This essay examines Michael Trebilcock’s access to justice scholarship from his work on consumer protection in the 1970s to his 2008 Legal Aid Review. Trebilcock’s approach over the years has consistently been informed by a consumer welfare perspective, including a concern that the middle class be included in access to justice initiatives, and by a broad concern with access to markets and regulatory regimes as well as to adjudication. Trebilcock’s use of public choice analysis, however, has made him more sceptical about the use of regulatory regimes to lessen or simplify disputes. The authors argue that the increased resources that would be required to add the middle class to legal aid might be better directed at the replacement of a costly court-based system in areas such as family law with a more efficient and holistic tribunal structure and by a return to the political process to produce regulation to limit and simplify disputes.

Keywords: access to justice/Trebilcock/consumer protection/legal aid

1 Introduction

Much ink has been spilled about the crisis of access to justice in Canada.1 Much less ink has been devoted to how this crisis may be solved. Few scholars, and even fewer policy makers, have advocated for innovation in the justice system as long or as loudly as Michael Trebilcock.

One goal of this essay is to provide an intellectual history of Trebilcock’s scholarship. Trebilcock has suggested that his work on international trade can be seen as the logical extension of his earlier work on consumer protection, given the harmful effect of trade barriers on consumers.2 In this essay, we suggest that there is a similar consistency between Trebilcock’s early work on consumer protection in the 1970s and his rethinking of legal aid in his 2008 Legal Aid Review.3

Trebilcock’s scholarship on the justice system spanning four decades may be characterized by a number of interlocking themes: the consumer welfare perspective, including a concern that the middle class be

included in access to justice initiatives; the dangers that consumer welfare reforms will be thwarted by well-organized producer interests; the search for evidence-based policies; and the need to deploy a wide range of regulatory instruments to improve the effectiveness and efficiency of legal service delivery. Access to justice, for Trebilcock, was not just about access to the courts but also about access to markets and regulatory regimes that would lessen the need for access to the courts.

At the same time, there have been some shifts in Trebilcock’s approach to access to justice, most notably a diminished enthusiasm for *ex ante* forms of regulation designed to limit or simplify disputes. Trebilcock’s increased engagement with public choice analysis has made him more sceptical about political regulation. We will suggest in this essay that there is a need to return to the legislative and regulatory process as a means to advance the access to justice agenda.

The work of Trebilcock and others on the need for small claims courts, contingency fees, class actions, and innovations in the public and private delivery of legal services have helped to achieve some improvements to access to justice. At the same time, access to justice conceived of as access to lawyers and courts seems to be stalled. For example, the Ontario government has yet to respond in a significant way to Trebilcock’s 2008 *Legal Aid Review*. In the face of serious fiscal restraints, it is unlikely that the government will follow Trebilcock’s proposals to expand legal aid to include the middle class. Even if governments included the middle class by providing free legal advice centres, it is not clear, on Trebilcock’s own public choice analysis, that the diffuse middle class would be a potent force in gaining increased resources for legal aid.

The second goal of this essay is to suggest that the increased resources that would be required to add the middle class to legal aid might be better directed at more fundamental reallocation of resources, including the replacement of a costly court-based system in areas such as family law with a more efficient and holistic tribunal structure. We will also suggest that more resources should be devoted to *ex ante* regulation, education, and redistribution in order to limit and simplify disputes.

Many of the ideas that we advocate in this essay – greater use of tribunals and *ex ante* regulation – can be found in Trebilcock’s work. Nevertheless, they were most clearly expressed in his early consumer protection work and are found less frequently in his later work on access to

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justice and legal aid. Trebilcock’s optimism about achieving better access to justice from the legislative and administrative branches of governments has been adversely affected by his engagement with public choice. Although the warnings of public choice about the difficulties of increasing consumer welfare through a political process dominated by producer interests should not be ignored, ultimately, in our view, it is only the political branches of government that can advance the unfinished access to justice agenda.

Our analysis is divided into two sections. Part II below examines Trebilcock’s engagement with access to justice issues in the context of consumer protection. This scholarship is largely consistent with Trebilcock’s later access to justice scholarship, but it provides some important insights into the importance of political and normative engagement and alternatives to court- and lawyer-centred reforms. Part III focuses on regulation and innovation in the delivery of legal services. Here we discuss how Trebilcock’s 2008 *Legal Aid Review* follows from his early consumer protection work in arguing that the middle class should be included in access to justice; at the same time, we suggest that more emphasis needs to be given to Trebilcock’s earlier insights that access to justice must be situated in the broader context of political regulation and social and economic redistribution and justice.

II Consumer protection

Many of Trebilcock’s articles in the early 1970s focused on consumer protection. Although some of these articles seem dated today, they contain many of the themes that run throughout his later access to justice work, including the use of economic analysis and wide-ranging innovation and experimentation in policy design. The articles also demonstrate the combination of hardheaded reason and softhearted passion and compassion that characterizes Michael Trebilcock as a person. Much of his consumer protection work was premised on the notion that without fundamental reform of the legal and political system, ‘the observation of the late Senator Robert Kennedy that large sections of the community now see the law as an essentially hostile institution – it seems only ever to take things away from them – remains uncomfortably close to the truth.’

In one early article published in 1970, Trebilcock faced the problem of the difficulties of ensuring access to justice for consumers. He expressed

5 But see Anthony Duggan, ‘Consumer Credit Redux’ (2010) 60 U.T.L.J. 689 (this volume), suggesting that scholarship about truth in lending is making a comeback in the wake of the recent economic collapse.

considerable scepticism about various forms of ‘paternalism’ then in 
vogue, which he associated with the work of John Kenneth Galbraith. He worried that paternalism would arbitrarily limit a consumer’s choice of goods. To this end, he expressed scepticism about reforms such as interest-rate ceilings. At the same time, however, he also expressed scepticism about the free-market perfection route, advocated by Friedrich von Hayek and Milton Friedman, of attempting to ensure that consumers simply receive full information. Trebilcock engaged with but ultimately was sceptical about the big ideas of the age. The truth, for him, was more in a pragmatic assessment of the evidence than in normative argument.

A A BROAD ACCESS TO JUSTICE AGENDA
Trebilcock was concerned about increasing access to justice for consumers, but he recognized from the start that access to justice requires more than access to courts. For example, he recognized the impossibility of litigating all possible consumer rights, whether they are ‘bargained for or conferred by statute.’ He cited studies demonstrating the paucity of consumer claims in the ordinary courts and warned against the instinctive tendency at the time to interpret the results of these studies as a form of discrimination against the poor. The answer, for him, was more complex and based on a shrewd recognition that ‘it pays nobody in our present system . . . to litigate the usual kind of consumer claim.’ This analysis was insightful both in its implicit recognition of the need for small claims courts and in its recognition of the inherent limits of even accessible adjudication in enforcing standards for consumer products. It recognized that ex ante regulatory reforms that avoid consumer disputes over defective products and services might be better than more efficient and accessible ex post dispute resolution.

Trebilcock warned that the notion ‘that any claim, no matter how small, warrants Ritz Hotel style justice’ must go. He advocated both small claims courts and class actions. At the same time, however, he

10 Ibid.
11 Trebilcock, ‘Protecting Consumers,’ supra note 6 at 41.
also advocated increased use of mediation and arbitration, at a time when alternative dispute resolution was not in vogue. He also argued that consumers should receive more information so that they could make informed choices. Echoes of these early creative approaches can be found in the 2008 *Legal Aid Review*, where Trebilcock advocates experimentation with summary and Web-based legal advice. A heading in a 1971 article about protecting consumers from defective merchandise succinctly captures Trebilcock’s pragmatic approach: ‘exploiting all options.’

Perhaps influenced by the redistributive reformism of the early 1970s, Trebilcock’s early scholarship contained frequent references to the need for economic redistribution, better education, and proactive regulation from the legislative and administrative branches of government, including criminal and quasi-criminal sanctions. This early work defined access to justice as much more than access to the courts and legal services; access to justice included also access to the market, to education, and to political regulation. Some of Trebilcock’s later analysis, both with respect to class actions and contingency fees and with respect to legal aid, is less explicitly redistributive.

Trebilcock articulated in 1971 the danger that small claims courts could frequently be used as a means of debt collection because producers and lenders would be better able than consumers or debtors to make use of adjudicative remedies. More than a quarter-century later, Rod MacDonald would confirm this danger with empirical research. Although he advocated small claims court reform, Trebilcock recognized that such courts would have difficulty in helping uneducated consumers who were unable to take the initiative of bringing lawsuits. He looked to more radical alternatives that would see justice dispensed by phone- or write-an-arbitrator schemes and the banning of all lawyers from small claims courts. Echoes of such ideas are found in his 2008 *Legal Aid Review*. Nevertheless, the idea for radical reforms that would dramatically decrease reliance on lawyers was not fully developed in the *Legal Aid Review*. It will be suggested in Part III below that such regulatory reforms could provide a means to advance an access to justice agenda that seems stalled because of the diminishing returns from attempts to achieve more efficiencies in the delivery of legal services and dispute resolution.

12 Trebilcock, *Legal Aid Review*, supra note 3 at s. VII.
13 Trebilcock, ‘Protecting Consumers,’ supra note 6 at 40.
14 Ibid at 13.
15 Seana McGuire & Roderick MacDonald, ‘Small Claims Court Cant’ (1997) 34 Osgoode Hall L.J. 509.
Trebilcock’s access to justice scholarship in the 1980s and 1990s was more court centred than his earlier work on consumer protection. This shift was related in part to the choice of topics. Publishing in the *Journal of Legal Studies* with Donald Dewees and Robert Prichard, Trebilcock provided an important economic analysis of how loser-pay cost rules and restrictions on contingency fees inhibit the use of class actions as a regulatory device.\(^{16}\) He advocated, to the dismay of established interests in the defendant bar, increased private enforcement of competition law, while recognizing that various procedural reforms were required both to facilitate such enforcement and to prevent its abuse.\(^{17}\) Trebilock was attracted to harnessing private initiative for public and regulatory aims. As will be seen, this more court-centred process took on added urgency once Trebilcock became more cautious about advocating more direct forms of political regulation.

In some later access to justice work, perhaps inspired by his new interest in developing countries, Trebilcock has returned to his roots in conceiving access to justice in the broadest possible terms. He has advocated public legal education and informal means of dispute resolution as promising means to avoid and resolve disputes, given that most people rationally want nothing to do with lawyers or courts even if the costs of such access are somewhat reduced through contingency fees, small claims and simplified proceedings, and class actions.\(^{18}\)

Many of Trebilcock’s court-related recommendations on access to justice have been implemented. All Canadian jurisdictions now allow contingency fees; class actions have developed as a thriving part of Canadian legal practice, and some departures are being made from the restrictive loser-pay cost rule. Nevertheless, there are limits to how far these reforms have contributed to increased access to justice for the poorest members of society.\(^{19}\) There is also a danger that reliance on litigation, whether in the form of class actions or of Charter litigation, may result in less attention to the need for access to bureaucratic and legislative forms of justice that Trebilcock championed in his early consumer

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19 See, e.g., Jasminka Kalajdzic, *Access to Justice for the Masses: A Critical Analysis of Class Actions in Ontario* (LLM thesis, University of Toronto, 2009) (arguing that, based on a survey of class actions certified to date in Ontario and interviews with plaintiffs’ counsel, class actions have enhanced access to justice less than was expected).
protection work. In Part III below, we will return to the need to reinvigorate a broader access to justice agenda.

B THE LEGAL PROFESSION AND OTHER THREATS TO CONSUMER WELFARE
Trebilcock recognized early on that the legal profession as producers of traditional legal services could thwart reforms designed to increase consumer welfare. In 1972, he concluded that ‘procedural reform must be regarded as the first priority in making private law remedies for misleading advertising effective.’ Such reform would require ‘major changes’ in the legal profession and, indirectly, in the law schools.20 Similarly, he argued in 1975 that ‘the teaching of Administrative Law in the law schools also needs to adjust to the real dynamics, and problems, of the regulatory process.’21 The legal profession and law schools would have to change fundamentally if law were not simply to be a coercive instrument that took things from the poor and, increasingly, the middle class. Trebilcock has railed against the dangers of lawyers’ engaging in a costly, long, and inefficient ‘full court press.’22 As will be seen in Part III below, Trebilcock has consistently recognized that the entrenched interests of producers of legal services constitute a barrier to the many consumer welfare reforms he has advocated.

C THE TURN TO PUBLIC CHOICE AND INCREASED SCEPTICISM ABOUT POLITICAL REGULATION
Although Trebilcock has been a constant advocate for policy innovation, his agenda for policy change was a modest and cautious one. In 1973, he wrote an article warning about the dangers of ignoring consumer preferences and making matters worse for the poor by simplistic interventions into the markets that operated in their communities, or ‘ghettoes,’ as they were called at the time. This work responded to research demonstrating that the urban poor paid more for consumer goods than the more affluent middle class. In a theme that was pursued in later years by more explicit engagement with public choice, Trebilcock warned that restrictive legislation could raise costs and restrict services for the urban poor. Good intentions were no guarantee that policies would have the intended effect.23 One reason that reforms could backfire resulted from the insight, provided by public choice analysis, that legislation could be moulded to

suit the interests of concentrated producer groups. Such insight applied economic models to legislative and administrative behaviour and was based on the idea of a competitive market for political goods.

By 1975, Trebilcock was making greater use of economic analysis to explore the problems of consumer protection. He used the public choice analysis of Mancur Olson to illustrate the chronic problem of ‘the fragmentation of the consumer interest’ as opposed to the concentrated powers of producers. Concentrated groups of producers could obtain regulation, such as market restrictions, that helped them at the expense of consumer welfare. He warned that ‘business (with the aid of the government) has now emerged as the chief subverter of the competitive economy which it claims to remember so fondly.’ This shrewd observation rings only more true in light of the recent economic collapse that has seen massive government bail-outs of struggling financial institutions. At the same time, however, the recent economic collapse may increase collective appetites for ex ante regulation that can prevent harms and disputes from arising. In Part III below we will suggest that increased acceptance of the need for state regulation can help advance and reconfigure the access to justice agenda.

Trebilcock’s public choice analysis is sometimes discouraging. It suggests that diffuse, unorganized groups will be at a permanent disadvantage in relation to concentrated, well-organized groups in political markets. The quest for consumer welfare will always be an uphill battle. Even the best-intentioned political reforms, including those stemming from the recent economic collapse, are liable to be dominated or hijacked by well-organized producer interests.

The high point of Trebilcock’s engagement with the above bleak form of public choice analysis came in a 1982 monograph, The Choice of Governing Instrument. This work analysed both the objectives of governments and the means used by them to achieve these objectives. It adopted a welfare economics perspective that saw the state’s role as largely that of correcting market failures such as externalities and monopolies. Building on earlier work in public choice that had identified the difficulties faced by poorly organized and poorly informed consumers in both economic and political markets, it expanded access to justice beyond the courts to study access to legislatures and agencies and, in particular, the incentives faced by politicians and bureaucrats. The conclusion was that the choice of governing means is ‘interdependent’ with the choice of governing objectives.

24 Trebilcock, ‘Winners and Losers,’ supra note 21 at 624.
25 Ibid. at 646.
Trebilcock’s public choice work in the early 1980s confirms his later admission that he discounted the transformative potential of ideas. For example, one 1982 article caustically observes that ‘like preachers, proselytizers, and psychotherapists, politicians clearly have some ability to propagandize the electorate on behalf of personal and initially unshared views’; nevertheless, he also warns of the high costs ‘faced by political messiahs.’ Even at the time, this comment ignored the inroads made by the political messiahs of the Reagan revolution, neo-conservatism and the privatization of governmental functions.

The work on public choice in the 1980s also featured explicit discussion of the role of academics and other policy advisors to government. In 1982, Trebilcock pointed out the dangers of so many economists writing ‘as though their task was to advise the Prince rather than the public.’ This represented his ambitions to increase public welfare. At the same time, his growing use of public choice revealed many of the dangers of advising the Prince – in particular, the danger that welfare-maximizing policies would be blocked or distorted by officials or politicians acting in their own self-interest. Trebilcock kept seeking welfare-maximizing reforms, but these reforms were increasingly characterized as marginal and fragile. By the 1980s, he was much more sceptical about the possibility of public regulation that would maximize consumer welfare, given the dangers of rent-seeking by well-organized producer groups.

The tension between Trebilcock’s intellectual pessimism and his personal commitment to reform is partially resolved in a 2005 essay looking back on *The Choice of Governing Instrument*. He still maintains that public choice has ‘powerful, salutary and indispensable insights into collective decision-making,’ but Trebilcock now – correctly, in our view – concedes that his 1982 version of public choice discounted the role of non-economic values such as ideology and ideas and the possibility of genuine, non-incremental political change as represented by forces such as privatization and globalization. By this time, Trebilcock had seen the dramatic success of neo-conservatism, which had challenged the role of governments. Political and economic messiahs such as Hayek and Friedman had enjoyed considerable success; access to

29 Ibid. at 677.
justice had enjoyed less success. It remains to be seen whether access to justice and increased regulation to diminish and simplify disputes will emerge as a transformative idea in the future.

III Accessible justice and the delivery of legal services

Trebilcock’s early work on consumer protection and related issues of governance laid a solid and broad foundation for his work in later decades on access to justice. He recognized that there were limits to what small claims courts and reform of fee and cost rules could achieve. He conceived of consumer protection as something that could be advanced through regulation and better information in the marketplace as well as through more efficient and accessible adjudication. One of the challenges faced by Trebilcock’s later policy work on access to justice was to maintain the broad approach to access to justice demonstrated in his early consumer protection work. Another challenge was to overcome the pessimism that his engagement with public choice analysis produced about the possibility of welfare-maximizing regulation.

Those who have focused on solutions to the question of access to legal services have tended to emphasize the recognition of a “right” to legal services. Such a right has been recognized in some criminal law contexts and in some family law and administrative law settings. A number of scholars and advocates have argued that a similar logic applies in a variety of areas of civil justice – such as consumer protection, discussed above – that feature litigants who cannot afford legal services. The Canadian Bar Association has gone so far as to launch a Charter challenge in British Columbia asserting the right to legal aid in civil litigation settings.

31 Though even here, there are disputes about when the state must provide legal services and about the appropriate remedy for the failure to provide legal services that are essential for a fair trial.
32 New Brunswick (Minister of Health and Community Services) v. G(J), [1999] 3 S.C.R. 46. For the majority of the Court, a right to state-funded legal assistance will be triggered by state action that imposes stigma akin to a finding of criminal guilt on an individual or that threatens an individual’s liberty interest.
34 The claim was dismissed by the BC Supreme Court on grounds that the CBA lacked standing. See Canadian Bar Association v. British Columbia, 2006 BCSC 1342. For a
Behind every claim to a right, however, is a claim on resources. This is especially true in the context of access to justice and the delivery of legal services, and Trebilcock was particularly sensitive to the reality that resources are not unlimited. As discussed above, he did not conflate access to the justice system with access to full representation by a lawyer or ‘Ritz Hotel style justice.’ As Rod MacDonald has elaborated in a manner that is quite consistent with Trebilcock’s earlier work on consumer protection, access to justice may involve access to legal information, access to legal institutions, or access to a legal remedy that may not necessarily require dispute resolution or legal advice.

As discussed in Part II above, Trebilcock’s early work on consumer protection took a similarly broad perspective. By the early 1980s, however, some of Trebilcock’s initial enthusiasm for political and regulatory reforms that would avoid disputes through ex ante regulation was diminished by his engagement with public choice theories of governance. As discussed above, these theories stressed the difficulties of achieving consumer welfare through a political process or a market dominated by well-organized producer interests.

As the Supreme Court has dampened the prospects of a general right to legal representation in settings of civil justice, the focus of the public interest bar has shifted from the right to government-funded legal representation to other access to justice initiatives, often led by non-governmental organizations. These measures range from Law Foundation–funded articling positions to pro bono programs and include self-help centres such as Law Help Ontario, online public legal information like CLEONet, and pro bono clinics of various kinds (many situated at law schools).

35 Trebilcock, ‘Protecting Consumers,’ supra note 6 at 41.
38 The Law Foundations of Ontario and British Columbia both fund public interest articling positions. Ten of the Ontario positions are part of a Rural and Linguistic Access to Justice initiative by the LFO.
39 Most provinces now have pro bono service coordinating organizations (the first, Pro Bono Law Ontario, opened its doors in 2002, while the most recent, Pro Bono Law Quebec, was launched in 2008).
40 Law Help Ontario, online: <http://www.lawhelpontario.org/>.
41 CLEONet, online: <http://www.cleonet.ca/>.
42 Examples include the International Human Rights Clinics at the University of Toronto, the Environmental Law Clinic at the University of Ottawa, the Mediation Clinic at the
Access has become synonymous with facilitating social innovation, not simply expanding rights. Alongside the efforts of the public interest bar to pilot initiatives that address access to civil justice, the private bar in Canada has also attempted to bring down the cost of legal services and to tap the vast and underserved market for the middle class. Promising ideas have included an online service that ‘auctions’ legal work to the lowest qualified bidder;¹⁴ the development of firms that match individuals and small businesses with legal assistance they can afford,¹⁴ and virtual law firms.¹⁵ Networks of lawyers willing to offer subsidized (though not pro bono) legal services represent yet another model for reaching the middle class.¹⁶ These reforms are consistent with Trebilcock’s broad interest in market and social reforms that go beyond either judicial or legislative creation of legal rights and entitlements. Although many of these market and civil society initiatives to increase access to justice are innovative and promising, there is a danger that they may downplay the need for political reforms and for a normative commitment by the state to access to justice.

For innovation to flourish, other aspects of the justice system status quo will have to change – including the business model for lawyers, the regulatory context for legal services, and the legal aid system. In each of these settings, as we discuss below, Trebilcock has provided a provocative and constructive voice for reform.

A REVISITING THE BUSINESS MODEL OF LAWYERS

As suggested in Part II above, Trebilcock has long recognized that the interests of the legal profession as producers of legal services could block consumer welfare reforms. Trebilcock has been highly critical of restrictions on entry and other forms of input, as opposed to output, regulation undertaken by the legal profession.¹⁷ He has made the case for allowing easier access to the profession and for allowing lawyers to work with other professionals.¹⁸ He has warned that regulations taken

University of Windsor, the Osgoode Business Clinic at Osgoode Hall Law School, and numerous other pro bono, student volunteer clinics across the country.

¹⁶ See Lawyers Aid Canada, JusticeNet, online: <http://www.justicenet.ca/directory/search/>. Under the JusticeNet scheme, lawyers agree to charge $100/hour for their services and Lawyers Aid Canada markets and promotes those lawyers to people in need of their services.
in the name of consumer welfare can have the opposite effect, imposing net costs on the consumers of legal services.

At the same time, Trebilcock has recognized the need and potential to deploy private incentives for lawyers to pursue public purposes. A vivid illustration of Trebilcock’s contribution to this field relates to contingency fees in Canada. Under a contingency fee, the lawyer receives no up-front fee from a client or clients but instead receives a share of any potential recovery as compensation. Writing at a time when Ontario was on the cusp of considering legalizing contingency fees, Trebilcock weighed into the debate, strongly on the side of enterprising lawyers who could, through contingency fees, enhance access to justice.49 Indeed, Trebilcock would have gone further, permitting not just contingency fees but lawyers’ indemnities against costs, to remove all risk from the plaintiff’s side in civil litigation. Such arrangements provide incentives both for meritorious clients to pursue claims and for qualified legal counsel to undertake the risk of representation.

Other reforms to the business model of lawyers may have a significant impact on access to justice, particularly in the civil justice realm. For example, Trebilcock has advocated the development of private insurance markets for legal expense coverage, especially in family law and civil matters. This approach accords well with his interest in access to justice for the poorly organized middle class. As he notes, while prepaid legal plans are not a new concept in Canada (they were advocated by the Law Society of Upper Canada at least as far back as 1993), they have yet to penetrate significant markets.50 The lack of success of legal insurance in Canada, however, raises questions about the viability of Trebilcock’s desire, implicit in his early consumer protection work and explicit in the 2008 Legal Aid Review, to give the middle class a stake in access to legal services.

While the business model for lawyers presents barriers to access to justice, the regulatory context within which legal services are delivered arguably presents a more significant obstacle to reform.

50 See Pierre Boucher, Legal Expense Insurance Market Study (prepared for the Barreau du Québec, March 2005.) The Canadian situation may be contrasted with continental Europe, where legal insurance has taken root. See, e.g., Matthias Kilian & Francis Regan, ‘Legal Expenses Insurance and Legal Aid Two Sides of the Same Coin? The Experience from Germany and Sweden (2004) 11 Int’l J. Legal Prof. 233. See also Luis Milan, ‘While Europeans have embraced the concept, Canadians remain cool to pre-paid legal services’ The Lawyer’s Weekly (1 May 2009), online: The Lawyer’s Weekly <http://www.lawyersweekly.ca/index.php?section=article&articleid=908>.
B REVISITING THE REGULATORY CONTEXT OF LEGAL SERVICES

A premise for the crisis of accessible legal services is the high cost of good-quality legal services in the market. The state has awarded the legal profession a monopoly over entry into the profession, which includes significant educational requirements (including a law degree from an approved Canadian law school or equivalent institution), passing a series of licensing exams, and then, once licensed, maintaining insurance and trust accounts and complying with the rules of professional conduct.

Trebilcock, in his address on the occasion of the one-hundredth anniversary of the Law Society of Alberta, reflected on the rationale for regulating legal services and concluded that ‘[t]he only normative reference point that is defensible is a consumer welfare perspective. That is to say, we ask of any set of policy choices, which one is likely to maximize net consumer welfare?’

As Trebilcock notes, law is characterized by significant informational deficits on the part of the vast majority of those who demand legal services. People often do not know how to identify or diagnose their problems accurately, nor can they accurately estimate the cost of solving or redressing those problems. Another dilemma posed by the market for legal services is the risk of adverse externalities for third parties where, for example, a custody dispute is inadequately argued.

Trebilcock treats legal services as a policy setting in which we tend not to focus on choice of policy instrument. He sees a range of regulatory instruments as available to address quality assurance from a consumer welfare perspective in the context of legal services – both regulatory instruments featuring input regulation (e.g., academic qualifications, practical skills training) and output regulation (e.g., oversight of the quality of services actually delivered, liability for professional negligence).

As to the preferred mix of instruments, Trebilcock bemoans the absence of reliable empirical examination of what works, and the extent to which it works. In the absence of reliable data on the impact of input regulation, Trebilcock argues for ‘a more targeted, bottom-line, output-oriented regulatory focus, because that is what a consumer welfare perspective demands, particularly in segments of the legal services market that are particularly afflicted by information asymmetries.’

Trebilcock outlines a number of strategies that legal regulators could adopt, such as monitoring complaints for patterns of deficiencies of competence, which could then be the basis of tracking, performance evaluation, and quality assurance (whether through peer review or practice audit initiatives). Trebilcock also advocates a greater commitment to

52 Ibid. at 216.
continuing legal education (CLE), including mandatory CLE in areas of practice of high risk to vulnerable clients. The Law Societies of Ontario, British Columbia, and Saskatchewan have responded with limited mandatory CLE initiatives, but these are targeted in other ways (e.g., in Ontario, the emphasis thus far is on lawyers in their first twenty-four months of practice). For such CLE initiatives to bear fruit, however, more attention needs to be paid to the quality, pedagogy, and evaluation of CLE programs.53

Another reform to the regulatory context that could unleash innovation with significant potential for enhancing access to justice is that of unbundling. Unbundled legal services are provided when a lawyer accepts a retainer for a specific aspect of a case (e.g., drafting a statement of claim) but not the entire case. Unbundled services allow clients who cannot afford to retain a lawyer for their entire case, or who would like to have more involvement in their case, to get expert advice and services on the areas of the case that are most challenging or that the client thinks are the most important; clients handle all other aspects of their case.

Finally, Trebilcock has advocated a greater role for paralegals in the delivery of legal services, at least in jurisdictions such as Ontario, which has established a regulatory regime for licensing paralegals (including mandatory insurance, educational qualifications, and disciplinary oversight).54 While this might appear to represent a move contrary to the interests of lawyers, one of the motivations behind Law Society regulation of paralegals may well have been to forestall the kind of argument that found traction in the United Kingdom and Australia regarding the legal profession’s inability to protect consumers of legal services. In other words, even if the regulation of paralegals represents a threat to the market power of the legal profession, this concern might be outweighed by the longer-term interest in self-regulation. It is also worth noting that regulation of paralegals has not yet led to a substantial expansion in the scope of practice permitted to paralegals.

Taken together, Trebilcock’s proposed reforms to the regulation of the legal profession, and to the market for legal services more generally, would result in far more opportunities for the cost of legal services to be reduced. Trebilcock’s approach remains vigilant in placing consumer welfare before the interests of producers – in this case, lawyers – and recent reforms in Ontario with respect to contingency fees and paralegals suggests that reform to the delivery of legal services on consumer welfare

53 For a critique see Richard Devlin & Jocelyn Downie, ‘And the Learners Shall Inherit the Earth: Lifelong Learning and Legal Ethics’ (2009), online: Centre for the Legal Profession <http://www.clp.utoronto.ca/Assets/lifelong_devlindownie.pdf>.
54 See ‘Paralegal Regulation,’ online: Law Society of Upper Canada <http://www.lsuc.on.ca/paralegals/>.
grounds is possible. The market, however, can address only a share of the access to justice dilemmas we now face. The role of the public provision of legal services must also be addressed, as must public responsibility for the legal context in which disputes and demands for legal services arise.

C REVISITING LEGAL AID

In his 2008 *Legal Aid Review*, Trebilcock reiterates that there is no ‘silver bullet’ that will solve the problem of access to justice. Nevertheless, his scholarship and policy advocacy are premised on the belief that innovation can substantially enhance access to justice and that a just, democratic, and prosperous society depends on our realizing this potential.

Chronic under-funding of legal aid led Legal Aid Ontario (LAO) to cap expenditures on complex criminal cases in November 200655 and, more recently, led to a boycott by criminal defence lawyers in the summer of 2009.56 More state funding for legal aid, while clearly necessary in Trebilcock’s view, may never be sufficient to address access to justice. Provincial legal aid budgets are devoted primarily to funding criminal defence representation for indigent clients, as a matter of constitutional duty. It is highly unlikely that government would ever be able or willing to commit to funding all citizens without adequate means so that they have effective legal representation in the civil justice system. Provincial budgets are dominated by the costs of health care and education; the interests of producers and consumers in those fields are likely to dominate the diffuse interests of the middle class under even an expanded legal aid plan. These public choice–inspired insights provide a real challenge to Trebilcock’s attempts, from his early consumer protection work through to his 2008 *Legal Aid Review*, to provide more citizens with a stake in access to justice initiatives.

Despite this bleak state of affairs, the normative rationales for the ideal of access to justice apply with equal force to civil justice settings as to criminal justice. Trebilcock’s work highlights the importance of the rule of law, equality and equitable distribution, the dignity of individuals, and economic prosperity as the normative foundation for access to justice. He notes, for example, World Bank studies that have found that the rule of law accounts for nearly 60 per cent of a state’s intangible wealth, and accessible justice forms an integral part of the rule of law.57 Such

55 For example, while big trials accounted for just 1 per cent of legal aid’s criminal caseload in 2006, they accounted for 24 per cent of its budget.
57 Trebilcock pursues this theme in a recent study of rule of law reforms in the developing world: Michael J. Trebilcock & Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham, UK: Edward Elgar, 2008).
economic analysis, however, is no substitute for a normative rights-based commitment to access to justice. There is a danger that if access to justice is not conceived of as a right, it may lack the normative force to survive the many competing claims on the state’s resources. 58

Legal aid is the subject of a case study in Ron Daniels and Trebilcock’s *Rethinking the Welfare State*. 59 Daniels and Trebilcock consider a range of options for the delivery of legal services, from direct public provision of services to reliance on the market through vouchers. Having examined these models, they conclude that mixed systems such as Ontario’s, featuring both community clinics and vouchers that enable clients to seek out private lawyers, are the most efficient and the most effective. While Ontario’s legal aid system may appear to be a favourable model from a comparative perspective, improving the efficiency and effectiveness of that system represents one of Michael Trebilcock’s signature aspirations.

Trebilcock served as research director for the ambitious rethinking of legal aid in the review chaired by Professor John McCamus in 1997 (the ‘Blueprint Report’). 60 The Blueprint Report emphasized the importance of setting priorities in allocating legal aid resources and the need for a broader range of delivery models for legal services to the poor. For example, one of the report’s recommendations was that LAO should seek to narrow the gap between full representation and no representation by providing a much greater variety of legal services in order to assist a broader range of potential clients, invoking a wide spectrum of delivery mechanisms including public legal education, duty counsel, supervised paralegals, staff offices, community legal clinics, judicare, and block contracting.

In his 2008 *Legal Aid Review*, 61 Trebilcock cautions that the legal aid system cannot be approached in isolation from the broader justice system. Rather, it should be viewed as an integral part of a broader strategy of progressive and incremental reform of the justice system at large. Returning to themes explored in the Blueprint Report, Trebilcock urges that legal aid resources should be expended in ways that facilitate more timely and more effective resolution of disputes. As discussed in

58 Trebilcock indirectly recognized the importance of reaffirming our normative commitment to legal aid and quoted Chief Justice McMurtry in making a rights-based arguments in favour of legal aid: *Legal Aid Review*, supra note 3 at 69.
60 The McCamus Review was published as *Blueprint for Publicly Funded Legal Services*. A summary of recommendations is available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/sumrec.asp>.
61 Trebilcock took over the 2008 review from McCamus, who had been appointed to undertake the follow-up review in 2007, when McCamus was appointed chair of LAO later that year.
Part II above, this approach follows from Trebilcock’s insistence that access to justice be broadly conceived and not seen only as access to adjudication.

At the same time, the 2008 *Legal Aid Review* has a somewhat narrower vision than Trebilcock’s early work on consumer protection. There is less emphasis on the possibilities of *ex ante* political and market reforms that have the potential to diminish disputes. This orientation no doubt reflects the specific topic that the Ontario government assigned to Trebilcock, but it is also consistent with Trebilcock’s increased scepticism about consumer welfare reforms emerging from a political process frequently captured by well-organized producer groups.

**D ATTEMPTS TO INCLUDE THE MIDDLE CLASS IN LEGAL AID**

The legal aid system, overwhelmed with the needs of low-income residents, has become a needs-tested social program with little profile, relevance, or resonance for the middle class. This disengagement leads to a dangerous political vulnerability, as politicians court middle-class voters and middle-class voters increasingly become invested in universal programs such as public health care and education. Trebilcock argues that as fewer people qualify for legal aid, a larger number of people encounter a justice system that is remote, bewildering, and yet entirely dependent on their tax dollars to support. While publicly funded representation for all civil justice litigants in need may be unrealistic, a solution, Trebilcock contends in his 2008 report, is for LAO to address access to justice needs for the middle class – to evolve, in other words, from a needs-based social benefit to a universal program of accessible justice.

Providing universal legal representation for the middle-class individual’s civil litigation needs is neither tenable nor desirable (why should the public subsidize the decision of a particular individual to seek damages from a business partner or neighbour on grounds that may or may not be meritorious?). Trebilcock argues instead for deploying legal aid clinics to provide public legal information, summary advice, and other limited legal services. He concludes that there should be a ‘more integrated system for providing low-cost information and summary advice services to a broader range of citizens than is currently available.’

Tellingly, the recommendation for legal aid clinics to engage the middle class was the aspect of the 2008 *Legal Aid Review* that attracted the most media attention. Since most middle-class citizens will have little direct contact with the criminal justice system, the focus on access

to justice for the middle class focuses on unmet civil justice needs. Trebilcock sees innovations to address the civil justice needs of the middle class as an example of the way in which LAO must be more ‘strategic’ and ‘experimental’ in its approach to service delivery. For example, he suggests that staff duty counsel could be deployed, where feasible, to provide more, and more varied, pre-litigation services, especially in family law. The focus on the middle class in the *Legal Aid Review* in a sense brought Trebilcock full circle to his 1970s work on consumer protection. Both the legal aid and the consumer protection work were motivated by the same concern: that the view of ‘large sections of the community [who] now see the law as an essentially hostile institution – it seems only ever to take things away from them – remains uncomfortably close to the truth.’\(^64\)

At the same time, however, questions can be raised about the realism of Trebilcock’s aspiration to include the middle class in the legal aid system. As he himself notes, the middle class in Canada have not been eager to pay for legal insurance. Moreover, his own public choice analysis suggests that diffuse and unorganized groups such as the middle class will be at a permanent disadvantage in the political process. Finally, there is a possibility that the increased resources required to bring the middle class into legal aid could be better invested in the preventive regulatory measures that Trebilcock was also attracted to in his work on consumer protection in the 1970s. As discussed above, however, Trebilcock’s acceptance of public choice analysis in the 1980s has made him more sceptical about turning to the legislature for answers.

**E BEYOND SILO-BASED LEGAL AID TO HOLISTIC TRIBUNALS AND REGULATION TO PREVENT AND SIMPLIFY DISPUTES**

Building on empirical studies from other jurisdictions, particularly in the United Kingdom, that demonstrate how individuals’ problems often come in clusters, Trebilcock argues that legal services in a silo cannot address the way in which legal problems either cause or are caused by a cascade of other problems (social, medical, financial, etc.). Early intervention with integrated services would reduce costs by pre-empting this cascading effect. Trebilcock recommends a ‘a more holistic or integrated institutional response where individuals with clusters of interrelated problems are not subject to endless referral processes that are tied to particular institutions.’\(^65\) This call for a more holistic approach to the legal problems suffered by individuals is consistent with Trebilcock’s earlier

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64 Trebilcock, ‘Protecting Consumers,’ supra note 6 at 42.
65 Trebilcock, *Legal Aid Review,* supra note 3 at 80.
consumer protection work, which focused on the holistic problems faced by consumers, including the urban poor. As discussed above, however, missing from the *Legal Aid Review* is a full acknowledgement of the potential for *ex ante* regulation to eliminate, or at least simplify, the cluster of problems faced by those who must engage legal services. Some of the clinics, such as Aboriginal Legal Services of Toronto,⁶⁶ that Trebilcock praises for their holistic and integrated approach to cascades of legal problems also take an active role in advocating for more systemic political and legal reforms affecting their clients. They recognize that political reforms could lessen or simplify the cascade of problems encountered by their clients.⁶⁷

IV Conclusions

Trebilcock’s focus on consumer welfare in the context of legal services drives a progressive search for equality of legal representation. While Trebilcock’s focus on additional resources, integrated services, and innovation in how legal services are delivered through the legal aid system is persuasive, his claim that legal aid should appeal more directly to the middle class merits greater reflection.

Does it make more sense to inject resources into a system, such as family law justice, that imposes undue cost, delay, and uncertainty on parties, or to invest those resources in new models of dispute resolution, such as administrative tribunals and commissions, and in preventative services and regulations? Ultimately, access to justice is a matter of political will. Trebilcock observes,

My own tentative impressions are that unlike national defence or police services, most civil justice services can be priced and rationed. On the other hand, there may be major positive externalities from the provision of civil justice, such as providing an avenue for redressing grievances in a socially non-disruptive fashion (i.e., writs rather than rifles), and that a tightly co-ordinated and hierarchical system of civil justice provides some measure of consistency and predictability in decision-making by generating and interpreting legal rules which other parties can rely on as precedents in shaping their own conduct.⁶⁸

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⁶⁶ Ibid. at 107.
⁶⁷ See Aboriginal Legal Services of Toronto, online: <http://www.aboriginallegal.ca/advocacy.php>.
It is not clear why the court system, with all its inherent limitations (courts, for example, have a very limited capacity for providing integrated service remedies), would be preferable to a public system of dispute resolution or political regulation that can diminish and simplify legal disputes. Several other areas of dispute resolution involving parties of limited means have moved from the courts to tribunals (e.g., Ontario’s Landlord and Tenant Board now bills itself as Canada’s highest-volume dispute resolution body, handling somewhere around 70,000 matters annually69) and, where necessary, to tribunals complemented by other administrative bodies capable of undertaking early dispute prevention, public education, and other proactive measures, such as the Ontario Human Rights Tribunal and Ontario Human Rights Commission (complemented by a public legal assistance service for applicants through the Human Rights Legal Support Centre). In addition, no-fault schemes for accidents can move areas of litigation away from the courts and toward legislative and administrative regulation.70

Tribunals offer compelling efficiencies, from limits on procedural delays to adjudicators with specialized skills, the absence of cost shifting, and other disincentives to plaintiffs. As with so many other areas of access to justice, however, a significant barrier to fundamental reform remains the absence of reliable empirical data. We lack a well-justified set of performance benchmarks that could be applied to measure the effectiveness of administrative tribunals versus courts. That said, the ability to target particular policy objectives in the establishment of a tribunal may make this option better suited to specific areas of vulnerability, such as consumer protection and at least some areas of family law.

Movement in this direction, we argue, flows from the logic that Trebilcock has set out and from his understanding of access to justice as much more than access to courts. Trebilcock has approached the problem of civil justice as one of shifting resources within the system and of shifting disputes to alternative dispute resolution such as mediation and arbitration aimed at settlement.71

However, the idea of a specialized tribunal to deal with consumer disputes, family disputes, or other high-volume areas of civil justice may well address the efficiency and access concerns Trebilcock has highlighted while preserving judicial supervision to ensure consistency and

71 Trebilcock, ‘Legal Services,’ supra note 68 at 40.
adherence to overarching legal standards.\textsuperscript{72} Indeed, Trebilcock has recognized the shift toward specialized courts as a positive development.\textsuperscript{73}

There may also be a case for a shift of resources from \textit{ex post} dispute resolution to \textit{ex ante} regulation that has the potential to avoid or simplify disputes. As Trebilcock is fond of quoting, we focus too much of our thought on getting the ambulance to the bottom of the gorge rather than building fences at the cliff to prevent people from falling down.\textsuperscript{74} No-fault accident compensation regimes accompanied by regulation designed to reduce accidents would be a good example of a reform Trebilcock has advocated in other work that could help transform the access to justice agenda.\textsuperscript{75} Trebilcock’s work on consumer protection in the 1970s shows an awareness of the potential for preventive regulation, as well as self-protection remedies, to limit the need for consumers to go through the costly and after-the-fact process of dispute resolution before the ordinary courts, small claims courts, and tribunals. Nevertheless, Trebilcock’s enthusiasm for such legislative measures diminished as, from the early 1980s, he increasingly engaged with public choice analysis, which warned of the difficulty of achieving welfare-maximizing reforms through the political process. Emboldened by increased receptivity to state regulation in light of the recent economic collapse, governments may take the lead again in engaging in regulatory reforms that can advance and re-configure access to justice.

Almost all of Trebilcock’s access to justice scholarship includes a careful survey of existing data, warnings about the inadequacy of those data, and calls for the collection of more data. Such evidence-based research is necessary, especially in evaluating whether reforms have unintended or counterproductive effects. Nevertheless, even the most robust data sets will be subject to competing interpretations. There may be no escaping politics and the need for normative commitments. Trebilcock might respond to our proposals by pointing out that we lack adequate data to justify radical redistribution of resources either within the various venues for dispute resolution or from \textit{ex post} dispute resolution to \textit{ex ante} regulation. He might also warn us about the dangers of engaging with a legislative process that is easily dominated by well-organized interests. These are legitimate points, and there is much that is attractive


\footnotesize{\textsuperscript{73} Trebilcock, ‘Legal Services, supra note 68 at 40.}

\footnotesize{\textsuperscript{74} This reference can be traced to the 1895 poem ‘The Ambulance in the Valley’ by Joseph Malins.}

\footnotesize{\textsuperscript{75} Dewees \textit{et al.}, ‘Accident Law,’ supra note 70.}
in evidence-based policy making based on rational and integrated analysis. Nevertheless, the access to justice agenda may be encountering diminishing returns in achieving innovations and efficiencies in the delivery of legal services and adjudication. It remains unfinished, despite significant gains on contingency fees, class actions, and legal aid and innovation in the delivery of legal services – all innovations that Trebilcock has championed. Sometimes transformative ideas and aspirations have to come before all the data that are necessary for a rational redistribution of resources. It may be time to revisit the idea, found in Trebilcock’s early work on consumer protection, that sometimes access to justice is best served by preventive regulation and redistribution that can avoid disputes.