# The Legal Services Gap: Access to Justice as a Regulatory Issue


## *The Honourable Justice Thomas A. Cromwell* & Siena Anstis***



*The gap between the need for legal services and the ability of people to obtain them continues to grow, and legal aid and other means of making justice more accessible are (by themselves) insufficient to address the issue. This article considers an emerging dimension of the access to justice issue: the intersection between legal services regulation and the legal services gap. The way in which the legal profession is regulated affects how people access legal services, and it is incumbent upon regulatory bodies—as well as the wider legal profession—to prioritize regulatory reform that aims to remedy the access to justice crisis in Canada. This article describes in more detail who is affected by the legal services gap and considers how existing regulatory practices and structures impede access to justice and can be reformed to help close the legal services gap. Rules on who can provide legal services, restrictions on unbundled legal services and pro bono regulation are but some of the issues explored. Access to justice has not been given its due importance as a regulatory issue, and this article is intended as a call to action: Every sector involved in the justice system, in particular regulatory bodies, has to do better if there is to be meaningful improvement in access to justice.*



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# Introduction

It is hardly news that there is a serious access to justice problem in Canada. The civil and family justice system is too complex, slow and expensive. As the report of the Action Committee on Access to Justice in Civil and Family Matters (the Report) puts it, the system "is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve".[1] And do not make the mistake of thinking this is only a problem in the courts. The entire justice system—both inside and outside the courtroom—falls far short of providing access to the knowledge, resources and services that people need to deal effectively with civil and family legal matters.[2]

Of course, there are a host of factors that contribute to this state of affairs. As noted in the Report, there are important structural problems: The civil and family justice system lacks coherent leadership, institutional structures that can design and implement change and appropriate coordination to ensure consistent and cost-effective reforms.[3] There is also a lack of resources. Further, the system is unduly complex—both in terms of the law itself and the processes

1. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) at iii, online: Federation of Law Societies of Canada <www.flsc.ca/wp-content/uploads/2014/10/ACCESSActionCommFinalReport2013.pdf> [Action Committee].

2. See The Honourable Thomas A Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach" (2012) 63 UNBLJ 38 at 39.

3. See Action Committee, *supra* note 1 at iii.

by which it is applied—and does not operate efficiently. Finally, there is a failure to recognize either the importance of the problem or the importance of fixing it, and there is a lack of sufficient public support for the changes that need to happen. In short, access to justice in Canada is a complex, systemic problem.

This article focuses on the legal services gap and how legal services regulation contributes to this gap. The legal services gap describes the large and growing chasm between the need for legal services—broadly understood—and the ability of people to obtain them. While there are, of course, many aspects of access to justice, at the heart of them is meaningful access to legal information, advice and representation. Without that, people cannot know their legal rights, let alone take steps to protect them. Before describing in more detail the legal services gap and how changes to legal services regulation can assist in closing this gap, two important points need to be underlined.

First, the legal profession is not doing nearly enough to tackle this problem and close this gap. Broadening accessibility to legal information, advice and representation should be the number one priority for every governing body of the legal profession in Canada. It is not that nothing is being done: There are many promising signs of improvement. Nor is it that the legal profession is unique in not responding as vigorously as it should to the access to justice challenge. The same claim could be made about all sectors within the justice system. The point is simply that the profession as a whole needs to redouble its efforts to improve access to legal services and to do so with a much greater sense of urgency than shown to date.

Second, there is a legitimate concern that the emphasis being placed on how to address the rising tide of self-represented litigants risks distracting us from the underlying problem of which this is only a symptom. People need legal information, advice and representation to have meaningful access to justice. The problem is not that there are a lot of self-represented litigants in the courts. The problem is that there are a lot of people who are representing themselves because they do not have meaningful access to the legal services that they need. While one should not underestimate the importance or the value of self-help measures to assist unrepresented persons, the pressing need for those measures should not distract from the underlying problem: the large and growing gap in the availability of legal services.

With these broad concerns in mind, the starting point for this article is a statement by Gillian Hadfield, a law and economics professor at the University of Southern California. She maintains that the problem of inadequate access to

legal services is not fundamentally one of poverty, insufficient commitment by lawyers to pro bono work or insufficient government funding. She maintains that, at its root, the problem is one of regulation.[4] Indeed, this article argues that regulatory bodies must reconsider their regulatory work and the goals driving it. In particular, this transformation will require making access to legal services one of the key goals and priorities of regulation and a driver of regulatory change. The regulators may well need legislative change to pursue this agenda. However, the expansion of legal services for the public should be a primary objective and a central outcome of legal services regulatory reform.

This article is divided into two Parts. Part I describes the legal services gap in more detail. It attempts to provide a clearer picture of who falls within this gap and which areas of law regulatory bodies should have at the forefront when considering regulatory reform. Part II considers how existing regulation impedes access to justice by contributing to the legal services gap and looks at some potential regulatory reforms that would assist in closing the legal services gap. The key point of this article is simply that, to close the legal services gap, the objectives and means of regulation of the legal profession will have to be transformed, and all actors need to participate in this process.

# I. Understanding and Defining the Legal Services Gap

Research shows that roughly half of all Canadians will experience a legal problem in any three-year period and that Canadians have trouble accessing legal services.[5] Further, Canadians spend upwards of $7.7 billion a year on

4. See Gillian K Hadfield, "The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law" (2014) 38 (Supplement) Intl Rev L & Econ 43 at 43.

5. See Canada, Department of Justice, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*, by Ab Currie (Ottawa: Department of Justice, 12 May 2009) at 10, online: <www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/index.html> (44.6 % of all respondents reported that they had experienced one or more justiciable problems during the three years prior to the survey). For more recent data, see M Jerry McHale, Nicole Aylwin & Les Jacobs, *Cost of Justice: Weighing the Costs of Fair and Effective Resolution of Legal Problems in Canada* (30 May 2015) at 8, online: Canadian Forum on Civil Justice <cfcj-fcjc.org/sites/default/files//docs/costofjustice_law%26society_final 5 %28May 2015%29.pdf>; Trevor CW Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report*, (Toronto: Canadian Forum on Civil Justice, 2016), at 2, online: <www.cfcj-fcjc.org/sites/default/files/Everyday Legal Problems and the Cost of Justice in Canada - Overview Report.pdf>.

legal services, and unresolved legal problems cost the state an estimated $800 million per year.[6] Many legal services are expensive, but legal aid and other forms of financial assistance with legal problems are limited and leave many, including the middle class, without help. This state of affairs is reflected in Canada's eighteenth place ranking in the *World Justice Project Rule of Law Index, 2015* in terms of the accessibility and affordability of its civil justice system.[7]

While these general figures demonstrate that there is an access to justice problem in Canada and while there has been a significant increase in legal needs research in Canada, more research and data are required if regulatory bodies are to craft a sophisticated, comprehensive plan on how to address the biggest and more urgent areas of need. That said, existing studies show that the legal services gap has many dimensions, including income levels, geography, underserviced areas of law and cultural, linguistic and other barriers to accessing legal services.[8] We will briefly discuss income, geography and underserviced areas of law.

### *A. Income Levels*

The poor and the vulnerable are especially prone to legal problems and often have difficulty accessing the necessary legal services.[9] However, the legal services gap is not only created by poverty. It is also created by a lack of affordable services for individuals in a range of income brackets. As Professor Noel Semple concludes after reviewing numerous sources of data on the cost of justice, "legal fees for civil 'personal plight' disputes are very onerous

6. See Farrow et al, *supra* note 5 at 13, 16.

7. World Justice Project, *World Justice Project Rule of Law Index, 2015* (Washington, DC: World Justice Project, 2015) at 30, online: <worldjusticeproject.org/sites/default/files/roli_2015_0.pdf>.

8. See Action Committee, *supra* note 1 at 14. See also Nova Scotia Barristers' Society, *#TalkJustice* (2015) at 26–28, online: <https://nsbs.org/sites/default/files/ftp/2015_05-19_TalkJusticeReport_final_web.pdf> (where respondents described their experiences of racism and discrimination when interacting with the justice system and when receiving legal representation); CLEO Centre for Research & Innovation, "Don't Smoke, Don't Be Poor, Read Before Signing: Linking Health Literacy and Legal Capability" (Summary report delivered at the Connecting Ottawa Conference, 27 May 2015), online: PLE Learning Exchange <www.plelearningexchange.ca/wp-content/uploads/2015/05/Executive-Summary-health-paper-version-for-Ottawa.pdf>.

9. See Action Committee, *supra* note 1 at 2.

for low- and middle-income Canadians".[10] This is also reflected in Dr. Julie Macfarlane's research on self-represented litigants, which revealed that while 40% of the sample group reported income of under $30,000, around 20% of the sample group reported income of between $50,000 and $75,000, and 12% reported income of between $75,000 and $100,000.[11]

The fact that individuals with a variety of incomes cannot afford legal services is perhaps unsurprising when one considers the data. In 2013, Statistics Canada reported that the median after-tax income of economic families of two or more people was $72,200 and for persons not in an economic family it was $28,200.[12] Further, among lone-parent families, median after-tax income was $41,700 in 2013.[13] Lone-parent families headed by a woman had a median after-tax income of $39,400.[14]

One need only compare these median incomes to the average hourly fees charged by lawyers and the average cost of certain types of retainers to understand how wide the gap is between the cost of legal services and what many people can afford. For example, in 2015, the *Canadian Lawyer* reported that a lawyer called in 2010 in Ontario charges an average of $300 an hour.[15] A contested divorce in Ontario costs an average of $8,747, while a civil action up to trial (two days) averages $47,605.[16]

Legal aid is often considered one of the primary means for ensuring that legal services are affordable and available to the public. However, legal aid while of course crucially important, fills only part of this gap.[17] The income

10. Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Can Bar Rev 639 at 642 [Semple, "Cost of Seeking Justice"].

11. Dr Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants (Final Report)* (2013) at 28–29, online: Law Society of Upper Canada <www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf>.

12. See Statistics Canada, *Canadian Income Survey, 2013* (Ottawa: Statistics Canada, 7 August 2015), online: <www.statcan.gc.ca/daily-quotidien/150708/dq150708b-eng.htm>.

13. *Ibid.*

14. *Ibid.*

15. See Michael McKiernan, "The Going Rate", *Canadian Lawyer* (June 2015) 33 at 35, online: <www.canadianlawyermag.com>.

16. See *ibid* at 37. For a recent criticism of the hourly billing model, see Barreau du Québec, *Hourly Billing: Time for a Rethink* (Montreal: Barreau du Quebec, 2016), online: <https://www.barreau.qc.ca/pdf/publications/2016-summary-report-hourly-billing.pdf>.

17. See Semple, "Cost of Seeking Justice", *supra* note 10 at 648. Semple notes that "[s]tate-funded legal aid for civil matters is typically only available to very low-income people, and only for a

eligibility cut off for access to legal aid shows just how restricted this type of assistance is in practice and contributes to the lack of affordable services for a broad spectrum of Canadians.[18] Typically, legal aid will only be available to those near the bottom of income earners.[19] Thus, legal aid as it stands is not in and of itself sufficient or a comprehensive solution to the legal services gap.

### *B. Geography*

Geography also forms part of the legal services gap. Briefly, rural populations in Canada face a shortage in the number of lawyers available and limitations in terms of the range of models (e.g., mediation, legal clinics and legal information centres) in which legal services are delivered. These obstacles also contribute to the legal services gap and inequalities in the ability of Canadians to equally access legal services.

### *C. Underserviced Areas of Law*

Another dimension of the legal services gap is the fact that some important areas of law are less well-serviced than others, either because they are excluded

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small range of matters." *Ibid.* Legal aid in Ontario is available only to persons who are living "substantially below the poverty line". *Ibid.* See also Jennifer Bond, David Wiseman & Emily Bates, "The Cost of Uncertainty: Navigating the Boundary Between Legal Information and Legal Services in the Access to Justice Sector" (2016) 25:1 J L & Soc Pol'y 1 at 4–5.

18. The gap between income levels, legal aid and the availability of counsel was underlined by Nordheimer J in a recent decision. See Jacques Gallant, "Toronto Judge Halts Charges Against Man Until Government Pays for Lawyer", *The Star* (3 June 2016), online: <www.thestar.com>.

19. See e.g. Legal Aid Ontario, *Duty Counsel and Summary Legal Advice Services Eligibility* (2016), online: <www.legalaid.on.ca/en/getting/eligibility.asp#dutycounsel> (a one-person family likely qualifies if gross family income is less than $21,438 and a two-person family likely qualifies if gross family income is less than $32,131); Legal Aid Ontario, *The Amount of Money You Earn to Qualify for a Certificate* (2016), online: <www.legalaid.on.ca/en/getting/eligibility.asp#amountyouearn> (a one-person family likely qualifies if gross family income is less than $12,863 and a two-person family likely qualifies if gross family income is less than $22,253); Legal Services Society, *Do I Qualify for Legal Representation?* (2016), online: <www.legalaid.bc.ca/legal_aid/doIQualifyRepresentation.php> (a one-person family likely qualifies if net monthly income is less than $1,520 and a two-person family likely qualifies if net monthly income is less than $2,120); Legal Aid Manitoba, *Who Qualifies Financially* (2015), online: <www.legalaid.mb.ca/getting-legal-aid/who-qualifies-financially> (a one-person family likely qualifies if gross family income is less than $23,000 and a two-person family likely qualifies if gross family income is less than $27,000).

from legal aid or because the sorts of legal assistance available in some areas are not available in others. Consider first what we know about the most commonly encountered civil and family legal problems. Without quoting all of the statistics, these problems involve matters such as family, wills and powers of attorney, housing/land, real estate transactions, employment and consumer protection (e.g., product safety or repairs).[20] Many of these legal problems are either not covered at all or only covered to some limited degree by legal aid.

Of course, as mentioned before, legal aid is only one part of a complex web of means by which legal services may be made available in affordable ways. Liability insurance with the right of subrogation and the duty to defend is another method of providing for the legal services needed to address a fairly wide swath of potentially serious legal problems. Title insurance is another. While personal legal expense insurance may be available in some provinces for problems relating to employment and contractual disputes, it is not available for family law litigation, a particularly underserviced area of law, and the popularity of and reliance on such insurance has been limited in Canada unlike in Europe.[21] Contingency fees assist those with meritorious financial claims. Class action procedure permits collective litigation of individually

20. See Ontario Civil Legal Needs Project, *Listening to Ontarians* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010) at 21, online: Law Society of Upper Canada <www.lsuc.on.ca/media/may3110_oclnreport_final.pdf> [Ontario Civil Legal Needs Project]. For more recent data, see Farrow et al, *supra* note 5 at 7–8.

21. See Alison MacPhail, *Report of the Access to Legal Services Working Group* (May 2012) at 12, online: Federation of Law Societies of Canada <flsc.ca/wp-content/uploads/2014/10/services3.pdf> (brief overview of legal expense insurance in Canada); Jeff Gray & Tara Perkins, "Go Ahead, Sue Me – I Have Insurance", *The Globe and Mail* (12 July 2011), online: <www.theglobeandmail.com> (legal expense insurance in Europe attracts roughly $11 billion in premiums a year while Canadians are only buying roughly $11 million to $12 million worth of coverage and primarily in Quebec, where, in 2009, an estimated 225,000 people or eleven percent of Quebeckers had purchased such insurance); Ontario Civil Legal Needs Project, *supra* note 20 at 39 (indeed, in one Ontario survey, sixty-seven percent of participants indicated that they would not be interested in the purchase of legal expense insurance); Canadian Bar Association, Press Release, "DAS Canada Sponsors Canadian Bar Association Access to Justice Initiative" (3 September 2013), online: Canadian Bar Association News & Media <www.cba.org/News-Media/Press-Releases/2013/DAS-Canada-sponsors-Canadian-Bar-Association-Acces>. The Canadian Bar Association is partnering with DAS, which provides legal expense insurance in Canada, to help them extend the scope of their services. See DAS, DAS*Group - Personal* (May 2014), online: <das.ca/Group-amp;-Association-Programs/Products-Services/DAS-em-group-Personal-em.aspx>. It should also be noted that legal expense insurance is only available for a limited scope of legal disputes.

uneconomical claims. There is a host of pro bono services, legal information and help centres, not to mention the resources available online.

However, many of the most common legal problems encountered by Canadians are not caught in this web or, if they are, remain underfunded. Family law, for example, is a markedly underserviced area of law and is perhaps one of the best illustrations of how severe the legal services gap truly is in Canada. An alarmingly high number of self-represented litigants appear in family disputes. In her 2013 report, Dr. Macfarlane reported that figures provided by provincial ministries of justice showed that the proportion of litigants appearing on their own in provincial family court was consistently at or above forty percent and in some cases far higher.[22] This reality provides strong evidence that the existing means of ensuring access to legal services are simply not sufficient.

While we should know much more about the precise dimensions and characteristics of the legal services gap, we can conclude that necessary legal services are for practical purposes unavailable for many people across a broad spectrum of income levels. The challenges are particularly acute in rural and remote areas. And the biggest area of need appears to be in what we might call "everyday" legal problems, particularly, in the areas of consumer, employment and family law. In conclusion, there is indeed a legal services gap and the main target of regulatory reform should be the provision of cost-effective legal services in these areas.

As it stands, and as the above clearly demonstrates, the legal profession is not doing enough to ensure access to legal services. One aspect of this problem, as noted earlier, is the existing regulatory framework within which legal services are managed and delivered. Regulation of the legal profession contributes to the legal services gap. Better and more innovative regulation has the potential to close that gap. The next Part of the article considers in more detail the link between the legal services gap and legal services regulation by exploring how regulation affects access to justice in concrete terms and what changes might help.

22. Macfarlane, *supra* note 11 at 33.

## II. Legal Professional Regulation and Access to Legal Services

Regulatory bodies have a duty to act in a way that furthers access to justice and closes this gap. It is undisputed that the self-governing legal profession in Canada has broad regulatory powers and responsibilities. Traditionally, the focus of the exercise of these powers has been on licensing and discipline. But increasingly, the profession is recognizing the access to justice implications of these regulatory powers and responsibilities.

Some of the governing bodies have an explicit access to justice mandate. The *Law Society Act* in Ontario was amended in 2006 to explicitly provide that the Law Society "shall have regard" to the principle (among others) that the Society has a "duty to act so as to facilitate access to justice for the people of Ontario" in "carrying out its functions, duties and powers under [the] Act".[23] Other statutes implicitly address access to justice. The *Legal Profession Act* in British Columbia states that "[i]t is the object and duty of the society to uphold and protect the public interest in the administration of justice".[24]

An access to justice orientation is also implicit in the obligation shared by all governing bodies to regulate the profession in the public interest. To be blunt, a regulatory approach that unnecessarily impedes or fails to promote access to legal services for a broad segment of our population is not in the public interest. The legal profession also recognizes that facilitating and improving access to justice is an ethical responsibility of lawyers. Most law societies have adopted the commentary on access to justice and pro bono services proposed in the Federation of Law Societies of Canada's *Model Code of Professional Conduct*.[25] Rule 4.1-1 of the *Model Code* provides that a lawyer must make legal services available to the public efficiently and conveniently.[26] Some law societies, such as those in Alberta and Quebec, have also adopted more pointed language in their rules of professional conduct or mandates.

Overall, given the statutory mandate and the professional responsibility in this area, governing bodies have a responsibility to regulate the profession in

23. *Access to Justice Act, 2006*, SO 2006, c 21, s 4.2; *Law Society Act*, RSO 1990, c L 8, s 4.2.

24. SBC 1998, c 9, s 3.

25. Federation of Law Societies of Canada, *Model Code of Professional Conduct*, FLSC, 2016, c 4.1-1, online: <flsc.ca/wp-content/uploads/2014/12/Model-Code-as-amended-march-2016-FINAL.pdf> [*Model Code*].

26. *Ibid.*

ways that will help to narrow the access to legal services gap. Where legislative changes are necessary to better respond to this imperative, the profession should not be slow to request them. Further, it should be recognized that the obligation to enhance accessibility of legal services is a collective as well as an individual responsibility. In particular, fixing the access to justice deficit will require a reconsideration of existing regulations and a reprioritization of what values matter. Further, even where there is the appropriate regulatory framework, it is not necessarily clear that it is being implemented as intended or in a manner to further access to justice. In either rewriting the rules or in reconsidering how existing rules should be implemented, the guiding principle for regulatory bodies should be access to justice and closing the legal services gap—any effort at deregulation or amending current regulation should have this goal as the focus.

One potentially innovative approach involves moving away from a regulatory model that focuses on the prevention of the unauthorized practice of law to one that has as one of its goals the promotion of access to legal services. Such a transformation is currently underway in Nova Scotia, where the Barristers' Society has adopted a new policy framework to govern its regulatory reform. The policy framework adopts as its regulatory objectives not only the protection of those who use legal services but also the promotion of access to legal services and the justice system.[27] One aspect of this strategy involves the introduction of "entity regulation", which would empower a law society to regulate legal entities as a whole and influence practice arrangements and firm culture rather than being limited to the sanctioning of individual lawyers. In Nova Scotia, for example, the new regulatory framework would require legal entities to establish Management Systems for Ethical Legal Practice, which would include requiring the legal entity to demonstrate that it is engaged and committed to working to improve the administration of justice and access to legal services.[28] The three Prairie Provinces are also actively considering this sort of approach and Ontario is seeking input on this kind of reorientation.[29]

27. See Nova Scotia Barristers' Society, *Legal Services Regulation: The Policy Framework* (Nov 2015), online: <nsbs.org/legal-services-regulation-policy-framework>.

28. See Nova Scotia Barristers' Society, *Management Systems for Ethical Legal Practice (MSELP)*, (2014), online: <nsbs.org/management-systems-ethical-legal-practice-mselp>.

29. For example, the Law Society of Upper Canada has been seeking submissions on entity regulation. Law Society of Upper Canada, *Compliance-Based Entity Regulation* (2016), online: <https://www.lsuc.on.ca/better-practices/>. The Law Societies of Alberta, Saskatchewan and

These issues should be pursued with vigour and a sense of urgency guided by the pressing need to ensure that the regulation of the profession is, to the greatest extent possible, narrowing the access to legal services gap, not widening it. Returning to the statement by Professor Hadfield mentioned earlier: Access to justice "is not fundamentally a problem of poverty, of insufficient volunteerism among lawyers or even of insufficient government funding".[30] Rather, it is a problem of "economic regulation", which is created and perpetuated by the profession.[31] The bottom line is that the existing regulatory structures are not designed to further access to justice.[32] With this in mind, the following paragraphs review some of the concrete ways that professional regulation may contribute to the legal services gap and how some innovation in professional regulation has the potential to help close it.[33]

### *A. The Unauthorized Practice of Law*

As is well-known, the regulatory structures that govern the practice of law generally limit the delivery of legal services to licensed professionals. While non-lawyers can provide legal information, only lawyers are traditionally permitted to provide legal advice.[34] While this rule is designed to protect

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Manitoba have also drafted a joint paper on innovating regulation, which includes a section on compliance-based regulation or entity regulation. See Law Society of Alberta, Law Society of Saskatchewan & Law Society of Manitoba, *Innovating Regulation: A Collaboration of the Prairie Law Societies*, (November 2015) at 23–38, online: Law Society of Alberta <www.lawsociety.ab.ca/docs/default-source/innovating-regulation/innovating-regulation-paper_v6.pdf?sfvrsn=2> [*Innovating Regulation*].

30. Hadfield, *supra* note 4 at 43.

31. *Ibid.*

32. Three justifications have been put forward for legal services regulation: the protection of clients, the protection of specific and identifiable third parties, and the preservation of positive externalities created by good legal services, including the rule of law and the administration of justice. See Noel Semple, *Legal Services Regulation at the Crossroads: Justitia's Legions* (Cheltenham, UK: Edward Elgar Publishing, 2015) at 20 [Semple, "At the Crossroads"].

33. See *ibid* at 33–44. Semple succinctly summarizes the four regulatory approaches to legal services: entry rules which limit who can enter the legal profession (e.g., licensing lawyers), conduct assurance rules which require those granted membership to behave in a certain way (e.g., the codes of professional conduct discussed further on in this article), conduct insurance rules which seek to mitigate and repair inevitable damage (e.g., compulsory insurance to practice law), and business structure rules which limit how legal services can be provided (e.g., the rule that bans non-lawyers from owning or managing a law firm).

34. See e.g. *Law Society Act*, *supra* note 23 ("[s]ubject to subsection (5), no person, other than a

the public against unqualified persons purporting to give legal advice, it also contributes to broadening the legal services gap. It lessens competition in the legal marketplace, making it difficult for non-lawyers (such as paralegals or independent non-lawyer service providers) to provide some legal services that are arguably within their competence at a lower cost, except in some highly regulated settings. It may also lead to lawyers performing relatively simple tasks while charging their full hourly fees to do so. Rules respecting the rights of audience in court, which vary considerably from one jurisdiction to another, may also prevent law students who are participating in legal clinics from doing as much as they are competent to do, especially under supervision, to help those who would otherwise be unrepresented.

These considerations give rise to the question of whether allowing non-lawyers to provide legal services would enhance access to justice. Richard Zorza and David Udell, for example, have written that the rule against the unauthorized practice of law is outdated and predates the legal services gap.[35] Professors Alice Woolley and Trevor Farrow argue that there should be a regulated and incremental introduction of new legal service providers into the legal market and provide some guidance on how such a transformation should happen.[36] Indeed, in both Canada and the United States, there seems to be some awareness of this among the legal profession as regulatory bodies have begun to soften this rule or at least enter into discussions about what amendments might be justified in the interest of access to justice.[37]

Without trying to be exhaustive, here are a few examples. One very recent one is found in Ontario, where the Attorney General and the Law Society of Upper Canada announced that the former Chief Justice of the Ontario Court of Justice, the Honourable Annemarie E. Bonkalo, "will lead a review to consider whether a broader range of legal services providers, such as

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licensee whose license is not suspended, shall practise law in Ontario or provide legal services in Ontario" at s 26.1(1)); Bond, Wiseman & Bates, *supra* note 17 (discussing how this rule can affect access to justice programs).

35. Richard Zorza & David Udell, "New Roles for Non-Lawyers to Increase Access to Justice" (2014) 41:4 Fordham Urb LJ 1259 at 1288–289.

36. Alice Woolley & Trevor Farrow, "Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges" (2016) 3:3 Texas A&M L Rev 549.

37. See MacPhail, *supra* note 21 at 10–11. See also the American Bar Association, *A Report on the Future of Legal Services in the United States: Part II. The Delivery of Legal Services in the United States: The Commission's Recommendations* (August 2016), online: <abafuturesreport.com/2016-fls-report-recommendations.pdf>.

paralegals, law clerks and students, should be allowed to handle certain family law matters".[38] In Nova Scotia, the president of the Bar has indicated that the Bar Council is considering policies that would loosen the lawyer monopoly somewhat by permitting specified individuals or groups of non-lawyers to deliver legal services in areas where there is an access to justice need and where there is no risk to the public.[39]

There appears to be no serious dispute that the traditional unauthorized practice of law prohibitions contribute to the access to legal services gap and there are many ideas on how to reduce that effect without endangering the public. There are many promising initiatives and recommendations, but what is needed is more action. Regulatory bodies should closely examine the restrictions on non-lawyers and critically assess whether the present rules prevent forms of service delivery that are in the public interest, particularly in areas in which there is an access to legal services gap and less or different regulation would not put the public at risk.

Blanket rules against the unauthorized practice of law may simply no longer make sense in the face of the legal services gap and the fact that some of the legal assistance required by litigants is straightforward and could be done at a reasonable rate. The Law Society of British Columbia's Legal Services Regulatory Task Force's recommendation of trying a limited relaxation of the unauthorized practice rule specific to legal areas where there is a large and unmet need for legal services might be another good starting point. These efforts should be targeted at enhancing legal services where the gap is the widest.

### *B. Universal Licensure*

A second way in which traditional legal regulation contributes to the legal services gap is the requirement of "universal licensure". Universal licensure is the requirement that all lawyers must meet the same licensing conditions regardless of the type of practice in which they intend to engage. All lawyers—regardless of whether they intend to open a poverty law clinic or work in a

38. Ministry of Attorney General, News Release, "Province Seeking Feedback to Make Family Legal Services More Accessible: Honourable Justice Bonkalo to Lead Family Law Review" (9 February 2016), online: <https://news.ontario.ca/mag/en/2016/02/province-seeking-feedback-to-make-family-legal-services-more-accessible.html>.

39. See Jill Perry, "The President's View", *The Society Record* 33:1 (2015) 5, online: <cdn2.nsbs.org/sites/default/files/cms/publications/society-record/srvol33no1spring2015.pdf>.

large firm in corporate law—must incur the same costs to gain entry into the profession, which include law school, articling, and membership fees. These costs may deter new lawyers from providing poverty law services or even entering the profession at all. This, in turn, affects the price of legal services by reducing variety and supply.[40] It may also lead to lawyers who have qualifications that are unnecessary and perhaps misfocused in order to do the legal work that they will actually do.[41] These costs of entry must get passed on to clients.[42]

This regulatory choice is not inevitable. Other common law jurisdictions license legal services providers who have different occupations, most with their own self-regulating bodies and protected areas of practice.[43] Considering this, one question regulatory bodies in Canada might consider further is whether they should be offering practice-specific licences and adopting a multiple licensing scheme. Multiple licensing schemes could include allowing for complementary professions (e.g., the barrister and solicitor distinction); two-level professions (where lower entry barriers are enacted to allow individuals to do a subset of what a full professional can do); and hybrid multiple licensing (where each group has an exclusive practice, but also has some overlap with other licensed groups).[44]

In addition to fostering competition among the profession, multiple licensing might also help to reduce costs for certain types of law practices, particularly those with an access to justice orientation.[45] For example, a lawyer who is exclusively trained and licensed as a family lawyer could be eligible for lower insurance fees than a lawyer in general practice who poses a greater actuarial risk to the professional insurance fund (one example of this is the discounted insurance fees for lawyers in Ontario who exclusively practice refugee and criminal law).[46] Overall, while there appears to be very limited data on whether multiple licensing actually reduces prices and whether universal

40. See Semple, "At the Crossroads", *supra* note 32 at 36, 147–57; Noel Semple, "Access to Justice: Is Legal Services Regulation Blocking the Path?" (2013) 20:3 Intl J Leg Profession 267 at 268 [Semple, "Blocking the Path"].

41. See Semple, "At the Crossroads", *supra* note 32 at 101–02.

42. *Ibid* at 105, 148–49.

43. *Ibid* at 50–51.

44. *Ibid* at 151–52.

45. See Semple, "Blocking the Path", *supra* note 40 at 4.

46. See LawPRO, *Restricted Area of Practice Option (Criminal and/or Immigration Lawyers)* (2016), online: <https://www.lawpro.ca/insurance/insurance_type/restricted_area_private_practice.asp>.

licensing drives it up, it is certainly an issue deserving of further consideration.[47] In summary, as Professor Noel Semple writes, there are important access to justice arguments that support further exploration of moving away from universal licensure.[48]

### *C. Equal Fees and Mandatory Insurance*

Conceptually related to the universal licensure approach is the traditional regulatory practice of imposing an equal charge on all lawyers for admission into the practice, for law society membership fees, and for continuing professional development courses and requiring the purchase of compulsory insurance at the same price point for all lawyers. These fees could be seen as contributing to the legal services gap in that they fail to distinguish, for example, between lawyers who work in poverty law with non-paying or low-paying clients from those working in more lucrative practice arrangements (of course, lawyers with greater exposure will often buy insurance above and beyond the required amount that a poverty law lawyer would also be required to purchase). While there are some exceptions to this situation, they are quite limited.[49]

Some law societies have already taken measures to exempt lawyers who are practising pro bono from mandatory insurance or to provide discounted insurance. These measures are an important way of encouraging pro bono work. But they do little to encourage lawyers to concentrate on providing cost-effective services in areas of particular need to middle- and low-income clients. It may be that the cost of compulsory insurance could be better indexed to the practice realities of those sorts of lawyers and firms in order to encourage

47. See Semple, "At the Crossroads", *supra* note 32 at 157.

48. *Ibid* at 152–53.

49. For example, LawPRO in Ontario exempts lawyers from getting insurance when they provide pro bono professional services for not-for-profit organizations or through a LawPRO-approved Pro Bono Law Ontario program. See LawPRO, *Pro Bono* (2016), online: <www.lawpro.ca/insurance/Practice_type/Probono_exempt.asp> [LawPRO, *Pro Bono*]. Similar schemes exist in other provinces. The Law Society of British Columbia, for example, provides a complete exemption from compulsory professional liability insurance where a lawyer is "engaged in the practice of law for no fee, gain or reward, whether direct or indirect, from the person[s] for whom the service[s] are provided". Law Society of British Columbia, *Lawyers Insurance Fund* (2016), online: <https://www.lawsociety.bc.ca/page.cfm?cid=203&t=Exemptions>.

practice in areas of great need and lower risk. Part-time fee options are also perhaps worth considering.[50]

In particular, sliding scale insurance and practice fees could be used as a tool to provide greater support to lawyers and firms who are trying to fill the legal services gap and might help to ensure that this type of work can be done sustainably. For example, lawyers that have a demonstrated access to justice mission could receive discounts for fulfilling their continuing professional development courses, getting practice insurance and maintaining their law society memberships. Such discounts would not necessarily require that a lawyer or law firm be practising exclusively pro bono law; rather, they could apply in a broader spectrum of situations than they do right now, namely where a lawyer has a certain percentage of financially-limited clients and is largely providing legal services in underserved areas of law.

*D. Rules Forbidding Non-Lawyers from Firm Ownership and Management*

The traditional approach to legal profession regulation in Canada restricts legal service providers to a limited range of business structures, usually in the form of solo practices and legal partnerships, along with limited liability partnerships and professional corporations.[51] These entities have to be entirely owned and controlled by licensed legal professionals, are generally limited to providing exclusively legal services and are prevented from fee sharing with non-licensees.[52] Quebec, British Columbia and Ontario allow multidisciplinary practices, which allow legal professionals to deliver legal services with non-licensees who deliver ancillary services. However, this is tightly controlled.[53]

50. Note that LawPRO in Ontario offers part-time insurance for lawyers who restrict their practice to 20 hours per week on average and 750 hours per year, and have gross billings of less than $75,000. See LawPRO, *Part-time Practice Option* (2016), online: <https://www.lawpro.ca/insurance/practice_type/part_time_practice.asp>.

51. See David Wiseman, "Access to Justice and Legal Profession Regulation in Canada: To ABS, to Not ABS or to ABS+?" (2015) 18:1 Leg Ethics 78 at 78.

52. *Ibid.*

53. See Law Society of British Columbia, *Law Society Rules 2015*, LSBC, 2015, rr 2-38 to 2-49 [LSBC, *Rules*]; Law Society of Upper Canada, *Rules of Professional Conduct*, LSUC, 2015, r 3.4-16.1 [LSUC, *Rules*]; *Loi sur le Barreau*, RLRQ 2016, c B-1, art 4; *Code des professions*, RLRQ 2016, c C-26, arts 93(*g*)–(*h*), 94(*p*); *Règlement sur l'exercice de la profession d'avocat en société et en multidisciplinarité*, CQLR 2016, c B-1, r 9.

The rules forbidding non-lawyers from firm ownership and management have been cited as undermining access to legal services in at least three ways: they increase the price of capital, impede the emergence of large consumer law firms and potentially preclude access to justice enhancing inter-professional partnerships.[54] In reaction to this, alternative business structures (ABS) have been proposed as a regulatory modification that could potentially have an important impact on access to justice.[55] ABS refers primarily to allowing non-lawyer ownership of some form in law firms, although it can also include novel forms of legal services delivery such as over the internet or offering legal services in conjunction with other professionals offering different services.[56]

The central argument is that ABS will allow legal professionals to provide more efficient and cheaper services.[57] However, some are skeptical that ABS will truly have an impact on access to justice. One concern is that ABS will not create the economic incentive for legal professionals to offer cheaper services or work in underserviced areas.[58] Indeed, while England, Wales and Australia allow ABS, a 2014 paper for the Ontario Trial Lawyers Association by Professor Jasminka Kalajdzic concluded that there is very limited empirical support for the contention that non-lawyer firm ownership has improved access to justice in England or Australia.[59]

There have been significant discussions among law societies in Canada into the merits of ABS and a lively debate has ensued on the possibility of allowing such arrangements. The reports, considering the limited existing research into the access to justice impact of ABS in jurisdictions that allow them, perhaps unsurprisingly, cut both ways. Law societies continue to see a potential value

54. See Semple, "Blocking the Path", *supra* note 40 at 7; Semple, "At the Crossroads", *supra* note 32 at 158. See also Nick Robinson, "When Lawyers Don't Get All the Profits: Non-Lawyer Ownership Access, and Professionalism" (2016) 29:1 Geo J Leg Ethics 1 at 3; Richard Devlin & Ora Morison, "Access to Justice and the Ethics and Politics of Alternative Business Structures" (2012) 91:3 Can Bar Rev 483 at 495–96.

55. See Robinson, *supra* note 54 at 3–4; Gail J Cohen, "Age of the Consumer is Here", *Law Times* (2 May 2016) 5.

56. For a helpful introduction to the topic, see Law Society of Upper Canada, *Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper* (2014) at 9, online: <lsuc.on.ca/uploadedFiles/abs-discussion-paper.pdf>.

57. See Devlin & Morison, *supra* note 54 at 495–96.

58. See Wiseman, *supra* note 51 at 81.

59. See Glenn Kauth, "Study Questions Access to Justice Benefits of ABS" (26 January 2015), *Legal Feeds* (blog), online: <www.canadianlawyermag.com/legalfeeds/2505/study-questions-access-to-justice-benefits-of-abs.html> (a link to the study can be found in the article).

for ABS as improving access to justice, but also continue to express caution and skepticism about its transformative potential.[60] That said, there is some evidence that ABS could help middle-income Canadians have access to a greater range of legal services at more affordable prices. What should be encouraged is framing the ABS debate in terms of its capacity to narrow the access to legal services gap and to have that consideration drive regulatory reform in this area.[61]

One way to use ABS for this purpose would be to carve out an exception for not-for-profit law firms, which could be owned and managed by civil society or non-profit organizations. The idea behind not-for-profit law firms is to provide an organizational model that is better suited to the realities and aims of legal service providers whose work, because of the demographics of their clients and the types of issues addressed, generates little to no revenue. Not-for-profit law firms could provide a way of extending services offered by government-funded legal clinics through private-public partnerships. For example, not-for-profit law firms operating as privately-run legal clinics could be the recipient of blended legal aid and private donation funding.[62] Indeed, in the context of the ABS debate, the Law Society of Upper Canada has recognized the potential merit of not-for-profit law firms and has agreed to continue its work on ABS by considering, among other issues, whether there may be an opportunity to develop an access to justice focused ABS framework to enable civil society organizations, not-for-profit organizations and others to

60. See e.g. Law Society of British Columbia, *Alternative Business Structures in the Legal Profession: Preliminary Discussion and Recommendations* (21 October 2011), online: <www.lawsociety.bc.ca/docs/publications/reports/AlternativeBusinessStructures.pdf>; Law Society of Upper Canada, *Alternative Business Structures* (2014), online: <www.lsuc.on.ca/ABS/>. A number of reports have been issued by the LSUC ABS Working Group. In particular, see the September 2015 report which maps out the way forward for the possibility of introducing ABS in Ontario. See Law Society of Upper Canada, *Report to Convocation* (24 September 2015) at 128, online: <www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf> [LSUC, *Report to Convocation*].

61. LSUC, *Report to Convocation supra* note 60.

62. See West Coast LEAF, *Rise Women's Legal Centre is Open Today!* (24 May 2016), online: <westcoastleaf.org/2016/05/24/rise-womens-legal-centre-open-today/>. Rise Women's Legal Centre, which is operating in Vancouver, is a partnership between University of British Columbia's Peter A. Allard School of Law and West Coast LEAF, a not-for-profit organization. It is an interesting new model of legal services provision specific to family law and intended to fill the gap between those who are eligible for legal aid and those who are ineligible but also have access to no other means of legal representation.

become owners of legal entities in order to facilitate access to legal services.[63] In addition to allowing for non-lawyer management and ownership of such firms, a separate regulatory structure for not-for-profit law firms could help facilitate their work and relieve some of the financial pressures. As Zorza has suggested, with a special exemption in place, one could release not-for-profit law firms from almost all regulation that drives up administrative costs for law firms.[64]

*E. The Scope of Legal Retainers and Unbundled Services*

Regulation which restricts lawyers from providing unbundled legal services is also problematic. Unbundled legal services refers to splitting a legal matter into discrete legal tasks and only being retained on one or more particular aspects of that discrete task. The expanded availability of unbundled services could have an impact on access to justice—a fact that has been observed by some legal aid plans. The Law Society of Upper Canada's Action Group on Access to Justice has a cluster addressing what it is calling "targeted legal services", which is engaging both the profession and the public on how to make effective use of unbundled services. While the potential of unbundled services has been recognized and several law societies in Canada have amended their rules of professional conduct to facilitate the provision of unbundled services, access to such services appears to remain a challenge for most litigants.[65] It is clear that there are issues in actually getting lawyers to offer such services or, where lawyers do offer such services, in ensuring that clients know of their availability and how they work.

63. LSUC, *Report to Convocation*, *supra* note 60 at 111.

64. Richard Zorza, "An Introductory Exploration of Five Broad New Ideas on How to Cut Through the Access to Justice-Commercialization-Deregulation Conundrum" (5 January 2016), *Richard Zorza's Access to Justice Blog* (blog), online: <https://richardzorza.files.wordpress.com/2015/12/abstract.pdf>.

65. For example, in 2011, the Law Society of Upper Canada amended the *Rules of Professional Conduct* to provide guidance for lawyers and paralegals who provide such services. See LSUC, *Rules*, *supra* note 53, rr 3.2-1 to 3.2-1.A.2. The Federation of Law Societies of Canada *Model Code* has also incorporated provisions for "limited scope retainers" with relevant commentary. *Model Code*, *supra* note 25, r 3.2-1A. Following this, other provinces followed suit. For example, in 2013, the British Columbia Law Society adopted the *Model Code* rules on limited retainers: Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, LSBC, 2016, Law Society of BC, r 3.2-1.1.

In addition to more studies on how unbundled services affect the legal services gap in Canada, it would also be helpful to conduct more research on why unbundled services—despite the existing regulatory framework—are not readily accessible to individuals seeking legal services. This could be a problem of lawyers being hesitant to use such models of service delivery because of issues that may arise in litigation (e.g., difficulty getting off record) and the administrative burdens that such retainers necessarily create (e.g., it may simply not be cost-effective to offer unbundled services on a routine basis considering all the work that goes into being retained by a client such as client identification, document preservation, conflict checks, etc.).[66]

This research should be translated into a clear strategy to assist lawyers in offering such services. For example, more training could be offered to lawyers on the benefits of limited scope retainers, the type of liability issues that could arise, how to draft model retainer agreements, and for judges and court staff on how limited scope retainers will affect the progress of litigation through courts. Steps should also be taken to enhance public awareness so that an individual seeking assistance will know what to ask for. Overall, to facilitate this form of legal services delivery, the regulatory change must be supported by educational initiatives to deliver information to lawyers, the judiciary and the public.[67]

### *F. Regulation and Innovation*

Legal services regulation necessarily plays a role in the breadth of innovation in the legal marketplace. As R.W. Campbell writes, the legal regulatory framework dictates the model in which legal services are to be delivered.[68] The converse of this is that modifications to legal services regulation could have an important impact on the profession's ability to innovate. This point is made by Malcolm Mercer, who observes that simple innovation, for example, could involve amending the current regulatory framework to allow existing

66. Note that in providing unbundled services, a written document confirming the scope of the retainer can be required. There are some exceptions to this rule where only "summary advice" is being provided. See Law Society of Upper Canada, "*Unbundling" of Legal Services* (2016), online: <www.lsuc.on.ca/unbundling/>.

67. See e.g. Ontario Civil Legal Needs Project, *supra* note 20 at 56–57; Barreau de Montréal, *A Lawyer's Guide to Limited Scope Representation* (2011), online: <www.barreaudemontreal.qc.ca/loads/Guides/GuideMandatPorteeLimitee_an.pdf>.

68. Ray Worthy Campbell, "Rethinking Regulation and Innovation in the U.S. Legal Services Market" (2012) 9:1 New York UJL & Business 1.

community organizations dedicated to serving the vulnerable and other communities to also provide legal services (which is similar to the not-for-profit law firm proposed earlier).[69] In *Innovating Regulation*, the law societies of Alberta, Saskatchewan and Manitoba have all pressed the point that innovation must remain front and centre in regulatory changes.[70]

The bottom line is that more innovation is needed if the legal services gap is to close. As noted in the Canadian Bar Association's *Reaching Equal Justice Report: An Invitation to Envision and Act*, "[t]he justice system's capacity for innovation is underdeveloped and undernourished."[71] More creative and varied ways of offering legal services, as well as better ways of communicating legal information and advice are necessary. This innovation needs to be driven by law societies and lawyers alike, with substantial input from the general public who are the most affected by innovations (or a lack thereof) in legal services regulation. Technology is a key player in this transformation.[72]

One example of innovation is the development of new ways of funding and structuring legal services in underserviced areas. This type of innovation is exemplified by the Law Society of Manitoba's Family Law Access Centre, which has the goal of bridging the gap between legal aid and those able to afford some legal services. The Centre's services are available to persons who make more than the legal aid cut-off, but who also make under the Centre's designated limits. This means, for example, that a two-person family making less than $45,000 is eligible.[73] The Law Society of Manitoba has a roster of lawyers willing to provide services at reduced rates and in return the Law Society of Manitoba guarantees the payments. The client pays the Law Society of Manitoba in monthly installments in an amount they can afford.

This "brokerage" initiative is now being transitioned to Legal Aid Manitoba through an "agreement to pay" pilot project. Newfoundland and Labrador have recently launched a Family Law Equity Program to help couples with equity

69. Malcolm Mercer, "Innovate or Be Innovated" (10 September 2015), *Malcolm Mercer* (blog), online: <https://malcolmmercer.ca/2015/09/10/innovate-or-be-innovated/>.

70. *Innovating Regulation*, *supra* note 29 at 1.

71. Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act* (2013) at 137, online: <https://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/EqualJusticeFinalReport-eng.pdf >.

72. At the center of a recent Barreau du Québec report on billing practices in the legal industry is the message that lawyers need to better harness technology. Barreau du Québec, *supra* note 16.

73. See Law Society of Manitoba, *Family Law Access Centre* (2016), online: <www.lawsociety.mb.ca/for-the-public/family-law-access-centre/>.

in their house be able to obtain affordable legal services. As Richard Devlin remarks, these types of initiatives are illustrative of a "recalibration of the regulatory responsibilities of law societies", with law societies and others acting as intermediaries in the access to justice project.[74] More innovative projects like this—which target underserviced areas of the law, provide assistance to people who fall outside the reach of legal aid and encourage lawyers to provide reduced rate services—are necessary if the legal services gap is to close.

*G. Pro Bono and Regulation*

There is an ongoing debate about whether lawyers should be required to perform a certain number of hours of pro bono work. For example, the Canadian Bar Association has suggested that lawyers strive to contribute fifty hours or three percent of their billings per year on a pro bono basis.[75] There has, however, been resistance to the imposition of mandatory pro bono. Law societies, while not imposing mandatory pro bono, have taken certain regulatory measures to facilitate pro bono work by lawyers. For example, as mentioned earlier, LawPRO in Ontario offers certain insurance exemptions for lawyers offering pro bono services.[76] The Law Society of Upper Canada makes certain exceptions for lawyers providing pro bono summary legal advice from the usual conflict of interest rules.[77] The *Rules of the Law Society of Alberta* provide exemptions from payment of the Assurance Fund levy and/or the trust safety insurance assessment where an applicant seeks reinstatement to active status and provides an undertaking that he or she is providing exclusively pro bono services.[78] The British Columbia *Law Society Rules* states that non-practising and retired members can perform pro bono legal services and provides for an insurance exemption.[79] The Law Society of British Columbia also collects one percent of fees from licensees to fund pro bono legal services

74. Richard Devlin, "Bend or Break: Enhancing the Responsibilities of Law Societies to Promote Access to Justice" (2015) 38:1 Man LJ 119 at 153.

75. See Ontario Bar Association, *About*, online: <https://www.oba.org/ProBono/About> (for more information on this resolution).

76. LawPRO, *Pro Bono*, *supra* note 49.

77. LSUC, *Rules*, *supra* note 53 at r 3.4-16.2.

78. Law Society of Alberta, *The Rules of the Law Society of Alberta*, LSA, 2016, r 115(2.1).

79. LSBC, *Rules*, *supra* note 53 at r 2-4(2).

in the province.[80] Many law firms, as well as law schools, also have pro bono initiatives. These are just some examples.

Having said this, while there is clearly a rich tradition of pro bono in the legal profession, there is no doubt that voluntary pro bono cannot bridge the access to legal services gap.[81] If pro bono is to play a more central role, a first step may be for law societies to consider regulating lawyers' pro bono requirements in more explicit terms rather than just providing general guidelines on what lawyers should aim for in terms of providing pro bono services.

# Conclusion

Access to legal services is not being given the priority that it ought to have as a legal profession regulatory issue. The legal services gap is a major element of our serious and urgent problem of access to justice. Of course, the governing bodies are not the only entities that have responsibility and authority in relation to matters that affect access to legal services. Nor are they uniquely responsible for the costs of legal services. However, the professional governing bodies have a leading role to play in ensuring appropriate access to legal services: they have wide regulatory powers, the ability to engage with government to make required changes, the capacity to set norms of professional responsibility and a public interest mandate.

Briefly, giving priority to legal services would mean the following:

- **Every aspect of a governing body's regulatory framework would be critically examined from an access to legal services perspective.** It is encouraging to see the President of the Nova Scotia Barristers' Society writing that access to justice priorities are at the root of the thorough regulatory overhaul being undertaken in that province.[82] It is also heartening to read the President of the Federation of Law Societies, Jeff Hirsch, being quoted as saying that access to

80. See Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* (29 September 2014) at 19, online: <flsc.ca/wp-content/uploads/2014/10/services6.pdf>.

81. See Semple, "At the Crossroads", *supra* note 32 at 283.

82. See Jill Perry, "Access-to-Justice Priorities at the Root of Regulatory Overhaul", *The Society Record* 33:2 (2015) at 5, online: Nova Scotia Barristers' Society <cdn2.nsbs.org/sites/default/files/cms/publications/society-record/nsbssrvol33no1fall2015.pdf>.

affordable legal services is perhaps the most pressing issue facing the industry today.[83]

- **Governing bodies would have a sophisticated, evidence-based understanding of where the gaps are in the present array of available legal services.** The many studies of legal needs in Canada will help guide that understanding, but more targeted and action-oriented research as well as broader public consultation may well be required. A comprehensive knowledge of the diverse types of legal information and assistance currently available would also be necessary in order to define the gaps in access to legal services with as much precision as possible. What is needed is reliable and specific evidence about the nature and scope of the problem.

- **Governing bodies would develop and share benchmarks and priorities to guide action.** This would require asking the key questions: for example, who are the least well-served and what measures will help the most people at the lowest cost? Human energy and money are both limited. As a result, reform measures need to be carefully targeted and their likely impact assessed and, if implemented, evaluated.

- **Governing bodies would adopt accountable, bold and sustained action to address the legal services gap.** This means that every governing body should have a five-year plan in relation to how it is going to improve access to legal services, with measurable goals publicly stated.

A senior business leader once recounted her mentor's favourite adage of leadership: "The most important thing is to make sure that the most important thing is the most important thing." This adage should be adopted by the governing bodies of the legal profession. And—hopefully this need only be asked rhetorically—what could be more important to the legal profession than doing what it can to ensure that the public has access to the legal information and services that members of the public reasonably require?

83. See Geoff Kirbyson, "Hirsch Focusing on Access to Legal Services", *The Lawyers Weekly* (26 February 2016) at 27, online: <law.ucalgary.ca/files/law/feb-26-2016_lawyers-weekly_lisa-silver-pg-26-27.pdf>.

There are many dedicated lawyers going far beyond the call of duty to do what they can to improve access to justice.[84] As even the brief overview in this article attests, many governing bodies are also taking action on many fronts. However, major stumbling blocks to significant change are the failure to recognize that this aspect of regulation is squarely within the purview of the governing bodies and how urgently it is needed.[85]

This article is intended not as criticism, but as a call to action. Every sector involved in the justice system is going to have to do better if there is to be meaningful improvement in access to justice. Within the legal profession there is the commitment, the energy and the imagination to make legal services much more widely accessible. Doing so should become a top priority.

84. See e.g. Canadian Bar Association, *Do Law Differently: Futures for Young Lawyers* (2016), online: <https://www.cba.org/CBA-Legal-Futures-Initiative/Reports/Do-Law-Differently-Futures-For-Young-Lawyers>.

85. See generally John P Kotter, "Leading Change: Why Transformation Efforts Fail", *Harvard Business Review* (January 2007) at 1, online: <https://hbr.org/2007/01/leading-change-why-transformation-efforts-fail>.