lack of affordable legal assistance makes crowd sourced legal advice a reality and educating individuals on how to approach crowd sourced legal advice might actually help some achieve better access to justice.

Despite the obvious concerns, the access to civil justice community should allow and encourage limited crowd sourced advice from social media. In most instances, the benefits outweigh the risks. The most compelling argument is that many users have no other option and some advice is better than none. However, it is also evident that people are engaging in crowd sourced legal advice despite formal censure and there is merit to respecting people's agency. Moreover, people are not looking for full representation but just some direction on next steps to take. The concerns raised above could further be tempered if organizations that already provide summary legal advice entered the Reddit space wherein they could better control crowd sourced legal advice. These organizations could set up their own subreddit and directly respond to users who post questions there. In doing so they provide a more reputable forum for this behaviour. They could also seek out legal questions on other subreddits such /r/LegalAdviceCanada and offer summary advice to those individuals. This proactive approach may have an effect of greatly

increasing the quality of advice available on Reddit and, along with targeted legal information, have an immensely positive impact on increasing access to civil justice.

8.4.4 Conclusion

Using Reddit to crowd sourced legal research and legal advice can offer a practical and effective method of improving access to justice civil justice. When measured against the benchmarks identified above, it is evident that initiatives that would leverage Reddit to promote legal information or offer summary advice would align with the public's legal needs. In terms of system design, such initiatives would reduce the monetary cost associated with having a legal problem by providing free information and advice. This is particularly true for simple or straightforward questions that may not otherwise warrant expensive professional help. Moreover, Reddit can be used to better inform individuals of the processes and procedures and thereby help to reduce perceived complexities which may make the formal system less intimidating. Using Reddit to promote legal information and provide summary advice would also help improve rights allocation. By informing people about their legal rights and entitlements, along with how to make them effective, Reddit can be used to reduce the reliance that individuals have on lawyers and thereby help promote equal standing before the law, particularly in those instances where one side is represented and the other is not. Finally, in terms of paths to justice, Reddit can be used to move disputes away from a winner take all situation, by helping people articulate their rights. It can also be used to educate users about the role of lawyers, and perhaps, promote a more conciliatory approach to litigation. These are just some possible ways that Reddit can be leveraged as a practical tool to assist people with resolving their problems and improve access to justice for Ontarians.

8.5 Concluding Remarks

Legal needs research has provided access to justice scholars with much insight on how individuals interact with and utilize the legal system. We know that legal problems are ubiquitous, we know that most people do not use the formal system to resolve their problems, and we know

that people perceive the law as inaccessible.[978] This knowledge has helped inform much of the access to civil justice landscape over the last twenty years.[979] Yet there is still lots that is unknown about the state of legal needs. Perhaps the two most pressing unknowns are: how do we determine if access to civil justice initiatives are effective? And; how do we incorporate a public perspective into policy development? Though seemingly disparate, these two questions are in fact closely interrelated. In order to be meaningful, access to civil justice initiatives must be understood in terms of how they benefit those with legal needs: to do otherwise would not serve the public. Perhaps the best way to ensure that access to civil justice initiatives actually align with the legal needs of the public is to approach these initiatives from the perspective of the public and incorporate that perspective into policy development. In other words, both of these unknowns are fully dependent on determining what the public needs and wants from their legal system.

This project represents an effort to empirically answer the two questions posed above by using a data set that is relatively novel for legal scholarship. Specifically, it examined hundreds of conversations posted about legal problems to the website Reddit to better understand how individuals approach and interact with their legal problems. In doing so, this project was able to identify three benchmarks that could be used to measure the efficacy of access to civil justice initiatives. These benchmarks represent common difficulties individuals have in resolving their problems and the types of changes needed to make it easier for individuals to resolve their problems. Specifically, initiatives that make the formal system more accessible, that distribute rights and entitlements more fairly, and that allow individuals to realize outcomes more effectively can all be considered initiatives that improve access to civil justice. These benchmarks are notable in that they derive from the public experience and thus are able to measure whether access to civil justice initiatives actually align with the needs of the public.

As well as identifying benchmarks, the data also made clear that the public is leveraging social media to assist them in resolving their legal problems through the crowd sourcing of legal research and through the crowds sourcing of legal advice. This chapter examined these potential

[978] See e.g. Farrow et al, *supra* note 51; Farrow, *supra* note 79.
[979] Macdonald, *supra* note 14.

avenues for improved access to civil justice and concluded that both are viable solutions. Crowd sourced legal research mainly takes the form of directing posters to relevant legal information. It is an effective way to connect those in need with authoritative sources that they otherwise may not have found. In doing so, it equips the individual with the knowledge to determine next steps on their path to justice. Using social media to promote and distribute legal information is not a controversial solution. Indeed, many organizations are either already doing this or are endorsing it. The reason that it is accepted is because legal information is understood to be general in nature and not particular to any one problem. As such there is less worry that it will run afoul with the Law Society of Ontario's prohibition on non-licensee's providing legal advice.

Crowd sourced legal advice is admittedly the more controversial proposal. Here Redditors are not only providing links to relevant legal information, but they are also providing their opinion on how the poster should attempt to resolve their problem. This is obviously of a concern because the poster is seeking legal advice from anonymous and unqualified sources. When seeking advice from a lawyer "…the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf."[980] If a lawyer was to offer advice at a comparable quality to most of the advice offered on Reddit than the lawyer would likely be in breach of their professional obligations. This is the case even for problems that would be considered mundane or trivial as the quality of advice is independent of the seriousness of the problem: a client should be able to expect high quality advice from a legal professional even for insignificant problems. Based on the data it is evident that crowd sourced legal advice rarely meets the standard required of lawyers. However, one can query if it is appropriate to hold non-legal professionals to the same standard given the reality that legal advice from a lawyer remains unattainable for most people. In some less serious contexts – such as when one experiences a minor problem or when one is simply looking for some basic information – the quality of advice one receives from Reddit might be seen by many as sufficient: it may not be ideal or perfect, but it is arguably better than no assistance. As noted by Chief Justice Wagner "Ultimately, [access to justice] is about getting good justice for everyone, not

[980] *Rules of professional Conduct,* supra note 543, r 3.1-2.

perfect justice for a lucky few."[981] None-the-less they are still legitimate concerns that poor quality advice will not only fail to assist in resolving problem but may aggravate the problem. For example, advising someone to litigate in an improper forum could result in extra costs and delays. This concern, however, could be addressed through a combination of self-regulation and professional guidance.

In regards to self-regulation, people should approach crowd sourced legal advice with caution. They need to consider who is providing the information, seek advice from multiple sources, and review it against authoritative legal information. While this approach does have an air of *caveat emptor* about it, it can also be viewed as providing agency to those legal with needs. The ubiquity of legal problems coupled with the crises in access to civil justice, means that crowd sourced legal advice from social media is a reality: it is easy to obtain, requires no upfront costs, and is available to anyone with an internet connection. The legal profession could take a leadership role to improve the quality of crowd sourced advice by allowing certain non-legal professionals to give legal advice on social media. In such a case, legal organizations and other non-profits could moderate their own subreddit and leverage the knowledge and experience of non-lawyers to provide high quality advice to those that need it the most. Currently, organizations are allowed to produce and distribute legal information. Legal information alone, however, only provides a baseline of assistance. Complimented with timely summary legal advice, legal information can provide a level of assistance comparable to full legal representation.[982] In other words, by allowing and encouraging people to use a readily accessible medium to crowd source both legal information and legal advice, policy makers could have a real and positive impact on access to civil justice.

[981] Right Honourable Richard Wagner, "Access to Justice: A Societal Imperative" (Address delivered at the 7th Annual Pro Bono Conference,Vancouver, 4 October 2018), online: < https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx>.
[982] Jacobs, *supra* note 473.

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Appendix A

Protocol for Studying Housing Problems

I. Conversation label

II. Months since posted (as of date of collection)

III. Number of comments

IV. Percent upvoted

V. Posted by:
0. Other
1. Landlord
2. Tenant

VI. Problem category
0. Other
1. Termination of tenancy
2. Eviction
3. Lease renewal
4. Change of lease terms
5. Obligations
6. Application for rent
7. Repairs
8. Assignment of lease
9. Security deposit
10. Problem with roomate/neighbour

VII. Specific problem

VIII. Poster cites authority
1. Yes
2. No

IX. Most common suggested path to justice
-9. no path suggested
1. Bring Application to the LTB
2. Negotiate
3. Seek advice
4. Do nothing – (e.g. not your problem, let LL deal with)
5. Walk away – (e.g. get out of there, not worth fighting problem, don't sign lease)
6. None – no suggestions, the law says X

X. Commentators provides authority
1. Yes
2. No

XI. Commentators cite RTA
1. Yes
2. No

XII. Commentators cite precedent
1. Yes
2. No

XIII. Commentators cite municipal code
1. Yes
2. No

XIV. Commentators cite other authority
1. Yes
2. No

XV. Commentators refer to external info
1. Yes
2. No

XVI. Commentators refer to SJTO Website
1. Yes
2. No

XVII. Commentators refer to LTB hotline
1. Yes
2. No

XVIII. Commentators refer to Ontario Government website
1. Yes
2. No

XIX. Commentators refer to City/Region website
1. Yes
2. No

XX. Commentators refer to CLEO website
1. Yes
2. No

XXI. Commentators refer to StepsToJustice website
1. Yes
2. No

XXII. Commentators refer to law blog
1. Yes
2. No

XXIII. Commentators refer to tenants' rights website
1. Yes
2. No

XXIV. Commentators refer to a Facebook page
1. Yes
2. No

XXV. Commentators refer to a newspaper article
1. Yes
2. No

XXVI. Commentators refer to another source
1. Yes
2. No

XXVII. Suggests to call a lawyer
1. Yes
2. No

XXVIII. Suggests to call a paralegal
1. Yes
2. No

XXIX. Suggests to call a legal clinic
1. Yes
2. No

XXX. Suggests to call police
1. Yes
2. No

XXXI. Suggests to call LTB
1. Yes
2. No

XXXII. Suggests to call a tenants association
1. Yes
2. No

XXXIII. Suggests to call the city or by-law
1. Yes
2. No

XXXIV. Suggests to call rental enforcement agency
1. Yes
2. No

XXXV. Seriousness of problem (Scale 1-5)
1. Mundane/inconsequential
2. Requires attention but little potential to escalate
3. Can resolve through negotiation, potential to escalate, loss of some money
4. Requires professional help/difficult to solve
5. Life changing/most serious of issues

XXXVI. Quality of Advice (Scale 1 -5)
1. Terrible. Mainly incorrect and misleading
2. Okay but either not useful or lost in clutter of responses. Conflicting advice. Does not answer question.
3. Generally correct but not practical in terms of next steps. Not much conflicting advice.
4. Good advice. Generally accurate. Helpful in terms of next steps.
5. Excellent. Comprehensive and helpful.

Protocol for Studying Employment Problems

I. Conversation label

II. Months since posted (from date of collection)

III. Number of comments

IV. Percent upvoted

V. Posted by:
-9. Unclear
1. Employer
2. Employee

VI. Union or non-union

-9. Unclear
1. Union
2. Non-union

VII. Industry
-9. Unclear
0. Other
1. Food/Service
2. Retail
3. Construction/labour
4. Service/Office
5. Grocery Store
6. Health
7. IT
8. Government
9. Automotive/factory
10. Not Working

VIII. Problem category
0. Other
1. Payment & Benefits (inc. Min. Wage & EI)
2. Overtime
3. Hours of Work
4. Vacation & Holiday
5. Discipline
6. Harassment & Discrimination
7. Health and Safety
8. Termination
9. Resignation
10. Hiring and Applying

IX. Poster cites authority
1. Yes
2. No

X. Most common suggested path to justice
-9. No path suggested
1. Report to LB
2. Negotiate
3. Do nothing
4. Walk away
5. Apply for EI
6. Litigate Small Claims/HR/Sup Ct
7. None – no suggestions, the law says X

XI. Commentators provides authority
1. Yes
2. No

XII. Commentators cite ESA
1. Yes
2. No

XIII. Commentators cite ONHRC
1. Yes
2. No

XIV. Commentators cite regulations
1. Yes
2. No

XV. Commentators cite case law
1. Yes
2. No

XVI. Commentators refer to external info
1. Yes
2. No

XVII. Commentators refer to MOL website
1. Yes
2. No

XVIII. Commentators refer to OLRB website
1. Yes
2. No

XIX. Commentators refer to News Article
1. Yes
2. No

XIX. Commentators refer to City/Region website
1. Yes
2. No

XX. Commentators refer to CLEO website
1. Yes

2. No

XXI. Commentators refer to StepsToJustice website
1. Yes
2. No

XXII. Commentators refer to law blog
1. Yes
2. No

XXIII. Commentators refer to LSO website
1. Yes
2. No

XXIV. Commentators refer to another source
1. Yes
2. No

XXV. Suggests to call a lawyer
1. Yes
2. No

XXVI. Suggests to call a paralegal
1. Yes
2. No

XXVII. Suggests to call a legal clinic
1. Yes
2. No

XXVIII. Suggests to call police/fire department
1. Yes
2. No

XXIX. Suggests to talk to a union
1. Yes
2. No

XXX. Suggests to call MOL for advice
1. Yes
2. No

XXXI. Suggests to call the city or by-law
1. Yes

2. No

XXXII. Speak to HR/ombudsmen
1. Yes
2. No

XXXIII. Speak to HR Commission/Tribunal
1. Yes
2. No

XXXIV. Suggests to call MP or MPP
1. Yes
2. No

XXXV. Call radio
1. Yes
2. No

XXXVI. Seriousness of problem (Scale 1-5)
1. Mundane/inconsequential
2. Requires attention but little potential to escalate
3. Can resolve through negotiation, potential to escalate, loss of some money
4. Requires professional help/difficult to solve
5. Life changing/most serious of issues

XXXVII. Quality of Advice (Scale 1 -5)
1. Terrible. Mainly incorrect and misleading
2. Okay but either not useful or lost in clutter of responses. Conflicting advice. Does not answer question.
3. Generally correct but not practical in terms of next steps. Not much conflicting advice.
4. Good advice. Generally accurate. Helpful in terms of next steps.
5. Excellent. Comprehensive and helpful.

Protocol for Studying Family Problems

I. Conversation label

II. Months since posted (from date of collection)

III. Number of Comments

IV. Percent upvoted

V. Posted by
0. Unclear
1. Husband/boyfriend/male partner
2. Wife/girlfriend/female partner
3. Child
4. Sibling/cousin/other family
5. Friend/neighbour

VI. Married or common-law
0. Unclear
1. Separated/divorced
2. Married/common-law
3. Single
4. Widowed

VII. 'Problem Category
0. Other
1. Custody/access
2. Child support
3. Domestic contract
4. Child care
5. Domestic violence/child abuse
6. Divorce
7. Spousal support

VIII. Poster cites authority
1. Yes
2. No

IX. Overall comments suggested path to justice
-9. No path suggested
1. Negotiate
2. Do nothing
3. Walk away
4. Litigate
5. None – no suggestions, the law says X

X. Commentators provides authority
1. Yes
2. No

XI. Commentators cite legislation
1. Yes
2. No

XII. Commentators cite regulations
1. Yes
2. No

XIII. Commentators cite case law
1. Yes
2. No

XIV. Commentators refer to external info
1. Yes
2. No

XV. Commentators refer to StepsToJustice website
1. Yes
2. No

XVI. Commentators refer to law blog
1. Yes
2. No

XVII. Commentators refer to LSO website
1. Yes
2. No

XVIII. Commentators refer to another source
1. Yes
2. No

XIX. Suggests to call a lawyer
1. Yes
2. No

XX. Suggests to call a paralegal
1. Yes
2. No

XXI. Suggests to call a legal clinic
1. Yes
2. No

XXII. Suggests to call police/fire department
1. Yes
2. No

XXIII. Suggests to call the city or by-law
1. Yes
2. No

XXIV. Seriousness of problem (Scale 1-5)
1. Mundane/inconsequential
2. Requires attention but little potential to escalate
3. Can resolve through negotiation, potential to escalate, loss of some money
4. Requires professional help/difficult to solve
5. Life changing/most serious of issues

XXV. Quality of Advice (Scale 1 -5)
1. Terrible. Mainly incorrect and misleading
2. Okay but either not useful or lost in clutter of responses. Conflicting advice. Does not answer question.
3. Generally correct but not practical in terms of next steps. Not much conflicting advice.
4. Good advice. Generally accurate. Helpful in terms of next steps.
5. Excellent. Comprehensive and helpful.