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BETTER ACCESS TO BETTER JUSTICE: THE POTENTIAL OF PROCEDURAL REFORM

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Improving access to justice is often identified as a goal of reforms to legal procedure. What does access to justice mean in this context? This article proposes that "better access" and "better justice" should be understood as distinct but overlapping goals. Access *improves when procedural costs confronting litigants are reduced.* Justice *has three qualities—substantive justice, procedural justice, and public justice—which legal procedure can produce to a greater or lesser degree. Although access and justice are sometimes in tension as goals for procedural reform, they are also harmonious. Better access to better justice is a worthy goal for procedural reformers. Welfarism is introduced in the final part of the article, as a way to focus access to justice reforms and make the necessary tradeoffs. This article's argument is illustrated by three procedural reform trends—mandatory mediation, smaller-dollar procedure, and inquisitoriality.*

Améliorer l'accès à la justice est souvent vu comme un objectif de la réforme des procédures judiciaires. Mais qu'est-ce que l'accès à la justice signifie dans ce contexte? L'auteur présente « un meilleur accès » et « une meilleure justice » comme deux objectifs qui sont distincts, mais qui se recoupent. L'accès s'améliore quand on réduit les frais procéduraux des parties. Quant à la justice, elle a trois dimensions essentielles—son fond, sa procéduralité et son caractère public—qui sont représentées à degrés variables dans les procédures. Bien que l'accès à la justice et la justice elle-même se concurrencent

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parfois comme objectifs de réforme procédurale, elles existent en symbiose. L'accès amélioré à une justice améliorée est un objectif louable aux yeux des artisans de réformes procédurales. La dernière partie de l'article aborde l'assistantialisme comme point de mire des réformes de l'accès à la justice et des compromis nécessaires. La substance de cet article est illustrée par trois tendances en matière de réforme procédurale : la médiation obligatoire, les procédures à moindre coût et le caractère inquisitorial.

Contents

1. Introduction

"Every individual," according to Canada's Constitution, "has the right to the equal protection and equal benefit of the law."[2] Although the law's protections and benefits are numerous, they often seem to be little more than words on a page. This is because people often don't understand, cannot afford, or lack the time and energy to obtain the protection and benefit of the law. All of these challenges are compounded for those who must confront deep-pocketed and powerful adversaries in order to uphold their rights. This is our access to justice problem in a nutshell.

Is reforming legal procedure an effective way to address the access to justice problem? Legal procedure "regulate[s] the sphere of adjudicative institutions," including courts, administrative tribunals, and other bodies that determine rights and resolve disputes.[3] Procedural reform focuses on the way the legal system processes disputes. It can be undertaken by the legislative, executive, or judicial branches of government.[4] Procedural reform is sometimes considered the less ambitious, less charismatic sibling of substantive law reform, which changes legal rights and obligations in the "real world".[5]

Nevertheless, procedural reform is often an attractive option for policymakers looking to improve access to justice. Compared to alternative strategies such as increasing legal aid, creating new administrative agencies, or amending the substantive law, procedural reform often seems to be a cheap and politically straightforward way to improve access to justice. Procedural reform may also be more appealing to powerful constituencies

2 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s 15.

3 Lawrence B Solum, "Procedural Justice" (2004) 78 Scholarly Commons L Rev 181 at 215 [Solum]. This includes the rules and structure of public justice system institutions. It also includes rules about what matters will and will not be subject to those institutions, e.g., judicial review of private arbitration and the jurisdiction of courts.

4 An important example of the latter is the Supreme Court of Canada's ruling in *Hryniak v Mauldin*, 2014 SCC 7, which sought to expand the role of summary judgment across the country and foster a broader "culture shift" in civil procedure. See also Brooke MacKenzie, "Effecting a Culture Shift—An Empirical Review of Ontario's Summary Judgment Reforms" (2017) 54:4 Osgoode Hall LJ 1275 [MacKenzie].

5 Solum, *supra* note 3.

than those alternatives are. Most of those who encounter legal procedure—including corporations and affluent people—have reason to wish it were more speedy, affordable, and accurate than it is.

But can procedural reform actually improve access to justice? If so, how? Answering these questions requires a better understanding of what "access to justice" means, as a normative goal for procedural reform. That is what this article seeks to provide. The thesis is that *better access* to *better justice* is an ambitious, but realistic goal for procedural reform.

Part 2 introduces three major trends in procedural reform: mandatory mediation, smaller-dollar procedure, and inquisitoriality. These are used throughout the article to illustrate the analysis. Part 3 argues that "better access" is achieved when procedural reform reduces the costs and burdens that legal procedure imposes upon those who use, or could use, the system to assert legal rights.

Part 4 turns to "better justice". This is a distinct normative goal for procedural reform, and one that is sometimes overlooked in pursuit of better access. Reform can affect (i) *substantive justice* and (ii) *procedural justice* for parties involved in procedure.[6] Procedure also has the potential to deliver (iii) *public justice* benefits for those who are not directly involved in it.[7] *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* a landmark 1999 workplace discrimination decision of the Supreme Court of Canada, illustrates the capacity of traditional civil procedure to deliver all three aspects of justice.[8] This decision, known as *Meiorin*, did not change Canadian legal procedure, but it is used here to show what's at stake when procedure is reformed in pursuit of access.

Part 5 reunites "better access" and "better justice", tracing the relationship between these two goals. Justice and access can be symbiotic goals for procedural reformers, but they can also be in tension. *Welfarism* offers a way to manage the tradeoffs and prioritization challenges involved in the reform of procedural law. Reformers should learn as much as they can about how the available options will affect individuals, and then try to choose the policy options that will maximize net welfare.

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6 Explaining substantive and procedural justice, see sections 4.B and 4.C, below.

7 Regarding concept of public justice, see section 4.D, below.

8 *British Columbia (Public Service Employee Relations Commission) v BCGSEU,* [1999] 3 SCR [cited to], [1999] SCJ No 463 [*Meiorin*].

2. Three Trends in Procedural Reform

Broad patterns in procedural reform efforts are visible, often extending across jurisdictions. Three trends in procedural reform—mandatory mediation, smaller-dollar procedure, and inquisitoriality—will serve as examples. They will ground this article's argument about access to justice as a normative goal for those who alter legal procedure.

A) Mandatory Mediation

Mediation includes any process in which a neutral party seeks to help disputants reach agreement, without having the power to impose an outcome upon them. Mediation is confidential and conducted in private. Mediators may provide legal evaluation of the parties' positions; they can also facilitate communication between the parties and help them understand their own interests and options.

Mediation of legal disputes began as a purely voluntary option for parties, completely outside of formal legal procedure. However, in the 1980s procedural reformers recognized mediation's potential to bring about reasonably quick and satisfactory resolution of legal disputes. Formal justice system rules were amended to make it obligatory in some cases. When mediation is mandatory—as it is for some civil cases in Alberta and Ontario, and for matters in many administrative tribunals—parties are obliged to participate (although not obliged to settle), as a prerequisite to accessing adjudication.[9] Mandatory mediation may be conducted by judges, in which case it is known as judicial dispute resolution or settlement conferencing.[10]

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[9] *Rules of Civil Procedure*, RRO 1990, Reg 194, R 24.1[*Ontario Rules of Civil Procedure]; Alberta Rules of Court*, AR 124/2010, R 8.4(3)(a)(i). For an example of mandatory mediation in an administrative tribunal, see Rule 9 in Tribunals Ontario, "Landlord & Tenant Board Rules of Procedure (Last modified 2020)," online: *Tribunals Ontario* <www.tribunalsontario.ca/documents/ltb/Rules/LTB%20Rules%20of%20Practice_dec2020.html> [perma.cc/76LC-5XAM].

[10] Jean-François Roberge, "Sense of Access to Justice as a Framework for Civil Procedure Justice Reform: An Empirical Assessment of Judicial Settlement Conferences in Quebec (Canada)" (2016) 17 Cardozo J Conflict Resolution 323 [Roberge]; Archie Zariski, "Judicial Dispute Resolution in Canada: Towards Accessible Dispute Resolution" (2018) 35 Windsor YB Access to Justice 433 [Zariski]; Fabien Gélinas et al, "The Challenges of Participatory Justice for Public Adjudication" in Fabien Gélinas et al eds, *Foundations of Civil Justice* (Berlin: Springer International Publishing, 2015) at 81 [Gélinas et al, "The Challenges of Participatory Justice for Public Adjudication"].

B) Smaller-dollar procedure

A second reform trend sees civil justice systems assigning disputes to procedural categories based on the monetary value of what is in dispute. Cases that involve less money are handled in a way that is meant to be less expensive and time-consuming for the parties and for the justice system, although still reasonably fair. Opportunities for discovery, motions, and trial advocacy may be curtailed. Multiple tracks may be used within a single court, for example simplified and normal procedure in Ontario's *Rules of Civil Procedure*.[11] Lower-dollar-value cases can also be assigned to a different court (e.g. the small claims courts that exist in most common law jurisdictions), or assigned to an administrative tribunal (such as BC's Civil Resolution Tribunal, which has jurisdiction over small claims worth less than CAD$5,000).[12] Smaller-dollar procedure is a straightforward application of the procedural proportionality principle, which holds that the expense and burdens of legal procedure should be proportionate to what is at issue.[13]

C) Inquisitoriality

Inquisitoriality is the third procedural reform trend that this article will analyze in terms of access and justice. Common law jurisdictions have traditionally used *adversarial* legal procedure, the hallmark of which is the passivity of the tribunal and its official representatives. They confine themselves to hearing and ruling on the procedural and substantive claims put forward by the parties.[14] The parties themselves are responsible for initiating the procedure, moving it forward, adducing evidence, and identifying deficiencies in other parties' submissions. More inquisitorial procedure gives the judge or adjudicator a more prominent role in all of these tasks.[15]

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11 Jonathan Silver & Trevor C W Farrow, "Canadian Civil Justice: Relief in Small and Simple Matters in an Age of Efficiency" (2015) 4 Erasmus LR 232.

12 *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 118(1).

13 Colleen Hanycz, "More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform" (2008) 27:1 Civ Justice Q 98 [Hanycz]; J A Jolowicz, "Adversarial and Inquisitorial Models of Civil Procedure" (2003) 52:2 Intl & Comparative LQ 281 [Jolowicz]. Regarding proportionality, see section 5.C.1, below.

14 Elizabeth G Thornburg, "The Managerial Judge Goes to Trial" (2010) 44 U Richmond L Rev 1261 [Thornburg]; Michelle Flaherty, "Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law" (2015) 38:1 Dalhousie LJ 119 at n 4 [Flaherty, "Self-Represented Litigants"].

15 Laverne Jacobs & Sasha Baglay, "Introduction" in Laverne Jacobs & Sasha Baglay eds, *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Surrey, UK: Ashgate, 2013) at 6 [Jacobs & Baglay].

Almost all of Canada's courts and adjudicative tribunals are still basically adversarial in nature. However, adversarialism and inquisitoriality are increasingly recognized as a spectrum,[16] and the recent adoption of techniques such as "managerial judging"[17] and "active adjudication" represent moves toward the inquisitorial pole. Inquisitoriality can mean giving adjudicators more power to fine-tune the procedure that will apply to each matter that comes before them, on a case-by-case basis. Case management, for example, empowers judges to impose timelines, and structure motions and evidence-gathering. More ambitious steps towards inquisitoriality give judges a substantive role in finding evidence.[18] The procedural contexts in which most litigants are self-represented are also the ones in which the recent trend to inquisitoriality is most pronounced.[19]

An example is found in the Informal Trial Pilot Project, ongoing in Kamloops under British Columbia's *Provincial Court Family Rules*.[20] Informal trials are available for parenting (custody and access) disputes, child and spousal support, and family violence protection orders.[21] The judge in an Informal Trial is empowered to question the parties, request expert and lay evidence, waive the rules of evidence, and narrow the issues in dispute.[22]

These three trends—mandatory mediation, smaller-dollar procedure, and inquisitoriality—can be seen in civil, family, and administrative

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16 Michelle Flaherty, "Best Practices in Active Adjudication" (2015) Ottawa Faculty Law No 2015-23 [Flaherty, "Best Practices"]; Flaherty, "Self-Represented Litigants," *supra* note 14; Jacobs & Baglay, *supra* note 15 at 6.

17 Thornburg, *supra* note 14; Judith Resnik, "Managerial Judges" (1982) 96 Harvard L Rev 374 [Resnik].

18 Rollie Thompson, ""Everything is Broken: No More Spousal Support Principles?" (Paper delivered at the Continuing Legal Education Society of British Columbia Family Law Conference, 12 July 2001) [unpublished]; Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal" (2017) 3 McGill J Dispute Resolution 113 at 127 regarding British Columbia's Civil Resolution Tribunal [Salter & Thomas].

19 Jennifer Leitch, "Coming off the bench: Self-represented litigants, judges and the adversarial process" (2017) 47 Advocates' Q 309 [Leitch]; Flaherty, "Self-Represented Litigants", *supra* note 14 at 125. See also John-Paul Boyd, "Family Justice 3.1: Inquisitorial and Abridged Hearing Processes" (20 February 2015), online: *Slaw Canada's Online Legal Magazine* <www.slaw.ca/2015/02/20/family-justice-3-1-inquisitorial-and-abridged-hearing-processes/> [perma.cc/9MTF-F5WX]; Anna E Carpenter, "Active Judging and Access to Justice" (2017) 93:2 Notre Dame L Rev 647; Jolowicz, *supra* note 13 at 281.

20 *Provincial Court Family Rules*, BC Reg 120/2020 [*BC Family Rules*].

21 The informal trial will be available for these matters when they arise under the province's *Family Law Act*. The *BC Family Rules Rules* do not apply to divorces, or to these issues when they arise as a matter for corollary relief under the *Divorce Act*.

22 *BC Family Rules*, *supra* note 20, ss 124–127.

procedure in multiple jurisdictions. Improving access to justice has often been cited as a rationale for these reforms. This makes the three trends helpful aids in this article's effort to better understand what access to justice should mean, as a goal for procedural reform. However, the ambition of this article is to develop "better access to better justice" as a conceptual framework for evaluating any proposed revision to procedure.

3. Better Access: Reduced Procedural Costs

"Better access" is a goal that can be understood before tackling the more complicated idea of "better justice." Better access is achieved when procedural reform reduces the procedural costs confronting those who use (or could use) legal procedure to uphold legal rights.[23] Procedural costs come in three varieties: (i) monetary costs (the legal fees and other sums that justice-seekers pay while using the system), (ii) temporal costs (the time that justice-seekers spend engaging with legal procedure), and (iii) psychological costs (the stress and other negative effects caused by procedure on justice-seekers).[24]

An important preliminary distinction should be made. Procedural costs are not burdens caused by the state of affairs that leads a person to use legal procedure, but rather those occasioned by the procedure itself. For example, the procedural costs of bringing a divorce application do not include the losses occasioned by the actual marital breakdown and separation. They do include the time, money, and stress involved in going to court, retaining a lawyer, and so forth.

Those who initiate legal procedures—e.g., plaintiffs and applicants—must pay procedural costs in order to assert and uphold their legal rights. Respondents and defendants must also pay procedural costs, in order to resist claims that are not supported by the law.[25] Most people with legal problems do not seek legal advice or invoke any formal justice

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[23] This includes those asserting the legal rights of others, such as non-profit organizations with public interest standing to challenge state action. It also includes those pursuing public interest litigation, seeking to move the law forward: Basil Alexander, "Pragmatic Assorted Strategies: How Canadian Cause Lawyers Contribute to Social Change" (2019) 90 Supreme Court L Rev 3. It does not include those who use legal procedure in bad faith, to extort concessions from an adversary by threatening them with procedural costs. (See section 5.A.1, below.) Reducing procedural costs for such parties is not part of the "better access" goal.

[24] Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93 Can Bar Rev 639 ["Semple, Cost of Seeking Civil Justice"].

[25] If a claim is supported by the law, and the respondent or defendant knows this, then reducing the costs that they incur in resisting it is not a legitimate goal for procedural reform.

system procedure.[26] The reasons are complex,[27] but actual and perceived procedural costs are clearly among them. Based on monetary costs alone, lawyers must tell clients that disputes worth less than a certain amount cannot be cost-effectively brought to court. This amount is quite high in jurisdictions with access to justice problems. Ontario lawyer Allison Speigel, for example, wrote in 2017 that

> From a purely economic, risk-management perspective, a civil claim worth less than $75,000 (and that figure is probably low) being brought in the Greater Toronto Area using a local lawyer is rarely worth fighting to a final determination. In most cases, the potential recovery is simply not large enough to justify the risk.[28]

People who are poor or otherwise disadvantaged are most likely to abandon their legal rights in the face of the monetary, temporal, and psychological costs of invoking legal procedure.[29] Making the road to justice easier is not only worthwhile in of itself, but also increases the number of people who will come forward to protect their rights instead of abandoning them.[30]

A) Reducing Monetary Costs

For parties with professional counsel, legal fees are usually the largest source of monetary expense.[31] Expert fees, court filing fees, and other

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[26] Trevor C W Farrow et al, "Everyday Legal Problems And The Cost Of Justice In Canada: Survey" (2016) 12:12 Osgoode Hall Law School Research Paper Series 1. Most do, however, take other steps to try to resolve their problems, such as speaking to the other people involved and seeking advice from friends.

[27] Matthew Dylag, "Informal Justice: An Examination of Why Ontarians Do Not Seek Legal Advice" (2018) 35 Windsor YB Access to Justice 363; Rebecca Sandefur, "What we Know and Need to Know about the Legal Needs of the Public" (2016) 67 South Carolina L Rev 443.

[28] Allison Speigel, "Why you should care that our civil-justice system is broken" (6 Sep 2017), online: *Globe and Mail* <www.theglobeandmail.com/report-on-business/small-business/sb-managing/why-you-should-care-that-our-civil-justice-system-is-broken/article36112054/> [perma.cc/6N6B-NEM9]. It is worth noting that the $75,000 threshold must have increased since 2017. See also Stephen Croley's observation in 2016 regarding the United States: "there are few competent plaintiffs' lawyers who would take a contestable but strong medical malpractice case where the potential damages totaled much less than $200,000." Steven P Croley, *Civil Justice Reconsidered* (New York: New York University Press, 2016) [Croley].

[29] Pamela Herd & Donald P Moynihan, *Administrative burden: policymaking by other means* (New York: NY: Russell Sage Foundation Press, 2018) at 15.

[30] See section 5.A, below.

[31] Semple, "Cost of Seeking Civil Justice", *supra* note 24 at 647; Erik S Knutsen & Janet Walker, "What is the Cost of Litigating in Canada?" in Christopher Hodges, Stephan

expenditures can also be significant in some procedural contexts.[32] Saving parties' money is often a prominent goal for procedural reform, including the three trends identified above.

Mandatory mediation settles cases that would otherwise continue in litigation, and thereby saves legal fees for the parties. It can settle (or partially settle) cases that would otherwise have been adjudicated, but also those that would otherwise have settled months or years later after significant further expenditure.[33] On the other hand, mediation itself costs money—mediator fees in excess of $10,000 per day are not unknown in civil litigation. The parties' lawyers, if they have them, must also be paid to attend mediation. An unsuccessful mediation in a case that goes on to be adjudicated increases overall procedural costs for the parties.[34]

For cases with less money involved, smaller-dollar procedure can reduce the fees occasioned by discoveries,[35] trial, and motion advocacy. Small claims court was designed to make self-representation viable and thereby eliminate parties' legal fees entirely.[36] In some jurisdictions,

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Vogenauer & Magdalena Tulibacka, eds, *The Costs And Funding Of Civil Litigation: A Comparative Perspective* (London, UK: Bloomsbury Publishing, 2010) at 1.

[32] Gerard J Kennedy, "The 2010 Amendments and *Hryniak v Mauldin*: The Perspective of the Lawyers Who Have Lived Them" (2020) 37 Windsor YB Access to Justice 21 at 50–51 [Kennedy]; Anna J Lund, "Litigating On One's Doorstep: Access To Justice And The Question Of Venue" (2019) 56 Alberta L Rev 1040 at 1041 [Lund].

[33] Robert Hann et al, "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report The First 23 Months" (12 March 2001), online: *Osgoode Digital Commons* <digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1142&context=faculty_books> [perma.cc/BU4K-3RDT] [Hann et al]; For a review of the literature about different effects of mediation on settlement rates and costs, see Gélinas et al, "The Challenges of Participatory Justice for Public Adjudication", *supra* note 10 at 91.

[34] Moreover, if mediation settles a case that would otherwise have settled through traditional bilateral negotiation, then the parties' fees may be higher than they would have been without mediation: Hazel G Genn, *Judging civil justice* (Cambridge, UK: New York: Cambridge University Press, 2010) [Kindle edition] at 1405–1406 [Genn]; The prospect of mandatory mediation might diminish the efforts of parties or their lawyers to reach an unmediated settlement: Trevor Farrow, *Civil Justice, Privatization and Democracy* (Toronto: University of Toronto Press, 2014) at 3173–3174 [Kindle edition][Farrow, "*Civil Justice, Privatization and Democracy*"].

[35] Regarding the contribution of discovery to the cost of litigation, see Kennedy, *supra* note 32 at 50.

[36] Amer Mushtaq, "Hurdles for Self-Represented Litigants in Small Claims Court" (23 August 2016), online: *Law Now* <www.lawnow.org/hurdles-for-self-represented-litigants-in-small-claims-court/> [perma.cc/RU8T-MYEB].

including Quebec, lawyers are not permitted to represent parties in small claims court.[37]

Inquisitorial procedure can also reduce the need for legal representation and the associated fees. It is thought that legally inexperienced parties can more easily speak for themselves when they are being prompted and questioned by an adjudicator, who also assumes more responsibility for bringing to light any problems with the adversary's submissions and evidence. If increasing inquisitoriality allows litigants who would otherwise hire lawyers to forego that expense—without affecting their interests in any other way—then such people will have better access as a result of the reform.[38]

B) Reducing Temporal Costs

Seeking civil justice costs parties time, as well as money. Self-represented litigants are especially burdened in this regard, but even those with lawyers spend time in discoveries, mediations, meeting with counsel, etc. Reform delivers better access to the extent that it makes procedure consume smaller quantities of parties' time.

Mandatory mediation often saves the parties time (but can also backfire), for the same reasons that it is expected to save them money.[39] Smaller-dollar procedure generally delivers time savings for lower-value cases, by eliminating portions of the procedure that would otherwise be necessary. In appropriate procedural contexts, inquisitoriality can also reduce temporal costs. A just conclusion might plausibly be reached more quickly if the adjudicator takes a more active role. Within trials and other hearings, an active adjudicator might develop the parties' cases more quickly than they would be able to themselves (especially if they are self-represented.) Case management (another form of inquisitoriality) moves matters forward toward adjudication or settlement and reduces the number of adjournments.

C) Reducing Psychological Costs

Finally, procedural reform improves access when it reduces the psychological costs that procedure imposes on parties. Asserting one's legal

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37 Government of Quebec, "Representation (mandate)" (8 July 2021), online: *Government of Quebec* <www.quebec.ca/en/justice-and-civil-status/small-claims/who-can-sue-or-be-sued/representation-mandate> [perma.cc/E9RV-MTWY].

38 Whether such a person would receive a better substantive result if represented is a different question. That is part of the "justice" analysis rather than the "access" analysis within this article's organization.

39 Section 3.A, above.

rights in the face of opposition is, for most people, stressful and unpleasant to some degree.[40] Formal justice systems are often a source of confusion and frustration for people.[41] Good lawyers and paralegals take over many of the aggravating procedural tasks, and mitigate procedural stress for their clients, but self-represented litigants must bear all of this personally. One way to measure the psychological costs caused by procedure is through surveys asking justice system users about their experiences of the procedure (not the outcome) in their cases. Whether parties perceive the procedure as fair and respectful is highly determinative of their satisfaction with it, and the level of psychological burden it imposes upon them.[42]

Again, all three of the trends identified above are plausible ways for reformers to reduce psychological costs and thereby increase access. Mediation is typically less formal and adversarial than an adjudicative hearing. It does not require people to surrender control to a third party, and it is less likely to produce an all-or-nothing outcome. For these reasons, it is for most people a less stressful way to bring a dispute to an end.[43] Smaller-dollar procedure reduces psychological costs if it curtails or eliminates unpleasant procedural experiences, such as being examined for discovery, in cases with less money at stake.[44] Inquisitoriality is often said to have similar effects, at least on self-represented litigants who

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40 Semple, "Cost of Seeking Civil Justice", *supra* note 24 at 662.

41 Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants" (May 2013) online (pdf): *National Self-Represented Litigants Project* <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> [perma.cc/9UU6-AWMT] at 54 [Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants"]; Margaret Hagan, "A Human-Centered Design Approach to Access to Justice: Generating New Prototypes and Hypotheses for Interventions to Make Courts User-Friendly" (2018) 6:2 Indiana JL & Soc Equality 199 at 208–9.

42 Tom R Tyler, "Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform" (1997) 45 American J Comparative L 871 [Tyler]; Richard Moorhead, Mark Sefton & Lesley Scanlan, "Just Satisfaction? What Drives Public and Participant Satisfaction with Courts and Tribunals" (March 2008), online: *SSRN*, [perma.cc/444U-752D] [Moorhead, Sefton & Scanlan]. That procedure is *actually* fair (and not merely perceived as such by parties) is a distinct normative goal discussed below (Section 4.C).

43 See e.g., Lori Anne Shaw, "Divorce Mediation Outcome Research: A Meta-Analysis" (2010) 27:4 Conflict Resolution Q 447 at 448. However, some scholars note that mediation's lower psychological burden does not apply universally and consistently. See e.g., Nancy A Welsh, "Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation" (2017) 70 SMU L Rev 721.

44 Michaela Keet, Heather Heavin & Shawna Sparrow, "Anticipating And Managing The Psychological Cost Of Civil Litigation" (2017) 34 Windsor YB Access to Justice 73 at 77.

would struggle to make their own cases in a pure adversarial format.[45] If inquisitorial procedure allows an SRL to tell their story and answer an adjudicator's questions in a more natural and conversational way, it can be less stressful and difficult for them than formal adversarial procedure.[46] On the other hand, inquisitoriality might have the opposite effect if it creates the impression that the adjudicator is not truly neutral, not willing to listen to a party, or not respectful of them.

4. Better Justice

It would be easy for reformers to improve access alone. All legal procedure could be replaced with coins, which would be flipped to resolve each and every legal dispute.[47] This procedure would be cheap, quick, and stress-free for the parties. The result would be highly accessible dispute resolution, but justice would play no part in it.

It is *justice* to which legal procedure must give people *access*. What then is justice, as a normative goal for procedural reform? I propose that it has three distinct dimensions, which are explained in sections 4.2 through 4.4 of this article:

(i) *Substantive Justice.*[48] Adjudicated outcomes of legal disputes should deviate as little as possible from the outcomes that would be legally correct. Procedure should not skew settlement outcomes away from those that the law would provide.[49]

(ii) *Procedural Justice.*[50] If an outcome is to be imposed on disputants, then the decision-maker should be neutral and unbiased, should

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45 See e.g., Flaherty, "Best Practices", *supra* note 16 at 294 and Leitch, *supra* note 19 at 19.

46 See Tyler, *supra* note 42 at 887 regarding the importance of voice and participation to litigants. See also Flaherty, "Best Practices", *supra* note 16 at 296; Fabien Gélinas et al, "Architecture, Rituals, and Norms in Civil Procedure" (2015) 32 Windsor YB Access to Justice 213 [Gélinas et al, "Architecture, Rituals, and Norms in Civil Procedure"]. See also the discussion of "therapeutic jurisprudence" in Lorne Sossin & Samantha Green, "Administrative Justice and Innovation: Beyond the Adversarial Inquisitorial Dichotomy" in Laverne Jacobs & Sasha Bagley eds., *The Nature of Inquisitorial Processes in Administrative Regimes*: *Global Perspectives* (Surrey, UK: Ashgate, 2013).

47 Janet Walker & Lorne Sossin, *Civil litigation* (Toronto: Irwin Law, 2010) at 1.

48 Section 4.B, below.

49 Substantive justice is defined here in terms of deviation from the law as it stands at the time when the procedure is used. The ability of procedure to *improve* the law is a distinct source of value, this is part of Public Justice and discussed in section 4.D, below.

50 Section 4.C, below.

hear the parties before deciding, and should provide reasons for their decision.[51]

(iii) *Public Justice.*[52] Legal procedure has the potential to advance the interests of those who are not directly involved in it.[53] Procedure should inform non-parties about the law, allowing them to structure their affairs around it. It should also deter intentional breaches of the law and make the substantive law better by creating new precedent.

A) Many-Splendored Justice: *Meiorin*

The *Meiorin* case, which was decided by the Supreme Court of Canada in 1999,[54] illustrates the potential of legal procedure to deliver all three aspects of justice. This case was not about legal procedure, and the precedent did not change procedure in Canada. However, the traditional civil procedure deployed in this case generated a highly comprehensive form of justice, which access-enhancing procedural reforms may compromise.

In 1991, Tawney Meiorin took a job as a forest firefighter, working for the Government of British Columbia. Over the next three years, she consistently received good employment reviews. She later said that she loved the work and had never had a job that she was more passionate about.[55]

Three years later, the Government of BC introduced mandatory fitness tests for firefighters. This move was a response to a 1991 Coroner's Inquest Report, which recommended more scrutiny of firefighters' fitness in order to reduce their risk of death or injury. One of the new tests required all firefighters to run 2.5 kilometers in 11 minutes. Due to physiological differences, significantly fewer women than men can pass this test. While fitness testing in general was an evidence-based way to improve safety for firefighters, there was no evidence that this specific standard for running speed was necessary for safe and effective firefighting.

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51 This is the ideal of "natural justice." The extent to which it can be realized depends on the context in which the decision is being made: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [cited to], 174 DLR (4th) 193 [*Baker*].

52 Section 4.D, below.

53 Farrow, "*Civil Justice, Privatization and Democracy*", *supra* note 34 at 4228–4230.

54 *Meiorin*, *supra* note 8.

55 BCGEU, "Step Up: The Tawney Meiorin Story" (25 Jan 2018) online (video): *YouTube* <www.youtube.com/watch?v=XMk_aqzOQYs>. [perma.cc/NSU6-TZV6]

Tawny Meiorin was unable to pass the test. Her fastest time exceeded the mark by 49.4 seconds. She was laid off, with no prospect of rejoining her crew unless she could meet the standard. Her union, the BCGSEU,[56] brought a grievance challenging the lay-off. The arbitrator ordered that Meiorin be reinstated, with compensation for lost wages. The British Columbia Court of Appeal reversed that decision, and the BCGSEU appealed to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeal, restoring the arbitrator's decision. Section 13 of the BC *Human Rights Code* provided (as it still does) that employers must not discriminate between employees on the basis of gender, among other attributes.[57] If employees with an attribute protected by the *Code* find it more difficult than other employees to fulfil a certain test required by the employer, then that test may be considered discriminatory, regardless of the reasons why the test was introduced. However, the *Code* also states that discriminating between employees based on "bona fide occupational requirements" is not a violation of their human rights.

The Supreme Court of Canada had to determine whether or not the aerobic fitness test that Tawny Meiorin and the other firefighters were required to take was a bona fide occupational requirement. Writing on behalf of the entire Court, Madam Justice McLachlin (as she then was) took the opportunity to establish a new legal framework for workplace discrimination disputes. The previous law, which was based on a distinction between "direct" and "adverse effect" discrimination, was found by Justice McLachlin to be complex, unnecessarily artificial, and contrary to the broader goals of human rights legislation.[58] The judgment in *Meiorin* established a new test for determining whether a certain workplace standard, which has a discriminatory effect, is a bona fide occupational requirement. Justice McLachlin found that the aerobic fitness standard did have a discriminatory effect, and the British Columbia Government had not provided any evidence that loosening the standard (and thereby diminishing the discriminatory effect) would impose undue hardship in the form of less safe or less efficient firefighting. The order of the Arbitrator was restored, and costs were awarded to the BCGSEU.

1) Access and Justice in *Meiorin*

The procedure applied to *Meiorin* involved (i) a hearing before the British Columbia Labour Arbitration Board, (ii) an appeal heard by a panel of three

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56 British Columbia Government and Service Employees' Union.

57 *Human Rights Code*, RSBC 1996, c 210.

58 *Meiorin*, *supra* note 8 at para 25.

judges at the British Columbia Court of Appeal, and (iii) a further appeal heard by all nine justices of the Supreme Court of Canada. This procedure undoubtedly imposed high financial, temporal, and psychological procedural costs on the parties. It was not an "accessible" procedure as that term was defined above. Had Tawney Meiorin not been a member of a union prepared to invest in public interest litigation, the matter would have ended with a whimper rather than a bang. Applying anything like this procedure to more than a tiny fraction of the legal disputes that arise in a country like Canada each year is impossible. Nevertheless, *Meiorin*'s procedure also seems to have generated a very thoroughgoing type of justice. The case is used below to illustrate the substantive, procedural, and public justice benefits that legal procedure would, in an ideal world, generate. If reformers care about access to justice and not only access, then they must consider how potential reforms affect the capacity of procedure to produce the many-splendored justice that *Meiorin* produced.

B) Substantive Justice

Substantive justice is the first aspect of justice that procedure should deliver. The substantive law paints a picture of the world as it should be, according to the legislator. It makes promises to people about their rights, and about the remedies that they should receive if those rights are breached. When legal procedure terminates in adjudication, substantive justice is achieved if an order that is in line with the law on the books is made and complied with.[59]

For example, the British Columbia *Human Rights Code* promised that Tawney Meiorin would not be subjected to workplace discrimination. As a result of the *Meiorin* procedure, she was reinstated to her position and compensated for the wages and benefits that she lost. Justice McLachlin suggested that this would have been the outcome even under the old law, if it had been applied correctly by the British Columbia Court of Appeal. There is no reason to believe that this outcome was erroneous. Nine judges of the Supreme Court of Canada concurred in it, in addition to the arbitrator who first heard the dispute.

Procedural reform affects substantive justice when it changes the number or severity of adjudicative *errors* generated by the system. Adjudicative errors are discrepancies between the rulings generated by the system, and correct outcomes based on the law at the time. They can arise from mistakes about facts, mistakes about the law, or mistaken application of law to facts. Saying exactly what is and is not legally correct is a matter

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[59] Regarding the distinct but also valuable potential of legal procedure to *improve* the substantive law, see section 4.D.1, below.

of theory beyond the scope of this article. However, a few points can be made here to elucidate the concept of substantive justice as a goal for procedural reform.

First, error and substantive injustice in an adjudicated outcome are matters of degree. Suppose that, following a divorce, two children live with one of their parents full-time. The other parent earns $60,000 per year. On these facts, the federal *Child Support Guidelines* indicate that the parent who does not live with the children should pay child support of $915.00 per month to the other parent.[60] If a family court orders a child support amount greater or smaller than $915.00 per month, that order is substantively unjust to the extent that it differs from $915.00 per month.

Second, sometimes multiple outcomes within a range would all be free of substantive error. For example, consider a typical dispute about damages from a motor vehicle accident. The insurer is legally required to compensate the victim for the income they will lose, over the course of their life, as a result of the accident. Unlike in the child support example above, the exact dollar amount necessary to do substantive justice cannot be precisely fixed at the time of the litigation. This is because, at the time of the trial, it is unknowable precisely how the victim's earning capacity will develop over time, and unknowable precisely how much the victim would have earned if the injury had not occurred. However, there are certain amounts that clearly exceed the largest lifetime income loss the person could possibly have experienced. There are also amounts that are clearly smaller than the smallest possible amount that the victim might end up having lost as a result of the injury. If a civil trial culminates in an award of damages outside the zone of possibility, then a substantive error has been generated by this procedure.[61]

Likewise, some cases clearly belong in one or another legal category, but for other cases the law provides no clear answer. For example, Canadian law states (roughly speaking) that refugee status should be conferred on any individual who has a "well-founded fear of persecution" based on certain characteristics.[62] On some sets of facts, the law does not clearly say whether or not this threshold is met. If every single relevant fact about a certain refugee claimant were known, reasonable people might still sincerely disagree about whether the claimant's subjective fear

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60 *Federal Child Support Guidelines*, SOR/ 1997-175. This simplified example is based on the assumption that none of the factors that would change the amount owed (e.g., special expenses or imputed income) are present.

61 In some cases, the law and/or the facts may be so indeterminate that the zone of possibility is very large, covering almost anything that a court might order.

62 *Singh v Minister of Employment and Immigration,* [1985] 1 SCR 177, 17 DLR (4th) 422.

of prosecution is "well-founded" or not. In these cases, neither of the possible outcomes (conferring or denying refugee status) is substantively erroneous. However, in other cases, if all the facts were known, one outcome would clearly be legally correct. The Immigration and Refugee Board should get it right in as many as possible of those cases in which there is a legally correct answer. The procedure that the Immigration and Refugee Board uses may affect its ability to do so.

It is desirable for adjudicative bodies to generate predictable and consistent outcomes—to treat like cases alike.[63] Again, the procedure they use may affect their consistency. However, inconsistency of outcomes between two cases with identical facts does not necessarily indicate any substantive injustice. If both outcomes are within the legally correct range, or if the substantive law provides no clear answer on the facts, then the procedure cannot be blamed for the inconsistency.

How does the concept of substantive justice apply to settlements? Consensual resolutions should not be considered substantively unjust just because the terms would be substantively erroneous if they were imposed through adjudication. For example, if the divorcing parents described above agree on a child support amount that is not $915.00 per month, it does not necessarily follow that any substantive injustice has occurred. The payor parent might agree that a larger amount is necessary to provide properly for the children. The recipient parent might accept a smaller amount in exchange for concessions in some other part of a global separation agreement between the parties.[64]

However, it is equally clear that procedural reform can skew the outcomes of settlement in a way that should matter to reformers. For example, if it becomes more affordable for plaintiffs to take civil cases all the way to trial, and average settlement outcomes therefore move closer to the outcomes that courts would impose, then substantive justice

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63 Australia & New Zealand, Council of Australasian Tribunals, *Australia and New Zealand Tribunal Excellence Framework*, (Darlinghurst, NSW, Australia: COAT, 2017) at 7 [Council of Australasian Tribunals]; Lorne Sossin, "Designing Administrative Justice" (2017) 34 Windsor YB Access to Justice 87 at 97; Ian Mackenzie, "Noise" and Decision-Making—Why Consistency in Decisions Matters" (15 July 2021), online: *Canada's Online Legal Magazine* <www.slaw.ca/2021/07/15/noise-and-decision-making-why-consistency-in-decisions-matters/> [perma.cc/C94U-PZQF].

64 Settlement can produce arrangements that all parties prefer to anything a court might order; this is one of the chief advantages of settlement. See e.g., Carrie Menkel-Meadow, "For And Against Settlement: Uses And Abuses Of The Mandatory Settlement Conference" (1985) 33 UCLA L Rev 485 at 487.

has improved as a result of procedural reform.[65] If procedural reform skews the average settled outcome closer to the range of outcomes that the substantive law would require, then it has improved the system's substantive justice performance.

Substantive justice, then, is about the capacity of procedure to minimize deviation between the real-world outcomes of disputes, and the outcomes that the substantive law promises. This means minimizing adjudicative error, and also minimizing deviation between average settlement outcomes and the outcomes that are substantively just. Substantive justice in a particular case is primarily an interest of the parties themselves, but it is not exclusively theirs.[66] We turn now to examine the three exemplary procedural trends in terms of their effect on substantive justice.

1) Mandatory Mediation and Substantive Justice

Some of the cases that settle in mandatory mediation would otherwise have gone to trial or some other form of adjudication.[67] Like any contract, the terms of a settlement agreement reached in mediation often reflect the balance of power between the parties.[68] A party with deep pockets can afford to hold out for favourable terms, while its shallower-pocketed adversary might feel compelled to compromise their legal rights in order to end the procedure quickly.[69] It has been argued that mandatory mediation makes weaker parties vulnerable to substantively unjust settlements, whereas moving more quickly to adjudication would increase the likelihood of substantive justice being done.[70] For example, in mediation of a family matter, an abusive spouse might intimidate or threaten the other to extract consent to terms that are not in line with the law.[71]

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65 For more regarding the relationship between procedural costs and settlement, see section 5.A, below.

66 For example, illegal employment terminations and rental housing evictions increase demands on state-funded welfare programs. Ensuring substantive justice for employees and tenants saves public funds. See e.g., Croley, *supra* note 28 at 54. See also note 23 regarding "public interest" cases in which parties assert the legal rights of non-parties.

67 See e.g., Hann et al, *supra* note 33. However, the settlement rate does not appear to be as high as it is in voluntary mediation programs: Vicki Waye, "Mandatory mediation in Australia's civil justice system" (2016) 45:2 Common L World Rev 214.

68 Ilan G Gewurz, "(Re)Designing Mediation to Address the Nuances of Power Imbalance" (2007) 19:2 Conflict Resolution Q 135 [Gewurz].

69 RH Mnookin & L Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale LJ 950 at 966–73; Genn, *supra* note 34 at 1148–1150.

70 Richard Delgado, "Alternative Dispute Resolution: A Critical Reconsideration" (2017) 70:3 SMU L Rev 595.

71 Lisa G Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 Harvard Women's LJ 57 at 72;

On the other hand, mandatory mediation also settles some cases that would otherwise have been settled by the parties alone, or abandoned by the plaintiff. The presence of a mediator might nudge the parties toward a settlement that is more consonant with the substantive law than the outcome that would result from an unmediated settlement. If a party in a mandatory mediation asserts a position that is clearly out of line with the law, the mediator can say so. This is one of the hallmarks of the "evaluative" approach to mediation, and it has the effect of pushing settlements toward the zone that the substantive law would endorse.[72] Mediations involving unrepresented parties and conducted by judges or other public officials are especially likely to be evaluative and oriented toward the substantive law.[73]

For an example, consider parenting disputes following divorce or separation. The substantive law states that parenting arrangements are to be made with exclusive reference to the best interests of the child(ren) involved. However, arrangements negotiated by unrepresented parties without mediation may skew away from those that would be best for the children, instead favouring the interests of the parents—especially the parent who is more assertive or has a stronger bargaining position.

While mediators must remain neutral and cannot impose outcomes, in some situations they have leeway to steer negotiations toward outcomes that are in line with the law. For example, they can "level the playing field" by identifying clear legal entitlements and making sure both parties are fully heard (especially when they are unrepresented).[74] Cases in which extreme power imbalance renders mandatory mediation inappropriate may be screened out and adjudicated instead.[75]

2) Smaller-Dollar Procedure and Substantive Justice

There is a reason why traditional adversary procedure includes unlimited discovery, trial evidence, and motions. These opportunities allow the

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Martha J Bailey, "Unpacking the Rational Alternative: A Critical Review of Family Mediation Movement Claims" (1989) 8 Can J Family L 61 at 69 ; Noel Semple, "Mandatory Family Mediation and the Settlement Mission: A Feminist Critique" (2012) 24 Can J Women & L 207 at 216 [Semple, "Mandatory Family Mediation"].

72 Wayne D Brazil, "A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values" (1990) 1990:1 U Chicago Leg Forum 303 at 330.

73 Zariski, *supra* note 10 at 444–5.

74 Semple, "Mandatory Family Meditation", *supra* note 71 at 229.

75 Gewurz, *supra* note 68 at 136.

parties an open-ended search for the truth.[76] Every relevant question can be asked; every relevant witness can be called; every opportunity is afforded to ensure the process is fair.

Because smaller-dollar procedure curtails some or all of this for lower-value cases, it might lead to more, and more serious, substantive errors if applied indiscriminately. For example, Ontario's Simplified Procedure limits oral examinations for discovery to three hours per party,[77] whereas seven hours are allowed under normal procedure.[78] A six or seven-hour examination might uncover relevant facts (that would not come to light in the first three hours), which would bring the outcome of a case closer to substantive justice.

The costs decision in *Elmardy v Toronto Police Services Board et al* provides an interesting example.[79] The plaintiff had successfully sued the police for assault, battery, and wrongful arrest. He used the normal civil action procedure, even though the monetary value of his damages was only $27,000. According to the *Rules,* Mr. Elmardy should have used Simplified Procedure given the amount at stake. His failure to do so presumptively disentitled him to a costs award, according to Rule 76.13.

However, the Court found that it was reasonable for the plaintiff to use the ordinary procedure despite its apparent disproportionality. "Pinning" the police officer to his story took longer than the two hours of examination allowed under Simplified Procedure, and cross-examining him took more than the 50 minutes that would have been allowed. The Court granted Elmardy an unreduced cost award of $60,000.

The use of Simplified Procedure by the plaintiff and his counsel would likely have led to a substantively unjust outcome, and the approach they had to take to avoid this outcome was risky. If the lengthy examinations had not turned out to be necessary, then the normal costs penalty for avoiding Simplified Procedure would likely have applied. The plaintiff would then have been stuck with a legal bill more than twice as large as the damages payment he received from the defendant. Smaller-dollar procedure, notwithstanding its potential to improve access, can also threaten substantive justice in some cases.

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76 Gélinas et al, "Architecture, Rituals, and Norms in Civil Procedure", *supra* note 46 at 228.

77 *Ontario Rules of Civil Procedure*, *supra* note 9, R 76.04(2).

78 *Ibid* at R. 31.05.1

79 *Elmardy v Toronto Police Services Board et al*, 2015 ONSC 3710.

3) Inquisitoriality and Substantive Justice

The effects of inquisitoriality on a system's substantive justice performance are complex. There is a long-running debate over the respective merits of adversarial and inquisitorial systems, in terms of minimizing errors in adjudication.[80] At the risk of oversimplification, relatively pure adversarial procedure seems apt to produce substantive justice when the parties are willing and able to provide the tribunal with the facts and law necessary to reach a just conclusion.[81] When they are not—for example because parties are self-represented or unable to provide the necessary evidence—the case for inquisitoriality as a route to substantive justice becomes stronger. If the parties fail to take the right procedural steps, ask the right questions, or lead the right evidence, the court can "pick up the slack".[82] Assuming that the decision-maker is neutral and competent, active adjudication "can help ensure that the outcome of cases turns on their merits, not on the parties' relative ability to navigate the legal system."[83]

C) Procedural justice

Suppose a court ascertains the true facts, applies the law to them correctly, and makes an order that is obeyed. Can the parties nonetheless have any legitimate basis to complain about the procedure that the court used for their matter? The answer in common law jurisdictions is yes. Procedural justice is recognized as a distinct and independently valuable goal for legal procedure.

Procedural justice exists to the extent that parties whose dispute is adjudicated have the opportunity to be heard by a neutral decision-maker and provided with reasons for the decision. Two ancient principles stand to this day as its pillars.[84] *Audi alteram partem* ("hear both sides")

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80 Fabien Gélinas et al eds., *Foundations of Civil Justice* (Berlin: Springer International Publishing, 2015) at 66–71 citing Michael Block et al, "An Experimental Comparison of Adversarial versus Inquisitorial Procedural Regimes" (2000) 2 American L & Economic Rev 170 and Lon L Fuller, "The Adversary System" in Harold J Berman, rev ed, *Talks on American Law* (New York: Random House Trade Paperbacks, 1972) [Gélinas et al citing Block & Fuller].

81 Chulyoung Kim, "Adversarial and Inquisitorial Procedures with Information Acquisition" (2013) 30:4 JL, Economics, & Organization 767.

82 Jolowicz, *supra* note 13; Jacobs & Baglay, *supra* note 15 at 8; Gélinas et al citing Block & Fuller, *supra* note 80 at 71.

83 Flaherty, "Best Practices", *supra* note 16 at 296. See also *Morwald-Benevides v Benevides*, 2019 ONCA 1023 at para 34: "It is no longer sufficient for a judge to simply swear a party in and then leave it to the party to explain the case, letting the party flounder and then subside into unhelpful silence".

84 *Kane v Board of Governors of UBC,* [1980] 1 SCR 1105, 18 BCLR 124.

underpins a party's rights to be notified of allegations and evidence against them, to make submissions, to adduce evidence, to cross-examine, and to retain legal counsel.[85] *Nemo iudex in causa sua* ("no one should be the judge of their own cause") entitles a party to a neutral and impartial decision-maker, without actual or reasonably apprehended bias,[86] who gives reasons for their decision(s).

Providing procedural justice increases the likelihood that substantive justice will be done. The decisions of a tribunal that ignores parties' relevant submissions are not likely to be accurate vis-à-vis the substantive law.[87] No more so are those of a tribunal that is unable to independently apply the law, due to interference by powerful people.[88] Parties are also more likely to comply with the decisions of a tribunal that afforded them procedural justice.[89]

Procedural justice is also a way to improve access, by reducing psychological costs. As noted above, *perceived* procedural unfairness drives up the psychological costs imposed by procedure.[90] Feeling that one was fully heard by a truly neutral third party reduces the psychological burden of legal procedure (and therefore increases its accessibility).[91]

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85 Allan C Hutchinson, "How Civil Procedure Fails (And Why Administrative Justice is Better)" (2021) 43:2 Manitoba LJ [Hutchinson].

86 Leitch, *supra* note 19; Flaherty, "Self-Represented Litigants", *supra* note 14 at 135.

87 Formulating written reasons also, plausibly, increases the chance that a decision will be substantively just: *Baker*, *supra* note 50 at para 39.

88 Ron Ellis has argued that Canadian administrative justice is flawed because tribunals lack independence from government. See Ron Ellis, *Unjust by Design: Canada's Administrative Justice System* (Vancouver: UBC Press, 2013). Identifying independence as an attribute of excellence for administrative tribunals, see Council of Australasian Tribunals, *supra* note 63.

89 Fair procedures placate unsuccessful parties, argues Hutchinson, *supra* note 85 at 41. See also Roberge, *supra* note 10 at 343; Tyler, *supra* note 42.

90 *Supra* note 41, above, and accompanying text.

91 E Allan Lind & Tom R Tyler, *The Social Psychology of Procedural Justice* (Dordrecht: Springer, 1988); Moorhead, Sefton & Scanlan, *supra* note 42 at 7; Zariski, *supra* note 10.

92 Solum, *supra* note 3 at 183. See also *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223 (entered into force 3 September 1953) and Genn, *supra* note 34 at 241–242; Nayha Acharya, "Deciding, 'What Happened?' When We Don't Really Know: Finding Theoretical Grounding for Legitimate Judicial Fact-Finding" (2020) 33 Canadian JL & Jurisprudence 1.

However, procedural justice is also intrinsically desirable in of itself,[92] even if it must be compromised with other aspects of justice and access.[93] Not only should parties *feel* that are fully heard by a neutral decision-maker, this should actually be the case. In criminal procedure and administrative tribunals, providing some level of procedural fairness to parties is generally a constitutional obligation for the state. In the context of civil and family procedure, these considerations are not so explicitly constitutionalized, but procedural justice is still valorized.[94]

Once again, the civil procedure used in *Meiorin* is an exemplar of procedural justice, despite its shortcomings in terms of accessibility.[95] Before three adjudicative bodies, the parties had ample opportunities to present any and all submissions they considered relevant. The right to appeal is an aspect of *audi alteram partem*, and two appeals were argued in this case. There is no reason to question the neutrality of any of the 13 decision-makers who participated. Supreme Court of Canada and British Columbia Court of Appeal judges have very strong constitutional protections to ensure neutrality,[96] and a well-established tribunal such as the British Columbia Labour Arbitration Board is scarcely less reliable in this regard.

1) Mandatory Mediation and Procedural Justice

How do our three procedural innovations affect this aspect of justice? Mandatory mediation—so long as it is true mediation in which no outcome can be imposed—has no effect.[97] Procedural justice is about the circumstances in which *adjudicated outcomes* can legitimately be imposed upon parties.[98] So long as parties who do not choose to settle within mediation (and go on to have their disputes adjudicated) are afforded

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93 In Canada, superior courts are required to provide a fulsome level of procedural justice (sometimes known as "natural justice"). Administrative decision-makers and inferior courts are allowed to provide a compromised version in which, for example, the time allowed for presenting one's case can be curtailed. See *Baker, supra* note 51.

94 See e.g., *Endean v British Columbia*, 2016 SCC 42 at para 92.

95 This is not necessarily to say that the parties perceived the process to be fair or experienced it as such. In this article's rubric, those considerations are part of psychological procedural costs (see section 3.C, above).

96 *Ref re Remuneration of Judges of the Prov Court of PEI; PEI re Independence and Impartiality of Judges of the Prov Court of PEI,* [1997] 3 SCR 3, 150 DLR (4th) 577.

97 This is not to deny that mediation can enhance *perceived* procedural justice, insofar as it gives parties the opportunity to be heard by their adversaries and by a neutral party.

98 This is not to deny that hearing both sides and ensuring the neutrality of the third party are worthy goals in non-adjudicative contexts as well, such as mediation.

the right to be heard by a neutral decision-maker who provides reasons, procedural justice is not implicated.

2) Smaller-Dollar Procedure and Procedural Justice

The procedure applied to smaller-dollar disputes typically compromises, to some extent, the bundle of rights involved in *audi alteram partem*. If a party has a relevant question to ask of a witness, but is prevented from doing so because she has exhausted the time allotted to her during examinations for discovery under the smaller-dollar procedure, then it seems clear that her right to be heard has been curtailed.[99] Removing a party's right to seek a civil jury trial (another feature of many small-dollar procedural tracks)[100] also constitutes a limitation on their procedural rights. The other half of procedural justice (*nemo iudex)* need not be affected by smaller-dollar procedure, unless disputes are transferred from truly impartial adjudicators to adjudicators who are less so.

3) Inquisitoriality and Procedural Justice

The traditional view is that inquisitoriality endangers procedural justice. It requires adjudicators to make *more* decisions than they would in the pure adversarial mode, including decisions about litigation timetables, limiting testimony, and calling witnesses. Such decisions will often be made quickly, early in a case, with little opportunity to hear from the parties beforehand, and no written reasons.[101] This has ramifications not only for *audi alteram*, but also for *nemo iudex.* Judith Resnik describes these fast-paced micro-decisions as a "fertile field" for personal judicial bias, with rulings being driven by judges' personal hunches, sympathies, or antipathies for litigants.[102] If an inquisitorial approach makes the adjudicator more personally familiar with the parties and their lawyers, the risk may be augmented.[103] In the words of one jurist, the activist judge who "descends into the arena" might "have his vision clouded by the dust of conflict."[104]

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99 Hutchinson, *supra* note 85.

100 E.g., *Supreme Court Civil Rules*, BC Reg 168/2009, R 15.1(10) and *Ontario Rules of Civil Procedure*, *supra* note 9, R 76.02.1.

101 E Donald Elliott, "Managerial Judging and the Evolution of Procedure Symposium on Litigation Management" (1986) 53 U Chicago L Rev 306 at 317; Thornburg, *supra* note 14.

102 Resnik, *supra* note 17.

103 Thornburg, *supra* note 14 at 1289–91.

104 Lord Greene MR, in *Yuill v Yuill,* [1945] 1 All ER 183, 61 TLR 176. See for example *Hazelton Lanes Inc v 1707590 Ontario Limited*, 2014 ONCA 793.

The interventions of an inquisitorial adjudicator do not usually fall with equal favour on all the parties to a dispute. Commentators call on adjudicators to help the party who needs assistance more, in particular a self-represented litigant confronting a represented adversary.[105] A party who watches the adjudicator help their adversary in this way, without receiving the same benefit, is likely to find their confidence in fairness of the procedure challenged. The traditional passivity of the adversarial system is an easy way for a judge to project neutrality, even if it is not the only way to avoid reasonable apprehension of bias.[106]

However, more recently some scholars have come to see inquisitoriality as compatible with, or even complementary to procedural justice, especially in fora dominated by parties without counsel. Is a self-represented litigant's right to be heard really fostered by an adjudicator who sits back in perfect passive neutrality, and gives the person all the time they want to make submissions and ask questions that do not actually state their case at its strongest? There is an emerging model of *substantive impartiality,* whereby "differently situated parties might be treated differently so that an adjudicator is able to ensure that the legal system is fair and navigable to all parties."[107]

Michelle Flaherty suggests that neutrality is a challenging goal for active adjudicators, but one that is realizable with appropriate training and guidelines.[108] The effect of inquisitoriality on procedural justice, like the other effects identified by this paper, seems to be highly dependent on procedural context. Ideally, inquisitoriality will be deployed intelligently by system designers and individual adjudicators to produce better results in appropriate cases—in particular those involving SRLs.

D) Public Justice

Justice, as a goal for procedural reform, also encompasses interests that are broader than substantive and procedural correctness.[109] By providing information about the law, deterring illegal behaviour, and helping the substantive law evolve, legal procedure can and should deliver benefits for

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105 *Pintea v Johns*, 2017 SCC 23; Lund, *supra* note 32 at 1075–6; Flaherty, "Self-Represented Litigants", *supra* note 14 at 125; *Grand River Conservation Authority v Ramdas*, 2021 ONCA 815 at para 21.

106 Leitch, *supra* note 19.

107 Flaherty, "Self-Represented Litigants", *supra* note 14.

108 Flaherty, "Best Practices", *supra* note 16 at 299–300.

109 Farrow, "*Civil Justice, Privatization and Democracy*", *supra* note 34 at 4228–4230; Alan Uzelac, "Goals of Civil Justice and Civil Procedure in the Contemporary World" in *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Switzerland: Springer Cham, 2014).

those who are never personally involved in it. While the legislative branch of government takes the lead, important supporting roles in generating public justice benefits must be played by the courts of the judicial branch and the adjudicative administrative tribunals of the executive branch.

Meiorin illustrates the potential of procedure to deliver public justice. The case is considered a landmark not because of the substantive or procedural justice that it delivered for the parties, but rather because of what its amendment to the law of workplace discrimination did for everyone else. Procedural reform affects the capacity of courts and tribunals to do this sort of work. Reformers must weigh the effects of their plans on public justice, along with the other dimensions of access and justice described above.

Non-parties are not affected as directly as parties are by the characteristics of legal procedure, and they are certainly less cognizant that their interests are affected by it. However, the number of people who become personally involved in legal procedure is very small compared to the number who resolve disputes "in the shadow of the law" without invoking its formal mechanisms.[110] Even larger numbers avoid disputes entirely by consulting the law, and larger numbers still enjoy the peace, prosperity, and stability that the rule of law supports.[111] Thus, the conspicuous interests of parties in substantive and procedural justice are like the visible tip of an iceberg. The submerged bulk consists of the many non-parties who are affected by the way legal procedure works or fails.

1) Components of Public Justice

First, legal procedure *informs* interested people about the substantive law, primarily through written decisions. This allows them to avoid and settle disputes in the shadow of the law.[112] This is why reasons for decision are not only provided to the parties (as may be required by procedural justice), but also made publicly available. The Supreme Court of Canada's *Meiorin* ruling, for example, was well-publicized in the media, and quickly given a prominent place in legal texts for employment and human rights lawyers as well as training materials for managers. The decision was unanimous and relatively easy to understand. The British Columbia Human Rights Code language that *Meiorin* interpreted is also found in the human rights legislation of most other provinces and territories,

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110 Zariski, *supra* note 10 at 445.

111 Michael Trebilcock, "The Price of Justice" in Trevor Farrow & Les Jacobs eds, *The Cost and Value of Justice* (Vancouver: University of British Columbia Press, 2018); Genn, *supra* note 34 at 104.

112 See Solum, *supra* note 3 at 188.

and so the legal information provided by the decision was useful across the country. For employers seeking to comply with the law, the *Meiorin* judgment continues to help them understand how to do so. Authoritative precedents help people predict what a judge would do if confronted with "their" facts.[113]

For those who might intentionally breach the law, legal procedure should also encourage compliance.[114] It should create a credible threat that acts or omissions contrary to the substantive law will generate consequences and remedies.[115] After *Meiorin,* an employer *intending* to impose discriminatory (or potentially discriminatory) workplace requirements faced a more significant risk of legal resistance, at least in unionized workplaces.[116] The clear new precedent meant that the rights of employees could be more quickly and affordably vindicated by arbitrators and lower courts. Apart from deterrence, legal procedure might also promote compliance by improving respect for the law.[117]

Finally, legal procedure should help the substantive law develop. Especially in common law jurisdictions, courts do not only apply substantive law; they also create it.[118] If the system works as it should, substantive legal rules rendered obsolete by changing social or economic conditions will be modified on the basis of the facts that litigants bring to court. As David Luban famously wrote, "litigants serve as nerve endings registering the aches and pains of the body politic, which the court attempts to treat by refining the law."[119] High-level legal principles established by legislatures (such as the rights guaranteed by the *Canadian Charter of Rights and Freedoms*) can be fine-tuned by judges for diverse

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113 Regarding predictability as a goal of procedure, see Council of Australasian Tribunals, *supra* note 63 at 7.

114 Ivo Teixeira Gico, "The Tragedy of the Judiciary: An Inquiry into the Economic Nature of Law and Courts" (2020) 21:4 German LJ 644 [Gico].

115 C H Van Rhee, "Civil Justice in Pursuit of Efficiency" in Alan Uzelac ed., "Goals of Civil Justice and Civil Procedure in the Contemporary World" in *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Switzerland: Springer Cham, 2014) at 63 [Van Rhee]; Farrow, "*Civil Justice, Privatization and Democracy*", *supra* note 34 at 3612–3615 and 3780–3781.

116 Most unions have legal counsel and the resources to invoke formal legal procedure, if they choose to do so. Whether individual non-unionized employees were tangibly assisted by *Meiorin* is a more difficult question.

117 Gélinas et al, "Architecture, Rituals, and Norms in Civil Procedure", *supra* note 46 at 226; Genn, *supra* note 34 at 258–260.

118 Farrow, "*Civil Justice, Privatization and Democracy*", *supra* note 34 at 376; Van Rhee, *supra* note 115 at 63.

119 David Luban, "Settlements and the erosion of the public realm" (1995) 83 Geo LJ 2619 at 2638; Genn, *supra* note 34 at 378–381.

factual scenarios. Excluded people and excluded perspectives can be heard and empowered.[120]

Madam Justice McLachlin consciously shifted the substantive law with her *Meiorin* judgment, in a direction that she concluded was both simpler and more consonant with the underlying goals of human rights legislation. Her eight colleagues concurred. Provincial legislatures could have amended their human rights statutes to escape the effect of *Meiorin*; the fact that they did not do so suggests broad acceptance by legislatures that the judgment constituted progress.[121] While it is beyond the scope of this paper to argue the specific merits of *Meiorin* as substantive law, the point is that episodes of legal procedure (such as trials and appeals) have the potential to move the substantive law forward. If Tawny Meiorin's case had been subjected to mandatory mediation, to small-dollar procedure, or to a more inquisitorial approach, these public justice benefits might not have materialized from the case.

The availability of appeal is also key to public justice. Any substantial procedural or administrative decision can, in principle, come before the Supreme Court of Canada through judicial review and/or appeal. Appealability reduces access. The amount of time and money one might have to spend in order to uphold one's rights includes the costs of all of the potential appeals. However, appealability also pays dividends in terms of the system's public justice performance.[122] Thus, reforms that alter access to appeal or judicial review illustrate a tension between access and justice.[123]

2) Mandatory Mediation and Public Justice

Mediated settlements are usually confidential and privileged. If so, they cannot produce any public justice benefits. If mandatory mediation generates the confidential settlement of a case that would otherwise be adjudicated, it eliminates the potential for that case to inform or encourage compliance among non-parties,[124] or to move the law forward.[125] Trevor Farrow argues that the privatization of civil justice (which includes

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120 Sarah Marsden, "Just Clinics: A Humble Manifesto" (2020) 32 JL & Soc Policy Policy at 13.

121 Regarding the impact of this case, see Melina Buckley, "Lawyers, Snails, and Bottles: The Creeping Pace of Change in Law" in David L Blaikie, Thomas Cromwell & Darrel Pink eds, *Why Good Lawyers Matter* (Toronto: Irwin Law Inc, 2012) at 127–8.

122 It might also contribute to the system's substantive justice performance, if higher courts are more likely to issue substantively correct decisions.

123 For other such examples, see section 5.B, below.

124 Van Rhee, *supra* note 115 at 63.

125 Farrow, "*Civil Justice, Privatization and Democracy*", *supra* note 34 at 3189.

mandatory mediation initiatives), has significantly reduced the amount of information about civil justice that is available to the public.[126]

It might be possible for anonymized details of settlements to be published,[127] and this is an interesting opportunity to generate public justice benefits while giving the parties most of what they desire in terms of confidentiality.[128] However some public justice benefits are unavailable unless identities are disclosed. For example, Julie Macfarlane argues that non-disclosure agreements reached in mediation cases prevent disclosure of misdeeds, thereby undermining deterrence.[129]

3) Smaller-Dollar Procedure, Inquisitoriality, and Public Justice

Small-dollar and inquisitorial procedure can still culminate in public rulings that are subject to appeal. They should not therefore have any effect on the capacity of the system to produce public justice benefits. However, if these trends affect the perceived substantive and/or procedural justice of adjudicated outcomes, this might have knock-on effects on respect for and compliance with the law.[130]

5. Better Access to Justice?

"Better access" and "better justice," I have argued, should be understood as two distinct goals for those seeking to make legal procedure better. Reform affects *access* when it changes the financial, temporal, or psychological costs that legal procedure imposes on its users. Reform affects *justice* when it brings about better (or worse) substantive or procedural justice for parties, or brings about better (or worse) public justice effects for everyone else. Significant procedural reforms (such as mandatory mediation, smaller-dollar procedure, and inquisitoriality) have complex effects on

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126 *Ibid* at 979–981.

127 See e.g., Human Rights Legal Support Centre (Ontario), "Settlements at Mediation" online: *Human Rights Legal Support Center* <www.hrlsc.on.ca/en/human-rights-stories/settlements-mediation> [perma.cc/9UML-XG3J].

128 Farrow, "*Civil Justice, Privatization and Democracy*", *supra* note 34 at 1954–1957. A more extreme step in this direction would be to deny or discourage mediation in cases thought to have great public justice benefits (for example due to novel legal questions).

129 Julie Macfarlane, "Buying Silence With a Bluff: How NDAs Exploit Litigants, With and Without Counsel" (23 June 2021), online: *Slaw Canada's Online Legal Magazine* <www.slaw.ca/2021/06/23/buying-silence-with-a-bluff-how-ndas-exploit-litigants-with-and-without-counsel/> [perma.cc/D8B2-QDXB].

130 Inaccuracy in adjudication affects deterrence under some circumstances. See Louis Kaplow, "The Value of Accuracy in Adjudication: An Economic Analysis" (1994) 23 JL Studies 307 [Kaplow].

different aspects of access and justice. This conceptual distinction between access and justice does not mean that the recurring effort to improve access to justice through procedural reform is meaningless or futile. This Part considers the relationship between better justice and better access, highlighting the potential for harmony and tension between these two goals.

A) From Better Access to Better Justice

Investing in access often pays dividends in terms of justice. If procedure becomes less costly and more accessible, then more people with legal needs can be expected to use it, instead of accepting unjust outcomes ("lumping it"). This improves the system's substantive justice performance.[131] Shannon Salter memorably compares legal procedure to "the bouncer at an exclusive nightclub."[132] Procedure "decides who gets in, how long they will wait, how much they will pay, and what kind of documents they will have to produce along the way."[133] Improving access means making this bouncer a bit more easygoing, so that more people will be allowed into the justice club.

That, in turn, should lead to settlements that are more substantively just. Introducing smaller-dollar procedure, for example, can reduce procedural costs confronting plaintiffs in lower-dollar cases, and thus let them make more credible threats to take defendants to trial. This in turn encourages defendants to make settlement offers that match or come closer to plaintiffs' actual legal entitlements.[134] Public justice can also improve. The more that legitimate cases that are brought forward and adjudicated, the better job the system does of informing and deterring non-parties, and the more opportunities it has to advance the substantive law through new precedents.[135] There are three other specific ways in which reforms that initially improve access can also improve justice down the road: reduced procedural extortion, better access to legal counsel, and a more level playing field.

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131 See for example Lund, *supra* note 32 at 1072, regarding the difficulty that self-represented litigants face asserting their rights in housing-related actions. See also Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants", *supra* note 40.

132 Salter & Thompson, *supra* note 18 at 126.

133 *Ibid.*

134 Croley, *supra* note 28 at 57.

135 Gico, *supra* note 114 at 662.

1) Reduced Procedural Extortion

Reducing procedural costs advances substantive justice by reducing the potential for *procedural extortion*, which occurs when a litigant threatens to impose procedural costs upon an adversary in order to extract legally unjustified concessions. Examples of parties vulnerable to procedural extortion include:

- Defendants who find it logical to make concessions in order to settle claims which lack any legal merit, because defending them would be more onerous and expensive than settling them. This is known as the "nuisance-value problem" in civil litigation.[136]

- A community group legitimately criticizing a corporation, confronted with a "strategic lawsuit against public participation" brought by that corporation. The community group agrees to silence itself because it cannot afford to defend itself in court.

- Victims of domestic abuse, in cases where the perpetrators use legal procedure to intimidate and control their victims.[137]

- A tenant or homeowner facing an eviction or foreclosure action, which has been strategically commenced in a jurisdiction other than that in which the defendant resides. The cost of travel may induce the individual to abandon a viable defence.[138]

- A plaintiff with a legally unanswerable case, confronting a defendant who refuses to settle because they think the plaintiff will never be able to afford to take the matter to trial.

"Loser-pay" cost-shifting regimes, such as Canada's, are meant to deter procedural extrortion.[139] However cost awards very rarely come close to reimbursing the successful party for all of their legal fees. Thus, procedural extortion remains a genuine challenge for reformers of legal procedure.

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[136] David Rosenberg & Randy J Kozel, "Solving the Nuisance-Value Settlement Problem: Manadatory Summary Judgment" (2004) 90 Virginia L Rev 1849. See also Ontario, Ministry of Finance, *Ontario Automobile Insurance Dispute Resolution System Review Interim Report*, (Toronto: Ministry of Finance, 2013) at 25.

[137] This includes credible threats to impose the psychological costs of meritless family law or child protection litigation. Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32 Windsor YB Access to Justice 149 at 157.

[138] Lund, *supra* note 32 at 1066.

[139] Regarding the potential of cost-shifting to deter procedural extortion, see Croley, *supra* note 28 at 145.

The relationship between procedural costs and procedural extortion applies not only to legally meritless claims and defenses, but also to legally unnecessary steps within otherwise meritorious actions. The threat to subject one's adversary to *more* procedure—another motion, another expert witness, an unnecessary trial—can elicit concessions not required by the law.[140] For example, a party might disclose a privileged document that they are legally entitled to keep private, in order to avoid the procedural costs of defending a motion seeking its disclosure. The more affordable it is to respond to or obtain adjudication of a litigation step, the less likely it is that a threat to take that step can be used to extract concessions not supported by the law. Thus, reducing procedural costs (better access) can lead to reduced procedural extortion (better justice).

2) Better Access to Legal Counsel

Better access also leads to better justice when it lets more parties obtain legal representation. Retaining professional legal counsel not only reduces a party's temporal and psychological costs, but also, often, gives the party better procedural and substantive justice. Many self-represented litigants would retain counsel if the fees were affordable enough.[141] Legal fees are driven by the temporal costs imposed by legal procedure: the number of hours of the law firm's time required to see the case through to completion. Thus, if procedural reform were to reduce temporal procedural costs, then legal fees would likely fall and more people would be able to afford lawyers.

For example, if legal procedure could guarantee a resolution to any straightforward family law case within eight months and four court appearances, then family lawyers would be able to offer lower and more certain fees to separating people with cases of this nature.[142] A segment of middle-income people would become able to afford counsel instead of having to self-represent. The substantive justice of their adjudicated and settled case outcomes would improve.

Conversely, the less accessible procedure is, the less equitably its justice benefits are distributed among parties. Family court users in Canada confront a choice between (i) high and unpredictable monetary costs if

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140 Croley, *supra* note 28 at 143.

141 Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants", *supra* note 40; Rachel Birnbaum, Nicholas Bala & Lorne Bertrand, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants" (2013) 91 Can Bar Rev 67.

142 Noel Semple, "Accessibility, Quality, and Profitability for Personal Plight Law Firms: Hitting the Sweet Spot" (23 August 2017), online: *Canadian Bar Association* <www.cba.org/PersonalPlight> [perma.cc/6VAW-2BAK] at 49.

represented by a lawyer, and (ii) high temporal and psychological costs if self-represented.[143] Those who can afford lawyers, and those with the time and skills to effectively self-represent, are able to protect their substantive and procedural rights. Others cannot. Procedural costs compel them to accept improvident settlements or simply abandon their legal rights altogether. If family court procedure were more accessible, then it would not create a tier of citizens who do not enjoy the protection of substantive family law.

3) More Opportunity to Make New Law

The effect of inaccessibility on justice is even more stark in procedural contexts in which deep-pocketed, repeat-player parties confront adversaries of modest means. A party that can afford to take cases to trial (and beyond, to appeal) can decide which cases it wishes to become precedents, and which cases it wishes to disappear in confidential settlements.[144] In a common law system, this can be a powerful source of influence over the substantive law itself.[145]

For example, Trevor Farrow notes that the Ontario Lottery and Gaming Commission (OLGC) was sued multiple times in the late 2000s for failing to exclude problem gamblers from its casinos. Although the legal theory of OLGC's liability was novel, all of the early suits were settled with confidential terms. Some suggested that this was a deliberate strategy to avoid the creation of a judicial precedent that would have given the law a chance to evolve, but also potentially cost OLGC more in the long run.[146] If procedure were more accessible, then more plaintiffs with legally novel cases would have the realistic option of persevering to trial. They would thereby obtain better substantive justice for themselves, but also better public justice benefits for society at large.

B) From Better Access to Worse Justice

If improving access were to pay consistent dividends in terms of better justice, then reformers' job would be easier. Unfortunately, the access and justice goals are sometimes in tension. "More access to less justice," in Colleen Hanycz' memorable phrase, may result from measures focused exclusively on making the system cheaper and quicker and easier to use.[147]

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143 Noel Semple, "A Third Revolution in Family Dispute Resolution: Accessible Legal Professionalism" (2017) 34 Windsor YB Access to Justice 130.

144 Zariski, *supra* note 10 at 446. See also Genn, *supra* note 34 at 178–179.

145 Salter & Thompson, *supra* note 18 at 118–199.

146 Farrow, "*Civil Justice, Privatization and Democracy, supra* note 34 at 3207–3209.

147 Hanycz, *supra* note 13.

As legal procedure becomes more accurate and procedurally fair, it tends to become more expensive.[148]

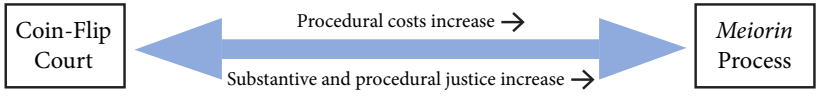
The tension between access and justice is visible in each of the three reform trends discussed by this paper. Mandatory mediation, like other official inducements to settle,[149] can cause parties to accept substantively unjust settlements even as it saves them procedural costs.[150] Smaller-dollar procedure also shows the tension.[151] Procedural thoroughness can be thought of as a spectrum, of which the two poles are

(i) "Coin-Flip Court," in which every dispute is resolved by flipping a coin or coins

(ii) the full three-level *Meiorin* procedure.

Coin-Flip Court epitomizes access without justice. *Meiorin*-level procedure, conversely, offers very comprehensive, but inaccessible justice (Figure 1).

Figure 1: Tradeoffs between procedural costs and justice.



Smaller-dollar procedure constitutes a step to the left on this spectrum. It improves access for cases of modest monetary value, but it poses a potential risk of more errors and less fairness for the parties.[152] Finally, while inquisitoriality might sometimes offer a "win-win" for access and justice, in other contexts it might make procedure easier for self-represented litigants at the expense of substantive and procedural justice.[153] Curtailing traditional rights of adversarial procedure, such as the unlimited right to present and cross-examine on evidence, could lead to more mistakes being made.[154] Access-improving reforms may bring more users into the

148 Kaplow, *supra* note 130; Geoffrey P Miller, "The Legal-Economic Analysis of Comparative Civil Procedure" (1997) 45 American J Comparative L 905 [Miller].

149 E.g., cost incentives to make and accept settlement offers. (See for example *Ontario Rules of Civil Procedure*, *supra* note 9, R 49.10.

150 See section 4.B.1, above.

151 See section 4.B.2, above.

152 Hanycz, *supra* note 13.

153 Sections 4.B.3 and 4.C.3, above.

154 The tension between access to justice is visible in many procedural reform questions. For example, making legal forms simpler reduces psychological procedural costs for self-represented litigants. However, beyond a certain point, form simplification might also deprive a litigant of the ability to present their true case (procedural justice)

system, overloading it and affecting system performance if there is no commensurate increase in public funding.[155]

C) Welfarism

Because the goals of access and justice are sometimes in tension, tradeoffs must be made between them. To what extent should justice be rationed, in order to improve access? Where should different courts and tribunals position themselves on the spectrum between Coin-Flip Court and *Meiorin*? How aggressively should they encourage parties to settle?

Welfarism is a normative theory of public policy that can help procedural reformers make the necessary compromises, and focus their efforts to improve access to justice. Welfare can be defined simply as "what we have when our lives are going well for us."[156] Welfarism is the theory that government should always try to make individuals' lives go better, for them, than they otherwise would overall.[157] A key text is *Fairness versus Welfare*, in which Louis Kaplow and Steven Shavell argue that law should always adopt the rules—including the procedural rules—that can be expected to maximize welfare for all affected individuals.[158]

The reason why procedural reform should seek to improve access, and the reason why it should seek to improve justice, are the same reason: because both access and justice contribute to the welfare of individuals. Reducing the costs imposed by legal procedure improves the lives of people who must pay those costs. Better substantive and procedural justice make the lives of litigants go better for them, while better public justice makes the lives of non-litigants better than they would otherwise be.[159]

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and/or lead to erroneous rulings (substantive justice). See e.g., Shannon Salter, "Court Fee-waiver Processes in Canada: How Wrong Assumptions, Change Resistance and Data Vacuums Hurt Vulnerable Parties" (2020) 96 Supreme Court L Rev 1 at 247–8.

155 Miller, *supra* note 148 at 909; Gico, *supra* note 114 at 661.

156 Valerie Tiberius, "Well-Being: Psychological Research for Philosophers" (2006) 1:5 Philosophy Compass 493.

157 Matthew D Adler, *Measuring Social Welfare: an Introduction* (New York: Oxford University Press, 2019) [Adler]; Noel Semple, "Welfare-Consequentialism: A Vaccine for Populism?" (2020) 91:4 Political Q 806 online: <www.noelsemple.ca/2020/07/welfare-consequentialism-a-vaccine-for-populism/#more-810> [perma.cc/7UYR-WB83]. Welfarism's precursor is the classical utilitarianism of Jeremy Bentham and John Stuart Mill.

158 Louis Kaplow & Steven Shavell, *Fairness versus Welfare* (Cambridge, MA: Harvard University Press, 2006).

159 For example, the creation of the *Meiorin* precdent in 1999 allowed specific Canadian individuals and corporations to avoid workplace disputes about discrimination in the subsequent years. The lives of these individuals were made better because of the monetary, temporal, and psychological costs they thus saved.

Tallying the different welfare costs and benefits that can be expected to result from a certain reform permits judgments about whether it would do more good than harm overall. The premise of welfarism is that individual welfare is a common currency, allowing the good and bad consequences of policies to be summed up together. In some policy contexts, this can be done quantitatively and formally. Cost-benefit analysis of a proposal to build a bridge, for example, might place dollar values on its economic and environmental impacts, and on how much time it would save for travelers.

This may not be possible in the case of reforms to legal procedure. Nevertheless, welfarism gives policy-makers an intellectually disciplined way to think broadly about consequences, and seek the course that will be best, overall, for everyone. A welfarist should try to take account of everyone whose welfare is affected, and take account of all the ways in which welfare is affected. A reform effort is most likely to succeed when it is informed by a thorough understanding of the access and justice dynamics within its specific procedural context.[160] This usually requires reliable empirical data, both quantitative and qualitative in nature.[161]

For example, mandatory mediation has multiple access and justice effects, identified above in this article. It produces "good" settlements in some cases, "bad" settlements in other cases, and different costs and benefits for parties and non-parties in cases that do and do not settle. These effects should all be understood and weighed against each other before a decision is taken about introducing mandatory mediation for any category of disputes. If it *is* to be introduced, it should be fine-tuned to do the most possible good and the least possible harm overall. Likewise, the number of hours allowed for discovery in simplified procedure should ideally be the number that maximizes welfare, because any smaller number would have a cost in justice that exceeds the gains in access, while any larger number would have a cost in access that exceeds the gains in justice.[162]

Nor is welfarism useful only for fine-tuning. Reformers might conclude that a certain part of the legal system is so far from what it could be (in terms of potential welfare benefits) that it should be abolished and redesigned from scratch. Where people have no access at all to justice, welfarism calls attention to the tangible improvements that justice can make in their lives, and insists that the state act to provide it.

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[160] See e.g., Shannon Salter, "ODR and Justice System Integration: BC's Civil Resolution Tribunal" (2017) 34 Windsor YB Access to Justice 112.

[161] See e.g., Mackenzie, *supra* note 4.

[162] Regarding the question of how many hours should be permitted for discovery, see section 4.B.2 above and accompanying text.

Welfarism is a flexible, evolving normative theory of public policy. It includes alternatives to cost-benefit analysis, such as the social welfare function, that attend to equality of welfare and uncertainty of consequences.[163] Individual welfare itself can be measured in various ways, including approaches based on the fulfilment of preferences and individuals' evaluations of their own lives.[164]

Welfarism values the welfare of each and every human being who (i) lives or will live in the jurisdiction making the policy, and (ii) is affected by the policy.[165] This means that the access or justice effects of procedural reform on large corporations or wealthy people are normatively relevant, as well as effects on others. However different parties are affected by burdens and benefits to very different degrees. A $10,000 cost award imposed on a government body would have a miniscule effect on anyone's welfare, because it would be shared among millions of taxpayers. Conversely a $10,000 cost award imposed upon an individual plaintiff could be devastating. Thus, welfarism is not incompatible with reforms that assist some litigants at the expense of others, such as Erik Knutsen's proposal that the law of costs should treat sizable corporations differently from other litigants.[166]

1) Proportionality and Welfarism

Procedural proportionality is the idea that the expense and thoroughness of legal procedure should be *proportionate* to what is in dispute.[167] This is seen not only in smaller-dollar procedure,[168] but also in criminal,[169] and administrative procedure.[170] Procedural proportionality is harmonious with welfarism's focus on the *net* benefits of public policy options. This

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163 Adler, *supra* note 157.

164 Daniel M Hausman, *Preference, Value, Choice, and Welfare* (Cambridge, UK: Cambridge University Press, 2011); Noel Semple, "Good Enough for Government Work? Life-Evaluation and Public Policy" (2021) 22 J Happiness Studies.

165 Some welfarists go further, and argue that the effects of policy on individuals who are foreigners, and/or unborn, and/or non-human should be factored into the analysis: Noel Semple, "Everybody to Count for One? Inclusion and Exclusion in Welfare-Consequentialist Public Policy" (2021) 8 Moral Philosophy & Politics 1.

166 Erik S Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36 Queen's LJ 113.

167 "The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure." *Hryniak v Mauldin,* 2014 SCC 7.

168 Section 2.B.2, above.

169 For example, the distinction between summary and indictment procedure for offences of different magnitude.

170 *Baker*, *supra* note 51: In Canadian administrative law, *Baker* v *Canada* establishes the idea that the level of procedural fairness owed to a party depends, among other things, on the importance of the matters at issue to the individuals affected.

is because the welfare value of justice in a legal dispute depends on what's at stake. Making the wrong order, or failing to fully hear the parties, or missing the opportunity to move the law forward, may be very damaging to human welfare when the legal issue involves wrongful conviction for homicide, or a human rights class action, or a deportation. Justice shortcomings tend to be less damaging to human welfare when the matter involves trespassing or a dispute over $5,000. Therefore, the procedural costs that are worth imposing on the parties in order to prevent injustice vary proportionately with the significance of the dispute.

It is important to recognize that the dollar value of a dispute is only a rough proxy for its significance in welfare terms. Substantive justice in a $10,000 dispute between people of modest means may have a larger welfare value than substantive justice in a $100,000 dispute between billionaires. As Catherine Piché argues, proportionality should not be used to justify a prioritization of wealthy litigants' matters over others.[171] Moreover, the public justice benefits of procedure must not be overlooked in the proportionality analysis. Hazel Genn asks:

> how much formal justice do we need to ensure that the common law can be refreshed, that legal risk can be minimised and that disputes can be rapidly resolved when they arise? Or, to put it another way, how much justice can we afford to forego?[172]

6. Conclusion

In support of procedural reform efforts, this article has theorized "better access" and "better justice" as distinct normative goals. Improving *access* involves reducing the financial, temporal, and psychological costs that procedure imposes upon those who use it. Improving *justice* performance means better fidelity to substantive law, better fidelity to the principles of procedural justice, and more public justice benefits for society at large.

When the two objectives come into conflict, welfarism offers an intellectually disciplined way to compromise between them. However better access and better justice are also congruent. Well-designed procedural reform can deliver both, especially if it draws on a thorough empirical understanding of the status quo and the likely consequences of reform for all affected parties. Better access to better justice is a challenging, but essential ambition for procedural reform.

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171 Catherine Piché, "Comparative Perspectives, Figures, Spaces and Procedural Proportionality" (2012) 2 Intl J Procedural L 145 at 164.

172 Genn, *supra* note 34 at 978–979.