

**University of Toronto Faculty of Law**

**Middle Income Access to Civil Justice Initiative**

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**Background Paper**

**The University of Toronto Faculty of Law**

**Middle Income Access to Civil Justice Initiative Steering Committee<sup>1</sup>**

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## **I INTRODUCTION**

The purpose of this background paper is to provide a general overview of the issue of access to the civil justice system by middle-income earners. Broadly speaking, our goal is to identify the most acute, unmet civil legal needs in the province for middle-income Ontarians across different key areas of law, and to explore a range of existing and possible solutions to these problems. Our current efforts are focusing on the problem as it exists in Ontario, but many of the themes and issues we raise apply to the rest of the country, and indeed to many other developed countries. The paper will be used as a starting point for broader policy discussions and ideas.

### **A Definitions**

For our purposes, we are relying on broad and inclusive definitions of each of the key areas of our work; that is, civil justice, access to justice, and middle-income earners.

We define civil justice broadly, to cover all areas of the justice system outside of the criminal justice system.

While the phrase “access to justice” does not have any one single meaning, we agree with the broad definition articulated by Rod Macdonald, who characterized the term as an umbrella covering a variety of relationships between individuals and the justice system.<sup>2</sup> As Lorne Sossin explains:

While this relationship was once linked to concerns over how litigants could obtain affordable legal representation (which was addressed primarily through legal aid), more recent approaches have included organized pro bono, creating specialized courts (*Gladue* courts, domestic violence courts, etc.), replacing courts with tribunals, promoting ADR and Collaborative Law, replacing tort with no-fault accident compensation schemes, community and public legal education, self-help and the prevention of disputes. Access to justice is also closely linked to

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<sup>2</sup> Rod McDonald, "Access to Justice in 2003: Scope, Scale and Ambitions" (Paper prepared for the Symposium on Access to Justice, Law Society of Upper Canada, May 2003).

the promotion of equity, fairness and the elimination of barriers to justice (whether physical, psychological, financial or social). In this sense, access to justice raises questions about “the degree to which the citizen has access to and can participate in the procedures by which substantive law is made.”<sup>3</sup>

Nor is there any agreed upon definition of the phrase “middle-income earners”. We define middle-income Ontarians to be those individuals whose household income is too high to allow them to qualify for legal aid, but too low to be in a position to afford to hire legal counsel to represent them in a civil law matter.<sup>4</sup> We recognize that further research and discussion about the scope of this group may be in order, building on a body of knowledge that currently exists on this topic. In addition to clarification regarding the scope of the category, a number of issues arise in relation to the definition of middle-income earners.

First, we are attentive to the fact that a focus on solving access to justice problems of the middle class may have an impact on low-income individuals and communities. We believe it is critical that any solutions for middle-income earners are considered within the context of access to justice for the poorest and most disadvantaged in our society – individuals whose civil legal needs and experiences are often quite different from the areas of civil law we are looking at in our work. As Stephen Wexler famously wrote: “Poor people are not just like rich people without money...; poor people are always bumping into sharp legal things.”<sup>5</sup> This suggests that individuals on the lower end of the middle-income spectrum will not only have radically different incomes than those at the upper end of the spectrum, but will also have radically different experiences of the justice system, and their legal issues will resemble those of low-income groups.

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<sup>3</sup> Lorne Sossin, *Research Priorities Report: Submitted to the Board of Governors of the Law Commission of Ontario* (2007) at 3.

<sup>4</sup> Because our definition will capture people who have sufficient resources to contribute to the cost of legal representation, but do not have sufficient resources to pay the full market rate for legal representation, it may be that some of our proposed solutions could entail co-payment funding models.

<sup>5</sup> Stephen Wexler, “Practicing Law For Poor People” (1970) 79 Yale L.J. 1049.

Second, we are mindful of the fact that, given the breadth of the definition, there will be significant differences between the experiences of individuals at the upper and lower ends of the middle-income category. At one end of the spectrum are individuals who do not qualify for legal aid because the income criterion is set so low,<sup>6</sup> but yet who are unable to afford even short-term legal representation. Toward the other end of the spectrum are those who can afford to pay the market rate for legal services for protracted litigation.<sup>7</sup> It is important to remember that many of the individuals at the upper end of the middle-income spectrum are among the top quartile of income earners in the province.

Third, we are also attentive to differences of education, literacy, language, geography, culture, mental health and other systemic barriers that affect the availability of legal resources for middle-income individuals, as well as the range of appropriate responses to the problem. As our research develops, we will explore the ways in which the elimination of these kinds of barriers to justice requires holistic and integrated approaches to the delivery of legal services.

Finally, a word about why we have chosen to focus our efforts on middle-income access, particularly in light of the very significant, extreme legal needs of the poor. We agree with The Honourable Chief Justice Beverley McLachlin's declaration that access to justice is "a basic right" for all Canadians, not unlike education or health care.<sup>8</sup> When Ontario's legal aid system was first created more than 40 years ago, the goal was to ensure justice for all Ontarians. Today, the system is unable to serve even all of the poorest in the province. Access to justice for low- and middle-income Ontarians is a serious problem, and we believe that some range of legal services should be provided to all citizens on a non-means tested

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<sup>6</sup> A single person earning just \$16,600 a year after taxes may not qualify for legal aid.

<sup>7</sup> A simple three-day civil trial in Ontario costs about \$60,000: Ontario Ministry of the Attorney General, *Report of the Legal Aid Review 2008* by Michael Trebilcock (2008) [Trebilcock Report].

<sup>8</sup> Tracey Tyler, "Access to Justice a 'basic right': Country's top judge says the system's high cost is an 'urgent' problem that must be addressed, but lawyer's recent accusations of money-grubbing among his peers won't help, chief justice says" *The Toronto Star* (12 August 2007) [Tyler].

basis. Further, access to justice is not only a public or a moral good but we believe it is a strategic priority. As the Trebilcock Report notes, middle-income earners currently feel weakly invested in legal aid because their only involvement in the system is as taxpayers, as opposed to participants. If we continue to expect middle-income Ontarians to financially support, through their tax dollars, a legal aid system for the poor, we would be wise to offer them a material stake in the well-being of the system.<sup>9</sup>

## **B Outline**

This background paper is meant to provide a general overview of the issue of access to the civil justice system by middle-income earners.

In section II of this paper, we explore the nature of the problem, by reviewing the literature on unmet need for civil legal services of middle-income Ontarians. We identify the most acute legal needs across different key areas of law. In so doing, we review and rely on a range of civil legal needs studies that have been undertaken in Ontario, Canada and beyond.

In Section III of the paper we explore the spectrum of legal services. We begin with a brief explanation of possible pre-emptive solutions to civil legal need – what we refer to as “front-end”, or proactive, solutions to the problem. We then explore the nature and range of legal services – what we are calling the “back-end”, or reactive, solutions to the problem of civil legal need. The purpose of this section is to provide a richer description of what we mean by “legal services”, which will provide more insight into problems of access and potential solutions. Having reviewed the nature of legal services more generally, we then examine a range of specific solutions along the spectrum of legal services, in response to the particular unmet needs of middle-income Ontarians. For each type of legal service, we describe the studies, reports and proposals which explore how the unmet need could be

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<sup>9</sup> Trebilcock Report, *supra* note 7.

addressed by the service, the extent to which the service is utilized in Ontario, if at all, and innovative examples of the service's implementation in Canada and foreign jurisdictions. Our focus in this paper is on the highest areas of civil need: family law, employment law, and consumer and debtor/creditor law. Finally, we explore the literature on issues and innovations in the private sector, where the supply of lawyers that provide the majority of legal services to individuals is dwindling and a fee structure based on an hourly billing model is unaffordable for most. In this context we focus on innovations in legal service provision that confront the "economics" of legal services: legal insurance plans; contingency fees and class actions; "low bono" models; "unbundling" of lawyers' services; solutions to lawyer supply issues; and emerging alternatives to the billable hours regime.

In section IV of the paper, we explore the literature that sets out alternatives to adjudication. These alternatives include the development of informal complaints systems and law reforms that have succeeded in either preventing litigation or reducing the complexity or number of issues to be resolved through the litigation process: mediation processes; the creation of tribunals that function to reduce costs, delays, intimidation and complexity; and court and procedural reform.

We recognize that the distinctions we have made between front-end solutions, back-end solutions, and the alternatives to adjudication do not yield watertight categories. For example, some of the alternatives to adjudication we explore could be re-characterized as pre-emptive solutions to the access to justice problem. Our aim in making these distinctions, however, is to provide a structure that is conceptually clear: section III focuses on mechanisms that prevent legal problems from forming, and facilitating recourse in the traditional court-based civil justice system once legal problems have formed, and section IV focuses on alternatives and improvements to the traditional court-based system.

## **II THE NATURE OF THE PROBLEM**

### **A The Lack of Access to the Civil Justice System in Ontario: An Overview**

In Ontario, as elsewhere, unrepresented litigants have become a regular feature of the courts. While evidence is mostly anecdotal, and will be discussed in the next part of this section, in some courts up to half of litigants may be unrepresented. In addition to posing technical challenges to the operations of courts, unrepresented litigants may also signify a denial of access to justice. Attempts to make courts more responsive to unrepresented litigants by simplifying procedures and forms are not always effective, and providing partial assistance to unrepresented litigants is also problematic for practical reasons and reasons of principle.

For the most part, the increasing number of unrepresented litigants is a result of rising costs of legal services. Legal Aid Ontario's ("LAO") funding is limited and the income threshold for legal aid certificates or for clinic services is very low. Furthermore, LAO's budgetary limits mean that there are many areas of civil law which it does not cover. Even if the income threshold were raised, the tariffs are below market rates for lawyers and, in many parts of the province, there are few lawyers willing to take legal aid certificates. Market forces have also contributed to a shortage of lawyers willing to work in certain legal areas and in certain areas of the province, particularly rural and remote areas, even for clients willing and able to pay.

While 60 percent of LAO's budget pays for certificate lawyers offering full representation in criminal, immigration/refugee, and occasionally family law matters,<sup>10</sup> it

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<sup>10</sup> Effective April 1, 2010, LAO no longer offers certificates for civil litigation matters, except for responses to third-party records applications in criminal cases (O'Connor/Mills applications) and test cases approved by the Group Applications and Test Case Committee. These changes apply only to litigation matters and therefore do not affect civil certificates for correctional law matters, Consent and Capacity Board and Ontario Review Board matters, or administrative board and tribunal matters.

does offer some other limited services to a broader range of clients, including duty counsel, and advice provision through the Family Law Information Centres. Limited advice is available through, for example, Pro Bono Law Ontario's Law Help Ontario centres funded by the Law Foundation of Ontario, and some public legal information is available through, for example, Community Legal Education Ontario ("CLEO"). Generally, however, there are few alternate delivery models for people who cannot afford to pay for lawyers and do not qualify for legal aid. Moreover, structural barriers preventing access to courts and tribunals may exist, such as filing fees, feelings of intimidation, or even simply schedules and distance. Alternatives to dispute resolution through the courts may not exist, or people may not be aware of them. Many services that exist in urban areas tend to be sparse or non-existent in rural areas, and services everywhere tend to be limited for people facing cultural or linguistic barriers to access.<sup>11</sup> Therefore, people with legal problems are often forced to deal with them on their own. All too often, as surveys show, people with legal problems will either do nothing to address them, or wait until they grow to unmanageable proportions.

## **B The Importance of Civil Access to Justice for Low- and Middle-Income Ontarians**

While legal problems of any kind can have economic consequences and can disrupt day-to-day life, a growing body of research has established causal links between lack of access to justice and health and social problems. The 2006 Canadian Department of Justice national "justiciable issues" survey, discussed in detail below, found that a significant portion

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These changes also do not apply to family law matters. Legal Aid Ontario, "Hot Bytes: Changes to Legal Aid Ontario's Civil Litigation Coverage", online: Legal Aid Ontario <[http://www.legalaid.on.ca/en/news/newsarchive/1005-04\\_civillitigation.asp](http://www.legalaid.on.ca/en/news/newsarchive/1005-04_civillitigation.asp)>.

<sup>11</sup> For a study of linguistic and rural access to justice barriers, see: Linguistic and Rural Access to Justice Project, *Connecting Across Language and Distance: Linguistic and Rural Access to Legal Information and Services* by Karen Cohl & George Thomson (Toronto: Law Foundation of Ontario, 2008) [Cohl & Thomson Report].

(38%) of people with legal problems believed that their problems had caused adverse effects in other areas of their lives, including mental health (36.6%), physical health (23.5%), feelings of threatened safety and security (12.9%), alcohol or drug use (6.4%), threatened or actual violence (5.7%), and problems with children (5.3%). While these effects vary according to the legal problem and demographics, the likelihood of a negative impact generally increases with the number of legal problems an individual faces. Similarly, the Ontario results of the 2008 Department of Justice survey found that 35 percent of people with legal problems believed that their problem had adversely affected their physical health, mental or emotional health, or their family and social well-being. The 2009 Ontario Civil Legal Needs Project survey found that 71 percent of respondents who had experienced "legal issues" had also experienced one of a series of related problems as a consequence, including stress-related or mental illness (46%), loss of confidence (46%), physical ill health (33%), loss of employment or income (31%), relationship breakdown (28%), a permanent disability (14%), a forced move (14%), violence (11%), bankruptcy (7%), a loss of custody (5%), or a move to a shelter (3%).

A report by Stratton and Anderson suggests economic, mental health, physical health, safety and security, discrimination, and language barrier problems may be associated with a lack of access to the courts.<sup>12</sup> Other research has noted the correlation between access to justice barriers and the more general concept of "social exclusion", which encompasses a wide range of social and health-related factors, and the particular vulnerability of people with chronic illnesses or disabilities, as well as their increased likeliness to experience a wide range of justiciable problems.<sup>13</sup>

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<sup>12</sup> Department of Justice Canada, *Social, Economic and Health Problems Associated with a Lack of Access to the Courts, Final Report Submitted to Ab Currie, Principal Researcher, Research and Statistics Division* by Mary Stratton and Travis Anderson (2006).

<sup>13</sup> See, for example: Department of Justice Canada, *Civil Justice Problems and the Disability and*

## C Approaches to Studying the Problem

Individuals may not always realize that a given problem has a legal remedy; instead, they might seek assistance from social services agencies or ignore the situation completely. If they do identify a legal issue, and seek assistance from legal aid, they might be turned away because they are not financially eligible. At the same time, they may not be able to afford a lawyer and, as a result, attempt to navigate the system unrepresented.

In this paper, we distinguish between unmet “expressed” need or demand, “felt” need and “normative” need. *Expressed need* is a demand from members of the public placed directly on the justice system; this includes the increasing number of unrepresented litigants appearing in court, and people who are refused legal aid or turned away from legal clinics. By *felt need*, we mean the subjective judgment people have of their own legal needs (whether or not they are so defined by law); and *normative need* is the assessment of an individual’s legal needs by a legal professional. While expressed need may be measured directly within the justice system, it is typically only a small fraction of felt and normative need. As one author writes, “It is widely accepted that many people with serious civil justice problems do not have access to the courts and thus do not appear as un-represented litigants. It is also part of the growing orthodoxy that many problems could be better resolved using alternative means, without engaging in expensive and lengthy court proceedings.”<sup>14</sup> A narrow view of access to the civil justice system, based only on expressed need, thus risks ignoring those who face barriers preventing them from accessing the courts and precludes attention to

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*Health Status of Canadians* by Ab Currie (2006); P. Pleasence, N.J. Balmer, A. Buck, A. O’Grady & H. Genn, “Civil Law Problems and Morbidity” (2004) 58(7) *J. Epidemiology and Community Health* 552; and A. Buck, N. Balmer and P. Pleasence, “Social Exclusion and Civil Law: Experience of Civil Justice problems Among Vulnerable Groups” (2005) 39(3) *Soc. Pol’y & Admin* 32.

<sup>14</sup> Department of Justice Canada, *The Legal Problems of Everyday Life* by Ab Currie (2007) at 1 [Currie 2007].

opportunities for addressing systemic problems through front end prevention, and alternative dispute resolution models.

We identify different solutions depending on whether we concentrate on expressed or felt/normative needs: a high number of individuals turned away from legal clinics and legal aid may call for raising the financial eligibility criteria for LAO funding; the increase in unrepresented litigants appearing in courts may call for the modification of procedural rules to assist them, or for the reduction of court costs; and if it seems clear that people do not know when their problems could be resolved effectively through the legal system, then public legal education and awareness campaigns present as appropriate solutions. The following sections focus on unrepresented litigants in the courts, and the unexpressed demand in the population at large as determined through legal needs surveys.

### **C.i Unexplored Sources of Data**

In preparing this paper, we have not explored the following sources of data that focus on expressed need: the Ontario Court Services Annual Reports which provide data on the numbers of civil, family, small claims, and appeal hearings, categorized by region;<sup>15</sup> statistics collected by community legal clinics and Legal Aid Ontario on the clients who are turned away due to financial ineligibility or subject matter;<sup>16</sup> local needs assessments undertaken by clinics for their specific regions and clientele;<sup>17</sup> information collected by administrative tribunals and alternate dispute resolution mechanisms in place; and the Law Society's Lawyer Referral Service or Findhelp 211, and MAG's Family Law Information Centres ("FLICs").

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<sup>15</sup> Ontario Ministry of the Attorney General, "Court Services", online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/courts/>>. More detailed information, for example about the area of law in the case, parties' representation, costs, proceeding length and outcomes, may be available through the Ontario Ministry of the Attorney General ("MAG") or through Statistics Canada's ongoing Civil Court Survey.

<sup>16</sup> LAO's certificate refusal rate was 23 percent in 2007.

<sup>17</sup> Mary Marrone, "The Evolution of Needs Assessments in Ontario" (Paper presented to the Legal Services Research Centre International Conference, March 2002).

Other projects have tried to determine legal need through more complex exercises know as "needs mapping", which may involve a combination of service inventories and focus groups with those involved in the legal system. The Ontario Civil Legal Needs Project has conducted such a series of focus groups, but only its preliminary results are discussed in this paper.

### **C.ii Studies of Unrepresented Litigants<sup>18</sup>**

While the Honourable Coulter A. Osborne, in his Civil Justice Reform Project Report ("the Osborne Report"), recommended that a detailed study of unrepresented litigants in Ontario be undertaken, no such study yet exists. In addition to isolated studies that have been conducted on the issue of civil needs,<sup>19</sup> the legal needs survey component of the Ontario Civil Legal Needs Project includes a study of unrepresented litigants in its terms of reference. Detailed studies of unrepresented litigants have also been carried out in BC, Alberta, Quebec, and Nova Scotia,<sup>20</sup> and many studies have been conducted in the US.<sup>21</sup> The Saskatchewan Ministry of Justice has also considered the problem and recommended system-wide

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<sup>18</sup> While there may be reasons for doing so in others contexts, this paper does not distinguish between unrepresented litigants who opt not to retain a lawyer and unrepresented litigants who cannot afford to hire a lawyer.

<sup>19</sup>For example, Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2004-5) 30 Queen's L.J.825 [Langan, "Scales of Justice"].

<sup>20</sup> Canadian Forum on Civil Justice, *Alberta Self-Represented Litigants Mapping Project: Final Report* by Mary Stratton (2007) [Alberta SRL Report]; Alberta Rules of Court Project, *Self-Represented Litigants: Consultation Memorandum 12.18* (Edmonton: Alberta Law Reform Institute, 2005) [AB LRI Memorandum 12.18]; Nova Scotia Department of Justice, *Self-Represented Litigants in Nova Scotia: Needs Assessment Study* (2004) [Nova Scotia SRL Report]; Community Services Consulting Ltd., *A Report on the Evaluation of the Alberta Law Line* (2006); John Malcolmson & Gayla Reid, *BC Supreme Court Self-Help Information Centre Final Evaluation Report* (2006) [BC SHC Report]; Gayla Reid, Donna Senniwi & John Malcolmson, *Developing Models for Coordinated Services for Self-representing Litigants: Mapping Services, Gaps, Issues and Needs* (2004) [SRL Service Models]; BC Legal Services Society, *Civil Hub Research Project: Needs Mapping* by Gayla Reid and John Malcolmson (2007).

<sup>21</sup> Some statistics from various states are available at <<http://www.ncsconline.org/wc/publications/memos/prosestatmemo.htm>>. One recent overview is Russell Engler, "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed" (2010) 37 Fordham Urban Law Journal 37 [Engler, "Civil Gideon"].

reforms.<sup>22</sup> Such studies are helpful for identifying the number of unrepresented litigants participating in the justice system, the reasons why litigants are unrepresented, the needs of unrepresented clients, and how this lack of representation affects court and tribunal processes and the fairness of outcomes. The studies also often assess the effects of services or procedural changes intended to assist unrepresented litigants. While unrepresented litigants appear to be increasingly common in all jurisdictions in Canada and in the US, empirical data on the issue is scarce. Selected statistics suggest there is an increasing number of unrepresented litigants in the past fifteen years in many jurisdictions, with this group often accounting for a majority of all litigants.<sup>23</sup>

### **C.ii.a Unrepresented Litigants in Ontario**

Statistics on the numbers of unrepresented litigants in Ontario have not been published by the court system and, as noted above, we have not collected them.<sup>24</sup> Nonetheless, anecdotal evidence suggests that the proportion of unrepresented litigants is high and part of the regular day-to-day operation of many courts. Unrepresented litigants are particularly common in family courts. A 2005 study found that in 2003, 43.2 percent of applicants in Family Court, Ontario Court of Justice Division were not represented when they filed with the court and that between 1998 and 2003, an average of 46 percent of litigants in Ontario Family Court were unrepresented.<sup>25</sup> The 2008 MAG report on *Recapturing and Renewing the Vision of the Family Court* (“the Mamo Report”) found that between 2003 and

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<sup>22</sup> Saskatchewan Ministry of Justice and Attorney General, *Unrepresented Litigants Access to Justice Committee Final Report* (November 2007) [SK SRL Report]; see also Appendix B, *A Discussion Paper On The Issue Of Litigants Without Lawyers In Saskatchewan* (25 October 25 2006) [SK SRL Report Appendix B].

<sup>23</sup> See: AB LRI Memorandum 12.18, *supra* note 20; SK SRL Report Appendix B, *ibid.*

<sup>24</sup> See: Ontario Ministry of the Attorney General, *Civil Justice Reform Project: Summary of Findings & Recommendations* by Coulter A. Osborne (2007) at 44 [Osborne Report], which says that the Ontario MAG was planning to collect them.

<sup>25</sup> Langan, “Scales of Justice”, *supra* note 19 at 826-7.

2005, both the applicant and respondent were unrepresented in 31 percent of the files considered,<sup>26</sup> and that overall, 33 percent of applicants and 58 percent of respondents were unrepresented.<sup>27</sup>

### **C.ii.b Reasons for the Lack of Representation**

According to most studies, litigants are usually unrepresented because they are unable to afford a lawyer or have been turned away from legal aid. These categories accounted for 64 percent and 6 percent of unrepresented litigants, respectively, in Law Help Ontario's survey; 75.9 percent and 2.4 percent, respectively, in the BC SHC evaluation; and 33 percent and 26 percent, respectively, in the Nova Scotia survey. Affordability sometimes admits of degrees; for example, Law Help Ontario's survey found that 5 percent of unrepresented litigants could afford some legal fees but not all and that 6 percent had run out of funds paying lawyers. In some cases, unrepresented litigants were still deciding whether to get a lawyer (17.2 percent in the BC SHC study) or did not know how to find one (4.2 percent in the BC SHC study).

Unrepresented litigants who chose not to obtain lawyer services form a minority group of all unrepresented litigants, but sometimes a significant one. In the BC SHC survey, 10.9 percent of unrepresented litigants did not want a lawyer. In Law Help Ontario's survey, 14 percent did not want a lawyer: 11 percent because they believed their case was straightforward and did not require a lawyer, 3 percent because they did not trust lawyers, and 1 percent because they did not want to pay for a lawyer. In the Nova Scotia survey, a surprisingly large 39 percent of unrepresented litigants did not want, or thought they did not need, a lawyer. Of these, 21.5 percent felt that their matter was too simple to warrant

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<sup>26</sup> 136 of the 437 files considered.

<sup>27</sup> Alfred A. Mamo, Peter G. Jaffe & Debbie G. Chiodo, *Recapturing and Renewing the Vision of the Family Court* (2007) [Mamo Report].

retaining a lawyer, 21.5 percent thought they could do as good a job as a lawyer, and 16 percent had a bad previous experience with lawyers. The remainder had other reasons, which fit into three themes: the respondent had a previous experience with representation and thought she could handle the matter just as well on her own; the respondent distrusted lawyers; or the respondent could not afford representation.

### **C.ii.c Characteristics and Needs of Unrepresented Litigants**

Most research across jurisdictions has found that unrepresented litigants tend to have low-to-middle incomes. The Alberta Self-Represented Litigants Mapping Project found that people with annual incomes below \$35,000 are far more likely to be unrepresented litigants and that half of the unrepresented litigants in the studies reviewed had incomes below \$15,000.<sup>28</sup> The one-year review of Law Help Ontario's pilot project found that in the one-person per household category of its clients, 86 percent earned less than \$27,000 annually and that 53 percent received social assistance.<sup>29</sup> As household size increased, so did income, and the likelihood of being on social assistance decreased. The one-year evaluation of the BC Supreme Court Self-Help Information Centre ("BC SHC") found similar patterns.<sup>30</sup> Of clients for whom data was available, 30 percent reported incomes less than \$12,000, 60 percent reported incomes less than \$24,000, and 80 percent reported incomes less than \$36,000.

While their income levels tend to be relatively low, unrepresented litigants often have above-average education levels. The Alberta Mapping Project found that between 80 and 96 percent of unrepresented litigants had completed high school and between 60 and 65 percent

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<sup>28</sup> Alberta SRL Report, *supra* note 20 at 10-11.

<sup>29</sup> Pro Bono Law Ontario, *Law Help Ontario Pilot Project: Year One Report* (2008), available online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/inventory/reform.php?id=60>> [LHO Report].

<sup>30</sup> BC SHC Report, *supra* note 20.

had some post-secondary education.<sup>31</sup> The one-year review of Law Help Ontario's pilot project found that 44 percent of their clients had some post-secondary education, although there is a self-selection bias in their clientele.<sup>32</sup> In the one-year evaluation of the BC SHC, 64 percent of clients had some post-secondary education and 85 percent had secondary education.<sup>33</sup>

The Alberta Self-Represented Litigants Mapping Project found that almost 50 percent of all unrepresented litigants are found in family law, with others distributed across a variety of primarily civil matters.<sup>34</sup> A Nova Scotia study on unrepresented litigants reported similar findings.<sup>35</sup> The BC SHC evaluation found that a large majority of cases that involved “full-service” (defined as fifteen minutes or more of a lawyers’ time), 78.2 percent, were family law matters. The evaluators commented that their system of data collection tended to bias “full-service” cases towards family law and pointed out that family cases accounted for only 56.3 percent of brief-services cases, 41.3 percent of which were civil-law related longer “brief-service” cases. Of the civil cases recorded in non-family law areas, consumer, personal injury, and wills were the most common issues. Common subjects in a third category, “Judicial review/Other” included human rights, landlord-tenant, small claims, and motor vehicle related issues.<sup>36</sup> An earlier BC report relying primarily on interviews with service providers found that priority areas for unrepresented litigants were, in descending order of priority: family law, judicial review (most often landlord/tenant disputes), debt and

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<sup>31</sup> Alberta SRL Report, *supra* note 20.

<sup>32</sup> LHO Report, *supra* note 29; LHO screens clients for suitability using factors such as English proficiency, literacy, mental health, incidence of domestic violence, and case complexity. According to this measure, LHO found that 92 percent of its visitors were deemed appropriate for self-help services.

<sup>33</sup> BC SHC Report, *supra* note 20.

<sup>34</sup> Alberta SRL Report, *supra* note 20.

<sup>35</sup> Nova Scotia SRL Report, *supra* note 20 at 27-28.

<sup>36</sup> BC SHC Report, *supra* note 20 at 33-36.

bankruptcy, probate, and other civil matters.<sup>37</sup> As Law Help Ontario does not provide services for family law, its one-year review reported that of known causes of action, contract disputes made up the majority (16%), followed by motor vehicle accidents, and loans and mortgages. Loan, credit card, and mortgage default cases (combined together) represented approximately 7 percent of cases.<sup>38</sup>

The studies report an overwhelming need for procedural advice. Law Help Ontario's review found that 48 percent of inquiries involved procedural, not substantive, issues. Of services provided by lawyers, 30 percent involved procedural advice, 23 percent involved form completion, 5 percent were referrals, and 2 percent were commissioned documents; only 30 percent involved summary advice and only 10 percent involved representation.<sup>39</sup> The BC SHC evaluation found that among self-help centre users who were interviewed, over half reported needing assistance completing court documents, 42 percent understanding procedural issues, and many needed explanations of technical issues related to their legal matters.<sup>40</sup> The Nova Scotia study also noted unrepresented litigants' need for assistance related to court procedures and forms, particularly the rules of evidence.<sup>41</sup>

Other findings from the studies include the unrepresented litigants' need to understand the litigation process: how long it will take, risks involved, what can be realistically expected, and how their positions can be appropriately articulated. Some studies have tried to identify key stages at which unrepresented litigants require the most assistance. The Nova Scotia study found that while there is need for assistance at all stages, the greatest need was at the pre-filing and filing stages.<sup>42</sup> The earlier BC report found that unrepresented

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<sup>37</sup> SRL Service Models, *supra* note 20 at 10-11.

<sup>38</sup> LHO Report, *supra* note 29 at 23.

<sup>39</sup> *Ibid.*

<sup>40</sup> BC SHC Report, *supra* note 20.

<sup>41</sup> Nova Scotia SRL Report, *supra* note 20.

<sup>42</sup> *Ibid.*

litigants need legal advice and assistance at strategic points in the process, and often need “in-person” assistance and help with implementing advice.<sup>43</sup>

#### **C.ii.d Impacts of a Lack of Representation on Court Processes**

The studies suggest unrepresented litigants struggle with the process and tend to: raise concerns in the courtroom that are irrelevant to the legal issues in question thereby causing frustration for judges;<sup>44</sup> prolong the process; submit incomplete documentation; and rely on judges to an extent that raises concerns about appearance of bias; and rely on opposing counsel to an extent that raises concerns about properly representing the interests of their own clients.<sup>45</sup> In the Nova Scotia study, court staff also expressed a concern about the resources needed to assist unrepresented parties, an increased need for judicial assistance, improper document completion, or improper case management.<sup>46</sup> Some studies in the US have suggested that in certain cases, hearings and trials involving unrepresented litigants take less time than those involving represented litigants; efficiency and fairness, however, may be at odds in such situations.<sup>47</sup> The situation is best illustrated in the family law area. The Mamo Report's study found that cases in which both parties were unrepresented had twice the median number of court appearances, a higher number of case conferences, and were more likely to have settlement conferences, trial management conferences, and to proceed to trial.

#### **C.ii.e Impacts of lack of representation on fairness of outcomes**

While the development of court-based self-help centres in the US, BC, and Ontario, focus primarily on assisting unrepresented litigants, representation seems to improve outcomes in many cases. As one US author notes, “[w]ith programs facilitating self-

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<sup>43</sup> SRL Service Models, *supra* note 20.

<sup>44</sup> Langan, “Scales of Justice”, *supra* note 19 at 839-841.

<sup>45</sup> *Ibid.* at 842.

<sup>46</sup> Nova Scotia SRL Report, *supra* note 20 at 10-11.

<sup>47</sup> Engler, “Civil Gideon”, *supra* note 21 at 56-57.

representation, litigants and court personnel report high levels of satisfaction with the programs; the programs' impact on case outcomes is less clear.”<sup>48</sup> Other studies focusing on the impact of representation include:

- A pilot study comparing provision of summary advice to full representation in the Ontario Rental Housing Tribunal which found that, while there was little difference in cases that were resolved through mediation, representation positively influenced outcomes in contested hearings.<sup>49</sup>
- A 2005 study of the Tax Court of Canada's informal procedure that suggested unrepresented litigants' lack of procedural knowledge may prevent them from achieving fair outcomes<sup>50</sup>
- The Nova Scotia study, in which 87.5 percent of judges thought that unrepresented litigants were generally disadvantaged by a lack of representation, and 70 percent thought that the “other party” was also disadvantaged; 82.5 percent thought that unrepresented litigants did not participate with competence.<sup>51</sup>
- Many studies in the US “demonstrate that litigants without counsel often fare poorly even where basic needs are at stake ... reports consistently show that representation is a significant variable affecting a claimant's chances for success in eviction, custody, and debt collection cases ... [and] administrative proceedings ...

The “Civil Gideon” movement in the US, which advocates the right to civil counsel, has performed evaluations of when representation is most necessary. Russell Engler, in a meta-study in the US, concludes that the need for representation is greatest in cases where a relatively powerless litigant opposes a powerful opponent, and that skilled advocates with relevant experience are the most helpful in these situations.<sup>52</sup> For example, in housing courts, representation has a large impact on tenants' outcomes, but typically little impact on landlord outcomes.<sup>53</sup> Similar conclusions apply in family law cases (with some caveats), debt cases, and the administrative context, including social security disability appeals and unemployment and immigration cases. Further, representation of only one party may impede the settlement process, for example, by reducing the likelihood of productive negotiations.

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<sup>48</sup> *Ibid.* at 3.

<sup>49</sup> Tenant Duty Counsel Program, *Toronto East Representation Pilot Project Report* by Gene Filice (Ontario: Advocacy Centre for Tenants – Ontario, 2006).

<sup>50</sup> André Gallant, “The Tax Court's Informal Procedure and Self-Represented Litigants: Problems and Solutions” (2005) 53(2) *Canadian Tax J.* 333.

<sup>51</sup> Nova Scotia SRL Report, *supra* note 20.

<sup>52</sup> Engler, “Civil Gideon”, *supra* note 21 at 3.

<sup>53</sup> *Ibid.* at 12.

### C.iii Legal Needs Surveys

#### C.iii.a The Strengths and Limitations of Legal Needs Surveys

One methodology for studying legal need that has emerged over the last decade is the “justiciable problems”<sup>54</sup> survey approach developed by researchers in the UK and Scotland,<sup>55</sup> and later modified for use in Canada, New Zealand, New South Wales (Australia), some American states, Japan, Hong Kong, the Netherlands, Bulgaria, Germany, and China.<sup>56</sup> The UK now conducts annual justiciable problems surveys for planning purposes and the federal Department of Justice in Canada has conducted three similar surveys in 2004, 2006, and 2008, with consistent results.<sup>57</sup> The Ontario Civil Legal Needs Project survey, conducted in 2009, used a slightly different but related methodology.

These studies generally consist of in-person, telephone, or internet interviews of the target population that focus on problems experienced in a given time period by respondents that may have been addressable through the civil justice system. Questions typically consider any steps taken by respondents to address their problems, the outcomes of these attempts and whether the legal system or legal advisors were involved. Some studies also attempt to

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<sup>54</sup> A “justiciable problem” is usually defined as a problem that could potentially have been resolved by accessing the civil justice system, whether or not the respondent has taken any steps to do so.

<sup>55</sup> Hazel Genn, *Survey of Litigation Costs for the Woolf Inquiry into Access to Justice* (1996); Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Portland: Hart Publishing, 1999); Hazel Genn & Paterson, *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Oxford: Hart Publishing, 2001).

<sup>56</sup> For inventories of studies and comparisons of their findings, see: Law Foundation of BC, *Civil Legal Needs Research Report* by Carol McEown (March 2009) [McEown Report]; Hazel Genn, “Legal Needs Studies: Policy Impact and Potential” (Delivered at the International Legal Aid Group Conference, Wellington, New Zealand, 1-3 April 2009) [Genn ILAG Presentation]; J.M. Barendrecht, P. Kamminga & J.H. Verdonschot, “Priorities for the Justice System: Responding to the most Urgent Legal Problems of Individuals”, *TISCO Working Paper No. 001/2008* (2008) [TISCO Working Paper]; Currie 2007, *supra* note 14; Pascoe Pleasence and Nigel Balmer, “Understanding Advice Seeking Behaviour: Findings from New Zealand and England and Wales” in K. Huang, ed., *Empirical Studies of Judicial Systems* (Taipei: Academia Sinica, 2009), available online: Institutum Iurisprudentiae, Academia Sinica <[http://www.ias.sinica.edu.tw./cht/index.php?code=list&flag=detail&ids=151&article\\_id=3259&eng=1](http://www.ias.sinica.edu.tw./cht/index.php?code=list&flag=detail&ids=151&article_id=3259&eng=1)>.

<sup>57</sup> McEown Report, *ibid.* at 4.

identify justiciable problems that cluster together or trigger each other or assess the objective or subjective severity of the problems.<sup>58</sup>

Civil justice surveys are useful for looking beyond expressed need to assess objective normative need and subjective felt need and therefore provide guidance in developing more effective solutions to the access to justice problem. More specifically:

- the methods that respondents choose to address their problems, and the success or failure of these methods, can tell us about the accessibility of specific components of the civil justice system;
- the identification of causally related or correlated justiciable problems may be useful in designing systemic reforms to address interrelated problems; and
- knowledge about the prevalence and severity of specific problems may generally offer some direction for future research and service developments. For example, problems of greater severity may warrant greater intervention.

Legal needs surveys have many practical and theoretical limitations. Large-scale surveys are expensive, and even the most detailed telephone surveys are necessarily limited by the kinds of information they can capture and by the necessity for subjective assessment by the respondent. Low-income and other vulnerable or isolated populations, such as linguistic minorities, may not be proportionally represented in legal needs surveys due to selection effects unless a deliberate attempt is made to include them.<sup>59</sup>

While legal needs surveys can describe the prevalence of legal problems quite well, they are limited in their ability to assess the severity of legal problems. Subjective judgments of respondents may be unreliable, while objective judgments may need to be compared based on their proportional impact on individuals. The methodology of the surveys, which are confined to a limited time period, limits their view of the long-term impact of legal problems. It may not be possible to determine the comparative costs of addressing or failing to address a

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<sup>58</sup> See, for example, Currie 2007 *supra* note 14.

<sup>59</sup> In Ontario, community legal clinics generally already collect, formally or informally, some of the kinds of information that legal needs surveys gather, and have detailed knowledge about the interaction of poverty-law-related justiciable problems: Mary Jane Mossman with Karen Schucher & Claudia Schmeing, *Comparing and Understanding Legal Aid Priorities: A paper prepared for Legal Aid Ontario* (2009), at 44 [Mossman Report].

given legal problem given the limited data collected by the surveys and the problems comparing individual cases.

Legal needs surveys are also limited in their abilities to predict future needs. Since civil law covers “the legal problems of everyday life”, demographic trends, such as an aging population, can create major shifts in the areas of highest need. The “justiciable problems” approach only considers problems with potential solutions inside the current justice system, though there may be serious social problems that require law reform before potential legal solutions can exist. Finally, due to differences in methodologies and contexts, legal needs surveys may not be easily comparable across jurisdictions.

### **C.iii.b General Findings of Recent Legal Needs Surveys**

Carol McEown identifies five criteria that distinguish legal needs surveys from each other and which must be considered when comparing them:

- i. surveys may vary in methodology, being carried out in-person or via telephone or the internet; it has been observed that in-person studies tend to report a lower incidence of legal need than telephone studies, which in turn report a lower incidence of legal need than internet studies;
- ii. surveys may have different target populations, for example focusing on different income segments;
- iii. surveys may use different time-frames, with longer time-frames leading to a higher incidence of legal need;
- iv. survey questions may have different foci, such that the more broadly a question is posed, the greater the number of responses; and
- v. survey questions may have different ranges (for example, when a question about neighbours of respondents was included on the 2008 Canadian Department of Justice survey, the incidence rate of legal need increased).<sup>60</sup> Crucially, the wording of questions can make a difference. The 2009 Ontario Civil Legal Needs Project survey asked open-ended questions that included the phrase “legal assistance” and “legal problem”, whereas the Department of Justice surveys prompted respondents about a wide range of problems or disputes that they may

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<sup>60</sup> McEown Report, *supra* note 56 at 3.

or may not have considered to be "legal". Correspondingly, the two surveys' findings vary significantly.<sup>61</sup>

Despite these differences in methodology, there are a few general findings shared by most international surveys.<sup>62</sup> Justiciable problems tend to be ubiquitous, being reported in different surveys by between 19 to 87 percent of the population, depending on the survey. The socially excluded tend to experience multiple problems, but a high proportion of the general population also experiences more than one problem. The most common problems are “everyday” ones involving consumer, money, employment, debt, neighbours, benefits, property, housing, and family issues. Tables 1 and 2 illustrate the prevalence of various problem types across a variety of jurisdictions.

**Table 1**

Ontario (OCLNP 2009) <sup>63</sup>		
Problem Type	%	N
Family relationship	12.1	242
Wills / power of attorney	5.6	103
Housing/Land	4.2	83
Real Estate Transactions	3.5	69
Employment	3.2	63
Criminal problems	2.6	51
Personal Injury	2.2	43
Money/debt	1.5	29
Legal action	1.2	23
Neighbourhood / property	1.1	22
Consumer	0.8	15
Disability-related	0.8	15
Discrimination	0.6	12
Immigration	0.6	11
Welfare / social assistance	0.5	10
Small / personal business	0.4	7
Hospital treatment / release	0.3	6

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*; Genn ILAG Presentation, *supra* note 56.

<sup>63</sup> Jamie Baxter, Michael Trebilcock and Albert Yoon, “The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data” (August 27, 2010) at 27 [Baxter et al].

**Table 2**

Canada (2006) <sup>64</sup>			England & Wales (2004) <sup>65</sup>			New Zealand (2006) <sup>66</sup>		
Problem Type	%	No.	Problem Type	%	No.	Problem Type	%	No. <sup>67</sup>
Consumer	22.0	1,469	Consumer	13.3	748	Consumer	10.4	748
Money/debt	20.4	1356	Neighbours	8.4	471	Money/debt	8.1	583
Employment	17.8	1184	Money/debt	8.3	465	Welfare Benefits	6.7	482
Wills and powers of attorney	5.3	348	Employment	6.1	344	Housing or land	5.8	417
Relationship breakdown	3.6	239	Personal injury	3.9	217	Employment	5.4	388
Personal Injury	2.9	192	Rented housing	3.8	215	Family Relationship breakdown	4.8	345
Police action	2.0	133	Owned housing	2.4	135	Immigration	0.8	57
Discrimination	1.9	130	Welfare benefits	2.3	127			
Housing	1.7	116	Relationship breakdown	2.2	124			
Hospital treatment /release	1.6	108	Divorce	2.2	122			
Other Family	1.4	93	Children	1.9	108			
Welfare benefits	1.2	78	Clinical negligence	1.6	92			
Legal action	1.2	82	Domestic violence	1.6	88			
Disability benefits	1.0	66	Discrimination	1.4	80			
Immigration	0.6	40	Unfair treatment by the police	0.7	38			
			Homelessness	0.6	36			
			Mental health	0.5	26			
			Immigration	0.3	18			

Problems often occur in clusters and can trigger each other, and unresolved problems are often linked to health problems. Resolution strategies and advice-seeking vary radically according to the problem type. In general, the range of advice-seeking strategies suggests that people often do not know where to go for advice, and the number of problems in which

<sup>64</sup> Currie 2007 *supra* note 14 cited in Baxter *et al. ibid.*

<sup>65</sup> Pascoe Pleasence *et al.*, *Civil Justice in England and Wales: Report of the 2007 English and Welsh Civil and Social Justice Survey* (London: Legal Services Research Centre, 2008) [2007 Survey] cited in Baxter *et al. ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> Estimated from reported frequencies and a total survey population of 7,200.

no solution was pursued is an indicator of unmet need. Table 3 below illustrates problem response tendencies across a variety of jurisdictions.

**Table 3: Responses to Justiciable Events<sup>68</sup>**

Country	Took Action	No	Handled on Own	Non-Legal Advice	Legal Advice
Canada	22%		44%	22.1%	11.7%
New South Wales, Australia	32.8%		16%		51.2%
England & Wales	8.8%		34.6%		49.1%
Netherlands	9.9%		46.3%		44.1%
New Zealand		76.4%		13.8%	9.8%
United States	26%		42%		51%
Japan	16.6%		54.9%		28.5%

Substantial numbers of unrepresented litigants and users of non-legal advice point to the limited role of lawyers in resolving justiciable problems in general. A substantial number of respondents do nothing to address their problems, often citing stress, lack of knowledge about their rights or methods of resolution, or thinking that nothing can be done.<sup>69</sup> The ubiquity of problems in general may strongly suggest the need for non-court resolution options.<sup>70</sup> In general, middle-aged, middle class people are better able to resolve their problems with fewer consequences than other segments of society.<sup>71</sup>

Two recent comparative studies of civil justice surveys, one of several countries<sup>72</sup> and one of the US and the UK,<sup>73</sup> concluded that Americans are much more likely to do nothing

<sup>68</sup> Baxter *et al*, *supra* note 63 at 20. Data in many national surveys are also available to characterize responses to justiciable events according to problem type: 2007 Survey, *supra* note 65 at 50; Ben Van Velthoven and Marijke ter Voert, “Paths to Justice in the Netherlands: Looking for Signs of Social Exclusion” (Leiden: Leiden University Department of Economics, 2004) at 9; Christine Coumarelos, Zhigang Wei, and Albert Zhou, “Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas: (Sydney: Law and Justice Foundation of New South Wales, 2006) at 99; Currie 2007, *supra* note 14 at 64.

<sup>69</sup> McEown Report, *supra* note 56 at 11.

<sup>70</sup> TISCO Working Paper, *supra* note 56 at 39.

<sup>71</sup> McEown Report, *supra* note 56 at 14.

<sup>72</sup> Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans* (University of Southern California, 2009).

about their civil justice problems than people in countries where there is broader access to a wider range of entry points to the civil justice system (for example, where non-lawyers are allowed to give legal advice); in countries where a wide range of non-lawyer entry points are available, these entry points tend to be used more than lawyers and are more often chosen over doing nothing; and countries with a wide range of entry points tend to be more equitable to low- and middle-income individuals who tend to be less likely to take their problems to lawyers or the courts.

### **III THE SPECTRUM OF POLICY INTERVENTION**

#### **A The Nature of Legal Services**

The term “legal services” incorporates a broad range of assistance with respect to legal matters. At one end of the spectrum are the most comprehensive models of assistance, perhaps best exemplified by the classic touchstone of full representation by a lawyer. At the other end of the spectrum are the least comprehensive models, which include various methods of making legal information and materials available to the public (Public Legal Education and Information: PLEI).

In part C below, we describe a number of existing delivery models along this spectrum with a view to their compatibility and viability in regard to middle class legal needs. Before turning to those models, however, it is useful to remind ourselves that full representation might involve a combination of most, if not all, of the following activities: information gathering; legal and other research and analysis; advice and counseling; commencing or defending proceedings; negotiations and mediation; interim proceedings;

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<sup>73</sup> Rebecca L. Sandefur & Jeanne Charn, “Class and Advice-Seeking: Comparative Insights” (Delivered at the International Legal Aid Group Conference, Wellington, New Zealand, 1-3 April 2009).

trials and hearings; law reform and systemic activities; educational activities; and referrals. Thus, legal services involve complex and continuous obligations to clients and we ought to be wary of the pressure to isolate elements of these services for the purposes of limited representation models.

## **B Front-End Prevention of Legal Problems**

It is important to note that there are opportunities to provide supports and systems that might preclude the need for litigation: these options may or may not also involve representation. We draw from an analogy provided by Richard Susskind in *The End of Lawyers? Rethinking the Nature of Legal Services*, in order to develop this point.<sup>74</sup> Imagine a cliff located in a highly-populated area. There have been incidents of people falling over the cliff and injuring themselves. The municipality in which the cliff is located is considering the combination of two strategies to address this problem: the first is implementing an ambulance response system that is available at the bottom of the cliff for those who are injured, which takes them to a hospital for intake through a triage system; and the second is building a fence at the top of the cliff to prevent people from falling over it. Returning to the civil legal services context, the cliff represents individuals “falling” into legal problems; the ambulance represents the entry point to the legal services spectrum, with the triage system representing the channeling of a given legal problem to the appropriate legal service; and the fence represents front-end or pre-emptive solutions to legal problems.<sup>75</sup>

There is extensive literature on the front-end mechanisms that may minimize, or prevent, the legal problems that give rise to civil litigation, and it is beyond the focus of this paper to do them justice. Instead, we will mention some very simple examples:

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<sup>74</sup> Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2008) at 231 [Susskind].

<sup>75</sup> Genn ILAG Presentation, *supra* note 56 at 26.

- education programs in high schools that coach students on financial management with the hope that this will prepare them for the responsibilities and opportunities provided by the credit system;
- licensing and certification regimes that ensure the professionals providing services are competent to do so; and
- regulatory frameworks that provide explicit guidance for communities in order to facilitate interactions (traffic safety law, zoning regulations) and the safety of foods, services and work environments.

These examples are a very small sample of the myriad opportunities we have to develop programs, resources, and systems that will minimize or eliminate the need to resort to the legal system in order to resolve some disputes for specific individuals. That said, access to forms of dispute resolution, and the spectrum of legal representation available in the 21<sup>st</sup> century Canada, is an important element of our notions of “justice” in Canada, and the subject of the rest of this paper.

## **C The Legal Services Spectrum**

Legal services may be considered on a spectrum according to the degree of intervention they offer for users. Presently, both the public and private sectors focus heavily on the delivery of legal services through a traditional, full representation model. In the public sector, Legal Aid Ontario’s services are largely restricted to full representation via legal aid certificates or clinics or limited representation via duty counsel services.<sup>76</sup> In the private sector, legal services are largely restricted to full representation for all aspects of a case, with hourly billing.

Therefore, we examine the literature describing a sample of services along the legal services spectrum which have the potential to diversify the public and private legal service sectors in Ontario including: self-help services; public legal education and information; advice from trained volunteers; paralegal services; summary advice, brief services, and referrals; duty counsel; unbundled legal services; and full representation by a lawyer. For

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<sup>76</sup> Aneurin Thomas, “LAO’s Service Pyramid” (27 November 2008).

each of these types of legal service, we describe the studies, reports and proposals which explore how unmet need could be addressed by the service, the extent to which the service is utilized in Ontario, and innovative examples of the service's implementation in Canada or foreign jurisdictions.

### **C.i Self-Help Services**

Self-help services cover a wide range of activities that aim to provide legal assistance and information to clients.<sup>77</sup> Despite the growing number of unrepresented litigants, self-help services have been less accessible in Ontario than elsewhere, although that seems to be changing. In the US, where legal aid services are limited in supply, and in BC, where there have been significant cutbacks in legal aid services, a wide range of innovative self-help services are available.<sup>78</sup> For example, new software called A2J Author has been developed by the Chicago-Kent College of Law Center for Access to Justice and Technology that enables lawyers or law students from the courts, legal services programs and educational institutions to create web-based guided interviews resulting in document assembly, electronic filing and data collection. Self-represented litigants can then use the web-based interface to go through a guided interview that leads them down a virtual pathway to the courthouse. As they answer simple questions about their legal issue, the technology then “translates” the answers to create, or assemble, the documents that are needed for filing with the court.<sup>79</sup> The increased attention to self-help services and the proliferation of services available have led to a debate about the appropriate role of those services.

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<sup>77</sup> Cohl & Thomson Report, *supra* note 11 at 49.

<sup>78</sup> *Ibid.*

<sup>79</sup> Centre for Access to Justice and Technology, “A2J Author”, online: IIT Chicago-Kent College of Law <<http://www.kentlaw.edu/cajt/A2JAuthor.html>>; American Bar Association, “Louis M. Brown Award for Legal Success”, online: American Bar Association <<http://www.abanet.org/legalservices/delivery/brown.html#kent>>; see also A2J Author Community Website, “A Brief History”, online: A2J Author Community Website <<http://www.a2jauthor.org/drupal/?q=node/123>>.

There are several concerns in the literature regarding the use of self-help services. One of the most serious concerns is that self-help services, even if facilitated, are inappropriate for individuals who face one or more barriers to access to justice. These clients may include: low-income individuals; clients who have experienced systemic discrimination; victims of trauma; clients with literacy or language issues; clients with physical, developmental, or mental health disabilities; and individuals suffering from isolation.<sup>80</sup> Studies from BC, the US, the UK, and Australia have found that self-help is most effective for people with high levels of literacy, comprehension, and confidence. Much of the literature concludes, therefore, that “marginalized clients likely lack the skills and capacities necessary to negotiate their way through” the legal system.<sup>81</sup>

A second concern is that self-help services may be less effective when they are delivered without institutional supports. Consequently, the literature suggests that for self-help services to be most effective they should be delivered in coordination with support systems provided by: community-based organizations that have knowledge or experience with self-help service users; trained in-person support workers; and educational and literacy experts.<sup>82</sup> A 2008 report on rural self-help services in BC supports these suggestions, finding that an in-person intermediary providing support “greatly enhances the effectiveness of self-help materials.”<sup>83</sup> Some of the literature acknowledges that self-help services may be an acceptable form of legal service provision to marginalized groups where those services are accompanied by a robust system of in-person supports.<sup>84</sup> It is suggested that the heavy reliance on self-help services in BC and the US is a response to far more limited legal aid

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<sup>80</sup>Community Legal Education Ontario (CLEO), *Tapping the Community Voice: Looking at Family Law Self-Help through an Access to Justice Lens: Themes and Recommended Next Steps* (September 5, 2008) at 3-4 [CLEO Self-Help].

<sup>81</sup>Cohl & Thomson Report, *supra* note 11 at 49-50.

<sup>82</sup>CLEO Self-Help, *supra* note 80 at 3-4; Cohl & Thomson Report, *supra* note 11 at 50.

<sup>83</sup>Cohl & Thomson Report, *ibid.*

<sup>84</sup>CLEO Self-Help, *supra* note 80 at 3-4.

programs.<sup>85</sup> Therefore, a final concern mentioned in the literature is that self-help programs may divert already limited attention and resources from the more extensive range of legal advice and representation services currently provided in Ontario.

The difficulty is that the number of unrepresented litigants in Ontario is growing, while financial support for the legal aid system is stagnating. This suggests that in some situations the options are either self-help services or no services. Moreover, the studies discussed earlier in the section on unrepresented litigants suggest that self-help services do benefit users. The studies show mixed results with respect to the impact of self-help services on the outcomes of cases, but consistently show that clients of self-help services experience a high level of satisfaction and a reduction in confusion and anxiety, and that court staff and clerks report experiencing reduced demands on themselves.<sup>86</sup> The same studies also show that in-court assistance supporting self-help services significantly improves case outcomes. These studies suggest both that facilitated self-help may be particularly effective and that the effectiveness of self-help services may be improved by integration with other court services.<sup>87</sup>

### **C.ii Public Legal Education and Information**

Many citizens may forego action to assert or defend their legal rights in the absence of information about these rights and the processes available to vindicate them.<sup>88</sup> A 2006 Canadian telephone survey asking 6,665 Canadian adults about their experiences with legal problems demonstrates this concern. Of the respondents who had faced legal problems, 46.6 percent did not act because they thought nothing could be done, were uncertain about their

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<sup>85</sup> *Ibid.*

<sup>86</sup> Engler, “Civil Gideon”, *supra* note 21 at 32-36.

<sup>87</sup> *Ibid.* Examples of self-help services integrated with other courts services include FLICs, IRCs and, the FLP, discussed above.

<sup>88</sup> Cohl & Thomson Report, *supra* note 11 at 45.

rights, or did not know what to do.<sup>89</sup> A report reviewing the survey concluded that “most of the responses suggest the potential value of initial legal information and advice to assist the person in understanding the nature of the problem and the courses of action that may be open.”<sup>90</sup>

In a Law Foundation of Ontario (“LFO”) report on access to legal services for rural populations and linguistic minorities, Karen Cohl and George Thomson consider how this kind of education and information might be delivered.<sup>91</sup> They suggest that linguistic minorities and individuals in rural or remote areas often approach those whom they know and trust when faced with a problem. Consequently, Cohl and Thomson suggest that “trusted intermediaries”, such as organizations focusing on social services, disability services, immigrant settlement, health care, education, or particular faiths or ethnic groups may be effective sources of public legal education and information (PLEI).<sup>92</sup> They also suggest that general service organizations such as libraries, community centres, information and referral services, and hotlines may be able to deliver PLEI effectively.

PLEI models can also be analyzed in terms of the degree of initiative required by the end-user. Individuals who are not aware of their legal rights require a more active PLEI delivery mechanism to alert them to these threshold issues; information might be positioned in a manner or in locations where the intended users will encounter it in the course of other activities. In contrast, individuals who are aware that their problem is a legal one and are seeking PLEI can be served by more passive PLEI models such as legal information websites. As well, PLEI initiatives must take into account a broad range of other factors including language barriers, geographic and social isolation, literacy and comprehension levels, and computer access and facility.

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<sup>89</sup> *Ibid.* at 45-46.

<sup>90</sup> *Ibid.* at 45.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.* at 43.

### C.ii.a PLEI Initiatives in Ontario

Initiative	Description
Community Legal Education Ontario (CLEO)	Creates and distributes approximately 1 million printed legal guides annually on such topics as social assistance and consumers' rights; targets disadvantaged and vulnerable groups; maintains a website
Legal clinics	Offer workshops to community service providers and the clientele of these service providers; distribute other PLEI materials such as self-help kits and plain-language pamphlets; some formats focus on specific areas of law, e.g., the Family Law Education for Women project and the Ontario Women's Justice Network <sup>93</sup>
Law Help Ontario	Pro Bono Law Ontario pilot initiative providing assistance to unrepresented, low-income civil litigants at the Superior Court of Justice and Small Claims Court; <sup>94</sup> provides general information and assistance, including starting and defending suits and motions, <sup>95</sup> and 30-minute legal advice session for those who meet eligibility requirements; <sup>96</sup> maintains a website that includes self-help materials, interactive court forms, interview-based document generators, and videos on self-representation <sup>97</sup>
Justice Ontario	Provides basic information about family law, criminal law, lawsuits and disputes, human rights, estate planning, and tickets and fines in 173 languages; does not provide legal advice <sup>98</sup>
FindHelp 211	Generalist referral information agency, including information on legal issues; does not provide legal advice <sup>99</sup>
Ontario government ministry websites	Some Ontario ministries have extensive legal information on their websites, such as the Ministry of Labour regarding employment

<sup>93</sup> Family Law Education for Women, "Family Law Education for Women" (December 2009), online: Family Law Education for Women <<http://onefamilylaw.ca/>>; Ontario Women's Justice Network, "Welcome to OWJN", online: Ontario Women's Justice Network <<http://www.owjn.org/>>.

<sup>94</sup> Cohl & Thomson Report, *supra* note 11 at 50.

<sup>95</sup> LawHelpOntario.org, "Visit Us", online: LawHelpOntario.org, <<http://www.lawhelpontario.org/visit>>.

<sup>96</sup> Cohl & Thomson Report, *supra* note 11 at 50.

<sup>97</sup> LawHelpOntario.org, "Welcome to Law Help Ontario", online: LawHelpOntario.org <<http://www.lawhelpontario.org>> [Law Help Ontario].

<sup>98</sup> Robert Todd, "Province launches justice information portal" *Law Times* (1 September 2008), online: Law Times <<http://www.lawtimesnews.com/200809014218/Headline-News/Province-launches-justice-information-portal>> [Justice information portal].

<sup>99</sup> Cohl & Thomson Report, *supra* note 11 at 38.

	law and the Ministry of Consumer Services regarding consumer law.
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### C.ii.b PLEI Initiatives in Other Jurisdictions

<b>Initiative</b>	<b>Description</b>
LawLINE (British Columbia)	Provides up to three hours of legal advice to individuals whose family net income is below \$36,000 <sup>100</sup> (a less restrictive threshold than the provincial legal aid cut-off for full representation <sup>101</sup> ); interpreters available for over 100 languages; callers who do not meet financial eligibility criteria can still receive legal information and referrals, but not advice <sup>102</sup>
LawMatters – BC Courthouse Libraries Society (BC) <sup>103</sup>	Provides public libraries with financial assistance for acquiring legal resources, bibliographies of recommended legal resources, research guides, training for staff, reference and referral support, and consultation and advice; <sup>104</sup> a similar program has been implemented in Australia by the State Library of New South Wales. <sup>105</sup>
Clicklaw (BC)	Offers practical legal information about rights and responsibilities, and options for solving legal problems; toll-free numbers for someone to speak to for legal information or advice; resources that help users learn about laws that affect BC citizens and the functioning of the legal system; and resources regarding legal reform and legal innovations.
Law Line (Alberta)	Provides legal information and referrals to the general public and advice to those callers who meet Legal Aid Alberta’s financial eligibility criteria <sup>106</sup>
Mobile Self-Help Centre (California)	A customized mobile home offering self-help materials, video terminals, and computers that

<sup>100</sup> *Ibid.* at 92.

<sup>101</sup> BC Legal Services Society, “Do I qualify for legal advice?”, online: BC Legal Services Society <[http://www.lss.bc.ca/legal\\_aid/doIQualifyAdvice.asp](http://www.lss.bc.ca/legal_aid/doIQualifyAdvice.asp)>.

<sup>102</sup> Trebilcock Report, *supra* note 7 at 92.

<sup>103</sup> This is an example of Cohl and Thomson’s PLEI delivery through “trusted intermediaries.”

<sup>104</sup> Courthouse Libraries BC, “Law Matters”, online: Courthouse Libraries BC <<http://www.courthouselibrary.ca/research/ForThePublic/LawMatters.aspx>>.

<sup>105</sup> See State Library of NSW <<http://www.legalanswers.sl.nsw.gov.au/about/policy.cfm>> for more information.

<sup>106</sup> *Ibid.* at 91.

	aims to service those who cannot access other self-help centres; staffed by volunteer lawyers and student interns <sup>107</sup>
PLEI kiosks (various jurisdictions, including BC, <sup>108</sup> the UK, and Queensland) <sup>109</sup>	Publicly accessible computers located in places like courthouses, libraries and regional centers that provide legal information. <sup>110</sup>
Other hotlines (US)	At least 112 civil legal assistance hotlines operate across the US that target low-income and senior citizens. <sup>111</sup>

The literature on PLEI kiosk experiences reports some valuable lessons: specialized hardware becomes obsolete so internet solutions are both cheaper and easier to maintain; users with enough computer literacy to access kiosks generally can access the same resources on the internet; and many clients lack the language or computer skills necessary for kiosk use, or prefer human interaction.<sup>112</sup> According to the Trebilcock Report, LAO acknowledges that it lags behind other jurisdictions in Canada with respect to the use of technology for enhancing the delivery of legal services.<sup>113</sup>

<sup>107</sup> Cohl & Thomson Report, *supra* note 11 at 51.

<sup>108</sup> In British Columbia, the Legal Services Society placed PLEI kiosks in 24 different public settings including court houses, libraries and community centres. The kiosks provide access to LawLINK [now replaced by Clicklaw: <http://www.clicklaw.bc.ca/>], the society's online PLEI portal: Legal Services Society of BC, *Evaluation of LawLINK Project Final Report* by Focus Consultants (2005) [LawLINK Report]. In addition to the kiosks, legal information outreach workers are available in some locations to provide support for the service and referrals: British Columbia Legal Services Society.

<sup>109</sup> The kiosk programs in BC, Queensland, and the UK have had limited success, with very low usage rates in Queensland and BC, and frustrated users requiring assistance in all three jurisdictions. LawLINK Report, *ibid.*; Cate Banks, Rosemary Hunter & Jeff Giddings, *Australian Innovations in Legal Aid Services: Balancing Cost and Client Needs*, (Nathan, QLD, Griffith University 2006) [Australian Innovations]; Scottish Executive Social Research, *Legal Information and Advice Provision in Scotland: A Review of Evidence* by Blake Stevenson Ltd. (Edinburgh: 2003) [Scottish Executive Social Research].

<sup>110</sup> *Ibid.*

<sup>111</sup> Trebilcock Report, *supra* note 7 at 92.

<sup>112</sup> LawLINK Report, *supra* note 108; Australian Innovations, *supra* note 109; Scottish Executive Social Research, *supra* note 109.

<sup>113</sup> Trebilcock Report, *supra* note 7 at 90.

### C.ii.c Hotlines

Legal hotlines have been used to provide legal information, advice, and referrals in a number of jurisdictions in the US, the UK, Australia, and in Alberta and British Columbia within Canada. In Ontario, the use of legal information, advice, and referral hotlines is just emerging.<sup>114</sup> The hotlines currently in operation provide information and referrals but, with the limited exception of the duty counsel hotline, not advice. Presently, many of the hotlines available in other jurisdictions offer more robust services than do the hotlines available in Ontario. LAO is currently in the early stages of developing a legal aid hotline.<sup>115</sup> The Trebilcock Report suggests that Ontario develop a legal services hotline similar to the TeleHealth Ontario hotline in the healthcare sector: a free, confidential hotline offering health advice and general health information from a registered nurse.<sup>116</sup>

Research suggests that hotlines are most effective when accompanied by some form of follow-up or ongoing support for users and that a possible explanation for this finding is that many clients, especially the most vulnerable, may not be capable or confident enough to use legal information or advice provided over a hotline on their own. The research also shows that, while recorded legal information has some value, most users desire a live connection to assist them in applying legal information to their own circumstances. Finally, the research indicates that for hotlines to be most effective, they must be capable of making referrals to appropriate legal services or professionals.<sup>117</sup>

The literature also raises some concerns about obstacles to the effective usage of hotlines. The first concern revolves around technological issues that may arise in the use of

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<sup>114</sup> Cohl & Thomson Report, *supra* note 11 at 38.

<sup>115</sup> Trebilcock Report, *supra* note 7 at 95.

<sup>116</sup> *Ibid.* at 79; Ontario Ministry of Health and Long-term Care, “Telehealth Ontario – Ministry Programs – Public Information”, online: <  
<http://www.health.gov.on.ca/en/public/programs/telehealth/>>.

<sup>117</sup> *Ibid.* at 38-39.

hotlines to serve rural and remote areas. Hotlines have the potential to bridge the large distances between legal services and clients in many rural and remote areas, but many residents in these areas have limited or no access to telephones and long-distance or toll-free service. For those residents with limited access, the norm is “pay-as-you-go” long-distance charges and toll-free services may only be accessible after long wait times.<sup>118</sup> A second concern is that because many legal service providers already include toll-free numbers, additional hotlines will result in service duplication with callers being rerouted to other existing services.<sup>119</sup>

#### **C.ii.d Websites**

The literature on legal websites suggests that there is no single website in Ontario that “currently provides legal information to the public that addresses the range of legal problems most frequently encountered” and that no site “contains accessible and accurate information on a wide range of legal issues, designed to help the public understand their legal rights, in multiple formats and languages.”<sup>120</sup>

However, the landscape in Ontario may change in the near future as CLEONet, a website created by CLEO and funded by the LFO, recently released an expansion report aimed at developing a “comprehensive legal information web site for Ontario.”<sup>121</sup> The expanded CLEONet site would provide online legal information on a wide range of topics, information about and referral to legal aid or social services, and legal education and training, primarily to

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<sup>118</sup> *Ibid.* at 35.

<sup>119</sup> For example, the Australian Regional Law Hotline was intended to offer legal advice to rural callers who had limited access to community legal clinics, but calls to the line for legal advice ended up being transferred to community legal clinic hotlines. Thus, the hotline effectively created a second entry point to an existing service and required users to pass through an additional intake process: Australian Innovations, *supra* note 109.

<sup>120</sup> Community Legal Education Ontario, *Exploring the Expansion of CLEONet: Final Project Report to the Law Foundation of Ontario* (2009) at 2 [CLEONet Expansion].

<sup>121</sup> *Ibid.* at 3.

community workers.<sup>122</sup> The information provided on the website would focus on the common and serious legal problems of vulnerable communities dealing with low-income, literacy and language issues, isolation, and disabilities.<sup>123</sup> Moreover, the expansion report acknowledges that legal information websites must be accompanied by institutional supports. The expanded site would then include information that connects users to legal, government, and social services.<sup>124</sup> The expanded site would also aim to connect community service organizations to one another, through features such as sharing online intake and referral procedures manuals.<sup>125</sup> Finally, the expanded site would aim to harness technology to provide online training and workshops in a variety of formats.<sup>126</sup>

There are some limitations to the usage of websites in legal service delivery. The first limitation focuses on the capacity of website users. Research indicates that some users may require assistance with website navigation and the comprehension and application of legal information.<sup>127</sup> Computer literacy and language issues are aspects of this concern. In rural and remote areas, where websites can be particularly valuable in bridging the distance between clients and service providers, users may not have the computer literacy skills to use websites effectively, and they may also have trouble understanding legal information.<sup>128</sup> These findings are similar to the findings of studies on self-help services generally; that is, online services are often most effective when accompanied by in-person or live support.

A second limitation may be the technology itself; as with telephone service in rural and remote areas, high-speed internet and computer access may be limited. Moreover, even where internet service is available, many rural and remote Ontarians cannot afford the service or computers. In response, some communities have group or organizational access through access

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<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.* at 8.

<sup>124</sup> *Ibid.* at 11.

<sup>125</sup> *Ibid.* at 11-12.

<sup>126</sup> *Ibid.* at 13.

<sup>127</sup> Cohl & Thomson Report, *supra* note 11 at 39.

<sup>128</sup> *Ibid.* at 35.

points, but travel time and privacy issues may be obstacles to their effective usage.<sup>129</sup> In the US, many legal information and service providers support the information provided on their websites with live assistance. These sites use software called “Live Help”, or other similar software, that enables users to communicate with advisors through instant messaging for assistance with website navigation.<sup>130</sup>

### **C.iii Advice from Non-Lawyers and Non-Paralegals**

In Ontario, pursuant to the *Law Society Act*, only lawyers and licensed paralegals are authorized to provide legal advice; specific exceptions include law students or community legal workers in legal clinics who provide advice under the supervision of lawyers.<sup>131</sup> More limited exceptions apply to the staff of community agencies.<sup>132</sup> These limitations are designed to ensure that all legal services are regulated and subject to professional protocols and ethics and to provide safeguards in the form of training, accountability, and professional liability insurance requirements, as well as access to a compensation fund for clients. They have significant implications, however, for the accessibility of Ontario’s justice system.

The results of three studies, one in the US and two in the UK, which assessed responses to legal needs and which were conducted in the 1990s, suggest that non-lawyers can play a crucial role in facilitating access to justice for individuals in the low- and middle-income demographics (these studies were noted in section II). The studies found that in the US, only 47 percent of respondents with legal needs sought assistance, while 60 and 65 percent of such respondents sought assistance in England/Wales and Scotland,

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<sup>129</sup> *Ibid.* at 34-35.

<sup>130</sup> *Ibid.* at 39.

<sup>131</sup> *Law Society Act*, R.S.O. 1990, c. L.8; Law Society of Upper Canada, By-law 4, *Licensing* (25 June 2009), ss. 30, 34.

<sup>132</sup> *Ibid.*

respectively.<sup>133</sup> Moreover, of the US respondents, only 37 percent sought assistance from a source specifically able to give *legal* advice. Surprisingly, however, the percentage of respondents in each jurisdiction who sought assistance from lawyers was roughly equal: 26 percent in the US, 27 percent in England and Wales, and 29 percent in Scotland.<sup>134</sup> The substantial difference, then, was in the use of non-lawyer third parties for legal assistance.<sup>135</sup>

In the UK, non-lawyer third parties are able to give legal advice, while in the US, they are not. The result was that only 37 percent of respondents in the US received advice from third parties authorized to give legal advice, while, in the UK, at least 60 percent of respondents received advice from third parties authorized to give legal advice.<sup>136</sup> These third parties included trained staff and volunteers of generalist advice organizations, paid specialist workers who focus on specific types of cases or work with specific communities, and Citizens Advice Bureaus (“CABs”).<sup>137</sup> CABs are accessible to all citizens of the UK, without any eligibility requirements, and provide advice on virtually any issue, including financial and legal matters.<sup>138</sup> CABs are examined further in part C.v of this section, Summary Advice, Brief Services and Referrals, below. The literature suggests, then, that non-lawyers and non-paralegals, such as trained staff and volunteers of community organizations, may be able to provide valuable and much-needed legal advice.<sup>139</sup>

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<sup>133</sup> Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans* (University of Southern California, 2009) at 7-9.

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> Richard Moorhead, Alan Paterson & Avrom Sherr, “Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales”, (2003) 37 *Law & Soc’y Rev.* 765 at 773 [Contesting Professionalism].

<sup>138</sup> *Ibid.*; Trebilcock Report *supra* note 7 at 89-90.

<sup>139</sup> While the studies cited do not include statistics for Ontario or Canada, Ontario, similar to the US, prohibits non-lawyers and non-paralegals from providing legal advice. As such, the lessons from these studies are arguably relevant in the Ontario legal services context.

A further question that arises, however, is whether non-lawyers can provide legal advice with the same, or at least similar, quality as advice provided by lawyers. Several studies from the UK suggest that the specialization of the legal service provider, rather than the service provider's professional qualifications, was the best predictor of service quality.<sup>140</sup> A possible implication of this finding is that volunteers who are adequately trained in specialized areas of the law may be able to provide satisfactory legal advice.

The literature suggests that the use of trained staff and volunteers to provide legal advice may be a measure to address some of Ontario's unmet legal needs. Further research and evaluation specific to the Ontarian and Canadian context would, however, prove useful in determining whether and how to proceed in this direction. In addition, careful thought must be given to the reasons for regulatory limitations, and the feasibility of implementing at least some of these safeguards with respect to non-lawyers and non-paralegals in the interests of protecting members of the public from inappropriate advice.

#### **C.iv Paralegals**

Two years ago the LSUC began regulating paralegals in Ontario as a result of the passage of the *Access to Justice Act, 2006*.<sup>141</sup> The LSUC has developed a comprehensive regulatory system for paralegals, including educational standards, rules of professional conduct, a licensing process, insurance requirements, a public directory, a complaint and disciplinary process, and a compensation fund.<sup>142</sup> Under this regime, licensed paralegals can provide advice, draft documents, conduct negotiations and represent clients in small claims court, before administrative tribunals, and before the Ontario Court of Justice for summary

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<sup>140</sup> Contesting Professionalism, *supra* note 137 at 769-70.

<sup>141</sup> S.O. 2006 c. 21. The legislation was passed in response to media reports that the public were vulnerable to some unscrupulous paralegals: Law Society of Upper Canada, *Report to the Attorney General of Ontario on the Implementation of Paralegal Regulation in Ontario*, (2009) at 3 [LSUC Implementation].

<sup>142</sup> *Ibid.* at 4.

conviction offences, hybrid offences where the Crown elects to proceed summarily, and matters falling under the *Provincial Offences Act*.<sup>143</sup> Ontario is the first jurisdiction in North American to license and regulate paralegals. There is debate in the literature, however, as to whether paralegal regulation furthers access to justice.

A report by the Honourable Peter Cory to the Ontario Attorney General on a framework for paralegal regulation emphasized two themes: public protection and access to justice.<sup>144</sup> Although the LSUC initially accepted public protection as warranting paralegal regulation and rejected the access to justice argument,<sup>145</sup> it seems to have changed its position. In March 2009, the LSUC stated that today's licensed and insured paralegals are "providing consumers throughout the province with more choice, protection and improved access to justice."<sup>146</sup>

Recent literature also supports the connection that Cory drew between paralegal regulation and improved access to justice. Prior to regulation, there were an estimated 750 to 1,000 paralegals in Ontario, while there were 2,300 licensed paralegals as of March 2009, with 200 to 300 new paralegals anticipated every year. This indicates that there are now more providers of affordable legal services in the areas in which paralegals practice, since paralegals generally charge less than lawyers.<sup>147</sup> Moreover, there are now provisions to protect the clients of paralegals such as a complaint process, insurance requirements and a compensation fund.

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<sup>143</sup> Law Society of Upper Canada, Media Release, "Paralegal regulation sets precedent for consumer protection" (30 March 2009) [LSUC Paralegal regulation].

<sup>144</sup> Law Society of Upper Canada, *An Analysis of A Framework for Regulating Paralegal Practice in Ontario* (2000) at 1-3.

<sup>145</sup> *Ibid.* The LSUC asserted that the evidence did not necessarily support the correlation between paralegal regulation and improved access to justice as the evidence did not give a clear sense of why certain parts of the population were being denied access to justice; only a minority were choosing paralegals over lawyers because of cost; and no amount of education or training short of that of lawyers could enable paralegals to bring the same knowledge, skills and abilities as a lawyer to a case.

<sup>146</sup> LSUC Paralegal regulation, *supra* note 143.

<sup>147</sup> *Ibid.*; LSUC Implementation, *supra* note 141 at 4.

The regulation of paralegals in the area of immigration law remains problematic. Ostensibly regulated by the Canadian Society of Immigration Consultants (“CSIC”), a federal regulatory body, they are considered by the Law Society to be exempt from provincial regulation. At the same time, CSIC has limited enforcement powers and has been the subject of allegations of corruption, internecine disputes, and law suits brought by members.<sup>148</sup>

### C.v Summary Advice, Brief Services and Referrals

Summary advice, brief services, and referrals are service provisions by paralegals and lawyers that fall short of full representation. The following charts summarize the services provided in Ontario and other jurisdictions.

#### Summary Advice, Brief Services, and Referrals Resources in Ontario

Service	Description
Family Law Information Centres (FLICs)	Provide clients with free information about divorce, separation, and related family law matters and alternative dispute resolution processes; at most centres, Legal Aid advice lawyers are available for financially eligible clients; <sup>149</sup> at the 17 Family Court locations, an Information and Referral Coordinator is also available. <sup>150</sup>
Information and Referral Coordinators (IRCs)	Assist clients with needs arising from separation, such as referrals for housing, counselling, legal services, and mediation services connected with the court. <sup>151</sup>
Family Law Project (FLP)	A student-supported pro bono service that assists clients in completing court forms after they have received claim advice from duty counsel or an FLIC advice lawyer. <sup>152</sup>
Law Help Ontario (LHO)	Includes two self-help centres in Ontario courthouses, supported by in-person assistance.

<sup>148</sup> Patricia Chisholm, “LSUC sets out paralegal regulation plans” *Law Times (Canada)* (6 October 2004).

<sup>149</sup> Trebilcock Report, *supra* note 7 at 109-12.

<sup>150</sup> Ontario Ministry of the Attorney General, “Family Law Information Centres (FLICs)”, online: <<http://www.attorneygeneral.jus.gov.on.ca/english/family/infoctr.asp>>; Mamo Report, *supra* note 27 at 14-16.

<sup>151</sup> *Ibid.* at 109-112.

<sup>152</sup> *Ibid.*

Legal clinics	The legal clinic system in Ontario provides summary advice, brief services and referrals to approximately 148,000 clients a year. <sup>153</sup>
Duty counsel	Provide assistance to otherwise unrepresented litigants in family and criminal courts; may provide assistance in such areas as show cause hearings, guilty pleas, and sentencing, but do not provide trial representation; most duty counsel services have financial eligibility criteria.
Law Society of Upper Canada (LSUC) Lawyer Referral Service <sup>154</sup>	Free referral service without financial eligibility criteria through which Ontarians can obtain the contact information for a lawyer who will provide them with a free 30-minute consultation.
“Ask a Lawyer” - Nishnawbe-Ask Legal Services and PBLO	Aims to connect, via website community legal workers to pro bono lawyers who specialize in a wide range of legal areas for consultations. <sup>155</sup>

### Summary Advice, Brief Services, and Referrals Resources in other Jurisdictions

Service	Description
Access to Justice (British Columbia)	Offers 30-minute, pro bono advice session to financially qualifying clients; lawyers generally do not represent clients, although a follow-up appointment can be made where the lawyer believes it is necessary. <sup>156</sup>
Justice Access Centre (British Columbia)	Nanaimo pilot project that aims to provide legal information, advice, and mediation from a single location; the Centre presently offers services for family and other civil law matters; all clients have access to self-help resources and clients meeting financial eligibility criteria can receive legal advice from a paralegal or lawyer. <sup>157</sup>
Citizens Advice Bureaus (United Kingdom)	Provide information and advice on a variety of topics, including legal advice, through staff, volunteers, and paralegals; are accessible to all

<sup>153</sup> Legal Aid Ontario, *2007 Annual Report* at 17.

<sup>154</sup> The Trebilcock Report noted that the 30-minute time limit for the LSUC lawyer referral service is a significant restriction for users, as many may not be able to afford to pay for continuing the consultation beyond that period. Trebilcock Report, *supra* note 7 at 92.

<sup>155</sup> Cohl & Thomson Report, *supra* note 11 at 39.

<sup>156</sup> The Western Canada Society to Access Justice, “Access Justice”, online: <<http://www.accessjustice.ca>>.

<sup>157</sup> Justice Access Centre, “Justice Access Centre”, online: British Columbia, Ministry of Attorney General <<http://www.justiceaccesscenter.bc.ca>>.

	UK citizens without financial eligibility criteria.
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One avenue for increasing access to justice for low-to-middle-income Ontarians may be to increase, or perhaps even eliminate, the financial eligibility thresholds for publicly provided summary advice and assistance.

The Trebilcock Report noted that “FLIC [Family Law Information Centre] services are effective and beneficial, but are quite limited in some jurisdictions” such that “the value of the FLICs could be significantly enhanced were LAO to explore the possibility of advice lawyers providing summary legal advice and assistance to a broader range of clients....”<sup>158</sup> The Mamo Report found that FLIC use appears to be low compared to the overall numbers of proceedings heard by the court; that about half of FLIC users have not started a court action; that the top three services provided by all FLICs were information on court forms, advice lawyer referral, and guides to procedures; and that community resource referrals were a very small percentage of FLIC services provided.<sup>159</sup> Thus, FLICs may be functioning as under-utilized self-help centres and advice providers, rather than as diversion or referral services. A major recommendation of the Mamo report is that FLICs should function as an entry point into the family justice system, with expanded resources, referral capacities, and early presentation of non-adversarial approaches. The Landau Submission builds extensively on this recommendation.<sup>160</sup> The Law Commission of Ontario’s “Best Practices at Family Justice System Entry Points: Needs of Users and Responses of Workers in the Justice System”

<sup>158</sup> Trebilcock Report, *supra* note 7 at 110.

<sup>159</sup> Mamo Report, *supra* note 27 at 52, 53, 55.

<sup>160</sup> The submission recommends that all family courts have a FLIC staffed five days a week by a case assessment coordinator (an experienced mediator/mental health person), advice counsel, a clerk, and an on-site mediator (part- or full-time). The submission also recommends a variety of media through which information ought to be provided and that every FLIC court location be associated with a supervised access and exchange centre. For more information, see Barbara Landau et al., Family Law Reform Submission, "Supporting Families to Support Their Children" (March 25 2009, Submitted April 7 2009) at 7 [Landau Submission].

project aims to “contribute to ongoing efforts at improving the family justice process across the province by focusing on the early stages of this process.”<sup>161</sup> Consultations were conducted for the project between September and December of 2009, and the consultation results were published in 2010. Participants recommended reform of family service delivery, including: the level of confidentiality and type of expertise necessary to solve family challenges and problems; the need for assistance in navigating the family justice system; and a better response to children and youth in the family justice system.<sup>162</sup> The final report is due in 2011.

#### **C.vi Duty Counsel**

Duty counsel are lawyers who provide limited assistance to unrepresented litigants in family and criminal courts.<sup>163</sup> The specific tasks they perform include show cause hearings, guilty pleas, and sentencing in criminal cases and interim motions, adjournments, preparation and review of documents, and negotiating settlements in family cases. Duty counsel may also provide information on the legal aid certificate application process, and may even accept applications. Duty counsel do not, however, provide representation in trials. In family courts, most duty counsel services require that litigants meet certain financial eligibility; in criminal courts, financial eligibility criteria only apply when the potential client is an adult who is not in custody and wishes to enter a guilty plea.<sup>164</sup>

The literature on duty counsel in Ontario describes a vast improvement in both the quantity and quality of duty counsel services over the past decade. In 1999, LAO

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<sup>161</sup> Law Commission of Ontario, consultation paper, *Best Practices at Family Justice System Entry Points: Needs of Users and Responses of Workers* (September, 2009), online: Law Commission of Ontario <[www.lco-cdo.org](http://www.lco-cdo.org)>.

<sup>162</sup> Law Commission of Ontario, consultation results, *Voices from a Broken Family Justice System: Sharing Consultations Results* (September, 2010), online: Law Commission of Ontario <<http://www.lco-cdo.org/en/family-law-process-consultation-results>>.

<sup>163</sup> Trebilcock Report, *supra* note 7 at 35.

<sup>164</sup> *Ibid.*

implemented family law “Enhanced Duty Counsel” (“EDC”) pilot projects. These are a mix of private and staff lawyers who work out of a Duty Counsel Office (“DCO”), with a full time supervisory duty counsel overseeing the DCO’s operation. Criminal law pilot projects were subsequently established. The success of these pilot projects has led to the expansion of full-time supervisory duty counsel and DCOs to 65 locations, making the DCO the preferred model of duty counsel service provision. Over the last 8 years, LAO has quadrupled the number of staff duty counsel lawyers that it employs.<sup>165</sup> Evaluations of the EDC and DCO services have been positive. Findings for the family law services include fewer adjournments and earlier settlements, and findings for the criminal law services emphasize the value of full-time staff lawyers and supervisory duty counsel for service quality and cost-effectiveness.<sup>166</sup>

In addition to DCOs and EDCs, LAO has also developed specialized duty counsel for domestic violence, mental health, Gladue (Aboriginal), and drug-treatment courts. These duty counsel are experienced in issues and procedures specific to their respective courts.<sup>167</sup> The LAO Duty Counsel hotline also provides free legal advice 24 hours a day, 7 days a week, but only to adults and youth who are in police custody.<sup>168</sup> The Trebilcock Report recommends that LAO “explore the potential for duty counsel to provide more, and more varied, pre-litigation services, especially in family law”, through innovative and creative uses of this valuable resource.<sup>169</sup>

### **C.vii Full Representation**

“Full representation” refers to retaining a lawyer to take on all aspects of a case. Extremely low-income Ontarians who meet the strict financial eligibility requirements for the

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<sup>165</sup> *Ibid.* at 36.

<sup>166</sup> *Ibid.* at 37.

<sup>167</sup> *Ibid.* at 38.

<sup>168</sup> Trebilcock Report, *supra* note 7 at 95.

<sup>169</sup> *Ibid.* at 84.

process may retain a lawyer under a legal aid certificate or be represented by a lawyer employed by a community legal clinic. For other Ontarians, this usually means retaining a lawyer privately and paying for services based on an hourly billing rate.

The literature on full representation suggests that the group of lawyers delivering legal aid and pro bono services across the province are the same small firm and sole practitioners retained by Ontarians reliant upon the private Bar.<sup>170</sup> Maintaining the supply of small firm and sole practitioners in the province is therefore critical to meeting the legal service needs of low- and middle-income Ontarians. Unfortunately, the evidence reviewed in the literature suggests that the small firm and sole practitioner bar in Ontario is shrinking in several geographic and practice areas; which raises serious concerns.<sup>171</sup> Moreover, virtually all lawyer services in languages other than English, French, and Italian are provided by small firm and sole practitioners, such that linguistic minority populations may experience difficulties finding lawyers that speak their language. There has also been a substantial decline in LAO lawyers participating in the provision of legal aid.<sup>172</sup> In family law, for example, there was a 29% decrease in the number of private lawyers accepting LAO certificates from 1999/00 to 2006/07, despite a 16% increase in the legal aid tariff during the same period.<sup>173</sup>

The Trebilcock Report indicates that financial support for LAO has stagnated or declined in real terms over the past decade or so. He suggests that a significant fiscal adjustment is necessary to bring remuneration for lawyers working under the certificate

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<sup>170</sup> Ontario Civil Legal Needs Project, *Lawyer Supply and Mapping Project Insert* [Draft, 15 October 2009] at 1-2 [Ontario Civil Legal Needs Project].

<sup>171</sup> *Ibid.* at 4-5. Several factors are contributing to this decline: an aging small firm and sole practitioner bar; an insufficient supply of new and young lawyers participating in small firm and sole practitioner practice; an exodus of lawyers from rural and remote areas; the nature of small firm and sole practitioner practice, including challenges managing overhead costs, expensive but necessary technological assets, reduced fees to meet demand, and greater difficulty securing financing.

<sup>172</sup> Ontario Civil Legal Needs Project, *supra* note 170 at 4-5.

<sup>173</sup> *Ibid.* at 3-4; Trebilcock Report, *supra* note 7 at 74-75.

program in line with the cost of living and other market reference points. Such a system would include adjustments to remuneration on “a regular, rational and incremental basis, rather than, as at present, on an ad hoc and episodic basis, often in response to crises of some kind (e.g., work stoppages by certificate lawyers) against unarticulated criteria and pursuant to a murky decision process...”<sup>174</sup>

In Part D of this section, Changing the Economics of Legal Services, we examine literature proposing a range of solutions to the small firm and sole practitioner supply issue. In addition to concerns about lawyer supply, the literature reviewed on Ontario’s unmet legal need suggests that even where lawyers are available, individual clients may not be able to afford full representation on a billable hour basis. Consequently, in Part D we also consider literature setting out reforms to the economic model of legal service provision, which may lead to more affordable forms of representation and other legal services.

#### **C.viii Beyond Full Representation: Holistic Services**

Holistic service delivery focuses on collaboration between legal and non-legal service providers to address multi-faceted problems. Ontario’s legal aid, health and social services systems are described, in the literature, as operating in “silos”. That is, problems falling under each system are largely treated independently and in isolation, such that treatment of one problem is prescribed without consideration of other potentially related problems.<sup>175</sup> At the same time, as was described in Section II, research from several jurisdictions has shown that many socioeconomic problems, including legal problems, occur in “clusters”; one problem may trigger a cascade of other problems.<sup>176</sup> Moreover, individuals facing a cluster of problems that involve treatment for each problem by separate agencies or organizations

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<sup>174</sup> Trebilcock Report, *ibid.*

<sup>175</sup> *Ibid.* at 103.

<sup>176</sup> *Ibid.* at 100-101; Cohl & Thomson Report, *supra* note 11 at 48.

may experience “referral fatigue”, i.e. “the correlation between the increase in advisors [that] an individual uses and the reduced likelihood of obtaining advice on referral.”<sup>177</sup> Consequently, much of the literature calls for a more integrated, holistic approach to the resolution of legal problems.<sup>178</sup> Early intervention aimed at resolving one problem can help to break or delay the formation of a problem cluster.<sup>179</sup> There have been some attempts at this kind of service delivery:

Service	Description
Barbara Schlifer Clinic	Offers counselling, legal interpretation, information, and referral services for women who are survivors of violence; <sup>180</sup> assist clients in accessing such services as shelters, community centres, mental health services, the social assistance system; <sup>181</sup> the service is not income-based.
Family Legal Health Program, operating out of Toronto’s Hospital for Sick Children	Operates as a partnership between the hospital, PBLO, LAO, and two law firms to provide low-income child patients and their families with free legal services; social workers and medical staff are trained to spot legal issues affecting patients and their families.
Centre Francophone de Toronto	Centre for Toronto’s francophone community; staffed by lawyers, social workers, and doctors that provides clients with a global needs assessment to determine their legal, health, social, and employment needs.
Clinics	A number of community legal clinics, and Student Legal Aid Services Societies, have developed partnerships with community agencies such as shelters and community centres to provide clients with “one stop shopping.” <sup>182</sup>

<sup>177</sup> Trebilcock Report, *ibid.* at 108.

<sup>178</sup> *Ibid.* at 103.

<sup>179</sup> *Ibid.* at 102. For example, relationship breakdown can lead to problems relating to child custody, ownership of a home, domestic violence, debt, and social assistance. Early and effective assistance with relationship breakdown may address some of these other problems, or at least minimize the disadvantage associated with multiple interconnected problems.

<sup>180</sup> *Ibid.* at 105-106.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*, at 106-107; Student Legal Aid Services Societies, *Report of the Student Legal Aid Services Societies to the Poverty Law Advisory Committee* at 4-5.

Specialized duty counsel	LAO has developed specialized duty counsel for domestic violence, mental health, Gladue (Aboriginal), and drug-treatment courts. These duty counsel are experienced in issues and procedures specific to their respective courts. <sup>183</sup>
CLEO's Connecting Consortium	Service in development to bring together legal and non-legal community organizations to share ideas and more effectively reach communities. <sup>184</sup>

Despite these examples, Cohl and Thomson suggest that the replacement of the predominant silo structure with multi-service organizations is unlikely. Rather, they suggest, a more likely solution in Ontario would involve building partnerships between specialized service providers.<sup>185</sup> The Trebilcock Report notes that many of Ontario's legal clinics address a wide range of legal matters, thus providing some service integration for low-income Ontarians. When problems cluster, they involve more than just legal problems. As a result, integration across a broader range of services is needed.<sup>186</sup> The Trebilcock Report suggests that Ontario's legal aid clinics take on a broader mandate, under which they would routinely conduct a global needs assessment for clients. They could then use an organized referral system to assist clients with resolving multiple aspects of the issues that they face. The ultimate aim would be to prevent further problems from forming and to avoid referral fatigue.<sup>187</sup>

## **D Changing the Economics of Legal Services**

As we have previously set out, the literature describes a legal services system in Ontario in which the needs of many are unmet. Legal aid programs offer limited services to

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<sup>183</sup> Trebilcock Report, *supra* note 7 at 38.

<sup>184</sup> Community Legal Education Ontario, "Project Backgrounder: Connecting Consortium" (27 May 2009), online: The Law Foundation of Ontario <<http://www.lawfoundation.on.ca/pdf/Connecting%20Consortium%20Backgrounder.pdf>>.

<sup>185</sup> Cohl & Thomson Report, *supra* note 11 at 48.

<sup>186</sup> Trebilcock Report, *supra* note 7 at 104.

<sup>187</sup> *Ibid.* at 108.

only the lowest-income Ontarians. In the private sector, the supply of lawyers that provide the majority of legal services to individuals is dwindling and a fee structure based on an hourly billing model is unaffordable for many. In this context, much of the literature has focused on innovations in legal service provision that change the “economics” of legal services. In this part of the paper, we set out some of the innovations described in the literature including legal expense insurance, contingency fees and class actions, “low bono”, solutions to lawyer supply issues, “unbundling” lawyers’ services, and emerging alternatives to the billable hours regime.

#### **D.i Prepaid Legal Insurance Plans**

Prepaid legal insurance plans are forms of insurance that may cover either certain unforeseen legal expenses encountered by a subscriber, or foreseen events such as real estate transactions or the preparation of a will; certain plans may also include an administrative structure that goes beyond simple expense reimbursement, and may include a specific referral lawyer or law firm to represent subscribers. Legal expense insurance (“LEI”) is a common form of legal insurance plan, which provides coverage for unexpected events that require the insured to consult a lawyer or resort to the judicial system.<sup>188</sup> While Legal Insurance Plans (LIPs) are unlikely to replace legal aid systems because of the cost of premiums, they may function as a practical cost-sharing measure for middle-income groups.

In the jurisdictions where LIPs are available, the literature describes a variety of plans which cover different areas of law and services. “True” LEI plans offer full coverage for all legal expenses related to certain kinds of unpredictable events severe enough to require a lawyer, and generally cover litigation costs. “Pre-paid” LIPs offer limited assistance with

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<sup>188</sup> Barreau du Québec, *Legal Protection Insurance: For a Greater Access to Justice* (1999) at 1 [Legal Protection Insurance].

less severe, predictable events, such as wills or real estate transactions and preventative advice, and generally do not cover litigation costs or provide very limited coverage. Plans can be purchased as “stand-alone”, meaning that they are purchased on their own and are generally more expensive, or as “add-ons”, meaning that they are added to existing insurance policies (such as homeowners or automobile insurance policies), offer limited coverage and are generally cheaper. Moreover, plans can be purchased “after the event”, in which case they are designed to handle uncertain costs after a legal problem has arisen, or “before the event”, in which case they are designed for unexpected events and generally cost less than after the event plans.<sup>189</sup> Plans may also be part of employment benefits packages, which may be offered by or negotiated with large employers.

#### **D.i.a LIPs in Canada**

In Ontario, the literature describes a very limited range of LIPs options and, despite promotion of LIPs by the LSUC going back as far as 1993, and by companies offering LIPs products, the role of LIPs has been minimal.<sup>190</sup> Pre-paid LIPs plans have been available in Ontario since 1999 on a personal or household basis through an American company, Pre-Paid Legal Services (“PPLS”). The PPLS standard family plan costs \$26 per month and includes phone consultations, access to a lawyer for arrest or detainment, limited phone calls and letters, and a variety of other limited services. The plan does not cover civil litigation costs.<sup>191</sup>

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<sup>189</sup> Matthias Kilian, “Legal Expenses Insurance – Germany’s Funding Concept as a Role Model” (Paper presented to the Legal Services Research Centre International Conference, March 2002) at 232-234 [Germany’s Legal Expense Insurance].

<sup>190</sup> Oliver Bertin, “Lawyers see more work thanks to prepaid legal plans” *The Lawyers Weekly* (4 February 2005), online: The Lawyers Weekly <<http://www.lawyersweekly.ca/index.php?section=article&articleid=30>>.

<sup>191</sup> *Ibid.* In addition to services provided for by the plan, a 25% discount on the Provider Lawyer’s standard rate is offered on services not covered by the plan; a 33% discount rate applies to those services not covered by the plan that must be performed outside of a lawyer’s office: online: Pre-Paid Legal Services, Inc <<https://www.prepaidlegal.com/>>

The Canadian Auto Workers Union (“CAW”) and the Power Workers Union (“PWU”) provide LIPs plans for their members. The CAW plan is funded by a trust, and is staffed by a mix of staff lawyers, “cooperating” lawyers and notaries who bill below-market fees, and “non-cooperating” lawyers whose fees are partly covered by the plan. Simple matters, such as real estate transactions and non-contested divorces are entirely covered, while 2 to 30 hours of lawyer time are offered for a wide range of other services. The plan has been in place since 1984 and, as of 2005, had 105,000 eligible members across Canada.<sup>192</sup> The PWU plan provides only defence costs for family law cases, criminal charges, and most other civil law suits. The plan includes coverage of litigation fees, and members can choose their own lawyer subject to the insurer’s approval.<sup>193</sup>

The literature on LIPs suggests that the market in Ontario may soon be expanding. DAS, a German company with a history of providing LEI in Europe, recently received approval to sell LEI products in Canada. Media reports indicate that DAS’s plans for individuals could cost under \$500 per year and provide up to \$100,000 in coverage per claim, including litigation costs, but that the plans would exclude family law cases.<sup>194</sup>

Quebec is the only strong LEI market in Canada. Currently, approximately 12 companies offer LEI plans. For individuals and families, premiums vary from between \$35 to \$90 per year. Coverage includes both telephone legal assistance and coverage for the costs of legal representation. The insured can generally select their own lawyer and legal strategy, with the lawyer being paid by the insurer at below-market rates. Coverage generally does not include services for family law matters, criminal charges, and pre-existing matters, and is

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<sup>192</sup>Canadian Auto Workers, “CAW Legal Services Plan”, online: CAW Legal Services Plan <<http://www.cawlsp.com>>.

<sup>193</sup>Power Workers Union, *Legal Expense Coverage Specifications Executive Summary*, online: Power Workers Union Protection Plan <[http://www.pwu.ca/protection\\_plan/legal\\_expense.php](http://www.pwu.ca/protection_plan/legal_expense.php)>.

<sup>194</sup>Tracey Tyler, “Firm to offer up to \$100,000 legal coverage for \$500” *The Toronto Star* (7 October 2009), online: The Star <<http://www.thestar.com/news/gta/article/706635>>. See also <<http://www.das.ca>>.

usually limited to \$5,000 per dispute and \$15,000 per year.<sup>195</sup> As a result of significant promotion by the Barreau de Quebec, approximately 10% of Quebec residents are covered by LEI plans.<sup>196</sup>

### **D.i.b Legal Expense Insurance in Germany**

The LEI market in Germany has been widely discussed in the literature, as it is Europe's largest LEI market. Approximately 44 percent of German households have coverage, and about 25 percent of all lawyer fees are paid out of LEI plans. There are approximately 50 insurers offering LEI plans, which fund approximately 3.6 million cases per year, with the average case costing 540 Euros. Most LEI plans are stand-alone, and offer a wide range of coverage.<sup>197</sup>

The literature indicates that the success of LEI in Germany, however, may be partly attributable to its unique fee structure for lawyers. Under the German regulatory system, there is a federal law on lawyers' remuneration which sets out a scale of fees based on the monetary value of a dispute. The fee scale is not, however, binding on lawyer services provided directly to clients; freedom of contract is preserved, and lawyers and clients can agree to higher rates. For cost-shifting purposes such as LEI, the fee scale is binding. Consequently, a German LEI provider knows the maximum amount it will have to pay for a given dispute in advance, based on the value of that dispute.<sup>198</sup> This has a significant impact on lowering the cost of premiums, as the insurer does not have to build up sizeable loss reserves to cover particularly expensive cases.<sup>199</sup>

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<sup>195</sup> Legal Protection Insurance, *supra* note 188.

<sup>196</sup> Tracey Tyler, "New insurance makes lawyers affordable" *The Toronto Star* (18 August 2008), online: The Star <<http://www.thestar.com/article/480287>>.

<sup>197</sup> Germany's Legal Expense Insurance, *supra* note 189 at 243-245.

<sup>198</sup> Note that the lawyer can ask for additional remuneration from the client, above the amount provided by the insurer, but Killian suggests such requests are rarely, if ever, made.

<sup>199</sup> Germany's Legal Expense Insurance, *supra* note 189 at 250-54

### **D.i.c Legal Insurance Plans in England and Wales**

In England and Wales, LIPs presently come as a relatively cheap add-on to many household and automobile policies, and they are also available as a stand-alone product.<sup>200</sup> Currently around 59% of people in the United Kingdom have some kind of LIP.<sup>201</sup> The Jackson Report<sup>202</sup> recommends that there should be further encouragement of LIP, and the UK Government agrees that greater use of LIP, in cases such as employment or housing, could be “an affordable and feasible alternative to publicly funded legal aid... and would welcome the development of a market in this area.”<sup>203</sup>

However, the UK Law Society believes there are substantial difficulties with these policies, including: the fact that they cover a relatively small number of cases and exclude many (e.g. family, crime and most aspects of social welfare law); coverage is typically limited to £50,000, which is not adequate to cover complex cases; some people will not buy the cover either because they cannot afford it, or they do not have household or automobile insurance; and there is a serious lack of transparency about the way in which the policies are managed. The Law Society believes that there should be a full review of the way in which LIP are provided in the UK, and that proper consumer protections should be built in.<sup>204</sup>

### **D.ii “No Downside” Options – Contingency Fees and Class Actions**

Two alternative methods of funding civil actions are contingency fees and class actions. These mechanisms can be termed “no downside” options as, under ideal

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<sup>200</sup> The Law Society, *Access to justice review: Final report* (November 2010) at 25 [UK Law Society Report]; Ministry of Justice, Consultation Paper CP12/10, *Proposals for the Reform of Legal Aid in England and Wales* (November 2010) at 137 [MoJ Consultation Paper].

<sup>201</sup> *Ibid.*

<sup>202</sup> Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, (December 2009), online: Judiciary of England and Wales <<http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf>> [LJ Jackson Report].

<sup>203</sup> MoJ Consultation Paper, *supra* note 200 at 137.

<sup>204</sup> UK Law Society Report, *supra* note 200 at 25.

circumstances, they involve shifting the cost of legal services away from the client with the aim of improving access to justice. The literature suggests that both of these mechanisms have the potential to improve access to justice, but that each also has its drawbacks and limitations.

### **D.ii.a Contingency Fees**

Under a contingency fee arrangement, a lawyer accepts a case on a “no win, no fee” basis. If the client wins, the lawyer takes a percentage of the award; if the client loses, there is no fee.<sup>205</sup> In 2004, Ontario became the last province in Canada to allow contingency fee arrangements in individual suits.<sup>206</sup> The literature suggests several ways in which contingency fee arrangements may benefit clients: first, such arrangements provide an incentive for the lawyer to act in the client’s best interests, whereas under an hourly billing arrangement, the lawyer may not have any direct economic incentive to do so; second, such arrangements may provide access to the courts for the poor and those not eligible for legal aid; and, third, such arrangements minimize the moral hazard problem, which may exist under hourly fee contracts, that clients cannot effectively monitor the actual time a lawyer works on a case.<sup>207</sup> At the same time, contingency fee arrangements raise various concerns.

One concern relates to the “costs follow the event” system. For a civil case in Ontario, much like many other common law jurisdictions, the losing party may have to pay a portion of the winning party’s legal costs. Under a contingency fee arrangement in Ontario, then, a client who loses may still have to pay part of the winning party’s costs, even though

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<sup>205</sup> Anthony J. Duggan, “Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective” in Charles E.F. Rickett and Thomas G.W. Telfer, eds., *International Perspectives on Consumers’ Access to Justice* (Cambridge University Press) at 52 [Consumer access to justice].

<sup>206</sup> Julius Melnitzer, “Ontario Officially Ends Prohibition on Contingency Fees” *Corporate Legal Times* (November 2004).

<sup>207</sup> Michael Trebilcock, “The Case for Contingent Fees: The Ontario Legal Profession Rethinks its Position” (1989) *Can. Bus. L.J.* 360 at 361-362 [The Case for Contingent Fees]

she does not have to pay her own lawyer.<sup>208</sup> In the US, on the other hand, where contingency fees are common, the general rule is that litigants bear their own costs, and so there is no downside if a client loses under a contingency fee arrangement.<sup>209</sup> Potential solutions to this downside are proposed in the literature. One option might be for the winning party's costs to be paid out of public funds. However, this is a form of legal aid and it raises the question, if the client does not qualify directly for legal aid, why should she be allowed to qualify indirectly.<sup>210</sup> Another possible solution might be insurance to cover the client's risk of losing. Where insurance premiums are costly, however, this could act as a barrier to contingency fee access for low-income and lower middle-income clients.<sup>211</sup> A final potential solution would be to negotiate a fee arrangement under which the plaintiff's lawyer personally bears the risk of the other party's costs. This would remove all risk from the client, thereby encouraging meritorious suits that clients would otherwise be wary of bringing, and would also serve to discourage lawyers from taking on frivolous or nuisance suits under contingency fee arrangements.<sup>212</sup>

A second concern is the "agency costs" associated with contingency fee arrangements. A contingency fee arrangement in substance makes the client and her lawyer joint owners of the client's claim. A joint owner (the client's lawyer) may have an insufficient incentive to exploit the claim because he has to share the rewards for his efforts with the other co-owner (the client). This means that the lawyer may be tempted to settle the case quickly and cheaply in preference to investing more time and effort and running the risk

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<sup>208</sup> Consumer access to justice, *supra* note 205.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.* at 53.

<sup>211</sup> *Ibid.*

<sup>212</sup> The Case for Contingent Fees, *supra* note 207 at 363-364.

of losing at trial. A possible solution to this problem might be to require that courts approve any out-of-court settlements made in cases involving contingency fee arrangements.<sup>213</sup>

A final concern with the use of contingency fees is that they may not be attractive to lawyers in small cases. In order for it to be financially worthwhile for a lawyer to accept a contingency fee case, the expected value of the claim must be at least as much as the estimated fee<sup>214</sup>; most lawyers can be expected to reject unprofitable cases regardless of their merits.<sup>215</sup>

#### **D.ii.b Class Actions**

In a class action, the claims of numerous persons against the same defendant arising out of a “common nucleus of fact” are brought together for a single determination. The action is brought by one or more members of the class, the “representative plaintiffs”, on behalf of the class as a whole. Only the representative plaintiffs are parties to the action, and only they are liable for its costs, unless the court permits other class members to participate, in which case the court determines the terms of this participation, including costs.<sup>216</sup> Judgment in a class action, however, is binding on all members of the class, unless they have opted out of the proceedings.<sup>217</sup> The literature on class actions acknowledges their potential to improve access to justice, but also raises some concerns.

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<sup>213</sup> Consumer access to justice, *supra* note 205, at 53.

<sup>214</sup> *Ibid.* at 54.

<sup>215</sup> Richard Moorhead, “Contingency Fees in England and Wales: Access to Justice in Employment Tribunals” (Paper presented to the International Legal Aid Group Conference, New Zealand, 2009) at 21.

<sup>216</sup> *Class Proceedings Act*, S.O. 1992, c. 6, s. 14. Class members are also responsible for costs with respect to the determination of any of their own individual claims: see *Class Proceedings Act*, s. 31(2). Note however that in exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest: see s. 31(1); Consumer access to justice, *supra* note 205 at 54.

<sup>217</sup> *Class Proceedings Act*, s 27(3). Members of a class can opt out of proceedings under s. 9 of the *Act*; Consumer access to justice, *ibid.*

The default rule is the representative plaintiff is liable for all of the costs of the action. Without some mechanism for sharing these costs, the representative plaintiff may be discouraged from proceeding. Class members may agree on sharing the costs of the action, but the representative plaintiff may encounter hold-out problems getting the other class members to agree, particularly if the class is large. Each individual class member has an incentive not to contribute because if the other class members contribute, the action will go ahead and the individual will benefit anyway. If sufficient class members reason this way, the action will not go ahead.<sup>218</sup> Another alternative might be for the representative plaintiff to enter into a contingency fee arrangement with the lawyer. This raises the concerns about contingency fees discussed above and, accordingly, the law imposes a requirement for court approval of contingency fee arrangements in the class actions context.<sup>219</sup>

Class actions, like contingency fees, raise agency cost concerns. The class members are joint owners of the claim, but the representative plaintiff or, perhaps more accurately, the plaintiff's lawyer, do all the work. It may be in the interests of the representative plaintiff and the lawyer to do less work, even if this means compromising the claim. To guard against this risk, class members need to monitor the conduct of the case. Monitoring requires involvement, involvement increases costs and additional costs reduce the net benefit of the procedure. In recognition of these concerns, Ontario law requires a fairness hearing to approve a proposed settlement of a class action. However, objectors may not have any significant influence at such hearings as they may lack resources and legal representation. Moreover, the literature suggests that there may be a judicial culture favouring settlement, potentially to the prejudice of objectors. Possible solutions include: providing a funding

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<sup>218</sup> Consumer access to justice, *supra* note 205 at 55; that is, each member of the class has an incentive not to contribute because, if other class members contribute, the action will go ahead and the member will benefit anyways.

<sup>219</sup> *Class Proceedings Act*, s. 33.

mechanism to support objectors; or providing a court-appointed neutral expert to ensure that the interests of objecting class members are advanced.<sup>220</sup>

A final concern is that class actions are often not initiated by clients. A significant proportion of class actions are initiated in response to government investigations, regulatory proceedings, or other identifiers of unlawful conduct. Moreover, “[i]n class actions more than any other kind of litigation, lawyers actively participate in the generation of legal claims...”<sup>221</sup> The suggestion, then, is that a limited category of cases tend to use the class action, such that it is unlikely to be useful to most middle-income Ontarians seeking alternative measures to fund their cases.

### **D.iii Low Bono**

“Low bono” refers to the provision of legal services by lawyers and other legal professionals to low- and middle-income clients at reduced fees. The literature indicates that these kinds of initiatives are specifically designed for clients in our target demographic: clients who do not qualify for legal aid, but cannot afford standard legal service fees.<sup>222</sup> One example of a low bono service available in Ontario is Lawyers Aid Canada’s Justice Net program (<http://www.justicenet.ca>). The program is available, nation-wide, to anyone whose net family income is less than \$59,000. Fees are calculated based on a sliding scale formula that takes into account income from all sources, as well as the number of the client’s dependents. Service is provided by lawyers who have agreed to devote a portion of their practice to qualifying clients at reduced fees. The service is available through Justice Net’s

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<sup>220</sup> Consumer access to justice, *ibid.* at 55; Jasminka Kalajdzic, *Access to Justice for the Masses? A Critical Analysis of Class Actions in Ontario* (LL.M. Thesis, Faculty of Law, University of Toronto, 2009) at 186 [unpublished] [Access to Justice for the Masses?].

<sup>221</sup> Access to Justice for the Masses?, *ibid.* at 186.

<sup>222</sup> Lawyers Aid Canada, “JusticeNet Home”, online: JusticeNet <<http://www.justicenet.ca>>.

website, which has a directory of participating lawyers, or through a toll-free number for those without internet access.

#### **D.iv Supply Side Issues**

In part C.vii of this section, Full Representation, we introduced the literature describing the decline in small and sole practitioners in Ontario. The literature indicated that this decline has a potentially severe impact on access to civil justice because small and sole practitioners are overwhelmingly retained by individuals for legal problems, account for a significant majority of lawyers in rural and remote areas of Ontario, and provide almost all legal services in languages other than English, French and Italian. In this part of section III, we describe solutions and innovations raised in the literature that are aimed at addressing this decline across Ontario: D.iv.a will address general solutions to the decline; D.iv.b will address solutions particular to the rural and remote area context, and D.iv.c will address solutions for cultural and linguistic minority communities.

##### **D.iv.a Small and Sole Practitioners**

Cohl and Thomson indicate in their report that the LSUC, Ontario Bar Association, and County and District Law Presidents' Association have been working on a joint strategy to develop resources and supports for small and sole practitioners. Some of the initiatives under the joint strategy include:

- developing and supporting new practice management tools for sole practitioners and small firms;
- developing mentoring, educational, and recruitment opportunities and materials for sole practitioners and small firms;
- supporting programs that improve the economics of small practices, including benefits packages and financial arrangements; and
- improving data collection regarding sole practitioners and small firms to facilitate future initiatives.<sup>223</sup>

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<sup>223</sup> Cohl & Thomson Report, *supra* note 11.

The decline in small firm and sole practitioners accepting LAO work is also considered in the literature; it is suggested that LAO could provide seed funding or financial support to small firm and sole practitioners that commit to taking on LAO work.<sup>224</sup>

#### **D.iv.b Rural and Remote Areas**

In this section, we set out the solutions and innovations described in the literature to address the decline of lawyers serving rural and remote areas of Ontario, as well as some of the major issues faced by those lawyers and their clients. Lawyers in rural and remote areas are facing growing challenges in the form of large service areas, isolated clients, a lack of public awareness of their services, and difficulty in recruiting staff.<sup>225</sup> In addition, as 80 percent of rural and remote area lawyers are small firm and sole practitioners, they also face issues related to the economics of their practices, some of which were described in “Full Representation” above.

For clients, the most significant obstacle to obtaining legal service is distance. In the worst scenarios, rural and remote area clients may have to walk an hour or more, or even hitchhike, to get to legal clinic appointments or administrative or court hearings. Public transport in many rural communities is rare or non-existent and, even for those with private forms of transportation, the cost of gas, long distances, poor road conditions, and severe weather may be further obstacles to accessing legal services.<sup>226</sup> Moreover, large distances between rural and remote areas and regional centres, combined with smaller economies of scale, mean that services in rural areas often cost more. Consequently, a trend has developed

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<sup>224</sup> *Ibid* at 34.

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.* at 32.

of government, community, commercial, and legal services moving from small towns to regional centres.<sup>227</sup>

The combined effect of these distance-related obstacles to obtaining legal services can be crippling. For example, a rural woman facing domestic violence in a family situation may not be able to access childcare services for her children and may not have access to public transport, making it difficult to see a lawyer. In addition, there may be a lack of shelters and support services in her community, such that she may not be able to leave the home.<sup>228</sup>

The literature sets out innovations and solutions aimed at increasing the legal services available in rural and remote areas. These include:

- offering incentives or supports to legal professionals that practice in rural and remote communities, such as support for operating or facility costs, free access to continuing legal education, and loan forgiveness programs;
- developing urban-rural partnerships through which urban lawyers provide *pro bono* services to rural clients, using rural legal aid offices, charities, or community legal services providers as contact points;
- organizing law students to provide legal services in underserved areas; and
- promoting articling opportunities for law students in underserved communities.<sup>229</sup>

Some of these solutions and innovations are already being put into place. For example, Pro Bono Students Canada has a program through which law students provide legal services in underserved areas, and the Law Foundation of Ontario has created a series of “Connecting Articling Fellowships” to promote articling opportunities in underserved areas.<sup>230</sup>

In addition to innovations and solutions aimed at increasing the availability of legal services, the literature also suggests that technological innovations may help to bridge the gap between clients and legal service providers in rural and remote areas. Some of these

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<sup>227</sup> *Ibid.* at 33.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.* at 36; Ontario Civil Legal Needs Project, *supra* note 170 at 4-5.

<sup>230</sup> Ontario Civil Legal Needs Project, *ibid.*

innovations were previously described in part C.ii of this section: Public Legal Education and Information. As noted there, technological solutions currently have limitations because of access issues in rural and remote areas and, in any case, technological solutions are not a replacement for in-person services. Nonetheless, technology has the potential for providing information and legal services to broad audiences over long distances. Consequently, as technology improves and internet and telephone service areas expand, some of the innovations set out in the previous sections may become particularly useful in the rural and remote areas context.<sup>231</sup>

#### **D.iv.c Cultural and Linguistic Issues**

Approximately 1.8 million Ontarians speak languages other than English or French most often at home, and nearly 270,000 Ontarians have no knowledge of either official language. The literature suggests, then, that the number of Ontarians who would need some form of language assistance to access legal services or information is somewhere between these two numbers; it constitutes a significant group of Ontarians.<sup>232</sup> Furthermore, apart from exceptions like Aboriginal languages spoken in remote communities and Spanish-speaking migrant farm workers, linguistic access to justice is almost entirely an urban issue.<sup>233</sup>

The literature on cultural and linguistic issues suggests that, in addition to language barriers, newcomers and immigrants in Ontario face a variety of other issues that may impede their ability to access legal services. These include:

- a lack of financial means, as literacy issues may lead to unemployment or underemployment;
- the inability to pursue self-help options due to a lack of language and/or computer literacy;

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<sup>231</sup> Cohl & Thomson Report, *supra* note 11 at 41.

<sup>232</sup> *Ibid.* at 10, 12.

<sup>233</sup> *Ibid.* at 10.

- unawareness of basic rights, as many immigrants come from countries with vastly different legal systems, and language issues may act as a barrier to learning about a new legal system;
- fear of engaging with the legal system because of negative experiences with, or perceptions of, the legal systems in their home countries, or a fear of deportation;
- cultural barriers, as immigrants may be reluctant to access services that do not recognize their cultures, value systems and faith traditions, or fear of ostracism in their communities; and
- issues particular to women, such as a higher need for language training, and the potential for isolation arising out of patriarchal traditions in their communities, family obligations, a lack of independent income, and a lack of experience with social services.<sup>234</sup>

The literature on legal interpretation services suggests that there are concerns with those currently available in Ontario. For example, using interpreters places demands on legal service organizations and may entail significant costs. Organizations must maintain a roster of interpreters and have knowledge of how to work with interpreters to use them effectively. In addition, it may be difficult to assess the qualifications of interpreters, as there is no standard accreditation process for them. The accreditation process that is in place for court and tribunal interpreters has been criticized for lacking consistency.<sup>235</sup> Moreover, qualified interpreters are either scarce or non-existent for a number of languages. As a consequence of these issues, many legal service providers serving low-income and immigrant communities resort to staff, volunteers, students, and the friends and family of clients to provide interpretation. This solution has its own drawbacks, as concerns about a lack of confidentiality, privacy, and conflicts of interest may arise.<sup>236</sup>

The literature on interpretation services describes a variety of initiatives either currently in place, or that could be put into place, to address some of the barriers to accessing legal services faced by cultural and linguistic minorities. These are grouped into three themes, as follows:

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<sup>234</sup> *Ibid.* at 15-17.

<sup>235</sup> *Ibid.* at 17-19.

<sup>236</sup> *Ibid.*

1. Providing legal information and services in the client's first language to avoid the need for interpretation services, through initiatives including:
  - specialty legal services, such as ethno-cultural and ethno-racial legal clinics, which can provide culturally sensitive service with some capacity for service in clients' first languages;
  - linking hiring practices to language skills, as done by many American legal service organizations, or offering training to those with basic, but not fluent, skills in non-official languages;
  - facilitating the accreditation of internationally trained lawyers; and
  - providing multilingual and multi-format PLEI materials, as audio and video formats are particularly important for those with limited or no literacy in any language.<sup>237</sup>
  
2. Conducting special outreach to the most vulnerable and isolated members of minority communities, such as:
  - workshops and mini-clinics, delivered in the native languages of high-need groups or delivered through interpreters; and
  - harnessing multilingual community media, such as community newspapers, radio, and TV, to connect with people who may otherwise be unaware of their legal rights or how the law can help them.<sup>238</sup>
  
3. Improving access to professional interpreters, through initiatives such as:
  - a centralized interpreter service, which could enhance the supply and availability of interpreters or, alternatively, and as preferred by many Ontario service providers, continuing existing relationships between legal service providers and interpreters with a focus on common standards and protocols, and perhaps creating a centralized roster of LAO interpreters;
  - a standardized certification process for interpreter services and post-secondary programs dedicated to legal interpretation; and
  - the use of telephone and video interpretation, despite some drawbacks to using technology for these purposes, to reduce cost and fill the need for interpretation of less common languages, for which interpreters may not be available locally.

Some of these initiatives are already in place in Ontario. For example, there are many specialty legal service clinics in Ontario, including the Metro Toronto Chinese and South East Asian Legal Clinic, the South Asian Legal Clinic of Ontario, the Centre for Spanish Speaking Peoples, and the Nishnawbe-Aski Legal Services Corporation. In order to facilitate the accreditation of internationally accredited lawyers, the LSUC has relaxed the

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<sup>237</sup> *Ibid.* at 21-25.

<sup>238</sup> *Ibid.*

rules for articling as they pertain to this group, and the University of Toronto launched a bridging programme in May 2010.<sup>239</sup> In addition, many PLEI materials are already available in a wide range of languages and formats as set out in the part of this section on PLEI and Websites. Finally, many hotlines use live interpretation services for phone calls with linguistic minority clients, and the Ontario Ministry of the Attorney General is currently working on tests to evaluate the interpretation skills of all current and new court interpreters.<sup>240</sup>

#### **D.v Emerging Alternatives to the Billable Hours Model**

The billable hours model is the norm for most lawyers, and the literature suggests that this creates challenges for clients who face uncertainty about the anticipated costs of legal services, and potentially extremely high fees. At the same time, the system may create undesirable incentives for lawyers to protract cases.<sup>241</sup> A recent survey of 500 Toronto small firms and sole practitioners, conducted by a private company, found that the average billing rate for such practitioners was \$338 per hour, and that only 5 percent of these lawyers offered alternatives to hourly billing, such as fixed fees, day rates or task- or project-based billing.<sup>242</sup> While the alternatives to the billable hours model currently in place in Ontario may be limited, the literature suggests several potential alternatives. Some of these alternatives are described in the sections that follow: competitive tendering, fixed tariff billing, and commoditization of legal services.

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<sup>239</sup> See University of Toronto, Faculty of Law, “Internationally Trained Lawyers Program” online: University of Toronto, Faculty of Law <<http://www.law.utoronto.ca/ITL/>>.

<sup>240</sup> *Ibid.* at 20-30.

<sup>241</sup> Michael Carabash, “Is Time Running Out on the Billable Hour” *Dynamic Lawyers* (April 2009).

<sup>242</sup> *Ibid.*

### **D.v.a Competitive Tendering**

Competitive tendering refers to a process through which an individual in need of legal services invites lawyers to offer tenders for performing those services. The individual can then select a lawyer from the tenders received based on the quotes provided, along with other factors that the individual considers relevant, such as the reputation or experience of the lawyer. In order for competitive tendering to be possible, there must be some organization connecting individuals to lawyers that are willing to offer tenders. In this section, we describe two competitive tendering organizations: 1) an online competitive tendering system, available in Ontario; and 2) a “block” competitive tendering system currently being considered in the UK.

Dynamic Lawyers is a Toronto based company that offers competitive tendering for legal services through its website (<http://www.dynamiclawyers.com>). Users of the website can post their legal issues online for free, and lawyers in the Toronto area provide quotes for those services. The cost of the service to lawyers is \$30 per month. The service has the potential to reduce the high costs of legal services faced by individuals by introducing more competition into the legal services market, and also by reducing, and perhaps even eliminating, the need for and cost of an initial consultation. Lawyers can provide quotes either based on an hourly billing fee or on a fixed fee for the service requested; where the quote is based on a fixed fee, the ultimate cost to the client may be lower and the client is provided with certainty regarding the cost of the services.<sup>243</sup>

A second model of competitive tendering is the “block” model, under which legal service providers offer tenders for providing services for a group of cases. For example, the Trebilcock Report describes a competitive block tendering system that was scheduled to be

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<sup>243</sup> *Ibid.*; Michael Carabash, “A Better Mousetrap?” *Canadian Forum on Civil Justice* (Spring 2009).

implemented in the UK by October of 2008, but has yet to be implemented.<sup>244</sup> Under that system, legal aid lawyers would be compensated “per case (rather than by the hour) at a price set by the market on the basis of competitive tendering for legal aid contracts by providers.”<sup>245</sup> Trebilcock indicates that competitive block tendering can result in cases being resolved at a lower cost than if they were contracted on a single case basis, and may also develop expertise in the local bar for certain cases or clients.<sup>246</sup> He notes, however, that several concerns about competitive block tendering for legal aid cases have been reported, including that it may compromise the quality of service that legal aid clients receive, as “the lawyer has a financial incentive to settle the case as soon as the billable hours and resources expended on it reaches the fixed price quoted”; and it takes away the client’s choice of lawyers from a panel of legal aid lawyers.<sup>247</sup> Ultimately, Trebilcock concludes that competitive block tendering for legal aid cases should not presently be considered in Ontario, as it is “not evident that Ontario has a thick enough market of legal service providers especially in rural areas”, and thus “the assumption that several firms will compete for contracts seems unrealistic.”<sup>248</sup>

More recently, the Law Society of Manitoba has established the Family Law Access Centre. The Law Society will act as a brokerage house in family law matters by buying legal services at a discount from private bar lawyers and then making them available to those in the middle of the socio-economic spectrum, provided that they meet certain financial criteria.

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<sup>244</sup> The current UK Government has indicated its intention to continue the move towards competitive block tendering. It intends the initial phase of competition to be limited to criminal matters, with an eventual extension to civil and family cases in the longer term. See: MoJ Consultation Paper, *supra* note 200 at 20, 101 113-116.

<sup>245</sup> Trebilcock Report, *supra* note 7 at 96-97.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.* at 97-98.

<sup>248</sup> *Ibid.* at 99.

The Law Society will also handle client billing and will guarantee payment to participating lawyers.<sup>249</sup>

#### **D.v.b Fixed Tariff Billing**

Another alternative to the “billable hour” is a fixed tariff model. In this section, we review literature describing the fixed fee system for lawyers’ fees in Germany and England and Wales, as well as the limited fixed fee options in Ontario. In Germany, as mentioned previously in part D.i, Prepaid Legal Insurance Plans, lawyer fees are prescribed in legislation.<sup>250</sup> The fees are calculated based on the subject of the legal matter and the complexity of the legal work performed in the matter. In civil, administrative, labour, and tax law matters, the first component of fee calculation is the value of the matter. The value of the matter corresponds to a “fee unit” under the legislation. For each separate aspect of work performed in the matter, such as advice to the client or a motion in court, the lawyer receives some multiple or fraction of the fee unit, determined by the complexity of that component of the matter.<sup>251</sup>

Importantly, the fees in the legislation leave freedom of contract untouched; that is, lawyers and clients can agree to higher fees in written agreements. For cost-shifting purposes, however, such as LIPs, the fees in the legislation are binding. As previously noted, the literature indicates that this may be one factor in the success of Germany’s LIP market, as the system “perfectly fits into the conditions of insurance theory that loss exposure should be definite and calculable.”<sup>252</sup> Moreover, the fee system has led to more affordable LIP

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<sup>249</sup> Canadian Forum on Civil Justice, “Inventory of Reforms – Manitoba Family Law Access Centre (FLAC)”, online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/inventory/reform.php?id=156>>.

<sup>250</sup> Germany’s Legal Expense Insurance, *supra* note 189 at 251-54.

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

premiums in Germany.<sup>253</sup> The literature suggests that while the German fixed fee system may not provide guaranteed fixed fees for individual cases, it improves access to legal services for Germans through more affordable LIPs.

In England and Wales, “fixed fees” in civil legal aid have become common in the last few years.<sup>254</sup> The range of fees depends on the type of case and the venue of proceedings. For example, there is one fee per category in social welfare law, and a variety of different fees set for each category of law in health, family and immigration matters.<sup>255</sup> The UK Law Society notes that the fixed fee system results in “a disincentive to take on time-consuming, difficult matters, which may often involve the most needy of clients.”<sup>256</sup>

In Ontario, the literature indicates that fixed fee legal service options are extremely limited. The survey mentioned in the competitive tendering section indicates that fixed fees for legal services are rare in Ontario. The online competitive tendering service also mentioned previously may be one limited option for accessing fixed fee legal services, as the lawyers providing quotes on that site may offer fixed fee services. Additionally, our conversations with several small firm Toronto immigration and refugee lawyers indicate that the norm in immigration and refugee cases taken on by small firm and sole practitioners is fixed fee billing based on the service requested. This option, however, is limited to one practice area and further research would be necessary to obtain an accurate sense of how widely fixed fee services are offered in Ontario.

#### **D.vi Unbundled Legal Services**

Under the traditional legal services model, a client retains a lawyer to take on all aspects of his or her case. The client pays a retainer, and keeps paying until the matter is

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<sup>253</sup> *Ibid.* at 250.

<sup>254</sup> UK Law Society Report, *supra* note 200 at 31.

<sup>255</sup> MoJ consultation paper, *supra* note 200 at 27.

<sup>256</sup> UK Law Society Report, *supra* note 200 at 31.

complete, with fees usually calculated on an hourly billing basis.<sup>257</sup> Our review of the literature on Ontario’s unmet legal need suggests that many low- and middle-income individuals are unable to afford this kind of traditional legal service. Consequently, as we described in Section II, the literature indicates that more litigants are appearing in court unrepresented or attempting to use self-help measures. Some of these individuals, however, have the resources to pay for some assistance, but not full representation.<sup>258</sup> One possible reform is the “unbundling” of legal services.

Under a system allowing for the provision of unbundled legal services, a lawyer may accept a retainer for a specific aspect of a case, such as drafting a statement of claim, but does not take on carriage of the entire case.<sup>259</sup> This kind of legal service is also described as a “limited-scope retainer”. In Ontario, however, the Law Society of Upper Canada’s (“LSUC”) Rules of Professional Conduct, as well as recent Supreme Court of Canada jurisprudence, suggest that once a lawyer assumes any role in representing a client, she has carriage of all aspects of the client’s case.<sup>260</sup> One of the aims of this rule is to protect client privilege and confidentiality and avoid conflicts of interest,<sup>261</sup> but it also precludes the provision of unbundled legal services.

However, unbundled legal services have been used successfully in the United States since the 1990s. They are now used in a variety of situations, in both urban centres and rural

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<sup>257</sup> Jeanette Fedorak, “Unbundling Legal Services: Is the Time Now”, *Canadian Forum on Civil Justice* (Spring 2009) [Unbundling Legal Services].

<sup>258</sup> *Ibid.*

<sup>259</sup> Kent Roach & Lorne Sossin, *Access to Justice and Beyond*, Faculty of Law, University of Toronto, Draft (6 November 2009) at 10 [Access to Justice and Beyond].

<sup>260</sup> *Ibid.*; *R. v. Neil*, [2002] 3 S.C.R. 631.

<sup>261</sup> The concern is that allowing unbundled legal services could lead to some lawyers and legal service providers developing high-volume practices; detailed conflict checking would not be feasible and confidentiality protections might be ignored or violated (for example, in the context of a court-based service, opposing parties seeking information or advice from the same program, or even the same person). See, for further details and other examples of concerns related to unbundled legal services: Richard Zorza, “Discrete Task Representation, Ethics, and the Big Picture: Toward a New Jurisprudence” (2002) 40 *Fam. Ct. Rev.* 19.

areas, where they are a response to the limited supply of lawyers and the needs of less affluent clients.<sup>262</sup> In order for the use of unbundled legal services to be feasible, the literature indicates that many US states have modified their rules of court and lawyer codes of conduct, and have provided lawyers with guidelines and training on the effective provision of limited-scope retainer services.<sup>263</sup> In Washington State, for example, practice rules provide that, “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”<sup>264</sup>

The literature reports some potential for reform in Canada with respect to unbundled legal services. For example, the *Task Force Report of the BC Law Society* endorsed a model of the limited-scope retainer, and Alberta Justice, the Law Society of Alberta, and the Canadian Bar Association are jointly exploring the possibility of encouraging limited-scope retainers in Alberta.<sup>265</sup> Since the *BC Task Force’s* endorsement, the province’s *Professional Conduct Handbook* has been amended to exempt lawyers providing pro bono services from conflict of interest rules in certain circumstances.<sup>266</sup> Ontario has adopted a similar measure to extend to lawyers participating in Pro Bono Law Ontario’s court-based brief services programs.<sup>267</sup> Finally, a recent report of the Ontario Civil Legal Needs Projects notes that unbundling might help to address access to justice problems in Ontario, saying that, “in some

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<sup>262</sup> Unbundling Legal Services, *supra* note 257.

<sup>263</sup> *Ibid.*

<sup>264</sup> Washington State RPC, *ibid.*, Rule 1.2(c); Kim Prochnau, “Slicing the Onion: Proposed Rules of Professional Conduct and Court Rules Make it Easier for Private and Nonprofit Legal Practitioners to Provided ‘Unbundled’ Legal Services” *Washington State Bar Association* (April 2003).

<sup>265</sup> Unbundling Legal Services, *supra* note 257. See also the Law Society of British Columbia, *Report of the Unbundling of Legal Services Task Force* (2008).

<sup>266</sup> Law Society of British Columbia, “Highlights of Amendments to the Professional Conduct Handbook” (January 2009), online: Law Society of British Columbia <[http://www.lawsociety.bc.ca/publications\\_forms/handbook/amendments.html](http://www.lawsociety.bc.ca/publications_forms/handbook/amendments.html)>.

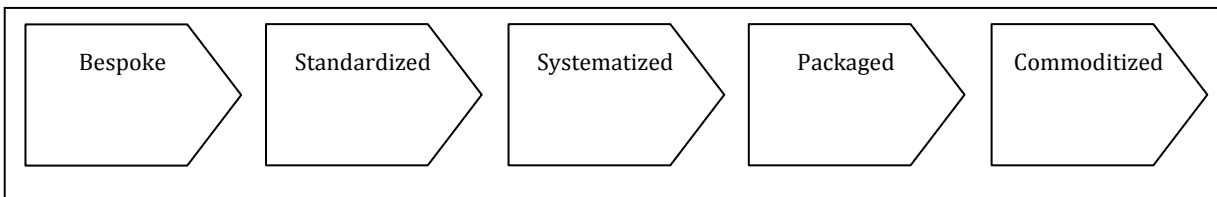
<sup>267</sup> Law Society of Upper Canada, Rules of Professional Conduct – Rule 2 (Rule 2.04 (15)-(19)), online: Law Society of Upper Canada <<http://www.lsuc.on.ca/regulation/a/profconduct/rule2/>>.

cases, partial legal and paralegal representation, or ‘unbundled’ legal services, might be the answer.”<sup>268</sup>

#### D.vi.a Commoditization

Richard Susskind, a British lawyer and academic, has written extensively on the concept of “commoditization” of legal services and the impact of technological advances on legal services. In his most recent book, *The End of Lawyers?*, Susskind explains the concept of commoditization and how it may lead to a shift away from the billable hours model of legal service provision.<sup>269</sup>

Susskind’s theory is based on an “evolution of legal services” through five steps on an “evolutionary path”. These steps are “bespoke”, “standardized”, “systematized”, “packaged”, and “commoditized” legal services.<sup>270</sup> The evolutionary path is depicted in Figure 1, below.



**Figure 1: *The Evolution of Legal Service***<sup>271</sup>

Susskind’s theory is that there is an increasing market pull towards the right of this evolutionary path enabled by emerging technologies.<sup>272</sup>

On the far left of the diagram, “bespoke” legal services are highly customized services, such as advocacy in the courtroom. The end product is “disposable” in that it

<sup>268</sup> Ontario Civil Legal Needs Project, *Listening to Ontarians – Report of the Ontario Civil Legal Needs Project* (May 2010), online: Law Society of Upper Canada <[http://www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf)> at 56.

<sup>269</sup> Susskind, *supra* note 74.

<sup>270</sup> *Ibid.* at 28-29.

<sup>271</sup> *Ibid.* at Fig. 2.1, p. 29.

<sup>272</sup> *Ibid.* at 28.

cannot be reused by future clients in future cases.<sup>273</sup> Susskind suggests that many law firms claim they undertake only bespoke work, but that this is rarely in fact the case.<sup>274</sup> On the far right of the diagram, “commoditization” occurs when a legal service or offering is readily available on the market at highly competitive prices. A “legal commodity”, as Susskind uses the term, is “an electronic or online legal packaging or offering that is perceived as commonplace, a raw material that can be sourced from one of various suppliers.”<sup>275</sup>

Susskind suggests that services on the left end of the evolutionary path are generally provided on an hourly billing basis, while those on the right are provided on a fixed fee basis. A shift in legal service provision towards the right, therefore, could result in a shift in legal service billing norms.<sup>276</sup> Susskind suggests that clients are pushing rightwards because these services offer several benefits including: fixed cost certainty; efficiency gains from standardization and systemization; and the promise of better performance in the form of increased quality, consistency, and speed, resulting from formal organization of procedures, knowledge, and expertise.<sup>277</sup>

The move rightwards, Susskind suggests, does not eliminate the opportunity to profit. While systemization may reduce unit profitability, it can radically increase the quantity of services that can be provided.<sup>278</sup> Moreover, a promising opportunity for profit can be found in packaged legal services. Once a packaged legal service has been developed, there is no need for lawyers to expend further time or effort on the product and all future sales, beyond the point of recovering the initial investment, yield revenues unrelated to expenditures.<sup>279</sup> The difficulty with packaged products, is keeping competitors out of the market to prevent

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<sup>273</sup> *Ibid.* at 29.

<sup>274</sup> *Ibid.* at 34.

<sup>275</sup> *Ibid.* at 31-32.

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.* at 35.

<sup>278</sup> *Ibid.* at 36.

<sup>279</sup> *Ibid.* at 37.

commoditization.<sup>280</sup> If commoditization is threatened by competitors in the market, however, Susskind suggests that options are available to the initial service provider including: enhancing the product; selling the product to another organization that sees potential to exploit it; building brand awareness to retain clients; and, if all else fails, giving the commodity away to the market for free as a form of marketing.<sup>281</sup>

However, Susskind concludes that, despite a “natural evolutionary flow” rightwards, there will always be a place for bespoke work because of the nature of legal work, although the quantity of bespoke work will diminish over time. Lawyers practising only bespoke work will have to innovate to generate new bespoke offerings.<sup>282</sup> According to Susskind, the opportunities to innovate in future legal services will be limited to two spheres: creating new bespoke work and developing systems and packages ahead of the competition.<sup>283</sup> In this future legal services market, fixed fee legal services would be the norm, rather than the exception.

## **IV Adjudicative Processes and Alternatives**

### **A Generally**

A range of alternatives to formal adjudication have emerged in recent years, including various forms of mediation; access to compensation funds; and complaint systems such as ombudsman schemes. The relative informality or non-legal character of these procedures can often obviate, or at least reduce, the need for legal assistance, although they are not without drawbacks discussed below. The development of an extensive tribunal system in Ontario has created opportunities for specialization, simplification, and flexibility

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<sup>280</sup> *Ibid.* at 38.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.* at 38-39.

<sup>283</sup> *Ibid.*

with respect to legal processes. Many of these tribunal processes have been designed to take into account or facilitate self-representation, offering insight into some of the issues that arise in this regard, as well as potential solutions. Similarly, a number of important measures have been proposed or implemented in regard to court reform, including the application of proportionality principles, diversion and streaming, simplification, and case management and technological mechanisms. These will be canvassed below.

Before we turn to this review, a general comment is in order. To the extent that these processes and alternatives must be triggered by individual complaints or claims, they also engage a public policy issue with respect to the enforcement of legal regimes more broadly. Where legislation establishes certain regulatory regimes, for example with respect to employment conditions or consumer rights, it might be suggested that primary responsibility for ensuring compliance should lie with government bodies. In these circumstances, requiring breaches of such legislation to be addressed by individuals pursuing legal claims may be considered a form of “downloading” or privatization with respect to compliance or enforcement functions.

In the area of employment law, for example, the original concept for the Employment Standards regime involved enforcement primarily through inspectors, rather than through individual claims. This was in part a result of specific characteristics of the employer-employee relationship; it was thought that the vulnerability of employees to employer reprisals meant that employees would be loath to file such claims (and indeed, most claims even now are filed by employees who have already been terminated from employment). However, while there is still a modest corps of inspectors, the major responsibility for compliance has devolved to individual employees who must commence legal proceedings. This gives rise to requirements for legal assistance both to pursue the initial claim and, in some cases, to file additional claims relating to subsequent reprisals. This example serves to

highlight the problem of the appropriate locus of responsibility for compliance with statutory regimes, and the attendant implications for legal supports.

## **B Informal Complaint Systems and Law Reform**

Informal means of dispute resolution have significant advantages when legal resources are scarce. These avenues may be said to represent, at least in some small way, a reversal of the trend to legalize generic problem-solving with the possibility of corresponding reductions in both the demands for legal assistance and the costs of legal fora.

However, there are also disadvantages to these informal processes. The failure to generate precedents, the loss of a public dimension to contests of rights or interests, and the diminishing of future incentive and deterrent effects are all important concerns that must be balanced against the utility of informal dispute resolution. It may also be important to consider whether there is a public good that would be better served by a stronger public institutional presence.<sup>284</sup> As well, complaint procedures related to industry bodies may prompt concerns about neutrality, and ombudsman-type services have limited powers, often restricted to recommendations.

The field of consumer law has given rise to a number of examples of these types of informal procedures. Industry or company-specific complaint-driven systems of redress have proved popular in this area, and include ombudsmen and compensation funds.<sup>285</sup> Ombudsmen

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<sup>284</sup> Michael J. Trebilcock, "Rethinking consumer protection policy" in Charles E.F. Rickett & Thomas G.W. Telfer, eds., *International Perspectives on Consumers' Access to Justice* (Cambridge: Cambridge University Press, 2003) 69 at 81 [Trebilcock].

<sup>285</sup> Anthony J. Duggan, "Consumer Access to Justice in Common Law Countries: A Survey of the Issues from a Law and Economics Perspective" in Charles E.F. Rickett & Thomas G.W. Telfer, eds., *International Perspectives on Consumers' Access to Justice* (Cambridge: Cambridge University Press, 2003) 46 at 62 [Duggan].

exist in both the private and the public spheres;<sup>286</sup> however, some studies suggest that ombudsmen actually play a minimal role in the redress of consumer disputes.<sup>287</sup> In Ontario, complaints processes are also provided through ombudsmen with respect to provincial public services and municipally in the City of Toronto, although their mandates have certain limitations in terms of both subject area and access. The federal Ombudsman for Banking Services and Investments is an example of an industry body that deals with complaints in regard to debit and credit card fraud, mortgage prepayment penalties, suitability of investment advice, and transaction disputes.<sup>288</sup>

In the area of employment law, public, quasi-public, and even large private employers often have some form of internal complaint or ombuds system, although it is frequently limited or geared to specific kinds of issues such as sexual harassment or other human rights issues. These internal complaint systems are considered to be useful with respect to both improving employee morale and minimizing potential liability on the part of the employer.

Another example of an ombudsman process involves the establishment in Ontario of an independent Fair Practices Commissioner, following the earlier lead of provinces such as British Columbia and Manitoba. The Commissioner provides a neutral and confidential service for injured workers, employers, and service providers with complaints about the service they receive at the Workplace Safety and Insurance Board, and also tracks complaint trends, identifies systemic issues, and recommends improvements. One of the interesting features of this ombudsman system is that it operates in a legal context that already includes

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<sup>286</sup> Iain Ramsay, "Consumer redress and access to justice" in Charles E.F. Rickett & Thomas G.W. Telfer, eds., *International Perspectives on Consumers' Access to Justice* (Cambridge: Cambridge University Press, 2003) 17 at 20 [Ramsay].

<sup>287</sup> *Ibid.* at 28.

<sup>288</sup> For more information, see: Ombudsman for Banking and Investments <<http://www.obsi.ca/UI/AboutUs/OurWork.aspx>>.

an appellate tribunal, suggesting the possibility of diverting issues away from the more formal legal forum.

The advantage of compensation funds is that access may be relatively easy, and the costs of applying are small. However, compensation schemes often involve limitations on the frequency and amount of claims made, and sometimes function only as a last resort.

The recently established “Fonds d’indemnisation des clients des agents de voyage” in Quebec, a tourism and travel industry indemnity fund, has removed the need for consumers to sue their travel agents in the event of trip failure.<sup>289</sup> A similar program, the Ontario Travel Industry Compensation Fund, exists in Ontario. Another example is the New Home Warranty in Ontario. Several professional or industry bodies also have compensation funds including the Association of Ontario Land Surveyors, the Land Titles Assurance Fund, the Motor Vehicle Dealers’ Compensation Fund, the Board of Funeral Services, and the Law Society of Upper Canada.

Another type of compensation fund available in Canada is the federal government’s Wage Earner Protection Program (“WEPP”). The WEPP applies when an employer declares bankruptcy or enters into receivership, pursuant to the *Bankruptcy and Insolvency Act*, and wages, vacation pay, severance pay, and/or termination pay are owed to employees. WEPP coverage, however, is limited to the equivalent of four weeks of insurable earnings under the Employment Insurance program, which is currently about \$3,520. Moreover, coverage only applies to wages or vacation pay earned in the six months prior to bankruptcy or receivership, and severance and termination pay relating to employment that ended in the six months prior to bankruptcy or receivership. The claims of applicants are subrogated to the Government of

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<sup>289</sup> Marc Lacoursière, "Le consommateur et l'accès à la justice " (2008) 49(1) *Les Cahiers de droit* 97 [Lacoursière]; Claims are limited to \$3,000 per person and a total of \$3,000,000 per event; See also: Office de la Protection du consommateur Quebec  
<<http://www.opc.gouv.qc.ca/WebForms/SujetsConsommation/Voyages/FICAV/Indemnisation.aspx>>

Canada, which then undertakes to recover the amounts paid as a creditor to the bankrupt or insolvent employer.<sup>290</sup>

The workers' compensation system in Ontario can also be characterized as a compensation fund of sorts, albeit a relatively complex one; determination of fault on the part of employers is not required and compensation is provided according to a predetermined scale.<sup>291</sup> However, it also incorporates several levels of adjudication, including the Workplace Safety and Insurance Board and the Workplace Safety and Insurance Appeals Tribunal. Extensive arrangements have been made for legal representation in these fora, including the Offices of the Worker Advisor and Employer Advisor, and several legal clinics that specialize in representation for injured workers. In this sense, it is not typical of the more informal compensation funds described above.

Research on workers' compensation schemes in the US and Canada suggest that they generally yield lower levels of compensation than a successful tort action, but settle claims much more quickly and less expensively; deliver benefits much more efficiently than the tort system, with significantly lower administrative costs;<sup>292</sup> and handle many small claims that would not be economical to pursue as tort claims because of the significant costs involved with litigation. Ultimately, commentators suggest that the performance of workers'

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<sup>290</sup> Human Resources and Skills Development Canada, "Labour Focus Newsletter Volume 1, Issue 1, Spring 2009: Protecting Canadian Workers", online: Human Resources and Skills Development Canada <<http://www.hrsdc.gc.ca/eng/labour/focus/2009/issue01/wepp.shtml>>; Human Resources and Skills Development Canada, "Wage Earner Protection Program Fact Sheet", online Human Resources and Skills Development Canada <[http://www.rhdcc-hrsdc.gc.ca/eng/labour/employment\\_standards/wepp/factsheet.shtml](http://www.rhdcc-hrsdc.gc.ca/eng/labour/employment_standards/wepp/factsheet.shtml)>; Service Canada, "What are eligible wages?", online: Service Canada <<http://www.servicecanada.gc.ca/eng/sc/wepp/apply/wages.shtml>>; Human Resources and Skills Development Canada, "Subrogating my claim to the Government of Canada", online: Human Resources and Skills Development Canada <[http://www.rhdcc-hrsdc.gc.ca/eng/labour/employment\\_standards/wepp/subrogation.shtml](http://www.rhdcc-hrsdc.gc.ca/eng/labour/employment_standards/wepp/subrogation.shtml)>.

<sup>291</sup> Trebilcock, *supra* note 284 at 86-87.

<sup>292</sup> For example, in the US and Ontario, administration costs consume no more than fifteen percent of workers' compensation premiums, while such costs can be as high as 50 percent in the tort system.

compensation schemes is generally quite impressive, and their advantages over the tort system are considerable, while their disadvantages are modest.<sup>293</sup>

Many law reform efforts in a variety of contexts have established statutory guidelines limiting the issues that may be disputed in court if there is no alternative to litigation. For example, the legislation of federal child support guidelines in 1997 has resulted in greater efficiency in decision-making and better average justice for many family law matters.<sup>294</sup> A federal government review of the child support guidelines system found that they “have helped reduce conflict and tension between parents by making the calculation of child support more objective, and by improving the efficiency of the legal process to such an extent that most parents are now setting child support amounts without going to court.”<sup>295</sup> Spousal support advisory guidelines were developed in 2008 and have also facilitated settlement of spousal support claims.<sup>296</sup>

In consumer contexts, an emphasis on “routinization” rather than individualization, such as creating automatic entitlements or contract terminations (e.g. door-to-door sales) based on “bright line rules”, might reduce the need for intermediaries, and better serve vulnerable people by reducing uncertainty.<sup>297</sup> Shifting from a standard to a rule may reduce legal costs by making trials simpler and shorter, facilitating pre-trial settlements, and

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<sup>293</sup> Don Dewees, David Duff & Michael Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (New York: Oxford University Press, 1996) at 393-396 [Accident Law].

<sup>294</sup> See Carol Rogerson and Rollie Thompson, “Spousal Support Advisory Guidelines” (Presented to the Family, Children, and Youth Section, 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>> [Rogerson & Thompson].

<sup>295</sup> Brenda Cossman & Carol Rogerson, *Family Law: Cases and Materials, Volume 1* (Faculty of Law, University of Toronto, 2007-08) at 718 [Cossman & Rogerson].

<sup>296</sup> Rogerson & Thomson, *supra* note 294.

<sup>297</sup> Ramsay, *supra* note 286 at 35, 39. See also Trebilcock, *supra* note 284 at 91-97, which discusses contract terms.

reducing appeals; however it may encourage opportunistic claims by reducing flexibility in decision-making.<sup>298</sup>

One example of a law reform involving routinization is the adoption of no-fault auto insurance regimes in several jurisdictions, including Ontario, which has had the effect of removing most automobile accident disputes from the court system. Studies from Canada and the US have found that, prior to the adoption of no-fault regimes, many automobile accident victims were undercompensated or uncompensated.<sup>299</sup> Consequently, objectives behind the adoption of no-fault regimes in North America included increasing the number of eligible claimants, matching payments more closely to economic losses, and providing more compensation quickly and with lower administrative costs than the tort system.<sup>300</sup> Evaluations of no-fault auto insurance regimes suggest that they generally have been able to achieve these objectives.<sup>301</sup>

A similar example, the no-fault divorce regime, is found in the area of family law. In 1986, a new federal *Divorce Act* was enacted in Canada, which made marriage breakdown the sole ground for divorce, thus allowing for “no-fault” divorce. Under the new system, marriage breakdown can be demonstrated through separation of the parties for one year or by establishing adultery or cruelty within the marriage.<sup>302</sup> An evaluation of the Canadian no-fault divorce regime found that, in comparison to the fault-based regime previously in place,

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<sup>298</sup> Duggan, *supra* note 285 at 64-65.

<sup>299</sup> Accident Law, *supra* note 293 at 54.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.* at 56-57, 62.

<sup>302</sup> Cossman & Rogerson, *supra* note 295 at 222; Department of Justice Canada, *Evaluation of the Divorce Act, Phase II: Monitoring and Evaluation* (1990) at 1-9 [DOJ Evaluation]. As such, two fault-based grounds remain, although they are reconceived as being demonstrative of a breakdown of the marriage.

it has resulted in a less adversarial divorce process.<sup>303</sup> Moreover, under the no-fault regime, parties may be able to avoid court altogether in the case of an uncontested divorce.

The need for interdisciplinary solutions to family law problems has been emphasized repeatedly in the literature.<sup>304</sup> In 2007, the “Mamo Report” urged that “[i]t is no longer acceptable in our society for the administration of justice to depend simply on the traditional litigation method of resolving matrimonial issues. The resolution of family law disputes should be a dynamic process that reflects the values, needs, and expectations of the community.”<sup>305</sup> Similarly, a submission from the Home Court Advantage Summit to Ontario’s Attorney General, Chris Bentley, emphasized the need for a paradigm shift in family law from “court based resolutions to a more cooperative, interdisciplinary, forward looking approach that addresses the legal as well as the emotional needs of families facing this difficult life transition.”<sup>306</sup> The report recommends that Ontario family law be reformed according to a four-pillared approach: (i) providing early information for separating spouses and children; (ii) assessing parties and directing them to appropriate and proportional services using a triage approach; (iii) facilitating greater access to legal information, advice, and alternative dispute resolution processes; and (iv) developing a streamlined and focused family court process.<sup>307</sup> Shortly after the Home Court Advantage Summit’s recommendation, the Ministry of the Attorney General committed itself to family law improvement efforts that include providing more upfront information about steps that families need to take when relationships break down, community referrals to better support

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<sup>303</sup> DOJ Evaluation, *ibid.*

<sup>304</sup> See, for example, BC Justice Review Taskforce, *A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Taskforce* (2005).

<sup>305</sup> Mamo Report, *supra* note 27 at 113.

<sup>306</sup> Dr. Barbara Landau, Tom Dart, Heather Swartz, Joyce Young, *Submission to Attorney General Chris Bentley: Creating a Family Law Process that Works: Final Report and Recommendations from the Home Court Advantage Summit* (2009) at 6.

<sup>307</sup> *Ibid.* at 3.

families, improved access to less adversarial means of resolution, and a streamlined process for cases that must go to court.

## **C Mediation**

There has been significant growth in the development and use of mediation processes over the last several decades for a number of reasons. Mediation offers the prospect of swift, lower cost dispute resolution in which the parties can craft settlements that are closely tailored to their needs. It avoids the binary, win/loss character of many legal fora, minimizes risks, and provides the parties with more control over the outcome of a dispute. At the same time, mediation processes can raise similar concerns as those noted with respect to informal legal processes; that is, failure to generate precedents and establish rights. In addition, mediation between unequal parties can provide one-sided settlements with an undeserved gloss of consent. This latter point highlights the fact that mediation does not necessarily obviate the need for legal representation.

In the area of consumer law, several more specific problems have been noted. First, the quality of mediation depends on the training and professionalism of the mediator. Second, many consumer agencies are in the position of both advocating for consumers and mediating (presumably impartially) between consumers and businesses. Third, mediation is often a preliminary stage to adjudication, often by the same mediator/adjudicator, and parties at mediation may fear reprisals at the later adjudication stage.<sup>308</sup>

A number of organizations offer conciliation, mediation or arbitration services for resolving consumer disputes. For example, the Consumer Protection Branch of the Ontario Ministry of Consumer Services offers complaint mediation in areas not covered by more

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<sup>308</sup> Duggan, *supra* note 285 at 60-61.

specific industry-based regulations, such as those mentioned in part B of this section.<sup>309</sup> The Better Business Bureau also offers mediation services for member businesses, although scope of services varies from area to area.

More developed dispute resolution regimes exist for specific consumer industries. A federal survey from 2001 identified regimes in the motor vehicle, cable television, banking, marketing, advertising, and new home industries.<sup>310</sup> Dispute resolution approaches vary by region and industry. For example, the Quebec branch of the Canadian Automobile Association (CAA), in collaboration with industry groups, offers mediation services covering disputes related to used vehicles.<sup>311</sup> Consumer disputes with financial institutions may be handled either by the Financial Consumer Agency of Canada (a regulatory agency) or by a member agency of the Financial Services Ombudsman Network, such as the Ombudsman for Banking Services and Investments whose decisions are nonbinding.<sup>312</sup>

Paul O'Shea's recent analyses of the growth in industry-based consumer dispute resolution services in Australia contain useful practical and theoretical discussions on how industry-based alternative dispute resolution schemes fit into the justice system, as well as some potential pitfalls to such an approach.<sup>313</sup> In general, these schemes in Australia involve decisions about substantive and complex areas of law, and many publish their reasons for

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<sup>309</sup> That is, excluding real estate, travel, motor vehicles, new home purchases, electrical safety, funeral services, amusement devices and fuel safety, upholstered and stuffed articles, cemeteries and crematoria: see Ontario Ministry of Consumer Services, online: <[http://www.sse.gov.on.ca/mcs/en/Pages/Consumer\\_Protection\\_Branch.aspx](http://www.sse.gov.on.ca/mcs/en/Pages/Consumer_Protection_Branch.aspx)>; See also Lacoursière, *supra* note 289 at para. 46 for similar governmental mechanisms in Quebec.

<sup>310</sup> Industry Canada, *Market Driven Consumer Redress and Legal Issues* by David Clarke and Kernaghan Webb (2001), online: Industry Canada <[http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/redress\\_case\\_studies\\_e.pdf/\\$FILE/redress\\_case\\_studies\\_e.pdf](http://cmcweb.ca/eic/site/cmc-cmc.nsf/vwapj/redress_case_studies_e.pdf/$FILE/redress_case_studies_e.pdf)>.

<sup>311</sup> Lacoursière, *supra* note 289 at para. 58.

<sup>312</sup> *Ibid.* at 50-56.

<sup>313</sup> P. O'Shea, *Underneath the Radar: The Largely Unnoticed Phenomenon of Industry Based Consumer Dispute Resolution Schemes in Australia* (2004), online: Social Science Research Network <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1313003](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313003)>; P. O'Shea, "The lions question applied to industry-based consumer dispute resolution schemes " (2006) 25(1) *The Arbitrator and Mediator* 63, online: Social Science Research Network <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1295723](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1295723)> [Lion's Question].

determination, possibly influencing perceptions of law if not the law itself.<sup>314</sup> O'Shea suggests that the schemes in effect determine rights. However, it is important to note that they have limited investigative and enforcement powers,<sup>315</sup> and are neither courts nor regulators because they are privately constituted and have limited societal interests.<sup>316</sup> O'Shea suggests that one particular emerging problem in the context of industry dispute resolution schemes is that of industry members seeking judicial review of decisions made under those schemes.<sup>317</sup>

A 1993 Canadian study discusses how consumer dispute resolution schemes relate to Small Claims Courts, and suggests that these alternative schemes may require better integration and at least minimal oversight by government to ensure that the adjudication outside the judicial system is reasonably fair.<sup>318</sup> The paper concludes that while some Small Claims Courts have adopted alternative dispute resolution techniques and could adopt more, other dispute resolution techniques that are not amenable to adoption by the courts might still be more efficient means of dispute resolution than analogous court techniques. It notes, however, that some types of disputes are probably still best resolved in Small Claims Courts.<sup>319</sup>

In family law, mediation and other forms of alternative dispute resolution have long been seen as a more appropriate option than courts in many cases. Mediation can produce solutions acceptable to all parties, emphasize children's needs as paramount, and can be more

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<sup>314</sup> Lion's Question, *ibid.* at 63.

<sup>315</sup> *Ibid.* at 71.

<sup>316</sup> *Ibid.* at 72.

<sup>317</sup> *Ibid.* at 63.

<sup>318</sup> Peter Finkle and David Cohen, "Consumer Redress through Alternative Dispute Resolution and Small Claims Court: Theory and Practice" (1993) 13 Windsor Y.B. Access Just. 81 at 113, online: <<http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1416&context=lawfaculty>>.

<sup>319</sup> *Ibid.* at 81.

effective and durable than court decisions.<sup>320</sup> Alternative dispute resolution has been integrated in various ways into the family justice system, a subject which is discussed in more detail under "Court Reform", below. The 2007 "Mamo report" recommended that mediation and ADR be promoted to the public, judges and lawyers, and that it become an essential step in the court process for appropriate cases; these would exclude high-conflict and domestic violence cases, which generally require specialized treatment.<sup>321</sup> A recent joint submission to the Attorney General by the OBA Family Law Section, the ADR Institute of Ontario, and the Ontario Association of Family Mediators, building on the Mamo report, has recommended that non-adversarial options become the primary framework for resolving family matters. Court-based litigation should be reserved for urgent cases involving high-conflict (such as failure to pay support), high power-imbalance, or family violence (these are estimated to make up less than 5 percent of all family law cases).<sup>322</sup> There is some concern, however, that mediation intake may not be able to screen adequately for domestic violence, leading either to mediation failure or inequitable mediation in the worst case scenario.<sup>323</sup> Proceeding to court would remain an option. For low-conflict, non-violent cases, non-adversarial options could include mediation, assessments, parent education, parenting coordination, circle processes, mediation-arbitration, arbitration, and collaborative law practice. The report envisions a court-based intake and assessment (triage) system based on an expanded network of FLICs. The report also recommends that ADR professionals be funded either by Legal Aid or by the Attorney General directly, and that a provincial roster of ADR professionals be established.

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<sup>320</sup> Mamo Report, *supra* note 27 at 22.

<sup>321</sup> *Ibid.*

<sup>322</sup> Landau Submission, *supra* note 160 at 4-5.

<sup>323</sup> Mamo Report, *supra* note 27 at 30-31, 46-47.

Family Courts in Ontario currently present mediation and other non-adversarial dispute resolution as an option both at FLICs and in a more institutionalized manner through the Family Law Rules. For example, the Rules include the duty to facilitate and encourage the use of alternatives such as mediation in the mandatory information program in the Superior Court in Toronto and in the case management rules. Disputants can be referred to mediation before any court action is started, during case conferences, prior to the first court date, or at the first court date. The Mamo report found that most court-based referrals happen before any action is started, a fact that is partly responsible for the perception that very few cases before the court are being mediated and the associated perception by some judges and lawyers that mediation is not living up to its potential of reducing court case loads. Family Courts often have on-site mediation available, free of charge, for narrower issues in disputes before the courts, and refer to off-site mediation for more complex issues or pre-emptive mediation. The Mamo report found significant variation in off-site referrals between court sites and among different actors (judges, lawyers, and referral coordinators) and that an overwhelming number of off-site referrals are self-referrals; further, many judges and lawyers were not aware of existing rosters of family mediators in their communities. These findings suggest that more integration and training for off-site referrals to ADR providers, and a provincial roster, might be advantageous. Following up on many of the recommendations of the Mamo report, the Landau Submission has recommended increased reliance on ADR in family cases.<sup>324</sup>

The Family Courts are currently experiencing severe pressure, particularly in traditional areas of provincial responsibility such as family law matters involving children, and the Mamo report has suggested that expanding Family Court mediation to include child welfare mediation could alleviate some of this pressure. Other provinces with more

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<sup>324</sup> Landau Submission, *supra* note 160.

successful unified family courts tend to experience lower case volume than Ontario. Insufficient (federal) judicial resources appear to be the main problem. Additionally, people with family law problems in Ontario who live outside the areas served by the 17 unified Family Courts are still forced to choose their jurisdiction based on their problem, which has traditionally led to a class-based divide because property issues that must be dealt with in a Superior Court are more common among the wealthy. Family courts also use a wide variety of different forms, and different local norms of practice should be harmonized to lessen confusion among users.

Mediation is pervasive in many areas of employment law, as a mediation stage is routine in Employment Standards, Occupational Health and Safety, and other types of labour matters. However, concerns have been raised about the suitability of mediation in regard to Employment Standards appeals to the Ontario Labour Relations Board, which often involve orders of Employment Standards Officers with respect to wages and other entitlements under minimum standards legislation. To the extent that mediation often produces a “split the difference” result in monetary matters, it has been suggested that mediation may operate to deprive employees of portions of minimum statutory entitlements.

## **D Tribunals**

There are approximately 235 administrative tribunals in Ontario of varying types and jurisdictions.<sup>325</sup> Some of these bodies, such as the Ontario Labour Relations Board and the Landlord and Tenant Board, handle legal disputes that were originally within the purview of the courts, and were subsequently moved out of the court system into tribunals created to

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<sup>325</sup> Ontario Ministry of the Attorney General, “Justice Ontario”, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/justice-ont/>>.

offer speedier, more informal dispute settlement processes, as well as specialized expertise. Others were established more recently, but with similar attributes in mind. There are also private arbitration models available in certain industries or areas of law.

Tribunals range along a spectrum of legalization and formality, as well as regulatory versus quasi-judicial functions. Although it is difficult to generalize because of the extent of variation, it can be said that most do provide faster, simpler, and more flexible processes than the courts. Often their enabling legislation will grant them considerable discretion with respect to their rules, forms, and procedures, and a number have developed innovative adjudication models, at least in part in response to the influx of unrepresented parties before them. At the same time, there is some tension with respect to issues such as their institutional independence from governments, and the problem of patronage appointments to adjudicator positions.<sup>326</sup>

In the area of employment law, there are several interesting models of adjudication that may offer insight with respect to simplified procedures geared towards unrepresented individuals. Claims under the *Employment Standards Act, 2000* (“ESA”) are filed with the Ministry of Labour’s Employment Practices Branch, either online, by mail, or at Service Ontario sites. Information in several languages is online at the Ministry’s website to assist claimants, including self-help kits, forms, and guides. An Employment Standards Officer (“ESO”) is then assigned to investigate the claim, and has the power to enter workplaces without a warrant and obtain records such as payroll documents. The ESO will typically set a date for a meeting with the parties, which also serves as an opportunity for mediation. If no settlement is reached, the ESO will hear the parties’ submissions, make decisions and, where appropriate, issue orders providing for remedies.

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<sup>326</sup> Judith McCormack, “The Price of Administrative Justice” (1998) 6 C.L.E.L.J. 1.

Appeals of the orders can be filed with the Ontario Labour Relations Board. The appeals will go through a mediation process, and then to a hearing or a “consultation”. The latter is an informal process developed by the Board to handle certain types of cases, including those with a significant proportion of unrepresented parties. In a consultation, the adjudicator plays an active role by questioning the parties, expressing views on issues, defining or re-defining issues and making determinations as to matters that are agreed or in dispute. The giving of evidence under oath and the cross-examination of witnesses are not normally part of a consultation, and when they are, it is only with respect to those matters that are defined by the Board.

The Board also handles reprisal claims under the *Occupational Health and Safety Act* using either a typical hearing or a consultation. However, wrongful dismissal claims in amounts over the termination and severance provisions of the *ESA* must be commenced in either a Small Claims Court or the Superior Court of Justice, depending on the amount claimed.

As noted previously, workers’ compensation claims can be appealed to the Workplace Safety and Insurance Appeals Tribunal. This tribunal was specifically designed with the expectation that many parties would be unrepresented, and employs an inquisitorial process in which an adjudicator elicits evidence through questioning the parties. In addition, the tribunal has counsel who assist in preparing the file for hearing by ensuring that all necessary medical and other evidence has been submitted and who may, on occasion, require the submission of further evidence or arrange for medical and other assessments. The tribunal counsel may also participate in hearings in an *amicus curiae* role, identifying and making submissions on legal issues.

There are no standing tribunals in Ontario with jurisdiction for consumer problems, although arbitration is available in some industries. For example, since 1994, the Canadian

Vehicle Arbitration Plan has allowed purchasers of new vehicles to have manufacturing defect and warranty issues resolved by arbitration rather than the courts. Most consumer or creditor-debtor problems of low monetary value are handled in Small Claims Court.

One focus of policy debates concerning consumer arbitration has been whether it is biased in favour of businesses, an allegation that has been supported in the US by high win-rates of business claimants in debt collection arbitration. In response to these criticisms, two US arbitration groups, the National Arbitration Forum and the American Arbitration Association, recently stopped administering consumer debt collection cases. However, a recent comparative study of debt-collection cases has found that creditor win rates and recovery rates were as high or higher in court than arbitration.<sup>327</sup> Thus, high creditor win rates may be due more to characteristics of debt collection cases than venue.

Although mandatory arbitration clauses in consumer contracts have become standard in the US and in Canada, recent consumer protection legislation in Ontario and Quebec prohibits mandatory arbitration clauses in consumer goods and services contracts, and preserve consumers' access to class actions despite any contractual limitations.<sup>328</sup> Consumer arbitration in Ontario thus remains an alternative to civil litigation, rather than a replacement.

In several states in Australia, low-monetary-value disputes involving consumer or debtor-creditor disputes are settled in small-claims tribunals which vary from state to state.<sup>329</sup> The rules of small claims tribunals are designed mostly to reduce the costs of the system. Emphasis is usually placed on reaching a mutually acceptable settlement, and normally a short mediation session is required before a hearing. Procedures are informal, rules of

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<sup>327</sup> Consumer Arbitration Task Force - Searle Civil Justice Institute, *Creditor Claims in Arbitration and in Court. Interim Report No. 1* (2009).

<sup>328</sup> Genevieve Saumier, "Consumer Dispute Resolution: The Evolving Canadian Landscape", (2007) 1(4) *Class Action Defence Quarterly* 52, online: Social Science Research Network <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1291960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291960)>.

<sup>329</sup> Clark, E. Eugene, "Small Claims Courts and Tribunals in Australia: Development and Emerging Issues" (1990-91) *U. Tas. L. Rev.* 201 [Clark]. See also Duggan, *supra* note 285 especially at 58-60.

evidence do not apply, referees can be inquisitorial, representation is usually only allowed with both parties' consent, and hearings are usually private and held in informal settings (for example, a hearing involving a dispute over home renovations might be held in the home for the purposes of allowing a referee to inspect the renovations). Referees may or may not be legally qualified. There is usually no right of appeal except on jurisdictional grounds, and costs are not usually awarded. In some states, in order to prevent tribunals from being used as collection agencies, only consumers and not traders are permitted to make claims. If a consumer has a counterclaim or defence to a court action brought by the trader, the consumer may have the proceedings shifted into the small claims tribunal by framing her counterclaim or defence as a claim. The tribunal may then determine the claim as if the consumer were the claimant and the trader; the trader's court action is stayed; and the tribunal has jurisdiction over the whole of the parties' dispute.

It has been argued that tribunals are better than courts at handling small claims on the grounds that tribunals can better resist pressures towards formality and complexity; that their independence allows them to be more responsive to consumers; and that they increase the diversity of dispute resolution options.<sup>330</sup> Arguments against establishing separate tribunals include a concern with bureaucratic duplication, difficulties moving matters between the two systems, and the threat of creating two tiers of justice.<sup>331</sup> Some tribunals may also be less effective than courts at preventing future disputes by generating rules to guide future behaviour because the reasons for their judgments are not usually detailed or published, although this may vary a great deal from tribunal to tribunal.<sup>332</sup>

Common issues involved in the development of both systems include the convenience of the consumer, the desire to reduce costs and delays, the parameters of

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<sup>330</sup> Clark, *ibid.* at 217.

<sup>331</sup> *Ibid.*

<sup>332</sup> Duggan, *supra* note 285 at 60.

jurisdiction, the role or exclusion of lawyers, the application of costs rules, the necessary level of formality, whether the primary emphasis should be on settlement or adjudication, who adjudicators should be, and what the role of alternative dispute resolution should be.<sup>333</sup> It is possible to think of small claims tribunals as alternatives to small claims courts that, as in the Australian case above, allow correction of structural biases favouring traders over consumers.

With the enlargement of the Ontario Small Claims Court jurisdiction from claims up to \$10,000 to claims up to \$25,000, small claims tribunals may be a practical way to fill a new niche of the lowest-monetary-value disputes.<sup>334</sup> For example, in Queensland, Australia, a small claims tribunal with a monetary limit of \$7,500 co-exists with a Magistrates Court that has a monetary limit of \$50,000; the court also has a separate stream for small debts up to \$7,500, which are usually not handled in the small claims tribunal.<sup>335</sup> The tribunal and court together account for 50 percent of civil claims filed in Queensland's Magistrates Court division.<sup>336</sup> A recent, though small (16 individuals), qualitative study of users of the Queensland small claims tribunal found that it often assumed a "legal fluency" in its procedures and self-help materials which users mostly lacked.<sup>337</sup> The literature seems to indicate that small claims tribunals, like small claims courts, are used mainly by middle-income individuals.<sup>338</sup>

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<sup>333</sup> Clark, *supra* note 329.

<sup>334</sup> The increase in the Small Claims Court threshold may also, however, have its drawbacks, including the potential for a significant increase in unmeritorious litigation. See, for example: Bob Aaron, "Will cheaper access to justice mean more litigation?", online: yourhome.ca <<http://www.yourhome.ca/homes/columnsblogs/article/736866--aaron-will-cheaper-access-to-justice-mean-more-litigation>>.

<sup>335</sup> See descriptions at Queensland's court site: Queensland Courts <<http://www.courts.qld.gov.au>>.

<sup>336</sup> Jeff Giddings, Merran Lawler, and Michael Robertson. "'It's More Like Judge Judy' – Self-help in a hybrid legal forum" (Paper presented to the International Legal Aid Group Conference, Wellington, New Zealand, 1-3 April 2009) at 4.

<sup>337</sup> *Ibid.*

<sup>338</sup> Duggan, *supra* note 285 at 60.

There have been recent movements towards the development of “super-tribunals”, the consolidation of various tribunals under shared procedural and administrative structures. For example, in the UK many tribunals are now administered by the Tribunals Service and subject to uniform appeals mechanisms, case records, and support services.<sup>339</sup> Several Australian states have, or are implementing, amalgamated tribunals.<sup>340</sup> While amalgamation may reduce some of the flexibility of tribunals and lead to “judicialization”, it may also lead to increased consistency in appointments, appeal-handling, and decision-making.

In Ontario, there are no tribunals that address family law issues, which are handled by the Ontario Court of Justice or the Superior Court of Justice, depending on the issue involved.<sup>341</sup>

## **D Court Reform**

Court reform measures that may increase access to justice generally fall into five major categories: proportionality, diversion and streaming, simplification, and case management, and technology. In practice, court reforms usually involve combining some or all of these measures.

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<sup>339</sup> UK Ministry of Justice, “Tribunals Service”, online: Tribunals Service <<http://www.tribunals.gov.uk/>>; See also House of Commons Library, *The Tribunals, Courts and Enforcement Bill: Research Paper 07/22* (2007).

<sup>340</sup> See, for instance, the Queensland amalgamated civil and administrative tribunal: <<http://www.qcat.qld.gov.au/>>.

<sup>341</sup> Where the Family Court branch of the Superior Court of Justice exists, the Superior Court of Justice hears all family matters. Where the Family Court branch of the Superior Court does not exist, the Superior Court hears family law disputes involving divorce or property claims, child and spousal support, and custody and access claims, and the Ontario Court of Justice hears disputes involving child protection applications, family law disputes involving custody, access and support, and adoption applications. See Ontario Ministry of the Attorney General, “Introduction to Ontario’s Courts”, online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/courts/intro2ONCourts.asp>>.

## D.i Proportionality

Proportionality involves rationing civil justice procedure based on a number of factors including the magnitude of the claim, the complexity of the claim, the impact of the claim on the parties, and the importance of the issues. Complex procedures and significant resources are then reserved for high-value, high-complexity and high-impact cases. Proportionality has been recognized as a principle driving civil justice reform projects in many jurisdictions, including the recent Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (2009), the Woolf reforms (Civil Procedure Rules) in the UK (1999), the recent Ontario Civil Justice Review Project (2007), and the BC Justice Review (2006). Reforms recommended by the latter two reviews took effect in 2010. Proportionality has been enshrined as a principle in Québec's most recent *Code of Civil Procedure*, which requires that "the parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute; the same applies to proceedings authorized or ordered by the judge."<sup>342</sup>

Proportionality is a principle that extends through all of the stages of the civil justice system and litigation procedure and, when recognized, may allow for reduction of costs. For example, the BC Civil Justice Reform Working Group found that the adversarial nature of the system, the lack of focus on true issues in cases, misuse of discovery, and misuse of experts were the main causes of the high cost of civil justice outside of the Small Claims Court.<sup>343</sup> These are all issues that can be addressed through proportionality. The UK, BC,

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<sup>342</sup> *Code of Civil Procedure*, R.S.Q., c. C-25, s. 4.2.

<sup>343</sup> BC Justice Review Task Force, *Civil Justice Reform in British Columbia Supreme Court* (2009) at 3-4, online: <<http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/461651/civilrulesfactsheet.pdf>> [BC Civil Justice Reform].

and Ontario reforms cite proportionality as one reason behind the development or enhancement of diversion and streaming, and case management, to be discussed below. Proportionality has also been cited in Ontario and BC as a principle determining limitations on the length and scope of oral and documentary discovery, litigation budgeting, and cost awards. In all three jurisdictions, proportionality has been cited as warranting restrictions on the use of expert witnesses.

For example, reforms to discovery in the new Rules of Civil Procedure in Ontario require parties to agree to “Discovery Plans” which include intended scope (with reference to proportionality), dates and timing, costs, manner of production of documents, and names of persons to be orally examined. Parties must also have regard to the “Sedona Canada Principles Addressing Electronic Discovery.”<sup>344</sup> The Court is also to consider proportionality in determining whether a question must be answered or a document produced. Disclosure of documents will now include a simple relevancy test, and examinations for discovery will be limited to seven hours total, regardless of the number of parties to be examined, except on consent or with leave, again to be subject to proportionality considerations.<sup>345</sup> The new BC Civil Rules also limit oral discovery to seven hours and the scope of document disclosure to documents “that could be used to prove or disprove a material fact at trial or that a party intends to refer to at trial.”<sup>346</sup> Limitations on documentary discovery have also been part of

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<sup>344</sup> These are a set of universally acceptable principles addressing the disclosure and discovery of electronically stored information in Canadian civil litigation. They were developed in 2006-07 by the Sedona Conference® Working Group 7, in response to the growing recognition that the discovery of electronically stored information is quickly becoming a factor in all Canadian civil litigation, large and small. See The Sedona Conference, *The Sedona Canada Principles: Addressing Electronic Discovery* (January 2008) at i, online: The Sedona Conference <[http://www.thosedonaconference.org/dltForm?did=canada\\_pincpls\\_FINAL\\_108.pdf](http://www.thosedonaconference.org/dltForm?did=canada_pincpls_FINAL_108.pdf)>.

<sup>345</sup> Taran Virtual Associates – The Legal Outsourcing Network, *Civil Justice Reform and Amendments to the Ontario Rules of Civil Procedure* [Taran].

<sup>346</sup> BC Justice Review Task Force, *Key Features of The New Civil Rules, Family Rules And Court Fees*, (2009) at 2, online: <[http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/458619/key\\_features\\_of\\_new\\_rule.pdf](http://www.llbc.leg.bc.ca/public/pubdocs/bcdocs/458619/key_features_of_new_rule.pdf)> [BC Key Features].

recent reforms in Nova Scotia, the UK, and Australia. Limitations on oral discovery have been built into the new Nova Scotia Rules as a set of obligations to consider, into the Yukon Rules as part of mandatory case management, and many jurisdictions include limitations on oral discovery in simplified proceedings.<sup>347</sup>

One critique of proportionality is that some of the mechanisms tend to consider only one factor in the assessment. In Ontario, this might be the monetary value of the claim which determines whether it will be heard in small claims court or under simplified procedure. A more fundamental challenge is that often these factors will be at odds with one another. For example, low-value claims can have large impacts on people with low to moderate incomes, and high-value but straightforward contract disputes may not require any more judicial process than straightforward low-value contract disputes. Another challenge is deciding whether various proportionality mechanisms should be optional or mandatory, and under what circumstances.

The Ontario Civil Justice Review Project adopted proportionality as one of its principles, and its 2007 final report recommended that proportionality be recognized in the Rules of Civil Procedure as “an overarching, guiding principle when the court makes any order”.<sup>348</sup> In particular, the report recommended that proportionality be involved in making costs decisions and determining the scope of discovery.<sup>349</sup> The report also cited the principle of proportionality as driving its recommendations to enlarge the jurisdiction of the small

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<sup>347</sup> Simplified procedure is a streamlined court process that was designed to address cost and delay concerns in the litigation process by reducing the number of pre-trial procedures associated with cases involving relatively low dollar amounts. In Ontario, claims for only money, real property, and personal property for between \$25,000 and \$100,000 must be brought under simplified procedure: Ontario Ministry of the Attorney General, “Fact Sheet: Simplified Procedure under Rule 76 of the Rules of Civil Procedure”, online: <[http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact\\_sheet\\_simplified\\_procedure\\_76.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact_sheet_simplified_procedure_76.pdf)> [Simplified Procedure Rule 76].

<sup>348</sup> Osborne Report, *supra* note 24 at 134.

<sup>349</sup> *Ibid.* at xi, 134.

claims court and increase the monetary limit for simplified procedure from \$50,000 to \$100,000, to strengthen the relevance test in discovery (requiring only documents "relevant to" the issues to be produced, not all documents "relating to" the issue), to limit the duration of discovery, to restrict the number of experts called (following similar changes in other countries), to develop litigation budgets, and to facilitate selective case management.<sup>350</sup>

Based on a proportionality principle, the new civil rules recommended by the BC Civil Justice Working Group include the ability to trigger the involvement of a judge in a case planning conference (on issues such as dispute resolution, dates for exchange of documents, electronic document exchange, parameters for discovery, and the use of experts) and limitations on the scope and length of discovery, subject to extension by the court.<sup>351</sup>

## **D.ii Diversion & Streaming**

### **D.ii.a Diversion**

The literature has recognized for some time that many disputes might be better handled outside of the formal litigation process. For example, the BC Justice Review Task Force's Civil Justice Working Group "found that most citizens are seeking early and fair dispute resolution, not a costly and prolonged trial."<sup>352</sup> To that end, civil justice "hubs" where people can get information and services required to resolve legal problems on their own have been created in Nanaimo and Vancouver, and a family law hub is being piloted on Vancouver Island. The hubs coordinate and promote existing legal services and provide legal information, diagnostic and referral services, and access to legal advice and representation if needed.<sup>353</sup>

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<sup>350</sup> *Ibid.* at xxiii, 23, 58, 71, 85.

<sup>351</sup> BC Civil Justice Reform, *supra* note 343 at 3-4.

<sup>352</sup> *Ibid.* at 1.

<sup>353</sup> *Ibid.* at 2.

The Woolf reforms in the UK included a list of “pre-action protocols”, mandatory procedures to be followed before one is allowed to file a claim, which are intended to encourage settlement, and support efficient proceedings when claims cannot be avoided by encouraging pre-claim information exchange and the use of ADR. Different protocols exist for different types of claims.<sup>354</sup> Evaluations of the Woolf reforms suggest that the pre-action protocols, because of the time they consume, may have been responsible for an increase in litigation costs; thus the BC Working Group did not recommend the adoption of pre-action protocols.

Family Courts in Ontario currently present mediation and other non-adversarial dispute resolution as an option both at FLICs and institutionalized within the Family Law Rules. For example, the Rules include the duty to facilitate and encourage the use of alternatives such as mediation in the mandatory information program in Superior Court in Toronto and in the case management rules.<sup>355</sup> Disputants can be referred to mediation, then, before any court action is started, during case conferences, prior to the first court date, or at first court date.

In Ontario, after a successful 1994 mandatory mediation pilot in Toronto, and pilots in Toronto and Ottawa in 1999, mandatory mediation, in combination with case management, was established in all civil non-family actions (except bankruptcy, class proceedings, commercial list, estates, and construction lien matters) in Toronto and Ottawa, and expanded to Windsor in 2003.<sup>356</sup> Justice Winkler writes that “there was an emerging consensus

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<sup>354</sup> BC Justice Review Task Force, *Responses to Concerns Raised by the Profession* at 5, online: British Columbia Ministry of Attorney General <[http://www.bcjusticereviewforum.ca/civilrules/downloads/New\\_Rules\\_QA\\_Sept15.pdf](http://www.bcjusticereviewforum.ca/civilrules/downloads/New_Rules_QA_Sept15.pdf)>. See also the pre-action protocols online: <[http://www.justice.gov.uk/civil/procrules\\_fin/menus/protocol.htm](http://www.justice.gov.uk/civil/procrules_fin/menus/protocol.htm)>.

<sup>355</sup> Ontario, O. Reg. 114/99.

<sup>356</sup> Under the 1996 Rule 77, all case-managed actions were subject to mandatory mediation. Parties had to attend a mediation session within 90 days of first filing of defence. By 2003 postponement of mediation occurred in more than half of the cases, and mediation reached a settlement in only about

amongst litigators that mediation had become an unavoidable, costly, untimely, and unproductive obstacle in the path of the party who wanted to move the lawsuit forward.”<sup>357</sup> Rule 78 of the Ontario Rules of Civil Procedure, implemented in Toronto in 2005, extended mediation to simplified procedure cases, and also extended the mediation timeline to two years (150 days under the simplified procedure), under the premise that mediation should not occur before the stage at which it is likely to be helpful — for example, early mediation often occurred before examinations for discovery and full documentary disclosure,<sup>358</sup> after which settlement is more likely. Early indications are that this flexibility in timelines has been helpful, and that mediation under the simplified procedure has also increased the speed of resolution.<sup>359</sup>

Rule 78 also provided for a detailed pre-trial memorandum to be completed by all parties, including the provision of a witness list, and indicated that the principles underpinning the pre-trial conference were to explore settlement options and to ensure that a trial will proceed efficiently and on time.<sup>360</sup> The reforms have been cited as increasing the number of cases resolved before trial, and vastly increasing the number of individuals opting for summary trials, from 2 percent for matters scheduled in 2004 to 23.5 percent for those scheduled in 2006, and increasing the number of cases settled either at pre-trial (from between 10 and 20 percent to about 35 percent) or after pre-trial and without trial (from an average of 39 percent to about 66 percent).<sup>361</sup> Note that Rule 78, along with Rule 77, was revoked in the 2010 amendments to the Rules of Civil Procedure and replaced with a single

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40 percent of cases. See: <<http://cfcj-fcjc.org/inventory/reform.php?id=13>>.

<sup>357</sup> Warren K. Winkler, *Evaluation of Civil Case Management In The Toronto Region: A Report on the Implementation of the Toronto Practice Direction and Rule 78* (2008) at 11 [Winkler 2008].

<sup>358</sup> *Ibid.* at 10.

<sup>359</sup> *Ibid.* at 18-19

<sup>360</sup> *Ibid.* at 21.

<sup>361</sup> *Ibid.* at 21-23.

case management rule under Rule 77 which will apply to Toronto, Windsor and Ottawa. This amendment is discussed further below at E.iv: Case Management and Technology.

In addition to mandatory mediation and pre-trial conferences, a third kind of mediation has been introduced; this mediation is known as “designated-hitter” mediation, which is conducted by a judge with experience in mediation and in the area of law involved in the dispute.<sup>362</sup>

The 2010 amendments to the Ontario Rules of Civil Procedure provide for mandatory mediation (Rule 24.1) in cases commenced in Ottawa, Toronto, or Essex, and no longer limit it to case-managed or simplified procedure cases.<sup>363</sup> The amendments also recognize the purpose of the pre-trial conference (Rule 50.01) as being “to settle without a hearing and to obtain court orders and directions to assist in the most expeditious and least expensive disposition.”<sup>364</sup>

While mediation has the potential to reduce client costs, delays, and public resources involved in trials, and involve disputants to a greater degree in reaching their own settlements, it is not without its critics. Some have argued that mediation, when unsuccessful – as seems to have been typical in Toronto, for example, when mandated too early in the litigation process – ends up being “nothing more than an additional layer of costs in the litigation stream.”<sup>365</sup> David Tavender has described some reasons mediation may fail: early mediation may fail if parties are not adequately committed to the process or are poorly prepared, such as where they have not properly assessed their positions in order to negotiate

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<sup>362</sup> *Ibid.* at 17; see also Warren K. Winkler, “Access to Justice Mediation: Panacea or Pariah?” 2007 16(1) Canadian Arbitration and Mediation Journal 5 [Winkler 2007].

<sup>363</sup> Garry D. Watson & Michael McGowan, *Ontario Civil Practice – Transition Guide 2009/2010: Amendments to the Rules* (2009), online: Carswell <[http://www.carswell.com/NR/rdonlyres/34BE674F-057D-4739-AD40-4CCC22336E18/0/Amendments\\_to\\_the\\_RulesL77981585TG.pdf](http://www.carswell.com/NR/rdonlyres/34BE674F-057D-4739-AD40-4CCC22336E18/0/Amendments_to_the_RulesL77981585TG.pdf)>.

<sup>364</sup> Taran, *supra* note 345; *Rules of Civil Procedure*. O. Reg. 575/07, s. 6 (1), Rule 50.01.

<sup>365</sup> Winkler 2007, *supra* note 362.

effectively; mediation is dependent on the skills and degree of intervention of the mediator; some mediations are demanded for tactical reasons and, conversely, parties may withhold information during mediation in order not to disclose their strategies before trial.

Justice Winkler also suggests that, in general, certain classes of cases are not well-suited for mediation: cases with apparently well-founded allegations of illegality or impropriety; cases in which parties are not fully informed; cases in which a party has a strong aversion to mediation or when one party is motivated to mediate for tactical reasons; cases involving one unrepresented litigant; and cases when parties want a judicial decision.<sup>366</sup> There is also the possibility of resistance from lawyers due to a lack of experience in mediation, feeling resentment at being compelled, or a preference for an adversarial context.<sup>367</sup> However, mediation at a later stage, such as has been provided for in the Toronto Region reforms, saves only a fraction of the legal costs saved in successful early mediation.

Others have argued that mediation is “a process fundamentally at odds with the role of the court as decision maker”.<sup>368</sup> It is also criticized for being at odds with the public interest by removing transparency from justice, prioritizing settlement which may not entail just outcomes, and reducing the pressure to improve access to the civil litigation system.<sup>369</sup> Some also have concerns that “judges are not equipped for, and are not comfortable with, the unstructured nature of mediation.”<sup>370</sup>

Nevertheless, Chief Justice Winkler writes that “if the movement toward mediation is now so strong as to constitute a tide, even the most senior and prominent of skeptical counsel appear willing to be carried along in it,” citing the Law Society of Upper Canada’s

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<sup>366</sup> *Ibid.*

<sup>367</sup> E. David and D. Tavender, “Personal Reflections on ADR Reforms” (Paper presented to the Canadian Forum on Civil Justice Conference, *Into the Future*, 2006).

<sup>368</sup> Winkler 2007, *supra* note 362.

<sup>369</sup> Lorne Sossin. “ADR and the Public Interest” (Paper presented to the Canadian Forum on Civil Justice Conference, *Into the Future*, 2006).

<sup>370</sup> Winkler 2007, *supra* note 362.

requirement that lawyers advise clients of the availability of mediation, the presence of mediation in law school curricula and continuing legal education programs, the numbers of retiring judges becoming experts in mediation, the popularity of “mediate-before-litigate” policies in large corporations, and the long tradition of mediation in labour, family, and insurance law.<sup>371</sup>

#### **D.ii.b Streaming**

In the UK, defended claims are put onto one or other of three tracks: small claims, fast track, and multi-track, depending on the amount of the claim involved. Small claims and fast track cases have fixed timetables with limits on oral and expert evidence, and multi-track cases are case managed and have adjustable rules. ADR is encouraged through cost penalties for unreasonable refusal.<sup>372</sup> Fast track cases are discussed below in the section on simplification. The small claims track is used for claims under £5,000, and involves a quick and informal trial with no formal rules of evidence, in which experts are only allowed to testify with court permission; if the parties agree, claims may be decided without a hearing.<sup>373</sup>

In Ontario, more than 60 percent of civil cases in Ontario are heard in Small Claims Court or in the Superior Court under Simplified Procedure;<sup>374</sup> this proportion should increase, now that the monetary limits for both small claims and simplified procedure have been raised to \$25,000 and \$100,000 as discussed above.<sup>375</sup>

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<sup>371</sup> *Ibid.*

<sup>372</sup> BC Ministry of the Attorney General, *The Civil Justice Reform Context Behind British Columbia's Expedited Litigation Rule and the Small Claims Court Jurisdictional Limit Increase* by Bob Goldschmid (2005), online: British Columbia Ministry of Attorney General <<http://www.ag.gov.bc.ca/justice-reform-initiatives/publications/pdf/Goldschmid.pdf>> at 6-7 [Goldschmid].

<sup>373</sup> *Ibid.*

<sup>374</sup> Warren K. Winkler, “Access to Justice – Remarks” (Delivered at the Canadian Club of London, 30 April 2008).

<sup>375</sup> Simplified Procedure Rule 76, *supra* note 347.

While the rationale of small claims courts has been to provide access to justice for a wide range of individuals, several studies have suggested that they fall short of this promise. For example, a study of the English small claims procedure before the Woolf Reforms found that small claims were used mostly by professionals or business interests, with "ordinary people" appearing mostly as defendants for non-payment of debt. The study also found that only half of successful plaintiffs had received payment. A study of a small claims court in Montreal found similarly that the court was used mostly by "well-educated, more affluent male professionals and business people" claiming for unpaid goods and services, even despite the relatively progressive model of the court, in which judges play activist roles, and lawyers and corporations are barred.<sup>376</sup> Ontario's move to increase the monetary limits of small claims disputes in 2010 to \$25,000 may result in increased use of small claims courts as collection agencies, and by only certain segments of the population.

Shelley McGill, a Deputy Judge of the Ontario Small Claims Courts, has discussed the small claims court system's internal developments and relevant external developments. Internally, "multiple conflicting goals and poorly defined priorities have led to the adoption of counter-productive strategies and an unclear mission for the small claims court."<sup>377</sup> She observes that small claims courts often strive to address too many objectives and interests, including the interests of a wide variety of disputants and stakeholders, access issues such as lowering cost, formality, complexity and delay, and judicial issues of fairness, finality and compliance. She suggests that attempting to meet all these expectations is unrealistic and

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<sup>376</sup> Ramsay, *supra* note 297 at 36-37.

<sup>377</sup> Shelley McGill, "Who Should Protect the Consumer? The Eroding Role of the Small Claims Court" (Working paper prepared for the 40<sup>th</sup> Annual Workshop on Commercial and Consumer Law, October 2010) at Part I, summarizing Shelley McGill, "Small Claims Court Identity Crisis: A Review of Recent Reform Measures" (2010) 49 Can. Bus. L.J. 213.

recommends that small claims courts each develop their own clear mandate and objectives and openly make choices of “priority and proportionality.”<sup>378</sup>

She also argues that the small claims court is still the most widely and easily accessible forum for most consumer disputes, despite the rise of several major developments that have reduced the impact of small claims courts on consumer protection (i.e. consumer class actions, consumer arbitration clauses, use of debt collection and counselling agencies in post-judgment processes and the availability of debt consolidation and consumer proposals under the *Bankruptcy and Insolvency Act*). On the other hand, she finds that the involvement of collection agencies in the post-judgment process of small claims court has a negative impact on expediency and also on civility (small claims courts have limited ability to control behaviour of third parties).<sup>379</sup> She advances eight recommendations for reforming small claims courts, including:<sup>380</sup>

- Preserve right to individual action in small claims court even in the face of a pre-dispute consumer arbitration agreement;
- Promote modest collective management of similar cases in small claims court;
- Allow court to control behaviour of external collection agencies; and
- Allow court to reduce amount of costs or accrued post-judgment interest on a debt consolidation motion.

Some have suggested that efficiencies and greater predictability (leading to more settlements) could be achieved by greater specialization in adjudicative functions (for example, a commercial law court or a family law court).<sup>381</sup> While this is a politically sensitive issue, local norms of practice and judge rosters may in effect involve specialization already. Specialized rules for family law cases are already in place in Ontario, and now also

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<sup>378</sup> McGill, “Small Claims Court Identity Crisis,” *ibid.* at 250-251.

<sup>379</sup> McGill, “Who Should Protect the Consumer,” *supra* note 377 at Part IV(i).

<sup>380</sup> *Ibid.* at Part V (Concluding Recommendations). She also refers to the recent Ontario Civil Legal Needs report, concluding that “access to justice is no longer a one size fits all approach; different strategies must be employed to meet the wide variety of civil legal needs.” *Ibid.* at Part V. See also Ontario Civil Legal Needs, *Listening to Ontarians* (May 2010).

<sup>381</sup> Trebilcock, *supra* note 291 at 89.

in BC since changes to its civil rules took effect in July 2010. Rules could emphasize alternatives to litigation, or less adversarial, more inquisitorial proceedings with more case management, as for example in the "Less Adversarial Initiatives" of the Family Court of Australia.<sup>382</sup> Australia's Shared Parental Responsibility Act 2006 lays down guiding principles for child-related proceedings in family law. Key principles from the Act specify that "the court is to actively direct control and manage the proceedings" and that "the proceedings are to be conducted without undue delay and with as little formality and legal technicality as possible."<sup>383</sup> In the 2006 Family Lawyers Survey, 60% of lawyers agreed that these changes were desirable, while in 2008 there was 58% support.<sup>384</sup>

In Canada, however, family courts are a special and complex example. Due to the constitutional division of powers, only federally-appointed judges have the power to hear family law matters related to property and divorce, while provincially-appointed judges can hear matters related to custody and access, spousal and child support, child protection, and adoption. Beginning with a pilot project in Hamilton in 1977, and extended in the 1990s to 17 sites, Ontario has had a "unified" Family Court that provides one single jurisdiction over all family-law related matters. In 1998, the Family Court was made a branch of the Superior Court of Justice. The Family Court was intended to deal with problems in an integrated manner, with mediation, other resources, and legal services attached to each court site, and to increase the non-adversarial resolution options by attempting to divert as many disputes as possible from formal court hearings.<sup>385</sup>

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<sup>382</sup> Jennifer E. McIntosh, Hon. Diana Bryant, & Kristen Murray, "Evidence Of A Different Nature: The Child- Responsive And Less Adversarial Initiatives Of The Family Court Of Australia" (2008) 46(1) Fam. Ct. Rev. 125.

<sup>383</sup> Australian Government, Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* by Rae Kaspiew, Matthew Gray, Ruth Weston, Lawrie Moloney, Kelly Hand, Lixia Qu (December 2009).

<sup>384</sup> *Ibid.*

<sup>385</sup> Mamo Report, *supra* note 27 at 12-13.

### D.iii Simplification

The Institute for the Advancement of the American Legal System (“IAALS”) and the American College of Trial Lawyers (“ACTL”), building on its joint “final project report”,<sup>386</sup> has developed a series of pilot project civil rules designed to simplify the civil justice system in general.<sup>387</sup> Part of the strategy is to eliminate a "one size fits all" mentality in procedure, either by allowing flexibility through case management or, alternatively, by developing simplified procedures for use in certain classes of cases. General techniques of simplification developed by the IAALS/ACTL proposal include the requirements to consider proportionality, include material facts in pleadings, allow pre-complaint discovery, ensure continuity of judges, adhere to timelines on disclosure of information, use of pretrial conferences, and limitations on discovery and experts. Simplification and consistent use of forms is another general technique to make courts more accessible, particularly to unrepresented litigants.

Following the principle of proportionality, it is common to have some kind of simplified procedure available for cases of lower monetary value, but not low enough to end up in small claims court. In Ontario, Alberta and Quebec, this is known as simplified procedure; in other jurisdictions, such as BC, Nova Scotia and the UK, it is known as fast-track<sup>388</sup> and in Manitoba and Newfoundland, as expedited action or trial. Most simplified

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<sup>386</sup> Institute for the Advancement of the American Legal System at the University of Denver and American College of Trial Lawyers Task Force on Discovery and Civil Justice, *Final Report on the Joint Project* (2009).

<sup>387</sup> Institute for the Advancement of the American Legal System at the University of Denver and American College of Trial Lawyers Task Force on Discovery and Civil Justice, *21st Century Civil Justice System: A Roadmap for Reform Pilot Project Rules* (2009) [Pilot Project Reform Roadmap].

<sup>388</sup> Canadian Forum on Civil Justice, “Civil Justice Thesaurus”, online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/research/thesaurus-en.php>>.

proceedings include limitations on examinations for discovery; for example, the new Nova Scotia Rules limit discovery to three hours for cases valued at less than \$100,000.<sup>389</sup>

In the UK, the fast-track procedure applies to civil cases involving claims valued at less than £25,000, for which the court expects a trial will last less than one day and involve oral expert evidence of no more than one expert per party per expert field and two expert fields.<sup>390</sup> Fast track cases usually have: fixed costs;<sup>391</sup> the same expert witnesses on both sides, and no oral expert evidence unless the court determines otherwise; limited discovery; a trial date within 30 weeks; and potential limits on oral evidence and cross-examinations.<sup>392</sup> The Jackson Report noted the following advantages of a fast track procedure for lower value litigation: it gives all parties certainty as to the costs they may recover if successful, or their exposure if unsuccessful; fixing costs avoids the further process of costs assessment, or disputes over recoverable costs, which can in themselves generate further expense; and it ensures that recoverable costs are proportionate.<sup>393</sup>

In BC, from 2002 until recent amendments introduced in July 2010, a “fast-track” procedure (Rule 66) was available for actions likely to take less than two days of trial time, at either party’s option. Rule 66 limited discovery to two hours per party, banned interrogatories, banned jury trials, required trial date applications to be filed within four months, required parties to file a trial agenda, and set costs at fixed amounts.<sup>394</sup> Following a trial period beginning in 2005, and from January 2008 until recent amendments in July 2010, almost all civil actions valued under \$100,000 (excluding family proceedings and class

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<sup>389</sup> See Nova Scotia Rule 57.10(3).

<sup>390</sup> *UK Civil Procedure Rules*, Rule 26.6.

<sup>391</sup> Fixed costs are prescribed by tables according claim types and values and other factors. For example see the UK Civil Procedure Rules, online: Ministry of Justice <[http://www.justice.gov.uk/civil/procrules\\_fin/contents/practice\\_directions/pd\\_parts43-48.htm](http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_parts43-48.htm)>.

<sup>392</sup> Goldschmid, *supra* note 3732 at 7.

<sup>393</sup> LJ Jackson report, *supra* note 202 at xviii.

<sup>394</sup> Canadian Forum on Civil Justice, “Inventory of Reforms: BC Fast Track Litigation (Rule 66)”, online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/inventory/reform.php?id=23>>.

actions) proceeded under the “expedited litigation rule” (Rule 68), which incorporated a proportionality test into the process and provided for limited document disclosure, no oral discovery unless permitted and being limited to two hours, one expert per side, the ability to order a joint expert, no juries, case management conferences, and a trial management conference.<sup>395</sup> The recently introduced BC “fast-track litigation” rule combines the existing expedited litigation rule (Rule 68) and fast-track rule (Rule 66) to provide a single simplified procedure for cases involving less than \$100,000 or trials of three days or less. Either party may put the case into the fast-track, if it meets the criteria. Either party may apply for removal of the case from the fast-track, and the court must then determine whether removal is appropriate.<sup>396</sup>

Simplified procedure in Ontario began as a pilot project for cases valued under \$25,000 in 1996 (Rule 76), and became permanent in 2001 when the limit was raised to \$50,000. Rule 76 is now mandatory for cases in the \$25,000-\$100,000 range following changes introduced in 2010. The Rule does not permit examinations for discovery or cross-examinations on affidavits filed on motions, requires affidavits of documents to include a list of all witnesses and their contact information, including experts, allows judges to order a summary trial, and mandates a settlement discussion and pre-trial conference. Other changes to Ontario’s simplified procedure introduced in 2010 include the narrowing of the scope of documentary disclosure to include a relevancy requirement and the allowance of a total of

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<sup>395</sup> Canadian Forum on Civil Justice, “Inventory of Reforms: BC Expedited Litigation Project (Rule 68), online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/inventory/reform.php?id=9>>.

<sup>396</sup> BC Key Features, *supra* note 346; Other features include that oral discovery will be limited to two hours unless consent is given to extend it, and costs will be limited to \$8,000, \$9,500, and \$11,000 for one, two, or three or more day trials. The limited cost provisions will apply regardless of track if the judgment recovered is less than \$100,000 or the trial is completed in three days or less, providing an incentive to put these cases on the fast track.

two hours of examination for oral discovery.<sup>397</sup> Limiting discovery was partly a response to the finding that banning oral discovery had led to discovery essentially being conducted at trial,<sup>398</sup> and also to the increase of the monetary limit.

#### **D.iv Case Management and Technology**

Caseflow management is one way to reduce litigation costs and delays in the civil justice system. It operates by setting timelines throughout the life of the case and ensuring that each event in the case is effective – for example, by ensuring that all parties are prepared in advance, and that preparation is not wasted. The Institute for the Advancement of the American Legal System and the American College of Trial Lawyers, building on their joint “final project” report, have developed a series of case management guidelines and pilot project civil rules.<sup>399</sup> Case management guidelines include the following:

- caseflow management should be tailored to specific circumstances of the case and parties are to ensure proportionality in discovery and pretrial events, with judges playing an active role in discovery;
- judicial involvement should begin early in the litigation, be ongoing, and be carried out by a single judge through the life of the case;
- an initial pretrial conference should be set as soon as possible after appearance of all parties, and additional conferences should be held by request or at the court's initiative;
- trial dates should be set at the initial pretrial order or as soon as practical;
- judges should rule promptly on all motions; and
- courts should raise the possibility of ADR as early as possible, when appropriate, and should have the discretion to order mediation unless opposed by all parties.

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<sup>397</sup> Ontario Ministry of the Attorney General, “What's New? Changes to the Rules of Civil Procedure”, online Ontario Ministry of the Attorney General  
<[http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes\\_to\\_rules\\_of\\_civil\\_procedure.a](http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.a)  
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<sup>398</sup> Winkler 2008, *supra* note 357 at 12.

<sup>399</sup> Institute for the Advancement of the American Legal System at the University of Denver and American College of Trial Lawyers Task Force on Discovery and Civil Justice, *21st Century Civil Justice System: A Roadmap for Reform -Civil Caseflow Management Guidelines* (2009); Pilot Project Reform Roadmap, *supra* note 387.

The project emphasizes the need for "differential case management"; that is, the ability to pre-screen cases to determine how much judicial attention a case may require, with the ability to develop different timelines and procedures for different kinds of cases.

Civil case management has been in place in parts of Ontario for some time. In his 2008 evaluation of civil case management in the Toronto region, Ontario Chief Justice Winkler wrote:

Historically, in the Canadian civil justice system, litigants and their counsel controlled the pace of litigation. Litigants filed a statement of claim with the court and worked through the steps of the litigation process – including pleadings, disclosure, examinations for discovery, and the trial itself – at their own pace. The court would only become involved if the parties expressed concern with their case's progress. This traditional approach to case management provided great flexibility to litigants and their counsel; however cases tended to drag on, with corresponding increased costs to the parties.<sup>400</sup>

The alternative – giving judges a greater role in case management – has been tested through pilot projects in Ontario which took place in the early 1990s. Positive results included fewer delays and the overall length of time to resolve a proceeding, lawyers spending less time on files, and lower administration costs per file.<sup>401</sup> The 1995 Civil Justice review recommended that case management be instituted province-wide. This recommendation was adopted under Rule 77, in Ottawa in 1996, Toronto between 1997 and 2001, and in Windsor in 2003. Rule 77 case management involved mandatory mediation, establishment of timelines and filing of timetables, and mandatory settlement conferences. Judicial intervention occurs in three types of conferences, each with its own purpose: case conferences, settlement conferences, and trial management conferences. Two streams have been established: "fast-track" and "standard track" (for cases requiring more intensive

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<sup>400</sup> Winkler 2008, *supra* note 357 at 1.

<sup>401</sup> *Ibid.* at 2.

management).<sup>402</sup>

Though successful in Ottawa and Windsor, problems with Rule 77 case management arose in Toronto. A 2004 evaluation of case management in Toronto found that the timelines were not realistic for the volume of cases being managed. Parties were being forced to file timetables early on in the process, and then later frequently convened case conferences to vary them, slowing down cases and increasing costs. Similarly, the Osborne report found that rule-based judicial case management (such as that under Rule 77) was too costly in general and necessary only for some cases.<sup>403</sup> Both the court system and litigants felt the strain of universal case management and the additional procedural steps added at the outset of the litigation process, including various case conferences, filings, extensions and mandatory mediations. Early and mandatory trial scheduling was also creating unnecessary problems, as most cases never proceed to trial and trials were being scheduled before the parties were ready. Rule 78, adopted in Toronto in 2005, eliminated universal case management to create a more flexible regime of “case management as necessary, but not necessarily case management” and relaxed trial scheduling procedures until both sides certify their preparedness.<sup>404</sup> Under Rule 78, case management only became active when there was a breakdown in the relationship between the litigants, when the case was unduly complex, when it involved multiple parties, or if parties requested and consented to management.<sup>405</sup>

Under the new civil justice rules introduced in January 2010, Rules 77 and 78 have been replaced by a new Rule 77 which establishes the principle that case management is to be used only when necessary and only to the extent necessary, investing the parties with greater responsibility for managing proceedings. Case management is to be tailored to local

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<sup>402</sup> *Ibid.* at 6-7.

<sup>403</sup> *Ibid.* at 8-9.

<sup>404</sup> Winkler 2008, *supra* note 357 at 15.

<sup>405</sup> *Ibid.* at 24.

practices and applies only to cases in Toronto, Essex, and Ottawa, and only to cases assigned to it by court order.

In cases where a request for summary judgment is refused, the new civil justice rules “effectively permit such cases to enter a form of case management”, including setting time limits for document delivery, bringing of motions and filing of material facts not in dispute, establishing discovery plans, setting time limits on examinations, ordering evidence by affidavit, and ordering experts to meet.<sup>406</sup>

In family law cases in Ontario, the Family Law Rules provide for a case management process that includes a series of conferences which promote early resolution or narrow the scope of issues being contested. This kind of case management also promotes mediation as an alternative dispute resolution strategy.<sup>407</sup> While the current system allows for a differentiation of cases into standard and fast track, based on the nature of the relief being sought, the Mamo report advocated a more refined differential case management approach, based on the level of conflict and kinds of court intervention and ancillary services required.<sup>408</sup>

In BC, family judicial case conferences have been standard since 2005, and case management conferences have been used in the expedited litigation track and for cases expected to require a trial of over twenty days. The draft of the new BC Civil Rules originally required a limited amount of upfront case planning, but due to concerns about unnecessary case planning conferences, the new rules now use a party-driven model allowing case planning conferences to be held if one party so requests, at which the judge or master

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<sup>406</sup> Canadian Forum on Civil Justice, “Inventory of Reforms: Ontario Summary Judgement (Rule 20)”, online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/inventory/reform.php?id=110>>; Taran, *supra* note 345 at 1.

<sup>407</sup> Mamo Report, *supra* note 27 at 13.

<sup>408</sup> *Ibid.* at 116.

will set the parameters of litigation guided by proportionality principles.<sup>409</sup> Case Plan Orders, thus set out, may include dispute resolution options, dates for document exchange, electronic document protocols, parameters of oral examination for discovery, and basic information about the planned use of experts.<sup>410</sup> The new rules also require trial management conferences to be held between two and four weeks before trial.

Alberta's new rules require parties to develop litigation plans, with the help of the court if necessary.<sup>411</sup> The Yukon's new rules include mandatory case management.<sup>412</sup> In Nova Scotia, active case management is limited to timeline management through "Date Assignment Conferences."<sup>413</sup> However, Nova Scotia has adopted a voluntary and confidential judge-assisted settlement conference, which can be held at any stage of a proceeding, and in which the judge is to express a candid opinion of the merits of the case. Settlement conferences can be "ordinary" or "trial-like"; in trial-like conferences, counsel can question and cross-examine witnesses, though not under oath.<sup>414</sup> Although the rules governing these conferences do not specify that the judge presiding over the settlement conference cannot preside over the trial, confidentiality provisions suggest that different judges will continue to be assigned at each of these two stages.<sup>415</sup>

In the UK, following the Woolf Reforms, case management conferences are used primarily for "complex multi-track" cases – small claims and fast-track cases (see "streaming", above) receive written directions and proceed according to fixed timelines. In

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<sup>409</sup> BC Key Features, *supra* note 346 at 1.

<sup>410</sup> BC Civil Justice Reform, *supra* note 343 at 4.

<sup>411</sup> See: <<http://www.albertacourts.ca/LinkClick.aspx?fileticket=MByVU6PXpqs%3d&tabid=310>>.

<sup>412</sup> See: <[http://www.yukoncourts.ca/pdf/rule\\_36\\_case\\_management\\_conference.pdf](http://www.yukoncourts.ca/pdf/rule_36_case_management_conference.pdf)>.

<sup>413</sup> Canadian Forum on Civil Justice, "Inventory of Reforms: Nova Scotia Civil Rules Revision Project – Management of Litigation", online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/inventory/reform.php?id=27>>.

<sup>414</sup> Canadian Forum on Civil Justice, "Inventory of Reforms: Nova Scotia Settlement Conferences (Rule 10)", online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org/inventory/reform.php?id=139>>.

<sup>415</sup> *Ibid.*

the "complex multi-track" cases, case management was found to be an effective tool for implementing proportionality that reduced delays, made the process more predictable, and ensured that cases reached court ready for trial in a reasonable time.<sup>416</sup> In the US, case management has been part of federal procedure for decades, and is used in many US states.

While technological developments have affected civil litigation, the effects have been uneven, and not always for the better. A recent report comparing data from several countries identified four major areas where technology has had a significant impact: filing documents with the court and issuing court notices, communicating and exchanging documents with other parties in the litigation process (such as discovery), creating the factual record and arguing the case, and court administration.<sup>417</sup>

While potentially increasing efficiency and lowering costs, E-filing has raised privacy concerns, particularly in the US. Fillable forms and form completion software is one way to make forms more accessible to unrepresented litigants. In jurisdictions that have adopted e-filing practices, there are usually court, clinic or third-party based facilities to help people without the necessary technology or skills to file electronically. In some locations, courts have used e-mail to issue notices or to communicate with counsel informally.<sup>418</sup>

Electronic delivery of documents, especially in discovery, has both the potential to facilitate discovery and also to increase confusion with the proliferation of the number of documents potentially at issue, such as e-mails, and the new issue of data storage and electronic document formats. Better electronic document management, discovery plans, and exemptions for electronic documents that are not easily accessible or no longer available may

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<sup>416</sup> See:

<<http://www.allenoverly.com/AOWEB/AreasOfExpertise/Editorial.aspx?contentTypeID=1&itemID=50265&prefLangID=4106>>.

<sup>417</sup> Janet Walker and Garry D. Watson, "New Technologies and the Civil Litigation Process Common Law General Report" (Paper presented to the XIIIth World Congress of the International Association of Procedural Law, Salvador de Bahia, Brazil, 16-20 September 2007).

<sup>418</sup> *Ibid.* at 4-11.

help to reduce the problems. The development of the US and Canadian "Sedona principles" for electronic discovery and Ontario's E-Discovery guidelines are important steps towards establishing reasonable and consistent guidelines.<sup>419</sup>

In the courtroom, teleconferencing and videoconferencing have the potential to radically change the day-to-day operation of courts. Their adoption, however, has been slow and partial. Generally these technologies have been incorporated to a greater degree in motions and appeals, or in tribunals, than for court trials.<sup>420</sup>

## V CONCLUSION

Developing an effective strategy for lowering barriers to middle-class access to civil justice first requires analysis of where the problems of access are most acute, in terms of both frequency and severity. Diagnosis must precede and drive prescriptions. Second, with respect to prescriptions, the menu of options available to respond to various classes of problems is rich and varied, and ranges well beyond simplistic axioms that would prescribe access to a lawyer's services for every legal problem that citizens encounter. At a time when public budgets are under strain, such a prescription is not fiscally realistic. Nor, in many cases, is it cost-effective relative to the many alternatives to full legal representation-- which indeed in some cases, independent of costs, may yield superior or more appropriate services. However, what works best in given contexts must in turn be driven by empirically-based program evaluations (not by hope or casual intuition).

Thus, many of the issues canvassed in this review move debates about access to justice well beyond the case for expanding the funding and scope of traditional legal aid programs. They also require a range of innovative and sometimes unconventional

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<sup>419</sup> *Ibid.* at 11-15.

<sup>420</sup> *Ibid.* at 15-20.

partnerships between public and private actors in exploring new avenues for advancing the ideal of access to justice and the broader ideal of the rule of law, of which access to justice plays an integral part.