Regulatory Reform for Access to Justice

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The mounting wave of unrepresented litigants, and the many unmet legal needs which Canadians experience, demand innovative responses that go beyond the traditional call for more state-funded legal aid. The argument of this paper is that excessive regulation of legal services is partially responsible for Canada's access to justice crisis. Liberalizing and rationalizing legal services regulation can tangibly enhance access to justice, especially in family law. Part I of this Paper focuses on unrepresented litigants: the tip of the iceberg which is the access to justice problem. It reviews the financial and non-financial factors which determine whether or not an individual retains expert legal assistance. Part II turns to Canadian legal services regulation, reviewing its barriers to entry, market conduct regulations, and business structure regulations. There is a legitimate public interest rationale for legal services regulation, but it also demonstrably increases price and reduces variety in the legal services market and thereby constitutes a barrier to justice. Part III of this paper will argue that the existing level of legal services regulation in Canada does so to an unjustifiable extent.

I. Unrepresented Litigants and the Access to Justice Problem

The unrepresented litigant, who is one of the most prominent representatives of Canada's access to justice problem, has become the focus of considerable attention in the legal community. Unrepresented litigants are found throughout the Canadian court system.[1] The scarcity of lawyers in courts has been remarked upon at all levels of the

[1] Sujit Choudhry, Michael Trebilcock and James Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., Middle Income Access to Justice (Toronto: University of Toronto Press, 2012); Richard Devlin, "Breach of

judiciary,[2] and many members of the bar have echoed this concern.[3] A major empirical research project by Prof. Julie Macfarlane will soon produce rich new data about the motivations of unrepresented litigants and the challenges they face.[4] However, the published literature to date is perhaps best developed with regard to family court. In particular, empirical studies led by Professor Nick Bala and Professor Rachel Birnbaum have recently contributed powerful new insights into why and how people come to these tribunals without representation.[5]

It is clear that a great many people appear in Canadian courts without lawyers or any other form of professional, personalized legal assistance. The best estimate quantifying this phenomenon comes from the Department of Justice's 2009 Evaluation of Ontario's Unified Family Courts.[6] The Department reviewed 1435 case files from family courts in 10 different Canadian cities located in four provinces.[7] In 44.1% of the cases, neither party was represented, while in only 25% were both parties represented. These

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[2] E.g. Michael McKiernan, "Lawyers Integral in Making Justice Accessible: Mclachlin" Law Times (Sunday, February 20, 2011), online: Law Times <http://www.lawtimesnews.com/201102218262/Headline-News/Lawyers-integral-in-making-justice-accessible-McLachlin> (last accessed: 26 October 2011); Luis Millan, "Judges Grapple with Unrepresented Litigants" The Lawyers Weekly (November 05, 2010); The Hon. Lance Finch, "Access to Justice: The Elephant in the Room (Address to the Canadian Bar Association – B.C. Branch)," Scottsdale, Arizona, November 20, 2010, online: The Courts of British Columbia <http://www.courts.gov.bc.ca/court_of_appeal/about_the_court_of_appeal/speeches/CBA%20Scottsdale%20-Final%20Nov%2022.pdf> (last accessed: 26 October 2011).

[3] E.g. Johanne O'Hanlon, Helen Sanders and Armenia Teixeira, "Unrepresented Litigants : Access to Justice or Access Undone?," Victoria, BC, July 12-15, 2010, online: DIVORCEMate <http://www.divorcemate.com/library/Chapter%2022%20-%20Urepresented%20Litigants.pdf> (last accessed: 26 October 2011); Melina Buckley, Report for the Canadian Bar Association 2010/June 2010 Moving Forward on Legal Aid Research on Needs and Innovative Approaches" 2010).

[4] Julie MacFarlane, "Representing Yourself in a Legal Process," online: <http://www.representing-yourself.com/> (last accessed: 25 March 2013).

[5] Rachel Birnbaum and Nicholas Bala, "Experiences of Ontario Family Litigants with Self-Representation and Representation. Paper Presented to the Family Law Summit, Toronto, Ontario," ["Family Law Summit Paper"]; Rachel Birnbaum and Nicholas Bala, "Views of Ontario Lawyers on Family Litigants without Representation" (2012) University of New Brunswick Law Journal (forthcoming) ["UNBLJ Paper"].

[6] Evaluation Division: Office of Strategic Planning and Performance Management, The Unified Family Court Summative Evaluation Final Report (Ottawa: Deptartment of Justice (Canada), 2009), online: DOJ <http://www.justice.gc.ca/eng/pi/eval/rep-rap/09/ufc-tuf/ufc.pdf> (last accessed: 26 October 2011).

[7] Files from 17 provincial and superior courts were used in the sample. The courts were located in Vancouver (BC), Saskatoon (SK), Sarnia (ON), Hamilton (ON), Toronto (ON), Sudbury (ON), Oshawa (ON), Halifax (NS), Truro (NS), and Pictou (NS).

figures suggest an overall representation rate of 40%, meaning that 60% of litigants are not represented in court. Other regional sources report representation rates of between 30% and 60%.[8] Quebec appears to have a somewhat higher rate of representation in family matters, between 58% and 64% according to one account.[9]

There is considerable evidence that the number of unrepresented litigants has increased over time.[10] Among Ontario family lawyers surveyed by Bala and Birnbaum in 2011, 81% reported that the number of unrepresented litigants had increased since 2006.[11] In one family court, the representation rate fell from 89% in 1992 to 59.2% in 2001.[12] Even more dramatic evidence of the long-term trend comes from California, where the percentage of divorce litigants with attorneys fell from 99% of the total in 1971, to 53% in 1985, and to less than 25% by 1999.[13]

1. Why Litigants are Unrepresented

What makes a person decide whether or not to hire expert legal assistance? The literature has typically distinguished between financial and non-financial factors. Financial factors pertain to the perceived cost of legal services, and push the client away from hiring a representative. Financial factors may include (i) the client's estimate of the total eventual

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[8] E.g. OBA Family Law Section, ADR Institute Of Ontario and Ontario Association Of Family Mediators, Family Law Process Reform: Supporting Families to Support Their Children (Toronto: Ontario Association for Family Mediation, 2009), online: Ontario Association for Family Mediation <http://www.oafm.on.ca/Documents/OBA%20OAFM%20ADR%20Institute%20submission%20Apr%207%2009.pdf> (last accessed: 26 October 2011); Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2005) 30 Queen's Law Journal 825 at 827. Bala and Birnbaum's most recent study found 39% of the litigants in their sample stated that they had lawyers. Ontario government data obtained by Bala and Birnbaum stated that 46% of family court litigants were represented by lawyers in 2009-2010. (Birnbaum and Bala, [unpublished], *supra* note 5 at 5a-4 and footnote 13.

[9] Millan, *supra* note 2 .

[10] Birnbaum and Bala, Family Law Summit Paper, *supra* note 5 at FN 13.

[11] Birnbaum and Bala, UNBLJ Paper, *supra* note 5 .

[12] Langan, *supra* note 8 at 830.

[13] Bonnie Rose Hough, Description of California Court's Programs for Self-Represented Litigants, Prepared for the Meeting of the International Legal Aid Group, Harvard University: California Judicial Branch, 2003), online: California Judicial Branch <http://www.courts.ca.gov/partners/documents/harvard.pdf> (last accessed: 26 October 2011).

cost of the service, and (ii) cost structure factors such as the requirement to produce a cash retainer and the unpredictability of the final bill.

Although comprehensive and reliable data about the cost of Canadian legal services is not available, the information that is available makes it clear that prices are high enough to deter many potential clients. According to the *Canadian Lawyer* 2012 survey of hourly rates, the average for a Canadian lawyer with 10 years' experience was $340 per hour.[14] The average legal fee charged for a contested divorce was $15,570.[15] Given that the median income for a single Canadian is less than $30,000 per year, the potential for these legal fees to deter Canadians is obvious.

Nonetheless, the literature is clear that non-financial factors also play a role in the decision-making process of a potential consumer of legal services. These include the perceived impact of legal representation on (i) the outcome and (ii) the experience of litigation. Recent research has identified the complexity of individuals' decisions regarding whether or not to hire an attorney, which in some cases have only a tenuous correlation to ability to pay.[16] Some people who can afford to hire lawyers do not do so because they do not like or do not trust lawyers. Some people do not believe that they need lawyers. Some might conceivably be willing and able to pay for professional and personalized legal services, but do not find any of the service models currently available in the legal services market to be appealing.

A distinction is sometimes drawn on the basis that "self-represented" people can afford representation but choose not to purchase it, while the "unrepresented" cannot afford it.[17] However, this binary division appears suspect on closer examination. While it

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[14] Robert Todd, "The Going Rate" Canadian Lawyer (June, 2012) 32 at 37.

[15] *Ibid*. at 34.

[16] Herbert M. Kritzer, "Examining the Real Demand for Legal Services" (2010) 37 Fordham Urb. L.J. 255; Rebecca L. Sandefur, "Money Isn'y Everything: Understanding Moderate Income Households' Use of Lawyers' Services (Paper Presented to the Access to Civil Justice Colloquium)" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., Middle Income Access to Justice (Toronto: University of Toronto Press, 2012).

[17] O'Hanlon, Sanders and Teixeira, *supra* note 3; Harvey Brownstone, Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court (Toronto: ECW Press, 2009) at 49; Langan, *supra* note 8, at 828.

is undoubtedly true that affordability is a stronger motive for some litigants than for others when deciding whether or not to retain help, it seems more likely that whether any given individual retains counsel will typically depend on a combination of financial and non-financial factors.

When litigants decide whether or not to hire a lawyer, what weight do financial and non-financial factors have? Most studies have found that financial considerations predominate, but that non-financial ones have a significant role for many people.[18] Preliminary results from MacFarlane's project identified lack of funds as the number one reason why people are unrpepresented.[19] This is confirmed by published data from Bala and Birnbaum. Their survey of unrepresented litigants in six Ontario family courts included questions about the motivations behind their representation choices. Among the unrepresented, 49% stated that "their primary reason for not having a lawyer was that they did not have enough money and were not eligible for legal aid."[20] The primacy of financial reasons for being unrepresented was bolstered by the statistically significant relationship which Bala and Birnbaum found between respondent income and presence or absence of a lawyer.[21]

Among those who did have legal representation, 41% cited the expectation of a better outcome as the most important motivator for hiring a lawyer.[22] Lack of knowledge about the court system (26%) or lack of knowledge about family law (approximately 15%) were also given by many represented people as reasons why they hired lawyers.[23] Non-

[18] A 2004 study conducted in a Kingston, Ont. family court reported that 83% of the unrepresented litigants stated that they were unable to afford a lawyer: Langan, *supra* note 8, at 832. See also D. A. Rollie Thompson and Lynn Reierson, "A Practicing Lawyer's Field Guide to the Unrepresented" (2002) 19 C.F.L.Q. 529 at 529-530. Regarding the United States, see Drew A. Swank, "The Pro Se Phenomenon" (2005) 19 BYU J. Pub. L. 373 at 378-379; Kritzer, *supra* note 16 and Sandefur, *supra* note 16.

[19] "Preliminary Results" at Macfarlane, *supra* note 4.

[20] Rachel Birnbaum and Nicholas Bala, "The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers & Litigants (Paper Prepared for National Family Law Program)," Halifax, Nova Scotia, July 18, 2012 at 10 ["NFLP Paper"].

[21] Birnbaum and Bala, "Family Law Summit Paper," *supra* note 5 at 5a-7.

[22] *Ibid*.

[23] *Ibid*. at 5a-10.

financial reasons given in Bala and Birnbaum's study for *not* having a lawyer included the respondent's belief that he/she had enough knowledge about law to obviate the need for one,[24] and the belief that retaining a lawyer would increase the amount of time and/or personal conflict created by the case. No non-financial reason was given by more than 7% of the unrepresented. However, 51% of the litigant respondents without lawyers cited a reason *other* than inability to afford it as their primary reason for not having a lawyer.[25]

2. The Lack of Professional and Personalized Legal Services: Why It's a Problem

Some people appear unrepresented use the cour rtsystem in an unproblematic way.[26] However it seems likely that many, if not most litigants, would benefit from professional, personalized legal assistance. Surveys consistently find that people experiencing legal problems want personalized assistance from someone with expertise, even if they also want to use "do-it-yourself" legal information and tools.[27] In court, competent professional assistance can significantly diminish the stress and hardship involved in litigation. Lacking it may cause people to abandon legitimate claims and defences, or suffer disadvantage in making them.[28] Some studies suggest that

[24] This is echoed by MacFarlane's Preliminary Results, *supra* note 4.

[25] Birnbaum and Bala, NFLP Paper, *supra* note 20 at 10.

[26] Swank, *supra* note 18 at 379.

[27] Mary Stratton, Some Facts and Figures from the Civil Justice System and the Public (Toronto: Canadian Forum on Civil Justice, 2010), online: Canadian Forum on Civil Justice <http://cfcj-fcjc.org/docs/2010/cjsp-ff-en.pdf> (last accessed: 26 October 2011) at 27; Nanaimo Family Justice Services Centre Implementation Phase Evaluation: Final Report (Victoria, BC: Focus Consultants, 2008), online: Ministry of the Attorney General (BC) <http://www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/FJSCFinalReport.pdf> (last accessed: 26 October 2011); John Malcolmson and Gayla Reid, BC Supreme Court Self-Help Information Centre: Final Evaluation Report: BC Supreme Court Self-Help Information Centre, 2006), online: BC Supreme Court Self-Help Information Centre <http://justiceeducation.ca/themes/framework/documents/SHC_Final_Evaluation_Sept2006.pdf> (last accessed: 26 October 2011) at 43; R. Roy McMurtry *et al.*, Listening to Ontarians: Report of the Ontario Civil Legal Needs Project (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf> (last accessed: 26 October 2011) at 59.

[28] Sande L. Buhai, "Access to Justice for Unrepresented Litigants: A Comparative Perspective" (2009) 42 Loy. L.A. L. Rev. 979.

unrepresented people obtain less favourable adjudicated outcomes, for example in refugee hearings or landlord-tenant disputes.[29]

There is also evidence that a litigant's lack of representation imposes costs on other parties and on the system. 91% of Ontario family lawyers surveyed by Bala and Birnbaum stated that having an unrepresented party on the other side of a file increases costs for the represented party.[30] Judges may understandably feel compelled to provide special assistance to an unrepresented party, but doing so can be difficult to reconcile with the neutrality of the judicial role.[31] The decline of legal representation in has also compelled governments to spend money to make court systems usable for unrepresented parties. For example, because Ontario family litigants can no longer reasonably be expected to have personalized legal advice, they are all required to attend Mandatory Information Programs.[32] Whatever their merits, such programs can only be second-best alternatives to receiving personalized legal advice from a professional. Although evidence is mixed on these questions, some have suggested that court proceedings involving unrepresented litigants require more time,[33] or that settlement negotiations are more difficult with an unrepresented party.[34]

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[29] Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49 Osgoode Hall Law Journal 71; Carroll Seron, Martin Frankel and Gregg Van Ryzin, "The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment" (2001) 35 Law & Soc'y Rev. 419.

[30] Birnbaum and Bala, UNBLJ Paper, *supra* note 5.

[31] Millan, *supra* note 2 ; Canadian Judicial Council, "Statement of Principles on Self-Represented Litigants and Accused Persons (September 2006)" (2006) http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf> (last accessed: 26 October 2011); Buhai, *supra* note 28.

[32] Michael McKiernan, "Windsor Lawyers Decry Reforms: Changes Not Needed as Many Litigants Retain Counsel" Law Times (Monday, April 11, 2011).

[33] Millan, *supra* note 1; Buahi, *supra* note 28; Swank, *supra* note 18; Jonathan D. Rosenbloom, "Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York" (2002) 30 Fordham Urb. L.J. 305.

[34] E.g. PricewaterhouseCoopers, Economic Value of Legal Aid: Analysis in Relation to Commonwealth Funded Matters with a Focus on Family Law (Brisbane, Australia: Legal Aid Queensland, 2009), online: National Legal Aid <http://www.nla.aust.net.au/res/File/Economic%20Value%20of%20Legal%20Aid%20-%20Final%20report%20-%206%20Nov%202009.pdf> (last accessed: 26 October 2011), but see Tiffany Buxton, "Foreign Solutions to the U.S. Pro Se Phenomenon" (2002) 34 Case W. Res. J. Int'l L. 103 at 115-117.

Moreover, unmet needs for legal services exist not only in courtroom litigation, but also in Canadians' efforts to use the law outside of court. To take an example from family law, many Canadians seeking to mediate or negotiate separation agreements without recourse to litigation would certainly benefit from personalized expert assistance. The same is true of those who not experiencing disputes but seeking to plan their lives in accordance with the law, for example with a will or prenuptial agreement. Quantifying unmet needs outside of court is much more challenging than counting the number who appear in court without representation, but the extent of those needs may be comparable or greater.

Underprivileged and equity-seeking Canadians face unique challenges in affording and obtaining legal services.[35] First Nations members living on reserves often confront geographic, socio-economic, and cultural challenges in accessing legal services, particularly in the criminal law sphere.[36] This has consequences not only for the ability of these individuals to protect their own individual rights, but also for their ability to assert constitutional and other legal interests in pursuit of a more just society.

3. Why calling for more legal aid is not enough

Many Canadian lawyers blame inadequate state-funded legal aid for the prevalence of unrepresented litigants, and propose bolstering those resources as a response to the problem.[37] The access to justice crisis has emerged during the same period in which

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[35] McMurtry *et al.*, *supra* note 27; CBA Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Canadian Legal Profession* (Ottawa: Canadian Bar Association = Association du barreau canadien, 1999), online: CBA <http://www.cba.org/CBA/pubs/pdf/RacialEquality.pdf> (last accessed: 1 June 2011) at 31-32; Elaine Gibson, "Legal Services and the Disadvantaged in the Year 2020 (Paper Presented to a Conference Entitled "Access to Affordable and Appropriate Law Related Services in 2020"), Windsor, Ontario, http://www.cba.org/cba/pubs/pdf/windsorpaper.pdf> (last accessed: 1 June 2011). Susan Boyd also recently suggested that women continue to experience gender-related access to justice barriers. (Susan Boyd, "Spaces and Challenges: Feminism in Legal Academia" (2011) 44 University of British Columbia Law Review 205.)

[36] Ashley Smith, "Bill C-47: The Answer or the Continuance of Inequity for the First Nations of Canada?" (2010) 29 Can. Fam. L.Q. 41 at 73.

[37] E.g. Leonard T. Doust, Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia (Vancouver: Public Commission on Legal Aid, 2011), online: Vancouver Bar Association <http://www.vancouverbar.ca/placeholder/pcla_report_03_08_11.pdf> (last accessed: 26 October 2011); Noel Semple and Carol Rogerson, "Access to Family Justice: Insights and Options" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., Middle Income Access to Justice (Toronto: University of Toronto Press, 2012) .

funding for civil legal aid has dissipated. In recent decades, Canada's state-funded legal aid programs have been pared back to the point that they provide only a very small range of services, to only a small group of the poorest Canadians.[38] For example, in Ontario an individual must have a gross annual income of less than $12,000 in order to qualify for a publicly funded lawyer in a family law case.[39] A half hour with duty counsel and a visit to a drop-in centre is usually the most which one can expect from the legal aid system, unless the state is a party to the dispute. Many Canadian lawyers have therefore called for enhanced legal aid as a remedy, both for the dearth of lawyers in courts specifically and for the access to justice crisis generally.[40]

However there appears to be little prospect of significant new state expenditures on legal aid, at least for non-criminal matters.[41] The Supreme Court of Canada has declined to compel government funding for legal aid in cases in which constitutional interests are not at stake.[42] Given the current atmosphere of fiscal austerity, and given that voters rank legal

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[38] Choudhry, Trebilcock and Wilson, *supra* note 1; Devlin, s*upra* note 1at 349; Michael Trebilcock, *Report of the Legal Aid Review* (Toronto: Ministry of the Attorney General (Ontario), 2008), online: Ministry of the Attorney General (Ontario) <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf> (last accessed: 26 October 2011).

[39] Sheilagh O'Connell, "Legal Aid Ontario: New Models of Family Law Service and Practice Management in the New World (Slides presented to Association of Family and Conciliation Courts, Ontario Chapter Second Annual General Conference)," Toronto, Ontario, October 12-13, 2010, online: AFCC Ontario <http://www.afccontario.ca/OConnellonLegalAidOntario.pdf> (last accessed: 8 December 2010) at 12.

[40] Mary Jane Mossman, Karen Schucher and Claudia Schmeing, *Comparing and Understanding Legal Aid Priorities* Association of Community Legal Clinics of Ontario, 2009), online: SSRN <http://ssrn.com/abstract=1640533> (last accessed: 8 December 2010); Trebilcock, at 61 *et seq.*; Semple and Rogerson, *supra* note 37; *

[41] Nicholas Bala, "Reforming Family Dispute Resolution in Ontario: Systemic Changes & Cultural Shifts (Paper Presented to the Access to Civil Justice Colloquium)" in Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., Middle Income Access to Justice (Toronto: University of Toronto Press, 2012) at 3; Cristin Schmitz, "Top Judge Proposes Free Court-Based Mediation, AG Says 'No Money'" The Lawyers Weekly (October 08 2010).

[42] *British Columbia (Attorney General) v Christie*, [2007] 1 S.C.R. 873, 2007 SCC 21. See also the related discussion in Alice Woolley, Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation (Spp Research Papers, Vol. 4, Issue 8, June 2011) (Calgary: University of Calgary School of Public Policy, 2011), online: University of Calgary <http://www.policyschool.ucalgary.ca/files/publicpolicy/A_Woolley_lawregulat_c.pdf> (last accessed: 26 October 2011) at 34-36.

aid well below health care, education, and many other competitors for public money, further cuts are more likely than expansions in legal aid budgets.

It is therefore imperative to develop policy innovations that can respond to the access to justice problem without requiring new government money.[43] Liberalizing and rationalizing the regulatory regime applied to legal services in Canada should be part of this agenda. In an environment of fiscal austerity, regulatory reform has the potential to significantly expand access to justice without any new government expenditure. Even if civil legal aid does miraculously receive new government funding, regulatory reform is essential to multiply the effectiveness of new dollars.

II. Regulation of Legal Services in Canada

Because it controls who can provide legal services, and how they can provide them, regulation has important ramifications for Canadians with legal needs. The regulatory mechanisms used in this country can be classified as (i) barriers to entry, (ii) market conduct regulations, and (iii) business structure regulations.[44] *Barriers to entry* limit the set of legal service providers.[45] In the context of Canadian legal services, market entry restrictions include educational requirements, licensure regimes, and the prosecution of unauthorized practice. *Market conduct regulations* require licensed legal service providers to comply with on-going obligations.[46] For example, lawyers must contribute to

[43] A compelling example is found in the recent proposal for public legal expenses insurance (Choudhry, Trebilcock and Wilson, *supra* note 1.

[44] Similar mechanisms are found in the regulation of most professional services, in most wealthy countries. See e.g. Iain Paterson, Marcel Fink and Anthony Ogus, E*conomic Impact of Regulation in the Field of Liberal Professions in Different Member States* (Study for the European Commission, DG Competition) (Vienna: European Commission, 2003), online: Institute for Advanced Studies <http://ec.europa.eu/competition/sectors/professional_services/studies/prof_services_ihs_part_1.pdf> (last accessed: 26 October 2011). However, as will be argued below, Canada's regulatory regime is strict relative to comparable jurisdictions.

[45] Competition Bureau (Canada), *Self-Regulated Professions: Balancing Competition and Regulation* (Ottawa: Competition Bureau (Canada), 2007), online: Competition Bureau (Canada) <http://www.bureaudelaconcurrence.gc.ca/eic/site/cb-bc.nsf/vwapj/Professions%20study%20final%20E.pdf/$FILE/Professions%20study%20final%20E.pdf> (last accessed: 26 October 2011).

[46] See e.g. Law Society of Upper Canada, "By-Law 7: Business Entities. Adopted by Convocation on May 1, 2007; Most Recently Amended April 30, 2009." (2007), online: LSUC

compensation funds and purchase professional liability insurance. *Business structure regulations* require service providers to refrain from certain forms of commercial organization. The prohibition on publicly traded corporations offering legal services to the public is one example of a business structure regulation that exists throughout Canada.[47]

The regulation of legal services in Canada is primarily carried out by 14 provincial and territorial law societies. Reflecting the principle of self-regulation, law societies are controlled by benchers who are mostly lawyers elected by other lawyers.[48] The official objectives of the law societies begin with the prevention and mitigation of fraud and incompetence.[49] However they also pursue loftier goals such as fostering lawyer "civility" and "professionalism."[50] Canada's law societies have also made efforts to understand and respond to the needs of underprivileged and equity-seeking groups within the legal profession.[51] Their access to justice initiatives include the promotion of pro bono work among lawyers as well as recent reforms to legitimize the provision of limited retainer ("unbundled") legal services.[52]

Statutes play a supporting role in regulating legal services, by empowering the law societies and reinforcing barriers to entry.[53] The Law Societies have also delegated certain

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<http://www.lsuc.on.ca/media/bylaw7.pdf> (last accessed: 26 October 2011); Michael Trebilcock and Lilla Csorgo, "Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective" (2001) 24 Dalhousie law journal 1; Benjamin Hoorn Barton, "Why Do We Regulate Lawyers: An Economic Analysis of the Justifications for Entry and Conduct Regulation" (2001) 33 Arizona State Law Journal 430 at 447.

[47] Eg., in Ontario, *Law Society Act* s. 61.0.1(4).

[48] A few benchers in each jurisdiction are "lay benchers" (non-lawyers).

[49] Barton, *supra* note 46 at 436.

[50] Adam M. Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 48 Osgoode Hall Law Journal 1; Betsy Powell, "Legal Profession Divided on 'Civility' Case" Toronto Star (August 19, 2011)

[51] Joan Brockman, "The Use of Self-Regulation to Curb Discrimination and Sexual Harassment in the Legal Profession" (1997) 35 Osgoode Hall Law Journal 209; Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25 Dalhousie Law Journal 27.

[52] E.g. Doug Munro, Limited Retainers: Professionalism and Practice (Report of the Unbundling of Legal Services Task Force (Vancouver: Law Society of British Columbia, 2008), online: Law Society of British Columbia <http://www.lawsociety.bc.ca/publications_forms/report-committees/docs/LimitedRetainers_2008.pdf> (last accessed: 26 October 2011).

[53] These are provincial statutes, e.g. Ontario's *Solicitors Act*, R.S.O. 1990, c. S.15, *Fair Access to Regulated Professions Act*, S.O. 2006, c. 31, and *Law Society Act*, R.S.O. 1990, c. L.8.

regulatory tasks to the Federation of Law Societies of Canada (FLSC). For example the FLSC influences legal education in Canada and operates the National Committee on Accreditation (NCA), which has a key role in the licensure of foreign-trained lawyers.[54]

1. The Public Interest Rationale for Regulation

That legal services should be regulated in some manner is an uncontroversial proposition. Most scholars and policymakers recognize that an unconstrained market for legal or other professional services would be deleterious for consumers and for the public more generally. Economists and regulatory theorists commonly identify two types of market failure that justify regulatory intervention in the professional services market.

First, *information asymmetry* refers to the difficulty which consumers (especially unsophisticated and natural person consumers) have in identifying their need for professional services, and in evaluating the quality of services that they receive.[55] Information asymmetry can lead to (i) a downward spiral of declining quality attributable to adverse selection,[56] and (ii) a moral hazard tempting professionals to over-supply the service.[57] Within the legal services market, information asymmetry is considered the primary form of failure requiring regulation.[58] Regulators seek to guarantee the minimum

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[54] The Law Societies have the right to decide which law schools' degrees allow an individual to qualify for the licensing process. This gives them influence over what is taught in the law schools. The FLSC sought to exercise this influence with a recent report providing recommendations for the curricular content of Canadian law schools: Task Force on the Canadian Common Law Degree, Final Report (Ottawa: Federation of Law Societies of Canada, 2009), online: FLSC <http://www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf> (last accessed: 26 October 2011).

[55] Michael J. Trebilcock, Carolyn J. Tuohy and Alan D. Wolfson, *Professional Regulation : A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario Prepared for the Professional Organization Committee* ([Toronto]: Ministry of the Attorney General, 1979).

[56] Hayne E. Leland, "Quacks, Lemons and Licensing: A Theory of Minimum Quality Standards" (1979) 87 Journal of Political Economy 1328. If consumers cannot tell the difference between good legal services and bad legal services, then they will refuse to pay any amount greater than what they would pay for bad legal services. Suppliers will not invest in supplying good legal services if they cannot obtain a price premium for the higher quality. This drives down the average quality of the services, which in turn reduces the amount which consumers are willing to pay.

[57] Paterson, Fink and Ogus, *supra* note 44 . In the context of legal services, this would mean counselling clients to take steps whose projected risk-adjusted benefits do not exceed their costs to the client.

[58] Michael Trebilcock, "Regulating the Market for Legal Services" (2008) 45 Alberta Law Review 215.

quality of legal services, so that consumers' lack of information does not leave them victims of incompetence or fraud.

Externalities (also known as third party effects) may also undermine professional services markets. The costs and benefits of legal services are not borne exclusively by the consumers and providers thereof. To take an example from law, a slapdash will might be suitable and satisfactory for both client and lawyer, but have disastrous effects on beneficiaries. Negative externalities create the potential for under-production, over-production, and self-dealing by consumers and producers at the expense of third parties.[59] By ensuring minimum service quality, and through legal ethics rules, regulators respond to the danger of third party effects. Because the rationale for professional services regulation is found in information asymmetry and in negative externalities rather than in monopolization concerns, it has been classified as a form of "social" rather than "economic" regulation.[60]

Regulation of legal services serves important public interest goals. However, the argument of this paper is that it also reduces competition and innovation, and increases the price of those services. It therefore impedes access to justice and drives up the number of unrepresented litigants. Some market entry and market conduct regulations appear to be stricter than they need to be to accomplish their legitimate goals, and others may not even have any legitimate goals. Policy-makers seeking to increase access to justice without spending public money should consider reforming these elements of the regulatory regime.

2. How Regulation Increases Price

As noted above, the price of legal services is a key contributor both to the dearth of representation in our civil courts, and to the access to justice problem more generally. There are convincing arguments that each of the three types of regulation described above pushes prices upwards. Barriers to entry increase price by reducing the supply of legal

[59] Randal N. Graham, Legal Ethics : Theories, Cases, and Professional Regulation, 2nd ed. (Toronto: Emond Montgomery Publications, 2011).

[60] Anthony Ogus, "Evaluating Alternative Regulatory Regimes: The Contribution of `Law and Economics'" (1999) 30 Geoforum 223 at 223.

services. In order to offer most legal services in Canada, one must be a licensed lawyer.[61] In order to become a licensed lawyer, one must overcome a number of significant barriers to entry that are established, directly or indirectly, by the law societies' licensure regimes.[62] These barriers include the tuition and opportunity costs involved in attending law school for three years and an undergraduate institution for at least two years.[63] For those with Canadian undergraduate degrees the most significant barriers to entry appear to be securing admission to a Canadian law school,[64] and securing articles.[65]

Aspiring lawyers without Canadian undergraduate education arguably face even higher barriers to entry. In order to practice law, they must convince the National Committee on Accreditation (NCA), established by the Federation of Law Societies of Canada, to issue a Certificate of Qualification.[66] The number of NCA evaluation exams has

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[61] E.g. *Legal Profession Act* (British Columbia), SBC 1998, c. 9, s. 15; *Legal Profession Act* (Nova Scotia), c. 28, 2004, s. 16(2).

[62] In a licensure regime, it is illegal to offer services without a license granted by the state or a state-authorized body. It is one of the three primary forms of occupational regulation, the other two being registration and certification (Morris M. Kleiner and Alan B. Krueger, "The Prevalence and Effects of Occupational Licensing" (2010) 48 British Journal of Industrial Relations 676).

[63] Task Force on the Canadian Common Law Degree, *supra* note 54 at 40. Most Canadian law schools require at least three years of undergraduate study: see e.g. Ontario Universities' Application Centre, "Law School Requirements – First Year" http://www.ouac.on.ca/docs/olsas/rc_olsas_e.pdf> (last accessed: 26 October 2011) and http://www.law.ubc.ca/admissions/admissions.html. Average tuition for a Canadian student at a Canadian law school exceeds $11,000 per year. (http://www2.macleans.ca/2010/09/16/law-school-what-will-it-cost/) However, bursaries are available for many students.

[64] In Ontario in 2011 there were 4,717 applicants and 1,376 registrants, or 3.43 applicants for each registrant. (http://www.ouac.on.ca/statistics/law-school-application-statistics/). David Percy, former dean of the University of Alberta Faculty of Law, was quoted in a magazine article stating: "Academic standards to get into Canadian law schools are far higher than any other common law country I know of." (Kate Lunau, "Where's a Lawyer When You Need One?" *Maclean's* (Feb 9, 2009)) The same article reported on the phenomenon of Canadian applicants who are unable to secure admission in this country enrolling abroad. For example, it reports that 100 of the 750 law students at Bond University in Australia, are from Canada.

[65] In April 2012, it was reported that 15% of the most recent group of applicants for articling positions in Ontario were unable to find them. (Kendyl Sebesta, "Articling Crisis Gets Worse: Report Shows Three-Percentage-Point Increase in Applicants without Jobs" Law Times (Monday, May 07, 2012) http://www.lawtimesnews.com/201205079078/Headline-News/Articling-crisis-gets-worse>).

[66] Federation of Law Societies of Canada, "Joining Canada's Legal Community," online: <http://www.flsc.ca/en/foreignLawyers/foreignLawyers.asp> (last accessed: 1 June 2011); Competition Bureau, *supra* note 45 at 67-8.

climbed steadily, more than tripling between 1999 and 2009.[67] During this period the NCA conducted 4515 evaluations and issued 1708 certificates, which appears to mean that the success rate of NCA applicants was only 37.8%.[68] The articling requirement may also be especially onerous for those foreign-trained lawyers who are recent immigrants.[69]

Those who do not surmount these barriers to entry can operate only in the margins of the legal services market. Independent notaries, immigration consultants, and paralegals have narrow scopes of legal practice, and are prosecuted by the Law Societies if they venture outside them.[70] In Ontario, the Law Society of Upper Canada regulates independent paralegals in a process that creates its own barriers to entry. Even once licensed, independent Ontario paralegals have a relatively narrow scope of permitted practice, which for example excludes any form of family law work.

Each of these barriers to entry reduces the supply of legal services, and therefore reduces competition and increases price.[71] That occupational licensure regimes increase the price of labour is well known. Economists have found that introducing licensure in an occupation increases wages by approximately 15% on average.[72] While it is true that people in licensed occupations tend to have more education and skill than other workers do, scholars have found that licensure itself has an impact on wages even after controlling

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[67] National Committee on Accreditation, Comparative NCA Evaluations 1999-2009 (Ottawa: FLSC, 2009), online: Federation of Law Societies of Canada <http://www.flsc.ca/en/pdf/NCAEV99-09.pdf> (last accessed: 1 June 2011).

[68] National Committee on Accreditation, Certificates of Qualification Issued 1999-2009 (Ottawa: FLSC, 2009), online: Federation of Law Societies of Canada <http://www.flsc.ca/en/pdf/CQ99-09.pdf> (last accessed: 1 June 2011); National Committee on Accreditation, Comparative NCA Evaluations 1999-2009 .

[69] Shree Paradkar, "Untangling the Arduous Road to Accreditation (Article from University of Toronto Faculty of Law Nexus Magazine, Spring/Summer 2011)," online: <http://www.law.utoronto.ca/visitors_content.asp?itemPath=5/4/0/0/0&contentId=2182> (last accessed: 1 June 2011).

[70] Joan Brockman, " 'Fortunate Enough to Obtain and Keep the Title of Profession:' Self-Regulating Organizations and the Enforcement of Professional Monopolies" (1998) 41 Canadian Public Administration 587 ; Joan Brockman, "Money for Nothing, Advice for Free: The Law Society of British Columbia's Enforcement Actions against the Unauthorized Practice of Law" (2010) 29 Windsor Review of Legal and Social Issues 1.

[71] Barton, *supra* note 46 at 441-2.

[72] Kleiner and Krueger, *supra* note 62 .

for the level of underlying human capital.[73] One recent book confirmed this conclusion with regard to American lawyers.[74]

Not only does introducing a licensure regime increase price, but increasing the number or height of the barriers to entry within an existing licensure regime has a similar effect. Using American data, economist Mario Pagliero found that the difficulty of the bar licensure examination (which varies considerably between American states) is correlated to lawyer salaries.[75] Increasing the exam difficulty by 1% produces, on average, an increase in lawyer salaries of approximately 1.7%.[76] Pagliero identifies two mechanisms by which increasing bar exam difficulty might increase salaries. The "quantity" effect is that increasing difficulty reduces the number of candidates who pass the bar exam. Reduced supply leads to increased price.[77] The "quality" effect obtains if increasing exam difficulty increases the perceived quality of new lawyers, which increases demand and leads to higher prices.[78] Pagliero found more convincing evidence of the quantity effect than of the quality effect.

Second, market conduct regulations create costs for legal services providers that are passed on to consumers, driving up the price of legal services and impeding access.[79] Without denying their public interest rationale, it is clear that on-going expenses imposed by regulation such as malpractice insurance premia have this effect. For example, the Law Society of Upper Canada recently chose to require all licensed lawyers to attend 12 hours of

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[73] *Ibid*. at 681. For example, the study examined wages for occupations such as electrician, which are subject to occupational licensure in some American states but not others.

[74] Clifford Winston, Robert W. Crandall and Vikram Maheshri, *First Thing We Do, Let's Deregulate All the Lawyers* (Washington: Brookings Institution Press, 2011) at 56.

[75] Mario Pagliero, "Licensing Exam Difficulty and Entry Salaries in the Us Market for Lawyers" (2010) 48 British Journal of Industrial Relations 726.

[76] *Ibid*.

[77] *Ibid*. at 733.

[78] *Ibid*. at 734.

[79] Competition Bureau, *supra* note 45 at 21-22. Barriers to entry also create costs which are passed on to consumers. For example, law school tuition, which can cost as much as $25,000 per year in Canada, can create significant student debt. The need for new lawyers to make student debt repayments increases the minimum price at which they can provide services.

continuing professional development classes per year.[80] The cost in time and money of these classes will eventually be reflected on clients' bills.

Professional discipline is a form of market conduct regulation. While it clearly has a value to consumers, discipline also reduces the supply of legal services by suspending, disbarring, and restricting the practice of some lawyers and paralegals. Critics have argued that self-regulatory discipline is most likely to be applied when the profession's own interests are at stake, for example when its public image is at risk, when lawyers too aggressively solicit each others' clients, or when a competitive group seeks to intrude upon lawyers' monopoly.[81] Discipline does not affect all lawyers equally,[82] and may apply disproportionately to lawyers and paralegals from equity-seeking communities.[83] It may thereby constrain the accessibility of legal services for consumers who also belong to these communities, to the extent that many people seek to patronize legal services providers with whom they share ethnic or linguistic ties.

Finally, business structure controls increase the cost of obtaining capital. Like other costs of doing business, these are passed on to legal services consumers. Regulations forbid corporate Canadian legal service providers to offer shares to anyone other than licensed lawyers. This stricture contributes to the small average size of legal service providers serving natural person consumers, which in turn impedes economies of scale and pushes prices upwards.[84] Closing off the option of obtaining capital from non-licensees

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[80] Law Society of Upper Canada, "News Release: Continuing Professional Development Requirement Supports Professional Competence (February 25, 2010)," online: <http://www.lsuc.on.ca/media/feb10_finalcpdrequirementrelease.pdf> (last accessed: 1 June 2011).

[81] Duncan Webb, "Are Lawyers Regulatable?" (2008) 5 Alberta Law Review 233 at 247.

[82] Harry Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33 Alta. Law Rev. 800 at 805.

[83] Regarding the historical use of professional discipline in this way, see Constance Backhouse, "Fostering Pro Bono Service in the Legal Profession: Challenges Facing the Pro Bono Ethic (Paper Presented to the Colloquia on Ontario's Advisory Committee on Professionalism)," online: LSUC <http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf> (last accessed: 26 October 2011) at 12-13.

[84] Edward Iacobucci and Michael Trebilcock, Self-Regulation and Competition in Ontario's Legal Services Sector: An Evaluation of the Competition Bureau's Report on Competition and Self-Regulation in Canadian Professions (Toronto: FLSC, 2008), online: University of Toronto Faculty of Law <http://www.flsc.ca/en/pdf/TrebilcockPaper.pdf> (last accessed: 26 October 2011) at 7.

presumably requires legal service providers to offer a higher rate of return to those licensees who can invest (e.g. by buying into a partnership). All of these factors increase the cost of doing business, and therefore the prices that consumers pay.

3. How Regulation Impedes Innovation

As argued above, non-financial factors play a secondary, but significant role in explaining why people lack professional and personalized legal services. It is plausible that regulation is contributing to this part of the problem as well, by reducing competition and innovation in the legal services marketplace. Many people who are unwilling to purchase any of the legal services that are currently available might be willing to purchase other ones. Liberalizing regulation could unleash Canada's lawyers, paralegals, and entrepreneurs to create new and innovative legal service delivery models, appealing to those who are not attracted to the traditional solicitor-client model.

Business structure regulations constitute the most significant impediments to innovation.[85] Chief among these is the prohibition on legal service provision to the public by corporations not owned exclusively by licensed lawyers. In the absence of this regulatory restriction, large corporations might offer innovative legal services to the public.[86] This has already come to pass in the United Kingdom, where the *Legal Services Act 2007* allowed "alternative business structures" partially owned and managed by non-lawyers, to offer legal services to the public.[87] Since that reform, an impressive array of new business models has emerged in the United Kingdom.

For example, the Co-operative Group Limited, a member-owned business that employs over 106,000 people, has launched a legal services operation.[88] The Co-operative

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[85] Gillian K. Hadfield, "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets" (2008) Stanford Law Review 101.

[86] Renee Newman Knake, "Democratizing the Delivery of Legal Services" (2012) 73 Ohio State Law Journal 1, online: SSRN <http://ssrn.com/abstract=1800258> (last accessed: 26 October 2011).

[87] *Legal Services Act 2007 (UK).*

[88] See http://www.co-operative.coop/corporate/aboutus/ and http://www.co-operative.coop/legalservices/

offers fixed fee legal services, which will soon include contested family law matters.[89] It offers personalized legal services over the Internet, via toll free telephone lines, and from numerous storefront offices. While it is too early to judge the success of this venture, it suggests that large corporations which benefit from economies of scale and ready access to capital can offer legal services in innovative ways which are impossible in Canada. (The Co-operative also relies on paralegals to an extent which would probably constitute unauthorized practice of law in Canada.)

Other innovative options are also foreclosed by business structure regulation in this country. The Law Societies have created complex rules about multi-disciplinary practices, which typically forbid a lawyer to enter a partnership with a non-lawyer professional unless the lawyer controls the practice of the other professional.[90] This is an impediment to legal service delivery models that could deliver low-cost access to justice, for example multi-disciplinary partnerships of equals, or even employment of lawyers by real estate agents or accountants. Professor Michael Trebilcock is among those to have criticized the regulation of multi-disciplinary practices from a consumer welfare perspective.[91] Lawyers who provide certificates of title for the purpose of real estate title insurance are forbidden by regulation from being employed by the insurance company.[92] This provision may protect legitimate consumer interests,[93] but it has been criticized as an effort to protect real estate lawyers from competition which increases the price of title insurance.[94]

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[89] A number of other English firms are already offering fixed-fee family law services. See e.g. Riverview Law, "How Can We Deliver Fixed Pricing," online: <http://www.riverviewlaw.com/downloads/How-can-we-deliver-fixed-pricing.pdf> (last accessed: 24 October 2011).

[90] Law Society of Upper Canada, *By-Law 7*, s. 18(2)(2). See also Rules of Professional Conduct (Toronto: Law Society of Upper Canada, 2000), online: Law Society of Upper Canada <http://www.lsuc.on.ca/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=10272> (last accessed: 26 October 2011), Commentary to 2.01(1). In other provinces, multidisciplinary practices are also prevented by rules forbidding lawyers to divide clients' fees with non-lawyers (Competition Bureau, *supra* note 45, at 77).

[91] Trebilcock and Csorgo, *supra* note 46 .

[92] *Title Insurance Licences (Regulation Pursuant to the Insurance Act)*, O.Reg 69/07.

[93] Iacobucci and Trebilcock, *supra* note 84 at 30.

[94] Paul D. Paton, A Review of the Law Society Act, Regulation 666 and the Commercial Activities of the Law Society of Upper Canada (Report for First Canadian Title) (Kingston, Ontario: First Canadian Title, 2007), online: First Canadian Title

Some market conduct regulations also impede innovation. For example, although contingency fees and third-party litigation financing are now generally permitted, lawyers are forbidden to purchase outright their clients' interests in the outcome of litigation.[95] This closes one avenue by which an impecunious tort victim, for example, might benefit from legal services and receive immediate financial compensation for an injury. While the provision may have a legitimate rationale, it also has an effect on competition and access to justice that merits further study.

III. Regulatory Reform for Access to Justice

Canadian legal services regulation serves legitimate goals, but also increases prices and reduces innovation and thereby plausibly exacerbates both the financial and non-financial impediments to access to justice. Regulation of Canadian markets for law and other professional services is relatively strict by international standards.[96] It appears likely that it could be liberalized and rationalized without undermining consumer protection or any other legitimate goal. This section will suggest some of the ways that legitimate regulation can be rebalanced, and unnecessary regulation removed, in order to foster access to justice in court and beyond.

The role of barriers to entry has been scrutinized with regard to Canadian professional services generally, but with little specific attention to legal services.[97] However, scholars have focused on barriers to entry in the American legal services market, which is subject to a regulatory regime similar in many ways to Canada's. Mario Pagliero, whose work was mentioned above, tackled this question by analyzing bar exam passage rates. He asked whether bar exam difficulty (and consequentially the pass rate) is being set in a manner that maximizes consumer welfare, or in a manner that maximizes entry-level

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<http://www.firstcanadiantitle.com/portal/server.pt/gateway/PTARGS_0_0_342_0_0_47/en/about/Corporate_Public%2520Affairs/Pdf/First%2520Canadian%2520Title%2520Report%2520on%2520Regulation%2520666_Paton.pdf> (last accessed: 26 October 2011); Competition Bureau, *supra* note 45, at 70.

[95] *Solicitors Act (Ontario),* R.S.O. 1990, c. S.15, s. 28.

[96] *Going for Growth, 2007: Structural Policy Indicators and Priorities in OECD Countries* (Paris: Organisation For Economic Co-Operation And Development, 2007); Finch, *supra* note 2.

[97] E.g. Competition Bureau, *supra* note 45 and OECD, *ibid.* at 42.

lawyer salaries by limiting competition.[98] He found that the pass rate is significantly below the ideal level, from the point of view of consumer welfare. Reducing exam difficulty to the "efficient regulation" level would result in 22% more lawyers, with average entry-level salaries decreasing by $23,000.[99] Lowering this barrier to entry, according to Pagliero, would result in "decreased cost of legal services" which would "more than compensates for the decrease in minimum standards."[100]

In Canada, licensing examination pass rates are higher than they are in the United States, but the educational and licensing barriers to entry are more onerous.[101] There is, however, no apparent reason why Pagliero's analysis could not be applied to other barriers to entry. Increasing or decreasing educational and licensing requirements is likely to have an effect on the price of legal services, and therefore on the accessibility of justice and the rate of representation. Given that Canada has fewer lawyers per capita than the United States, and given that there is no apparent reason why there would be less need for lawyers in this country, it is clearly possible that Canadian barriers to entry are also set above the level that maximizes consumer welfare.

Barriers could be lowered either by making it easier to become a lawyer, or by letting non-lawyers provide more services independently. Increasing the total number of lawyers in Canada may not have much impact on access to justice problems confronting natural person consumers, if for example the new lawyers choose to serve corporate or institutional clients. The latter option would therefore be better targeted at the specific access to justice problems in Canadian law.

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[98] Mario Pagliero, "What Is the Objective of Professional Licensing? Evidence from the Us Market for Lawyers" (2011) 29 International Journal of Industrial Organization 473

[99] *Ibid*. at 481.

[100] *Ibid*. at 481 : "Consumer welfare increases on average by 65% (over $800 million in total)."

[101] For example, it is significantly easier to gain admission to an American law school, and there is no articling requirement to become a lawyer in the United States.

Paralegals are potentially key, given that their services are usually significantly more affordable than those of lawyers.[102] However, at least in the family law field, many lawyers vociferously oppose the idea of expanding paralegal practice. For example the Family Lawyers' Association of Ontario, according to one press account, opposes paralegal practice on the grounds that "there is no such thing as a 'simple' divorce."[103] Lawrie Pawlitza, a family lawyer and former Treasurer of the Law Society of Upper Canada, argued against expanded paralegal practice on the grounds that "family law is complex… a single case can involve the application of federal and provincial legislation in areas as diverse as tax, pensions and shareholders' rights."[104] Georgina Carson, past chair of the Ontario Bar Association's family law section, opposed independent paralegal family law practice on the grounds that "people cannot be making life-altering decisions with incompetent - and I say that in the kindest way - but truly incompetent advisers."[105]

The proposition that trained and licensed independent paralegals are "truly incompetent" to provide any family law services whatsoever is, to say the least, not self-evident. It is clear that some family law cases require a professional equipped with all of the tools conferred by law school and licensure, such as knowledge of constitutional law, the analysis of precedent, and appellate advocacy skills.[106] However it also seems likely that not all cases are of this nature, and that there is in fact such a thing a simple divorce. The family law cases which Pawlitza mentioned, involving complex pension and shareholder rights, are the family law cases of a small and wealthy minority. The vast numbers of poor and middle-class Canadians who are currently denied access generally have family law problems with more straightforward legal dimensions. Many family law matters are simple enough that parties might be meaningfully assisted by someone who

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[102] Peter de C. Cory, *A Framework for Regulating Paralegal Practice in Ontario : Report* ([Toronto]: Ontario Ministry of the Attorney General, 2000) at 4.

[103] Tracey Tyler, "Ontario Paralegals Try to Expand Their Turf: Non-Lawyers Seek Right to Represent Clients in Family Law Cases, Including Simple Divorces" Toronto Star (Apr 29, 2010) 14.

[104] Lawrie Pawlitza, "No Unanimity on Paralegals (Letter to the Editor)" Toronto Star (14 Nov 2010: A.14.).

[105] Carol Goar, "Clients Stranded as Paralegals Shut out of Family Law" Toronto Star (10 Nov 2010).

[106] Some such epochal cases may even come initially disguised as simple disputes over small amounts of money, e.g. Moge V Moge.

has not surmounted the numerous and elevated barriers involved in practicing law in this country. This is most obviously true with regard to divorces on consent, but the same can probably also be said about many child custody and child support disputes, which are legally straightforward.

Indeed, doctrinal and technological developments in family law may have expanded the scope for non-lawyers to competently assist Canadians, especially those who are not wealthy. For example, child and spousal support are now subject to clear guidelines,[107] and in many cases can be readily and accurately calculated using a freely available Internet tool.[108] While a more detailed analysis is necessary, it is likely that allowing licensed paralegals to practice independently in a carefully defined set of family law cases would produce net benefits for the consumers of those services. Competition would reduce prices, thereby allowing more people to benefit from expert professional assistance in family court. Thoughtful definition of the scope of practice and entry requirements for the new competitors could secure these goals while minimizing or eliminating any effects on quality.[109]

The scope of paralegal practice should be defined in a way that balances the benefits of competition and innovation against the need to protect consumers. Doing so requires an analysis of what tasks and skills are involved in different family law cases, and how these tasks and skills correspond to the education and skills of lawyers and paralegals. The fact that occasional cases present unexpected complications requiring an advanced level of expertise is not a good enough reason to exclude lower-level professionals from any independent practice whatsoever.

Consider a comparison from the medical field. Vaccinations, on rare occasions, produce extremely severe allergic responses requiring the attention of a doctor. However

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[107] Department of Justice (Canada), "Federal Child Support Amounts: Simplified Tables," online: <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/legis/fcsg-lfpae/index.html> (last accessed: 24 October 2011); Carol Rogerson and Rollie Thompson, Spousal Support Advisory Guidelines (Final Version): Department of Justice (Canada), 2008), online: Department of Justice (Canada) <http://www.justice.gc.ca/eng/pi/fcy-fea/spo-epo/g-ld/spag/index.html> (last accessed: 26 October 2011).

[108] "Mysupportcalculator," online: <www.mysupportcalculator.com> (last accessed: 24 October 2011).

[109] Brockman, .

this fact has never been considered a good reason to prevent nurses from administering vaccines independently. In a multiple licensing environment, the requirement for a professional to recognize matters beyond his or her scope of practice, and refer those matters to others, can protect the consumer without sacrificing efficiency or competition.

Should Canada's law societies, which are controlled by lawyers, be allowed to define the appropriate scope of practice for independent paralegals, who are potentially their competitors? Prior to 2006, a succession of high-level reports recommended that Ontario paralegals either have their own self-regulatory organization, or at least be regulated by an institution not controlled by their competitors.[110] However the Ontario Legislature decided otherwise with the *Access to Justice Act, 2006*.[111] The Law Society of Upper Canada (LSUC) therefore now designs and enforces the licensure process for all Ontario paralegals not employed by lawyers. As noted above, the scope of practice that LSUC currently allows for independent paralegals does not include any family law whatsoever, and is quite narrow in other areas of law as well. LSUC has undertaken a review of the paralegal scope of practice, which will presumably consider family law.[112] This review is an important test. Will the paralegal scope of practice be defined in a manner attentive to the access to justice benefits of paralegal practice. Or will it be defined in a manner designed to protect family lawyers from competition?

Market conduct regulations also have a legitimate function, but should be subjected to a cost-benefit analysis from a consumer welfare point of view. For example, it was noted above that Ontario lawyers are now required to attend 12 hours of CLE classes per year, and that the cost of this market conduct regulation will presumably be reflected in the price of their services. Does this requirement have a commensurate benefit for clients? It has been argued that mandatory professional education programs only contribute to consumer

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[110] Ontario Task Force on Paralegals, Ron W. Ianni, and Ontario. Ministry of the Attorney General, *Report of the Task Force on Paralegals*, microform (Toronto, Ont.: Queen's Printer,, 1990) ("Ianni Report"); Peter de C. Cory, *A Framework for Regulating Paralegal Practice in Ontario : Report* ([Toronto]: Ontario Ministry of the Attorney General, 2000); Competition Bureau, *supra* note 45.

[111] *Access to Justice Act*, S.O. 2006, c. 21.

[112] Michael McKiernan, "Lsuc Launches Paralegal Review" Law Times (Sunday, March 06, 2011).

welfare if they are targeted at specific lawyers with specific problems.[113] The universal and vaguely defined requirement introduced in Ontario is not of this nature, which casts doubt on its value.

Business structure regulations are often justified by the idea that practicing law within certain types of commercial organization would undermine a lawyer's ability to uphold solicitor-client privilege, independence, and the avoidance of conflicts of interest.[114] However the potential ethical risks posed by non-traditional business structures are often asserted in the absence of empirical evidence that they actually materialize, or that these risks are any less real within traditional business structures. For example, one of the arguments against non-lawyer investment in legal services providers is that non-lawyer shareholders would demand profit maximization so vociferously as to lure the lawyers into docket-padding.

However, billable hour targets for associates in lawyer-owned firms would appear to present the same threat, perhaps in an even more salient way. Telling associates to bill 2000 billable hours per year or lose their jobs creates very significant pressure. Assuming that most lawyers resist the temptations to unethical conduct posed by the traditional partnership business structure, there is not yet any persuasive evidence that business structure innovations would present new and more irresistible temptations.

Publicly traded corporations have especially promising potential for reducing costs and increasing innovation. Permitting large corporations to offer family and other household legal services could improve the working conditions experienced by lawyers in these fields. Insofar as the vast majority of legal services for individuals are provided by small firms and solo practitioners, [115] it is difficult for a new lawyer to find opportunities to

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[113] Trebilcock, "Regulating the Market for Legal Services" *supra* note 58 at 224.

[114] Trebilcock and Csorgo, *supra* note 46 at 17; Multi-Disciplinary Practice Task Force, Report to Convocation (September 21, 2000) (Toronto: Law Society of Upper Canada, 2000), online: LSUC <http://www.lsuc.on.ca/media/MDPtaskforcereport.pdf> (last accessed: 26 October 2011); Knake, *supra* note 86 at 5-6.

[115] McMurtry *et al.*, *supra* note 27 at 48; Final Report of the Sole Practitioner and Small Firm Task Force (Toronto: LSUC, 2005), online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf> (last accessed: 26 October 2011) at 26-7.

work in these fields without also becoming an independent businessperson. There may be many Canadians who are willing and able to practice family, immigration, or criminal law, but who are less willing or able to engage in business management tasks such as billing, collections, technology management, hiring and firing, etc. The high rates of stress and burnout experienced by these lawyers in this country could be partially attributable to the business management obligations which the predominant sole practitioner and small-firm business models impose upon them. A large corporation opening a legal services business might find many family lawyers eager to become employees, and benefit from the attendant division of labour, economies of scale, and work-life balance options. A larger and more satisfied Canadian bar would redound to the benefit of consumers.

Conclusion

The growing dearth of legal professionals in our courts is the tip of the iceberg which is Canada's access to justice crisis. Many Canadians urgently need, but do not obtain professional, personalized legal assistance. Regulatory reform could reduce the price and increase the variety of legal services provided by the market. This could enhance the accessibility of justice and multiply the effectiveness of legal aid dollars, without endangering consumers and without any additional public expenditure. Barriers to entry, market conduct regulations, and business structure regulations should all be subjected to careful scrutiny. The need to protect consumers should not blind us to the potential of even well-intentioned regulations to drive up prices, suppress innovation, and deaden competition. Access to justice need not be an impossible dream, but it may require serious self-scrutiny and difficult decisions within the legal profession. The regulatory regime is an excellent place to start.