Justice for All: Ontario’s Civil Access to Justice System

by

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Abstract

This paper argues for increased access to civil justice in Ontario for citizens who cannot privately afford it (“needy citizens,” defined as those unable to engage in meaningful civil legal action due to financial inability). Access to justice is defined as access to trained legal representation as well as access to knowledge about Ontario civil law. The paper first articulates the theoretical underpinnings necessitating access to justice for all citizens. The paper then explores 5 common areas of Ontarian civil law (tort, residential, family, small business, and standard contract law) regarding access to civil justice within these regimes, and discusses 3 potential ways to remedy Ontario’s civil access to justice gap. These reforms are increasing government funding, an increase in activity by the legal profession of Ontario, and finally limited deregulation of Ontario’s law licensing process. The first two reforms are rejected, while the third is recommended.
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# Table of Contents

**INTRODUCTION** ................................................................................................................................. 1

**THE NECESSITY OF ENSURING ACCESS TO CIVIL JUSTICE** ......................................................... 4

**TORT LAW** ............................................................................................................................................... 10

**RESIDENTIAL LAW** ............................................................................................................................. 16

**PRIVATE FAMILY LAW** ......................................................................................................................... 23

**ENSURING CIVIL JUSTICE ACCESSIBILITY FOR SMALL BUSINESS** ................................................ 27

**CONTRACT LAW** .................................................................................................................................... 31

**THE NEED FOR POTENTIAL SOLUTIONS** ............................................................................................. 36

**THE FIRST POTENTIAL SOLUTION: GOVERNMENT EXPENDITURE** ................................................. 36

**THE SECOND POTENTIAL SOLUTION: AN INCREASE IN ACTIVITY BY THE BAR** ............................. 42

**THE THIRD POTENTIAL SOLUTION: DeregULATION** ........................................................................... 46

**CONCLUSION** .......................................................................................................................................... 50

**BIBLIOGRAPHY** ...................................................................................................................................... 51
Introduction

Access to justice for all citizens is vital to the successful operation of any justice system. In Ontario, the access to civil justice systems available to an average citizen is unduly restricted. Of the 38 176 refusals of legal aid applications in Ontario in 2009-2010, 59 percent were due to “financial ineligibility,” and that does not count “those who are denied services through pre-screening measures.”\(^1\) The duty of the government to ensure that all citizens have recourse to civil justice systems is not being met. This is a result of several factors, most importantly the lack of funds to procure trained legal assistance. This problem was addressed by Supreme Court of Canada Justice Ian Binnie when he wrote “protracted litigation has become the sport of kings in the sense that only kings or equivalent can afford it.”\(^2\) The cost of civil legal counsel represents a burden many citizens cannot afford. Self-representation by an average citizen generates inefficient and unjust results; however, legal fees are only one of the barriers to justice.

Ontario’s systems and resources vary across the province, based on factors such as urban or rural centres, administrative allocation, and resource availability. However, while civil justice systems in Ontario represent diversity in structure and jurisdiction, the average Ontarian represents a unifying thread to all civil systems. The average citizen requires access to the remedies which Ontario’s civil law provides. As such I will not be defining need using a monetary amount, but as the inability to engage in meaningful civil legal action due to financial constraints (this allows some mutability in the concept of financial need depending on the nature of the legal assistance required). The goal of ensuring that all Ontarians have substantial access to the civil laws of the province cuts across all demographic boundaries: while service availability varies by location, the animating spirit of equality before the law is a constant.

I will first illustrate how ensuring all citizens can access civil law resources is desirable as a means of ensuring equality under the law, the proper administration of justice and the efficient allocation of

resources in society. I will then discuss access to justice issues as they relate to Ontario’s tort, residential, familial (including the legal area of “wills and estates”), areas of contract law frequently encountered by the average citizen (such as major goods and services purchases, consumer protection issues and employment law), and small business legal regimes. These areas of law were not chosen as an exhaustive enumeration of all civil justice in Ontario, but as central illustrations of current problems in obtaining access to civil justice in Ontario. All these areas meet Scherer’s criteria for “civil proceedings involving important rights and interests,” namely “complex litigation, extraordinarily important individual interests, and a cost-benefit balance that militates in favor of assuring adequate procedures (i.e., a right to counsel) to protect the individual interests at stake.” These legal domains also share common issues:

When we consider personal injury litigation, consumer disputes or debt cases we are dealing with dissimilar subject matter but within a common framework—that of disputes about compensation for injuries, breach of contract, negligent performance of obligations, etc. In each of these cases the dispute will come to court as a result of a difference of view about a factual situation where the law and the courts offer a remedy…In most cases the claimant wants money to compensate for their loss. The defendant will not or cannot pay the compensation. Will not—because he genuinely believes he has done nothing wrong—or cannot because he is impecunious. The coercive power of the court is mobilised by the claimant in his right to a remedy and underlines the social function of the court in that it is prepared to hear and decide the claim.

Accordingly, these civil systems are areas where the public and government have an interest in justice being done, without actually being parties to the legal dispute.

Although this paper’s sole focus is Ontario, other common law jurisdictions throughout the world have wrestled with the balance between an accessible private law system and scarce resources. Where other jurisdictions have important precedents or innovations, I have included them in my analysis. Other common law jurisdictions across the world have studied equality in their civil justice systems, such as Great Britain, Australia, and the United States of America, notably the conservative jurisdiction of

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4 Ibid.
Texas. The findings of these jurisdictions can serve as guiding precedents for Ontario, especially so in that they have documented the benefits of an accessible civil justice apparatus.

Having identified the need for enhanced accessibility in the above stated areas of private law, I will proceed to suggest and evaluate three groups of possible reforms to improve access to these civil systems for the average Ontarian. While access to justice is most narrowly framed in availability of trained legal counsel, I will explore not only access to attorneys as litigation and negotiation resources, but also reforms aiming to improve the general public’s knowledge of private law in Ontario. As the Australian Attorney General’s Department stated, “[a]ccess to justice is not only about accessing institutions to enforce rights or resolve disputes but also about having the means to improve ‘everyday justice’; the justice quality of people’s social, civic and economic relations…providing the appropriate forum for each dispute, but also facilitating a culture in which fewer disputes need to be resolved.”

This paper discusses three groups of proposed reforms: an increase in government funding, either directly to needy citizens or to programs designed to address unmet access to the civil legal system, a self-stimulated increase in activity by the legal profession, and thirdly, a change in the way legal service provision is licenced in Ontario. These three reform proposals were chosen on criteria of cost efficiency, an ability to meet Ontario’s goal of ensuring that all citizens have access to the civil justice system, and


7 The Legal Services Corporation’s Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans (2d ed.) at <http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf>, as well as Andrew Scherer’s works, one of which is cited supra.


9 Australian Attorney General’s Department Report, supra note 6 at 4.
the pre-existence of an academic dialogue on the topic, so that past analysis guides this current examination. The central tension of the discussed reforms lies between the need for a private good (trained legal assistance) to be easily and cheaply available to the public and yet not over-consumed. However, this problem does not detract from this paper’s conclusion that “to give full meaning to the promise of equal justice under the law, we as a society will need to move toward a judicial system that enables people, regardless of their lack of income or assets, to obtain the assistance of counsel for matters for which a reasonable person, with means to hire counsel, would use counsel.”

The Necessity of Ensuring Access to Civil Justice

Ontario has a vested interest in the material wellbeing of its residents. Sometimes, civil law actions deal with more basic protected personal security rights, such as the need for shelter, physical care after a tort, or the private ordering of the individual free from interference. The need for private law, articulated by Lord Diplock, is clear: “[e]very civilised system of government requires that the state should make available to its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access.” Most often in civil law, a private entity will face an adverse side that is another private entity. An individual, and only an individual, stands to directly gain or lose on the outcome of a civil law issue. But equal access to civil counsel also confers a good on the public sphere. As Hazel Genn writes,

The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly reaffirm norms and behavioural standards for private citizens, businesses and public bodies.

David Luban expands on this reasoning:

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10 Scherer, supra note 3, 701 at n. 7.
11 Though protection of personal property does not rise to a constitutional right, see Canadian Bill of Rights, SC 1960, c. 44 section 1(a) for a pre-Charter of Rights and Freedoms attempt to safeguard private resources.
Because [parties] are not [forced to litigate], there is nothing wrong with using their resort to the courts as an occasion for improving the law…the litigants serve as nerve endings registering the aches and pains of the body politic, which the court attempts to treat by refining the law. Using litigants as stimuli for refining the law is a legitimate public interest in the literal sense of the term: the public is interested in learning the practical implications of past political choices and the values they embody. The law is a self-portrait of our politics, and adjudication is at once the interpretation and the refinement of the portrait.  

Every system needs to reach those it attempts to oversee: as Chief Justice of Canada Beverley McLachlin stated in a public speech, “[t]he most advanced justice system in the world is a failure if it does not provide justice to those it was meant to serve.” The needs of average citizens for assistance in addressing civil law systems, and therefore the potential public gain from the meeting of these needs, is made apparent by a passage from a recent report on civil access to justice commissioned by the Ontario Bar Association, entitled Listening to Ontarians. That research found that “[c]ivil legal needs arise frequently in the lives of low and middle-income Ontarians. Our research shows that civil legal needs touch upon fundamental issues and life circumstances, and unresolved civil legal problems often create great personal hardship. Our research also demonstrates that there is an important connection between access to justice issues and broader issues of health, social welfare and economic well-being.” Equal access to civil justice helps alleviate these hardships: it also increases efficiency in societal interaction by discouraging tortious or other actionable behaviour, it facilitates the administration of justice throughout society so that all laws can give recourse if breached, and most importantly it affirms the principle that litigant wealth is irrelevant to the application of the law. In addition to these relatively unquantifiable benefits of granting access to needy civil litigants, there are economic benefits: “[a] study on legal aid in Texas showed that investment in legal aid services led to economic growth in the community by increasing jobs, reducing work days missed due to legal problems, creating more stable housing, resolving debt issues and stimulating business activity. In fact, ‘[f]or every direct dollar expended in the state for

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indigent civil legal services [legal services for low-income people], the overall annual gains to the economy are found to be $7.42 in total spending, $3.56 in output (gross product), and $2.20 in personal income.\textsuperscript{17} Civil legal aid saves money: “short-changing legal aid is a false economy since the costs of unresolved problems are shifted to other government departments in terms of more spending on social and health services, the cost of caring for children in state custody, and so on.”\textsuperscript{18} However, the false economy allows the government to fund other, more politically viable, options, and the false economy does not appear to have been successfully recognized, with the result that “[f]or many Canadians, legal services are unavailable. Legal aid is granted only in highly limited circumstances, both in terms of the nature of the legal problems which it will fund and in terms of the low income needed to qualify. The time of a lawyer may be needed by many individuals but may be unaffordable.”\textsuperscript{19}

Comprehensive access to trained civil legal assistance also allows the courts to be fully impartial, ignoring the status of the litigants or the imbalances in their expertise. In the current situation, that is not always the case. Beverley McLachlin states: “[a]n unrepresented litigant may not know how to present his or her case. Putting the facts and the law before the court may be an insurmountable hurdle. The trial judge may try to assist, but this raises the possibility that the judge may be seen as ‘helping’, or partial to, one of the parties. The proceedings adjourn or stretch out, adding to the public cost of running the court.”\textsuperscript{20}

The benefits of all members of society gaining assistance in understanding Ontario’s civil law, and when necessary equal access to trained legal representation to assist in pursuing or defending a civil action, will enrich many areas of Ontarian society. In particular, the benefits will extend to many

\textsuperscript{17} The Perryman Group’s findings, supra note 8, here quoted in Leonard T. Doust, Q.C., Foundation For Change: Report of the Public Commission on Legal Aid in British Columbia (March 2011), online: <http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf> at 28.

\textsuperscript{18} Ibid. at 28.


\textsuperscript{20} Remarks of the Right Honourable Beverley McLachlin, P.C., supra note 15.
individuals in society, who, if they have access to civil law procedures, will increase the number of people willing to resort to civil law procedures, expanding the scope of legislation. The remedies would therefore not be limited only to the parties directly concerned with any given private action. Currie reports that “justiciable problems that are difficult to resolve are a common feature of the lives of low and moderate income Canadians. Almost half of all Canadians surveyed experienced at least one such problem over the three-year reference period [of the study]. Experiencing multiple problems is relatively common. Fourteen per cent of all respondents experienced three or more types of problems…Many of the problems experienced by respondents were the types that could threaten the security and well being of individuals and their families.” Currie’s finding is made more troubling by statistics cited by Hadfield: “[i]f the stakes are non-monetary---as they are in many cases involving individuals---legal process must either be foregone or paid for with whatever wealth the individual has. In Canada, the average individual who has contact with a lawyer has one instance of contact; approximately 1/3 never have contact with a lawyer. A 1994 ABA survey found that 61% of moderate income respondents with legal problems had no interaction with the justice system.”

This absence of access to civil justice for the needy represents future costs and drains on efficient social interaction. Marvy and Gardner state that “[w]ithout available legal assistance, laws that protect such basic needs as family integrity, shelter, medical care, food, and employment have become effectively meaningless for many people.” Since all of these subjects will have both an impact on societal efficiency and public expenditure, the timely enforcement of laws will ensure that future social costs will be avoided.

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Ensuring access to civil justice also confers a psychological benefit. A British study found that “[t]he symbolic value of the courts, irrespective of any immediate concerns of the public about access and cost, is clearly demonstrated by the three-quarters of respondents who agreed or strongly agreed with the statement ‘Courts are an important way for ordinary people to enforce their rights.’”\(^\text{24}\) *Listening to Ontarians* reported troubling perceptions: “[w]hen considering access to justice and legal services and costs, most of those surveyed indicated that they believed ‘the legal system works better for rich people than for poor people’ (79 per cent), and respondents were almost evenly split in deciding whether ‘a middle-income earner can afford to hire a lawyer if he or she needs one’ (49 per cent agreed and 46 per cent disagreed).”\(^\text{25}\) If almost four-fifths of society believes that the wealthy will prevail in legal action, respect for the legal system disappears. However, access to civil justice for Ontarians unable to personally finance such access combats the perception that justice is bought with money. A system that demonstrably provides equal access to civil justice would embody the fair and equal administration of justice.

Access to civil justice initiatives are important in part because increasing accessibility by treating parties differently on an *ad hoc* basis is unsustainable. As the British Columbia Supreme Court noted, “[a] judge will most assuredly apply an even hand in dealing with the parties. He or she will provide guidance to a self-represented litigant on how trials take place and on what types of evidence may be led. He or she will determine the case before them on the basis of the evidence presented. To this extent the trial is ‘fair’, but this is a much restricted view of what substantive or meaningful access to the courts entails.”\(^\text{26}\) The idea that the presentations of the litigants will not be of equal quality due to financial constraints cannot be acknowledged or remedied by the Court structure without violating the principles of impartiality and the dictum that every litigant must be the ultimate arbiter of how his or her case is presented. The ability to


\(^\text{25}\) *Listening to Ontarians*, supra note 16 at 19.

present a case effectively through counsel is undoubtedly possessed by the affluent, but not necessarily by unrepresented or underrepresented clients. There is a clear affirmation of this reality in criminal law, but civil law is treated with a different standard: “although lay litigants are no better able to navigate the legal system in civil cases than in criminal ones, the simple logic of *Gideon v. Wainwright*, has yet to be applied in the civil arena. In *Gideon*, the U.S. Supreme Court required that counsel be appointed for criminal defendants because ‘the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.’” *Gideon*’s underlying premise, that trained legal representation is inherent in equality before the law, should be applied to civil litigation as well.

Equality before the law remains a vital ingredient for many philosophies of law. A relatively uncontroversial aim, *de facto* legal equality will be realized with an effective civil justice system that is accessible to average citizens. In this vein, access to justice is defined by Ghai and Cottrell as “the ability to approach and influence decisions of those organs which exercise the authority of the state to make laws and to adjudicate on rights and obligations.” As such, access to justice is not formulaic.

Society’s duty is to ensure protection of the law is available. Millemann argues this forcefully:

> It should be the duty of government---the people collectively---to provide legal services to the poor. In significant part, government exists to make and enforce laws. This basic duty derives from, and is as old as, the Social Compact. Laws usually are not self-enforcing; lawyers play a significant role in enforcing them. Government should accept and discharge the primary duty to provide lawyers to the poor so that the laws that it enacts to protect the poor are enforced. The civil law enforcement obligation inheres in the law-giving function.”

Martín Abregú provides historical-philosophical background: “[b]eginning with Hobbes’ justification of the state in his *Leviathan*, but also considering other liberal explanations-not to mention any of the other much more interventionist modern theories-the notion of a ‘legal’ state has always

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27 372 U.S. 335 (1963)
included the principle that there has to be a fair way to solve disputes regardless of the qualities of those involved in the confrontation.”  

Without the ability to enforce its laws for the benefit of all of its citizens, the justification for State hegemony is weakened and there is little incentive for all people to submit to the law. As Justice Cory wrote, “[a] system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.”  

Insofar as access to justice and the ability to effectively present one’s case are subsumed into fairness, the above statement identifies access to justice as an underpinning of the rule of law in Canada. Cummings identifies another facet of legal action: “[l]itigation is a key strategy for protecting the rights and enlarging the power of subordinated groups, particularly when other channels of influence are unavailable. Groups hobbled by discrimination or collective action problems may turn to courts as allies in the struggle for social justice.”  

If disadvantaged groups cannot access civil justice, the system is tacitly assisting in the subordination of groups which might benefit under application of the law.

Tort Law

Legal advice and representation for tort law matters, for both plaintiffs and defendants, is not accessible to the average citizen in Ontario. The factors that contribute to this lack of accessibility, such as the time and cost of tort litigation, the dependency on lawyers, and finally the justified complexity of Ontario’s civil law to a non-professional, are not unique to tort law. However, potential for large amounts of money to change hands coupled with the social necessity that individuals who have suffered a tort (often a personal injury) receive compensation makes assistance for tort law claims especially compelling.

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From the other side of the matter, individuals sued in tort face liability significant enough to warrant intervening to allow them to provide a sufficient defence so as to prevent a potentially unjust result. The magnitude of the tort law system is large—there were approximately 57,741 tort cases active in Ontario in 2005-2006,\footnote{Statistics Canada. “Civil Court Survey Statistics, 2008-2009, Table 3” (March 22, 2010), online: Slaw (Legal Blog), <http://www.slaw.ca/wp-content/uploads/2010/03/Civil-Court-Survey-Statistics-2005-2006-to-2008-2009.pdf>.} which suggests that the annual number of potential tort actions in Ontario is in the hundreds of thousands.

It is not uncommon for tort claims to drag on for many years after the delict, nor for them to require resources to retain expert analysis and testimony, funds to compensate for the immediate loss that the tort has occasioned, and court and legal fees. The time and cost of tort actions in Ontario have a chilling effect on access to justice for those who have suffered a tort. An analogy to the American tort statistics, while not determinative, is instructive for the dangers of ballooning tort litigation costs: “[t]he cost to the eight families portrayed in the bestseller A Civil Action for their tort suit against a manufacturing company accused of dumping hazardous chemicals into the water supply was $4.8 million (paid from a settlement of about $8 million); the cost for the defense exceeded $7 million.”\footnote{Hadfield, supra note 22 at 953.} Hadfield continues, in the Canadian context, “legal fees for a Canadian judge successfully suing a satirical magazine for $75,000 in damages were $20,000; the magazine’s fees $40,000.”\footnote{Ibid., at 954.} In addition to the interests of minimizing governmental expenditure to a wronged plaintiff which could be more efficiently borne by the tortfeasor, and the protection of the injured party’s property (the cause of action), the correct application of tort law deters tortious action and specious claims. From some philosophical standpoints, the need of those facing significant detriment from a lack of access to the tort system should compel governmental action to protect the welfare of citizens: “[i]f the litigant’s ‘interest’ in the underlying claim in a civil lawsuit is a significant and protected property or liberty interest, if the government’s disinterest in providing legal help

\[\text{\footnotesize 35 Hadfield, supra note 22 at 953.}
\[\text{\footnotesize 36 Ibid., at 954.}\]
(a lawyer, paralegal, or trained advocate) is comparatively insignificant, and if the risk of error from uncounseled representation is substantial, government should be obligated constitutionally to provide the litigant with appropriate legal help.”37 The government will be validating both efficiency and justice critiques of the current system by assisting needy plaintiffs and defendants in tort law.

For defendants who cannot afford and cannot otherwise obtain counsel (through, for instance, automobile insurance), the inability to afford counsel results, in the vast majority of cases, in the inability to defend a tort claim, and certainly (keeping in mind the comments of Justice McLachlin above) a disadvantage in litigation. For plaintiffs, the situation offers some hope, in the form of contingency agreements (a contract whereby a lawyer is solely compensated by a percentage of the damages award or settlement amount received by the plaintiff). While contingency fee agreements, which have been legal since 2004 in Ontario,38 have enlarged the number of prospective plaintiffs able to be represented, people who have suffered a tort but are not members of a “class” (under the Class Proceedings Act) and cannot afford legal representation without a contingency agreement are still in a precarious position. There is no independent system to ensure that both people who have suffered a tort, or alleged tortfeasors have legal recourse even if they do not have the means to continue the action. Our system thus has the potential for people to fall through the cracks of the civil law system, repudiating the dictum of ubi ius, ibi remedium.

Trautner underlines the central problem with contingency fee agreements as the only way of ensuring tort representation: “[c]ontrary to popular public opinion, personal injury lawyers are highly selective about the cases they pursue, often accepting only a small percentage of cases with which they are presented. And while individuals who have suffered a compensable injury do occasionally pursue cases on their own with success, lawyers are generally thought to be a necessary, but not sufficient, condition for obtaining compensation through the civil justice system. In this way, plaintiffs’ lawyers act as gatekeepers

37 Millemann, supra note 30 at 55.
to justice.” These gatekeepers have the ability to deny access to civil justice, as well as enable it. One fundamental problem with allowing contingency fees to replace any other type of access to justice for the impecunious is that the hard-to-win cases may be ignored in favour of “better” cases. Lawyers, as profit-driven entities, will choose clients based on financial viability, ignoring other principles of access to justice: “[i]f the stakes are monetary, the legal process is not worth the expense unless potential awards --- and the resources available for an award --- can cover these extraordinary costs.”

There is nothing inherently wrong with lawyers operating on monetary concerns: after all, the legal profession is ultimately a business, and if a client cannot afford the lawyer’s services and has only a small chance of succeeding in their action, the lawyer risks financial harm by proceeding with the representation. However, the need of the person denied access is no less real because lawyers are financially justified in refusing to help them. Contingency fees are also subject to another criticism. While damages awards in Canada are designed to (excepting punitive damages) compensate, awards which remove a portion of that compensation will leave the successful plaintiff with less money than is perhaps needed for medical or personal care. Since these awards are not a windfall and are not inflated to take into account the lawyer’s fee, contingency awards may remove over a quarter of necessary compensation to a plaintiff. The current tort law system thus aids needy plaintiffs, but at the cost of potentially hamstringing their recovery or future care costs.

While torts occur with frequency in our society, to an untrained member of society, maintaining or defending an action in tort law in Ontario is a complex and difficult-to-understand process. The fact that a non-professional is likely not able to competently prosecute or defend a tort action in the Ontario courts means that access to justice is impeded when that citizen cannot afford a lawyer. While prospective plaintiffs cannot properly safeguard their rights or bring an action without professional counsel,

40 Hadfield, supra note 22, at 959.
prospective defendants are not always able to take appropriate action regarding tort law without the expensive advice of counsel, and face an even more dire threat if they cannot afford to defend what may be a specious action. Even if the action is not specious, there is often little objectivity in a plaintiff’s Statement of Claim, necessitating a trained legal mind to assess the strengths and weaknesses of the plaintiff’s claims. Without taking any complexity away from other areas of the law, the specialized nature of tort law requires the ability, in many cases, to read expert reports, deal with protracted civil procedure issues such as Examinations for Discovery and Motions, and, since the vast majority of claims settle, the ability to effectively negotiate with the opposing party. Needless to say, the ability of a pro se litigant to reach a favourable outcome in tort law is necessarily suspect. Speaking of the Australian experience, Tomasic writes: “takeover actors have been able to impress upon the courts the need for the expeditious hearing of their disputes. This has had the effect of displacing other litigants from court lists, such as asbestos cases, personal injury cases and the proverbial ‘widows and orphans’ cases.”41 This quotation highlights the role that competent counsel plays in ensuring that a tort action moves at the speed the plaintiff or defendant requires.

In Ontario’s “loser pays” model, the unsuccessful party at trial will bear all of its own costs, as well as some of the successful party. The threat of additional costs as penalties can act as a barrier to access to tort law justice in the current user-funded system. The chilling effect that the risk of failure of a tort action has on the desire and ability to access justice, what Kritzer terms the “downside risk,” must be offset by a comprehensive access to trained legal representation so that potential plaintiffs are not intimidated from pursuing legitimate cases:

risk.’ The downside risk is most important for the middle class because it does not pose a risk to those with no wealth because they have nothing to pay to the other side if they lose and those with substantial wealth can afford to take risks, at least in relatively typical kinds of cases.42

Plaintiff and defendants in tort will suffer if a lawyer is not available to advise on the case. The representation must be complete if the plaintiff or defendant is going to have the best chance of succeeding in litigation. Regarding the dangers of partial or well-meaning but incomplete tort law representation, it is instructive to refer to the dicta of a British defamation case as a general example: “in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel.”43 Sporadic help is no help at all, and therefore trained legal representation at all stages of a case is needed to overcome barriers to the tort system.

Having identified the problem of too-limited representation, tort-specific law reform faces other questions: how will essentially paying for everyone to sue anyone, and then defending everyone from everyone else, not represent an over-strenuous burden on public finances? Furthermore, how can the argument that increased access to justice for tort plaintiffs and potential plaintiffs encourages the avoidance of tortious conduct be reconciled with the aiding of defendants, those who allegedly committed the tort and who are now being shielded from the results of their conduct? In answer, the first concern is fairness: it is not defensible to privilege the needy plaintiff, or the needy defendant, over their adversary in litigation. To do so would unbalance the system and result in the government discouraging or over-encouraging tort actions. The problem of overconsumption is a thornier issue. It would likely be necessary to distinguish between legal advice (essential to provide in all cases), and legal representation (which would require a screening process to ensure that the claim or defence advanced was a reasonable one with

a chance of success). The process could be similar to current legal aid regulations, which mandate that a letter from a lawyer proposing to take the case is a necessity for funding (the pitfall to be avoided, as above, is over-limited of cases by lawyers). While the question of constraining consumption of a public good is only partially addressed by this potential control on tort law legal aid, potential overabundance and overconsumption of a public good is no reason to err in the opposite direction and thereby exclude needy citizens with a potentially successful legal claim from tort law. To do so would be to succumb to a basic of “floodgates” argument.

**Residential Law**

Residential law in Canada, a term I will use to describe any legal issue which touches directly upon a person’s residence, is also an area where many average citizens require legal assistance which is unavailable. A person’s dwelling place, recognized as his or her “castle” as early as *Semayne’s Case,* is a demonstrably important area of the law due to the physical and mental importance attached to one’s home. As Nelson Mandela wrote, “[e]veryone needs a place where they can live with security, with dignity, and with effective protection against the elements. Everyone needs a place which is a home.” Issues relating to access to justice are found in landlord-tenant actions, the purchase of real estate (such as in actions on condominium law or the purchase of a house), and access to trained legal assistance for stakeholders in affordable housing projects.

Landlord and tenant law is a quintessential area where people who cannot afford litigation may interact with the legal system. While some matters decided by the Landlord and Tenant Board (an administrative body) are relatively minor and can probably be argued *pro se* after an initial legal consultation confirms that they are *de minimis,* others, such as rent increases or evictions, especially if the

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44 (1604) 77 Eng. Rep. 194; 5 Co. Rep. 91
result of possible prohibited discrimination, can be complex, require professional knowledge of the law, and may be advanced into arenas such as the Ontario Divisional Court or even higher levels of Court. Trained legal assistance can have a profound effect on these matters, where tenants often face eviction, and Andrew Scherer’s comments, made in relation to the New York City Housing Court, are no less applicable in Ontario:

A lawyer representing a tenant knows how to navigate the court’s process, knows the defenses that can be raised and how to pursue them, knows how to secure available government benefits, social services, and other assistance. In most cases, a lawyer helps the tenant avoid eviction, and when eviction cannot be averted, a lawyer knows how to negotiate for time to move out before the tenant is forced out. An unrepresented tenant is sorely disadvantaged because he or she likely does not have the specialized knowledge required to maneuver through the morass of the Housing Court.46

One recent Ontario case instantiates the need for trained legal assistance for all participants and potential participants in Landlord and Tenant proceedings. That case, Williams v. Corporation of the City of Toronto47, featured an attempted class action with undisputed facts that in the low-income neighbourhood of Parkdale, the City of Toronto had failed to give renters a notice of a rate reduction, leading affected tenants to overpay an average of $3,000 over several years.48 The Court noted that “[m]any of the proposed Class Members are of very modest financial means, including a significant number who have disabilities or who rely on social assistance”49 and that “[m]ost of the Class Members do not have resources to pursue legal proceedings on their own.”50 Legal assistance for residential issues would serve two goals in a situation like this: first, advice at the time could have avoided this problem in the first place, and secondly, if negligence occurred, counsel provides a voice for disadvantaged people, whether they fit in a class or not.

Benefits to needy individuals seeking resolution of residential housing legal issues can be seen in a ground-breaking New York program to provide legal aid to people facing housing foreclosures may be a

46 Scherer, supra note 3 at 702.
47 2011 ONSC 2832
48 Ibid. at paras. 16-43.
49 Ibid. at para. 41.
50 Ibid. at para. 43
model for Ontario to follow. Commenting on the New York situation of approximately 80,000 foreclosure cases, about half of them involving unrepresented litigants,\textsuperscript{51} New York judge Jonathan Lippman stated “[i]t’s such an uneven playing field…[b]anks wind up with the property and the homeowner ends up over the cliff, on the street. It doesn’t serve anyone’s interests, including the banks.”\textsuperscript{52} Moreover, the economic efficiency of providing these services as opposed to helping needy people after they have lost their residences is stunning. To quote Scherer’s summary of some findings in New York City:

A study of the [Emergency Assistance Funds legal assistance program to indigent clients] in 1996 found that anti-eviction work conducted with the funds kept 6000 low-income families in their homes. As a result, the city saved more than $27,000,000 that would have been spent to house many families in homeless shelters. In 1993, another study calculated that providing counsel to low-income tenants facing evictions in the city would produce a net savings of $66,966,097. A separate study, conducted in 1990 by the New York City Department of Social Services, found that every dollar spent on eviction prevention saves four dollars in costs associated with homelessness.\textsuperscript{53}

In these cases, justice and economic efficiency concerns demands that people facing a massive upheaval in their lives receive government assistance. Yet governments do not always seem to agree. One Canadian example of a refusal to enable access to justice in the housing context is the 2003 British Columbia case of \textit{Lawrence v. British Columbia}.\textsuperscript{54} In that case, the applicant (who was 53, with a grade 12 education, and unable to work because of rheumatoid arthritis) argued that since she faced eviction from her home if she was not granted money to defend her case, she was constitutionally entitled to government funding. However, the British Columbia Court of Appeal affirmed rulings that there was no “authority for the proposition that the principle of access to justice means more than a duty on the government to make courts of law and judges available to all persons or that it includes an obligation to fund a private litigant who is unable to pay for legal representation in a civil suit — even one that may be \textit{sui generis}. If the meaning of access to justice is to be extended that far, it is in my view for government to do.”\textsuperscript{55}

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\textsuperscript{52} Ibid.

\textsuperscript{53} Scherer, \textit{supra} note 3 at 711.

\textsuperscript{54} \textit{Lawrence v. British Columbia (Attorney General)}, 2003 BCCA 379

Canadian and Ontarian governments, which have as yet not extended the meaning of access to justice, are apparently unconcerned with people losing their homes because they do not have enough money for legal representation.

As Kritzer writes, “we cannot ignore issues of what might be called everyday justice, justice in relationship with employers, neighbours, merchants, government agencies, little injustices left unresolved accumulating to social injustice.” At the forefront of the interaction is residential law, whether it be interaction with a landlord or condominium board, or the legal interactions which accompany being a property-owner. It seems clear that Justice Lippman is correct, at least with regard to landlord and tenant issues, when he states “[t]oday it is an…obvious truth that people in civil cases dealing with the necessities of life can’t get a fair day in court without a lawyer.”

One final area has to be examined when discussing access to justice in landlord-tenant legal disputes, which is what to do when the landlord is as financially unable to present its case as the lessee. In these cases, refusal to fund both sides (funding only the tenant or only the landlord) would result in unfairness systemically, weighting the system in favour of either the tenant or the landlord as the case may be. From an equality perspective, access to legal assistance must be extended not only to tenants, but to landlords as well. However, this will not likely be a major issue, as most landlords already possess the financial means to engage trained professional assistance and the appreciation that trained legal assistance is beneficial: Scherer cites a 1993 study which found that in New York City Housing Court, over 97% of landlords were represented, while only 18% of tenants had similar advantage of counsel. Thus, funding the portion of the remaining three percent of landlords who could not afford to defend their interests would accord with fairness and equality in housing law. I have engaged in a prolonged discussion of whether fairness and equality interests in relation to access to legal expertise are engaged by entities acting solely for profit

56 Kritzer, supra note 42 at 265.
57 Streitfield, supra note 51.
58 Scherer, supra note 3 at 704.
below in the section on small business and access to civil justice, reaching the conclusion (which I will reiterate here) that purely monetary matters, and those with rights in relation to them, must have a stake in our justice system, even if the entities affected cannot afford legal counsel.

The purchase of a home or condominium is a legal nexus of contractors, contracts, property law, and sometimes tort law. The average citizen purchasing a home is not legally knowledgeable, and issues may come up prior to, during, or after the purchase of a home which need trained legal advice or representation (a notable issue is the fiduciary duty owed to the purchaser by a sales agent). However, the high cost of legal advice is a disincentive to obtaining that advice, resulting in some individuals unable to get help without prejudicing their economic interests. When parties are not advised by counsel, property purchases are rendered inefficient, and inaccessible to prophylactic civil legal dispute resolution. What is needed in property purchases is not full-blown litigation, but often a ‘stitch in time’ to solve legal problems before they become problems.

Two illustrations of the need for legal advice at the formation of a residential contract (and if not then, then during any ensuing contractual disputes) are Peel Condominium Corporation No. 505 v. Cam-Valley Homes Limited\textsuperscript{59} and Scanlon v. Castlepoint Development Corp.\textsuperscript{60} \textit{Peel} concerned the contractual nature of good faith where the condominium developer had implied that a park would be set up, and then developed the land into more condominiums, while \textit{Scanlon} dealt with a closing date which the seller was attempting to move back. Both involve complex issues of fact and law, and both illustrate the need for private individuals to receive legal assistance when making these residential contracts. If no legal aid is available, private individuals face not only loss of money, but also a large impact on their living space. Since residential issues do not revolve around money, there is little financial incentive (but major non-financial incentives) for litigation in these cases, and the potential for injustice if no help is offered.

\textsuperscript{59} (2001), 53 OR (3d) 1, 196 DLR (4th) 621
\textsuperscript{60} (1992), 11 OR (3d) 744, 99 DLR (4th) 153
While the issues may be monetary or non-monetary, the purchase of a home and its subsequent occupation engage the psychological well-being of many citizens. If the law is not accessible to them when they have an issue in this regard, the administration of justice may be brought into disrepute, and the chance for the law to be applied for all citizens—not simply those who are litigious and can afford litigation—is lost. While some property purchases involve vast amounts of money and the participants are therefore comparatively sympathetic to resource distribution, not all property disputes involve the wealthy, and the middle class cannot be denied access to civil legal assistance on so flimsy a characterization. Nor should property law be removed from a discussion of civil legal need simply because it is possibly wealth-creating: stimulation of the economy and financial gain is the result of a working property law system, and lack of legal assistance at an acquisition of property may lead to unnecessary litigation at a later date, ultimately imposing more costs on the legal system and society.

Another area in which it is important to ensure civil access to justice is enabled is in legal issues pertaining to affordable housing and the provision of municipal services. Affordable housing can result in knee-jerk ‘NIMBYism (Not-in-my-Backyard-ism),’ whereby challenges are brought using municipal or zoning law. Even in cases where opposition to affordable accommodation projects does not exist, the law should endeavour to assist in an expansion of affordable housing initiatives and opportunities, in particular, and where necessary, by providing civil legal assistance to all stakeholders in affordable residences. Remedies for those unable to purchase legal help through money may be completely absent: the law is the true guarantor of civil protection. A British Columbia report on legal aid, *Foundation for Change*, quotes one striking submission about the effects of cutting legal assistance for housing issues and curtailing processes: “I don’t think it’s a coincidence that after withdrawing legal aid and implementing
only telephone hearings for residential tenancy matters that the rate of homelessness started its steady rise to its now epic proportions.\textsuperscript{61}

There are currently unanswered questions in affordable housing law, especially regarding the provision of services for disadvantaged persons. One such question, asked by Makuch et al., is whether a zoning by-law which has the effect of precluding an economically disadvantaged group in our society from the benefits of affordable housing would constitute a violation of s.15(1) of the Charter… discrimination against public housing tenants has been considered in \textit{Dartmouth/Halifax (County) Regional Housing Authority v. Sparks} (1993), 101 D.L.R. (4th) 224 (N.S.C.A.). The Court held that the provisions of the \textit{Residential Tenancies Act}…violated s. s. 15(1)... it is foreseeable that municipal by-laws which affect access to affordable housing may be challenged under s. 15 of the Charter.\textsuperscript{62}

The answers to legal questions relating to urban housing and services for the needy can only be found through the inclusion of affordable housing and municipal concerns in areas of a citizen’s life that will receive legal aid in the form of trained legal assistance.

Civil law relating to municipal concerns represents an exception to the conception of civil law as between private parties: here, the side facing litigation is often the city government. The myriad ways in which municipal law can discriminate against the less fortunate include the provision of services, democratic decisions (such as “gerrymandering” in drawing up city electorates or resisting improper expropriations), and unfair zoning restrictions. In all of these cases, legal assistance can help support the disadvantaged. For example, the Supreme Court of Canada has stated, in regards to municipal law, that “if, for instance, [by-laws] were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust…the Court might well say, “Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.”\textsuperscript{63} Municipal civil issues dealing with those who cannot retain their own counsel require justice, which in this case can be conflated with the

\textsuperscript{61} Quoted in \textit{Foundation for Change}, supra note 17 at 30.
\textsuperscript{63} \textit{Bell v. R.}, [1979] 2 SCR 212 at 222.
availability of information about the law and legal rights, professionally-trained legal advice and in some cases representation.

**Private Family Law**

A uniquely sensitive area of human life is engaged in family issues, and this sensitivity carries over into private family law, a term I will use to include all legal issues affecting a core familial interest where the State is not a party (thus excluding child protection proceedings and public law issues such as non-traditional marriage actions). Whether it is advice prior to getting married, advice on marital dissolution, or in estate planning or litigation, an average Ontarian citizen may need help in these areas but probably cannot afford the legal bill. The lack of current assistance for people facing division of property and access to the children reflects the fact that this funding is not a priority, probably because of the conception that these legal issues revolve mainly around money or minutiae. This renders the system unjust when needy citizens cannot access the remedies they are legally entitled to.

In addition to governing marriage, Ontario law has many family law tools for citizens, ranging from tax considerations, to pre-nuptial agreements, to property and estate considerations. These tools should be examined before a family is created through cohabitation, childbirth, or marriage, but currently the cost of trained legal assistance for this purpose must be borne by the individual citizen. This may inhibit family law planning, risking costly litigation (to both the parties and the system) in the future. The following passage from *Listening to Ontarians* is applicable to both pre-nuptial legal arrangements and post-nuptial legal assistance: “[a]ccess to resources in family law in the form of information, legal and social assistance, and resolution of family law problems for low and middle-income Ontarians is a priority issue for the civil legal system. As identified in our Project results, addressing the gap in services and support in family law will require a range of services from all partners in our civil legal system.”

64 *Listening to Ontarians, supra* note 16 at 57.
For child custody agreements, spousal support and property agreements, and dispute resolution mechanism agreements, prophylactic legal care creates benefits before familial discord. Currie’s research shows the benefit of preventative action in family law, not just treating emergent situations: “[t]he analysis suggests that relationship breakdown may be a trigger for other problems that threaten the financial security of the family. This is one good argument for providing assistance as early as possible for family law problems. It is also an argument for taking a holistic approach to the provision of legal services to deal with problems that may be systemically related.”65 Family law litigation will always have the potential to be protracted and hostile. However, with proper consultation with legal professionals at all stages of relationships, hostile proceedings may be minimized, resulting in a net benefit to needy individuals, their children, and the State.

Equalization of net family property (that is, distribution of property upon relationship dissolution) under Ontario’s Family Law Act66 and attendant custody battles are a drain on even the wealthiest individuals. The fact that all of the cost is borne by the individual renders access to justice in most family law actions an illusion, and engenders significant cost to (and a commensurate societal disapproval of) the justice system. Clearly, the wealthy can generally afford the cost; the average citizen usually cannot. It is unclear why the dicta of the Supreme Court of Canada discussing forcible apprehensions of children from unfit parents is not also applied to private custody battles to ensure a just result, as articulated in 1999 by then-Chief Justice Lamer:

For the hearing to be fair, the parent must have an opportunity to present his or her case effectively. Effective parental participation at the hearing is essential for determining the best interests of the child in circumstances where the parent seeks to maintain custody of the child. The best interests of the child are presumed to lie within the parental home. However, when the state makes an application for custody, it does so because there are grounds to believe that is not the case. A judge must then determine whether the parent should retain custody. In order to make this determination, the judge must be presented with evidence of the child’s home life and the quality of parenting it has been receiving and is expected to receive. The parent is in a unique position to provide this information to the court. If denied the opportunity to participate effectively at the hearing, the judge may be unable to make an accurate determination of the child’s best interests. There

is a risk that the parent will lose custody of the child when in actual fact it might have been in the child’s best interests to remain in his or her care.\textsuperscript{57}

This line of reasoning is directly applicable to contested custody litigation, which should receive government assistance just as children’s aid litigation participants do. Of course, the reality as Hadfield notes is that “[d]ivorce litigation routinely costs those few who can afford it hundreds of thousands of dollars; for most litigants, it commands what wealth they do have.”\textsuperscript{68} The vicious cycle of family law can eliminate assets completely, to the extent of the \textit{reductio ad absurdum} represented by the fictitious case \textit{Jarndyce v. Jarndyce} in Charles Dickens’s novel \textit{Bleak House}. \textit{Listening to Ontarians} found that of the survey’s total sample, twelve percent of people surveyed had a family relationship legal problem, and that of the people in the survey reporting a legal problem, almost one-third of the respondents were referring to a family law problem.\textsuperscript{69} The fact that legal assistance is not provided to mid and low-income Ontarians needing family law help despite the prevalence of family break-ups is a shortcoming of the system and a barrier to justice for the individual litigant and the proper administration of family law. Equality under the law, manifested by access to civil justice, should be a central concern of the government. Therefore, in private family law proceedings, the government is failing in its responsibilities.

No discussion on personal civil law affecting Ontario’s families would be complete without addressing wills and estates law, including powers of attorney. Estate litigation has the potential to deprive a beneficiary of bequeathed assets (or insurance benefits) based on poorly-planned, or poorly-interpreted, testamentary documents. It is certainly in the law’s interest to ensure that the average citizen understands, contemplates, and has trained legal assistance with, wills and estates law, so as to ensure the orderly transfer of wealth between generations. The current regime of wills and estates planning, where all cost is borne by the testator, is inefficient, and denies needy citizens the ability to order their post-mortem affairs.

\textsuperscript{67} \textit{J.G. v. New Brunswick (Health and Community Services)}, [1999] 3 SCR 46 at para. 73.
\textsuperscript{68} Hadfield, \textit{supra} note 22 at 954.
\textsuperscript{69} \textit{Listening to Ontarians}, \textit{supra} note 16 at 21.
Second only to family law problems, wills and estates issues were prevalent in the recent survey *Listening to Ontarians*, comprising thirteen percent of the legal problems of Ontarians.\(^\text{70}\) While many of these matters may be pecuniary and would lead to negotiation rather than litigation, the impact which wills and estates contests can have on an individual are heavy psychologically, and cannot be dismissed when a discussion of access to justice is undertaken. Whether it is for property, money, or heirlooms, people also have a considerable psychological and investment in estates cases, a factor that must be recognized when resources are being apportioned to ensure needy citizens receive what the law dictates.

The preventative nature of access to justice can also be seen in the wills context: individuals with the benefit of counsel are less likely to have easily-contestable wills, leading to a curtailing of future litigation. Moreover, because an individual is entirely responsible at present for the cost of the will, the government is creating a false economy by refusing aid to those who are essentially avoiding future litigation. Viewed from the context of a citizen with no legal training or expertise, writing a will is likely a confusing endeavour, and a source of stress when contemplating whether property will end up in the intended hands. Wills and powers of attorney (a related subject, especially the Continuing Power of Attorney designation for Property, contemplated by sections 7-14 of the *Substitute Decisions Act, 1992*\(^\text{71}\)) were, in Currie’s recent study, the highest “persistent problem by problem type:” 41.3% of respondents who reported unresolved legal problems in the wills and estates area had experienced the initial problem over 3 years before\(^\text{72}\). Doust notes that “the law develops where resources are directed,” citing a submission to his study that “[t]here are many estate-planning ideas for the wealthy.”\(^\text{73}\) It is time that the middle and lower-classes had the benefit of this development of resources. Access to civil justice

\(^{70}\) *Ibid.*

\(^{71}\) *S.O. 1992, c. 30*

\(^{72}\) *Currie, supra* note 65 at 16.

\(^{73}\) *Foundation for Change, supra* note 17 at 22.
regarding wills and estates is important for ensuring certainty in citizens’ ordering of their affairs, and a lack of assistance for needy Ontarians in this regard is troubling.

Ensuring Civil Justice Accessibility for Small Business

One objection to expanding the current civil legal assistance system to include small businesses is that the State would be expending resources on a purely profit-driven area of the law. Businesses succeed, flounder, or fail routinely, with the stringencies of the markets allowing only good business models to endure. Why, the argument goes, would government want to unnaturally skew this process? However, this argument fails on both justice and efficiency grounds. First, on an equality ground, small businesses and small business owners should not be penalized for corporate structure: if they are unable to access the civil justice remedies they are entitled to, the system fails just as surely as if an individual is denied justice. Secondly, although capitalism sees competition lead to some businesses failing, the more businesses that succeed, the greater the economic prosperity. Ontario should be deeply concerned about the success of small business because, to paraphrase Calvin Coolidge, the business of Ontario is small business.  

While government attempts to develop small businesses through tax incentives and other initiatives, legal assistance offered to a developing business venture is offered via a capitalist “user-pays” model. This is troubling, as growing businesses can profit from diverse types of legal advice and representation: an Ipsos Australia 2007 survey in the State of Victoria, quoted by the Australian Attorney General’s Department, reported that a “survey of 500 owners or operators of Victorian small businesses with fewer than twenty employees found that 37 per cent of Victorian small businesses had at least one dispute in the 12 months prior to the survey. The most common disputes were unpaid debts or late payments owed to the business (15 per cent) or the quality, timeliness or price of goods or services provided by the business (18

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74 The direct quotation attributed to Coolidge is “the business of America is business.”
per cent).” Additionally, a successful business benefits the economy in a variety of ways. Access to civil justice need not be only used to defend citizens from loss: it can also be used to increase gain. Corporate law adheres to the idea of incorporation as a beneficial business decision. However, corporate structures vary: there are issues of shareholder controls, unanimous shareholder agreements, to say nothing of under what structure to incorporate, or how best to operate. A healthy system will make small business growth more efficient by providing the ability to access this advice.

Legal advice for small business contemplates litigation assistance, but can also provide a healthy foundation for small or developing businesses that might be tempted to cut costs by failing to use legal services. Hadfield opines that

As is typical of non-competitive markets, the legal market results in prices being determined by the value placed on them by consumers, not the cost of providing the service. The allocation of lawyers’ efforts are thereby skewed to those who place high monetary value on legal services and are able to pay these large sums…legal resources are, as a result of free market forces, pulled disproportionately into the commercial sphere, and individuals are largely priced out of the market.

This problem is not only limited to individuals: small business owners can effectively be priced out of the market as well, in a manner which in some cases stifles economic growth. Ontarian businesses need to have access to legal advice throughout their day-to-day activities, not simply when problems with the business arise, so as to avoid both the problems and the uncertainty attendant upon unforeseen issues. Avoiding prophylactic legal care can be much more harmful than paying up front: Woolley observes that “even sophisticated corporate clients are unable to entirely eradicate the information problem when purchasing legal services. As noted, the absence of information is to some extent absolute: ex ante predictions about whether a lawyer will be able to achieve the desired legal result are necessarily uncertain.” Since even skilled businesses cannot be certain of achieving a desired result in litigation, this emphasizes the need for business to have legal advice throughout the business’s lifetime. The right legal

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75 Australian Attorney General’s Report, supra note 6, p. 27 at n. 94.
76 Hadfield, supra note 22 at 956.
advice can make the difference between a viable and unsuccessful business model. Moreover, issues such as the oppression remedy and corporate structure and transactions are complex legal issues which typically require trained legal assistance to successfully navigate. While there are many compelling areas which need civil legal aid in Ontario, small business concerns are no less needy, and the returns generated by this form of civil legal aid can make this a particularly good investment in light of the economic growth engendered and the potential for direct and indirect corporate repayment to the civil legal aid system.

Tax considerations are an omnipresent consideration for Canadian small business. While under the current system unbiased tax advice is unlikely to come from the government (as it is an interested party), the government should nonetheless ensure that businesses have access to tax representation, so as to improve economic efficiency and growth. Small businesses have many tax law issues to consider, including the nature of the service agreements they make (such as hiring employees or contracting services out), whether or not to attempt to qualify for the Small Business Deduction under section 125 of the *Income Tax Act,* or how to reimburse investors. A person with training, and ideally experience, in tax law is a necessary component of this area of business operation. Government would be creating a false economy if it funded small business without ensuring that businesses could succeed in this complicated and technical area of the law. Civil legal aid should sometimes be granted in this situation if the business organization is needy. Access to justice in the corporate tax world is not normally discussed, for the obvious reason that there are so many other areas of need when discussing access to justice, but they are no less important to both equality and efficiency critiques of civil justice. Tomasic makes the point: “[r]evenue authorities such as the US Internal Revenue Service, Revenue Canada and the Australian Taxation Office have a significant impact upon the rights of the citizen. They are of course also central to the operation and funding of the state. However, there has been relatively little research upon the extent to

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78 RSC 1985, c. 1 (5th Supp.))
which access to justice concerns are handled in this area.”

To allow the State to have unbridled power over any taxpayer insufficiently wealthy to resist them is contrary to the spirit of justice, and has the potential to be economically injurious to small or developing business concerns. Whether it is for an individual or a small business, the prevalence of tax law concerns militate for access to trained legal assistance for both tax planning and tax litigation purposes. This access to justice will enhance the competitiveness and business margin for business, and will enable claims to all of the tax benefits and deductions companies are entitled to, benefitting the economy.

Finally, the need for access to civil justice in corporate and small business matters is not limited to corporations or businesses. Currently, shareholders and public accountability organizations require funds to be able to access justice through legal advice and representation. Subject matter for these actions include oppression remedy suits, derivative actions, applications to the Ontario Securities Commission, and other advice relating to shareholder or affected group rights. By denying trained legal assistance to the average citizen, the law relating to shareholders and interest-holders is necessarily restricted to those that can pay. This can have harmful effects on the markets by limiting the controls on corporations, directors, and management, thereby endangering the public interest in ensuring that investors are able to participate in the system as litigants even if they do not have the funds. As Tomasic writes, “the fairness and openness of capital and financial markets are important in ensuring that those markets are not corrupted. These qualities also help to facilitate the maintenance of the confidence of investors in these institutions…an important access to justice concern is to ensure that shareholders and investors are able to protect themselves through the resort to a variety of legal mechanisms and remedies. Unfortunately, the effectiveness of legal remedies in this area has frequently been less than adequate.”

The stakes are high. A recent Supreme Court of Canada decision discussed the nature of the costs involved and the

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79 Tomasic, supra note 41 at 429.
80 Ibid. at 425.
ramifications of specious investor claims: “[t]he trial judge noted that the costs incurred by [the representative plaintiff in a shareholder class action] in this litigation outweighed any personal financial benefit. However…[t]hose who inflict [protracted litigation] on others in the hope of significant personal gain and fail can generally expect adverse cost consequences.” 81 In this decision, the Court recognized not only the chilling effect of high costs on corporate litigation, but also set ground rules against unsuccessful attempts to attack corporations. The resulting cost penalties would act as a powerful disincentive to specious litigation, a definite advantage if government funding were to be introduced in this area of the law. Since “Canadian corporate law prescribes no professional qualifications, training, or experience for directors [and] there has been little recent Canadian corporate law jurisprudence assessing whether an act or decision of an individual director meets the applicable legal standard of prudence, care, diligence and skill,” 82 in some cases investors should be encouraged to develop the law and ensure that corporate and securities law is being developed in a way that allows average Ontarians to feel safe about their investment. If investors lack the resources to do so, the government must consider this as a problem with public access to civil justice.

**Contract Law**

Ontario contract law needs examination since it governs the frequent transactions of average citizens. Access to justice in contract law is restricted by the same financial considerations noted above, and it is important to ensure citizens have access to justice in contract law because it is a common area in which the average citizen encounters a legal issue, and the justice system will be perceived negatively if contract law remedies are outside the reach of the average citizen. These rights are fundamental:

“[b]argains between strangers are possible because rights and responsibilities are determined by a settled

legal framework and are enforceable by the courts if promises are not kept. As a corollary, the law also offers remedies to average citizens who find themselves in unjust or unclear contracts.

Commonly-encountered contract law disputes include employment law issues, to common service provision contracts (such as computer access, cellular telephones, automobile purchases and auto and life insurance contracts) to travel (as notoriously explored in Jarvis v. Swan’s Tours). Such a common area of the law calls out for remedies when contracts are not properly honoured. One example of everyday contract law which set an important precedent is the case of Clendenning v. Tilden Rent-a-Car. In that case, a rental car agreement which the customer had signed but not read was overturned on the basis that the contract was not intended to be read. While that case did not involve legal aid, it is a good example of the necessity of litigation defence being available to an arguably victimized consumer, as well as a good example of how the law may be advanced if such assistance is afforded. In Ontario, the necessity of a lawyer to interpret the parol evidence rule, which is incorporated by the Ontario Consumer Protection Act, 2002 is clear. Section 18(10) reads: “[in a ] trial…under this section, oral evidence respecting an unfair practice is admissible despite the existence of a written agreement and despite the fact that the evidence pertains to a representation in respect of a term, condition or undertaking that is or is not provided for in the agreement.” Since a judge’s interpretation of “unfair” is crucial and could overturn the written text of a contract, the need for legal advice when making as well as litigating consumer contracts has clear benefits. Where a minor amount of money is at stake, the law nevertheless has a stake in the matter’s successful adjudication, both from the standpoint of consumer protection, and from the perspectives of developing jurisprudence or, alternatively, deterring corporations from infringing consumer protection rights or principles of contract law. In this way, access to justice for everyday law of contract issues ensures

83 Genn, Judging Civil Justice, supra note 13 at 3.
84 [1973] QB 233; [1973] 1 All ER 71
85 (1978) 83 D.L.R. (3d) 400 (Ont. C.A.)
86 S.O. 2002, c 35, Sched. A.
financial and commercial stability, whether the contract is large or small, and is appropriately included in services which needy citizens should sometimes receive.

One way in which problems with common contracts can be solved is through the class action system. However, providing trained legal assistance in solving commonly-occurring contractual issues (whether it be resisting contractual provisions or seeking to enforce them) is only partially solved by the Class Proceedings Act,87 designed to have a “representative plaintiff” represent all wronged parties (who then do not have to pay for legal advancement of their case) in an action which can gain all similarly-wronged parties restitution. Class actions, however, may not be appropriate for individual plaintiffs who have suffered more harm than the average class member and may not allow for the desired course of action for one of the class members, as they will be constrained by the actions of the class.

Giving needy citizens more options on how to address commonly encountered contractual problems will increase efficiency by creating a standard template to draw from when inquiring into various contractual issues, such as the validity of a certain form of contract. Good provides an example: “[c]onsider the following scenario: a bank unlawfully deducts one half of one cent from the accounts of 1,500,000 customers each month for 15 years. Customers complain, but the bank refuses to return the funds…Although the loss suffered by each customer is tiny, their rights have been infringed. They have a right to recover that money from the bank…For the half-cent customers, the costs of suing (money, time, and psychological trauma) outweigh the potential benefits (the return of the money) on an individual level. Only in the aggregate, as a class action where all of the claims are combined together, do they become realistically actionable.”88 While class proceedings can assist in Good’s example, sometimes nothing but the application of access to justice principles will assist an individual litigant, if no possibility of a class proceeding exists or no counsel is willing to pursue a class action. When “rights have been infringed,”

87 S.O. 1992, c. 6
civil justice in consumer protection issues may be philosophically necessary, even if there are no current methods of softening the financial cost on needy citizens. Class actions, then, are not perfect in assuring the plaintiff recovers his or her damages, but merely that the action is streamlined. This could be contrary to a just result, in a manner that providing civil legal aid would not be. As a joint venture system, class actions based on breach of contract are an effective competitor to civil legal aid, and properly used, help ameliorate funding pressure on the civil law system. However, the availability of civil legal aid must also be present to avoid improper class actions formed to pay for a contract action which should necessarily stand apart from any others.

Contracts are sometimes ‘efficiently breached’ for pecuniary reasons, knowing that the costs associated with pursuing the breach would result in a pyrrhic victory for the potential plaintiff. This increases disillusionment with the legal system, since in these cases the spirit of the law, upholding the sanctity of contract, cannot be made reality. One compelling example of this is provided in a personal vignette by Kritzer:

Twenty years ago a law professor in Toronto told me of a problem he encountered in selling a house. He had contracted to sell the house when the market in Toronto was at one of its peaks, but the closing date was sometime off. By the time the closing arrived, the market had softened, and the buyer told the seller that unless the buyer reduced the selling price by something like $10,000, the buyer would walk away. The seller consulted with his solicitor about the possibility of suing for specific performance if the buyer did as he threatened. The solicitor advised the seller that the case was very good, but you could never be sure what would happen at trial (perhaps the buyer could come up with some other legitimate reason for failing to follow through on the purchase), and if the buyer won, the seller would be looking at something in the way of $10,000 in party and party costs (to say nothing of what the ‘own solicitor’ costs would be). The law professor accepted the buyer’s demand to reduce the price.”

While the end result of consulting a lawyer was frustrating, it nevertheless allowed the seller to see clear legal issues, instead of operating blindly and possibly making a rash decision. The availability of legal advice, then, has positive effects in this day-to-day area of the law.

Justice Osborne’s findings are especially relevant to the doctrine of efficient breach, which Ontarians must understand in order to effectively access justice in this area of the law: “[w]hat is also missing is

89 Kritzer, supra note 42 at 259.
plain-language material for the public on the civil justice system generally and on substantive areas of the law that commonly affect unrepresented litigants. Moreover, the material that is available may not be accessible or its existence may not be well known to the general public.90 This is so because efficient breach runs counter to an intuitive understanding of contract, and thus in this case, civil access to justice should ensure, from a consumer protection standpoint, that more consumers are aware of their rights before entering into a contract which may not be fulfilled. Lastly, in addition to legal education on this point, access to civil legal aid for those unable to afford to litigate the efficient breach may help to overcome the frustration of a breached contract.

Special mention must be made of employment contracts. These contracts are extremely common, and for non-unionized employees may result in contracts which are deleterious to the individual worker. Later on, disputes between an employer and an employee may create legal issues, including, but not limited to, wrongful dismissal and harassment claims. While needy small business employers would qualify under the previous discussion of access to justice in business law, employees may be left vulnerable to an unjust result, with no group overseeing substantive interests past statutory requirements. Yet currently there is no access to justice for employment law: as Elaine Newman wrote for the Ontario Bar Association, “[o]ur own Task Force, for example, reported in April of 2009…for people in this province earning at or below the average income ($47,000), there simply is no common law of wrongful dismissal. People of average income cannot afford the legal process required to assert these rights.”91 Currently, trained legal assistance is necessary because “the statute is inaccessible by reason of its over-complication.”92 The exact test for when access to justice for needy citizens should be provided in

92 Ibid.
employment law is open to debate, but equality and efficiency concerns dictate that employment contracts must not be allowed to become inaccessible to trained legal advice because some needy employees (or employers) cannot afford to protect their rights.

The Need for Potential Solutions

Having established that in the above areas of civil law there is a gap between need for justice and access to justice, it is necessary to find a solution. The solution must be on a macro scale: there were 150,388 civil events heard in Ontario courts in 2009-2010, suggesting that the number of civil problems which are unreported is substantial. Any potential solution must allow for needy individuals to gain what Kritzer calls “[a]ccess to everyday justice,” which means “accessing legal expertise and not being fearful of the downside risks of seeking justice.” While any potential solutions must be evaluated for efficacy and efficiency based on a complex set of criteria and a study of the effects on various constituencies such as rural versus urban dwelling Ontarians, in this paper I will explore three practical methods which will potentially improve access to the civil justice systems discussed above. Broadly stated, these innovations are an increase in direct governmental expenditure on civil access, an increase of resources inside the legal system by system operators, and finally, a dramatic restructuring of the legal system itself, through deregulation or limited licensing programs.

The First Potential Solution: Government Expenditure

The simplest reform to suggest is always direct government expenditure. In this section, I will suggest areas in which government expenditure could assist in needy citizens achieving access to civil justice, including a funding increase to the existing system, augmenting the resources of the legal system

94 Kritzer, *supra* note 42 at 265
(by simplifying civil procedure or by graduating more law students from Ontarian universities), or by allocating additional resources to access citizens before they enter the legal system (by attempting to further educate the normal citizen on civil legal process and remedies, or by providing codification and protection through legal insurance, either subsidized or strictly regulated). Unfortunately, none of these solutions are a complete answer to the barriers facing needy Ontarians. While systemic change is needed to enable greater access to civil justice in Ontario, throwing money at the problem does not seem to be the correct solution.

An increase in government funding to existing programs is untenable, due in part to the potential outcome of the current foci of access to justice funding (criminal law and public family law) absorbing a funding increase. Legal Aid Ontario had an operating budget of $362 million in 2008, but the fact that barriers to civil justice still exist suggest that there is no shortage of, as Legal Aid Ontario describes it, “single parents seeking child support from delinquent ex-partners; victims of domestic violence; parents seeking custody of children to protect them from abuse; injured workers; refugees; and accused persons.” These groups involved in almost-exclusively public law matters would likely lay claim to a funding increase. Other reasons why increasing aid to the current system would not be an ideal solution are that an increase would likely not be enough to enable sufficient programs to achieve the goal of complete access to civil representation for the needy, and the political cost of an overhaul to the existing legal aid process, which was summed up by Genn: “[d]espite the social importance of the civil justice system to the economy and social order, in a climate of strained resources it is essentially undefended.”

Funding could easily be taken away again at a later time because of the lack of political will.

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96 Ibid.
97 Genn, Judging Civil Justice, supra note 13 at 42.
It would be unsurprising if there is simply no desire from the average citizen to support private legal aid without the ability for that average citizen to have access to that system when in need of trained legal assistance for a civil issue. Trebilcock summarizes the prevailing mood:

Civil claims more generally are now largely excluded from the purview of the system. In short, the legal aid system, despite the important normative rationales that underpin it, is not a system in which most middle class citizens of Ontario feel they have a material stake. As a percentage of the population, fewer and fewer citizens qualify for legal aid, and many working poor and lower middle-income citizens of Ontario confront a system which they cannot access and which they are expected to support through their tax dollars even though they themselves face major financial problems in accessing the justice system (as witnessed most dramatically in the family law area, but also in various areas of civil litigation).

The politics of access to civil justice in England provide a clear example of this scenario. A study of the British public revealed that “[a]lmost three-quarters of respondents agreed with the proposition that the legal system works better for the rich than the poor.” Genn found that “[t]here were…concerns that the system worked best for those who could afford to use it and those who were financially eligible for legal aid—leaving those in the middle either without the means of obtaining redress or the prospect of unaffordable legal bills. These views came sometimes through direct experience, but also through hearing about the experiences of others.” As Genn writes elsewhere, this perception occurred as civil legal aid was attacked: “[t]he increase in the legal aid bill, which had been rising steadily throughout the 1980s, by the late 1990s had started to look uncontrollable. This was not helped by criminal justice policy involving an extensive criminal legislative programme…in a fixed justice budget that has to accommodate both the rising cost of criminal justice and the civil justice system, it is civil justice that gets squeezed. There are plenty of votes in crime, but few in civil justice. No government ever won or lost an election on its record on civil justice.”

99 Ibid. at 76.
100 Ibid. at 236.
101 Ibid. at 236.
Another option for direct government expenditure is a restructuring of the civil legal adjudicative model. Such reforms may be feasible, so long as they do not involve significant increase in either cost or level of complexity of Ontario’s civil justice model, which could become incoherent or difficult to understand to the average Ontarian. Reforms could draw on the accessibility initiatives (less formality and greater availability) seen in systems such as Small Claims’ Court. However, the system would need to ensure that affordable trained legal representation was available, as reforms to make it easier for litigants to act \textit{pro se} is unsatisfying as a sole solution. Not every case can be assessed and argued by laymen, no matter how lax rules of procedure are made.

Government expenditure which aims to provide the general public with basic knowledge about Ontario’s civil law could also help by allowing citizens to more easily identify when they have a legal issue. As Galanter opines, “[j]ust as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.”\textsuperscript{102} \textit{Listening to Ontarians} identifies a key problem: “[l]ow and middle-income Ontarians experience many barriers to access to civil justice, including…lack of access to information and self-help resources. Once again, the poorest and most vulnerable Ontarians experience the greatest barriers.”\textsuperscript{103} Michael Trebilcock notes a potential system to ameliorate this concern: “[a]nother model that Ontario could look to is the recent introduction in British Columbia of central information hubs, based on the recommendations of the B.C. Family Justice Reform Working Group and the B.C. Civil Justice Reform Working Group. Under the rubric ‘Justice Services Centre’, these hubs provide people with information, advice, guidance and other services to prevent and solve legal problems as early as possible. The legal issues dealt with might include debt, consumer,


\textsuperscript{103} \textit{Listening to Ontarians}, supra note 16 at 46.
housing and any other civil or family law matter.”\textsuperscript{104} The goal must be to educate, and not to stunt the general public into accepting the current system. Macdonald writes that

public legal education in the service of access to justice is a double-edged sword. It does enhance access to justice by giving citizens the tools to engage in preventative law and informal dispute resolution. But it often winds up enhancing a certain dependency on lawyers and the formal dispute resolution system. Far from educating lawyers and judges about the legal needs of the public, legal information programmes typically co-opt the public into thinking that it cannot obtain justice without the aid of lawyers, judges and official law. Far from inducing the law to talk the language of the public, public legal education programmes typically wind up inducing the public to talk like lawyers.\textsuperscript{105}

It is unclear why either of these two results (greater ability for dispute resolution amongst citizens and greater ability to analyze legal problems through better understanding of the law and legal processes) are repugnant, and both should be encouraged. If people “talk like lawyers,” to a certain extent access to justice has been extended by that very action. In allocating resources, then, “the true access to justice challenge is: ‘How can we provide information and resources for citizens so that they can use their own understandings of the requirements of a just legal order to make the official system more sensitive and responsive?’”\textsuperscript{106}

Government spending could also be directed to simplifying procedures or developing a new set of courts to allow for the easier and cheaper hearing of civil disputes. Even if creating new fora for everyday civil disputes represented revenue neutrality for Ontario in terms of funding the process, creating the new systems would necessarily involve administrative spending. The Ontario government’s role would be to ensure that its targets of providing support for the poor were met in cases where neither private concern nor public body would be able to devote resources directly to an impecunious litigant. Allowing for greater freedom of action through systemic reform would be a positive step for civil justice, for as Patricia Hughes argues, “law reform is not merely about ‘changing’ the law. Rather, the law reform process connotes increasing access to justice by providing more people with meaningful access to courts,

\textsuperscript{104} Trebilcock, \textit{supra} note 96 at 90.
\textsuperscript{106} \textit{Ibid.}
tribunals, and other dispute resolution processes, and thus to legal process, to the substance of law, or, more broadly, to the rights and benefits generally available to society by the mechanism of law.”

In this context, reforms which grant more access to the courts should be encouraged, if not mandated, and Hughes simultaneously contemplates the need for access to courts by citizens themselves, and meaningful access to justice (through the advancement of legal representation opportunities). The ultimate goal is to “change the law” by providing the ability for all members of society to solve legal issues using the appropriate forum. Without lawyers, the majority of Ontarians will not be able to access the law. However, if the public are without the ability to understand or the desire to seek legal justice, lawyers will be as useless as the proverbial car without an engine.

Successful government restructuring of the civil law process could also involve additions to available trained legal representation, with the goal of driving down the price of a lawyer. One plan, which is not revenue-neutral, is to increase the number of law graduates across the province, either by increasing enrolment at Ontario’s six law faculties, or by encouraging the growth of more law schools around the province (the plan of encouraging the immigration of more foreign-trained lawyers is outside the scope of this paper). A greater supply of trained legal representation would absorb more of the demand, and could also raise the level of legal expertise at the same time. However, a major problem with this plan can be found in the possible attrition and relocation potential for legal graduates: thus there is no guarantee that more law school graduates would result in more Ontario lawyers, and even if the number of lawyers increased, the price for legal services would not necessarily decrease substantially, due to the cost of a legal education, and the inherent oligopolistic and cartel-like control lawyers have on their own fees. Moreover, government funding of post-secondary education would need to be increased, and if debt-

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forgiveness programs are implemented to ensure graduates have incentive to charge lower prices, the financial impact would be significant.

Lastly, another re-allocation of governmental resources is discussed by Trebilcock: “legal insurance may be one means to significantly improve access to justice in Ontario, particularly in civil matters, including family law. The Law Society of Upper Canada and [Legal Aid Ontario] should accord a high priority to promoting the role of legal insurance in Ontario.” While costing the government little in transactional costs (apart from development of any necessary legal insurance legislation and regulation), private legal insurance, encouraged by government, could allow citizens who can afford insurance to obtain legal services at reasonable cost. However, this solution does not address clients who cannot afford even modest premiums, nor the need for legal advice throughout the civil law process (including before an action is commenced). The multiplicity of actions against auto and housing insurance providers also serve as a warning against placing the State’s responsibilities to ensure access to civil justice in the hands of for-profit corporations. Therefore, it seems likely that legal insurance is only part of a potential solution, and that a more dramatic change of the system may be necessary to ensure equality in civil law.

The Second Potential Solution: An Increase in Activity by the Bar

The solution to current access to justice concerns may lie within the legal profession itself. Lawyers can increase levels of representation, and raise the level of legal knowledge of the average citizen. Such knowledge (including corresponding attitudes towards the legal system and legal profession) will strengthen citizens’ ability to change the law through the democratic process, as well as the appreciation of when civil legal advice or action is necessary. Different methods of public interaction must be explored. Lawyers are perfectly placed to speak on the matter of access to civil justice. This could start by educating the public about the availability of lawyers and paralegals, the services available to people to access them (such as the Lawyer Referral Service and the Law Society’s Lawyer and Paralegal

108 Trebilcock, supra note 96 at 97.
Directory\textsuperscript{109}, and the relative costs of retaining their services will enable low and middle-income Ontarians to make informed choices when it comes to purchasing legal services\textsuperscript{110}.

The wider the dissemination of knowledge of injustices created by inaccessibility of the civil legal system, the stronger political response it will generate. This will put increased pressure on the system to provide access to civil justice.

An increase in fully accessible civil legal work could be mandated by the Law Society of Upper Canada, as a prerequisite for maintaining membership in the Bar. Lawyers are likely to resist this imposition, and since the professional organizations are responsive to their members, an innovation like this may easily be defeated. There are also practical objections to such a system: “those Canadian law societies that have undertaken pro bono initiatives have been quick to reject the idea that pro bono be mandatory. Further, every attempt to introduce widespread mandatory pro bono programs in the U.S. has failed, and numerous academics and other commentators have asserted strong conceptual objections to a mandatory obligation.”\textsuperscript{111} Increasing the requirements for lawyers to provide free or affordable legal services does not solve the problem of inconsistent resources availability based on location, meaning that the availability of trained legal assistance would be inconsistently available depending on a citizen’s location or the legal issue they encountered. As Trebilcock notes, uniformity in Ontario is currently lacking: “programs and services [Community Legal Education Ontario, Pro Bono Law Ontario, and the Law Help centre]…do not constitute an integrated system for enhancing access to justice for a broad range of Ontario citizens. Notably, Legal Aid Ontario, which has this mandate, does not directly provide accessible legal information or advice in any significant way.”\textsuperscript{112}

The lack of uniformity in the availability of civil legal aid would likely not be ameliorated by an increase in \textit{pro bono} work, as current regional discrepancies in access would remain unchanged.

\textsuperscript{109} Found online at http://www1.lsuc.on.ca/LawyerParalegalDirectory/index.jsp.
\textsuperscript{110} \textit{Listening to Ontarians}, \textit{supra} note 16 at 60.
\textsuperscript{111} Alice Woolley, \textit{supra} note 19 at 109-110.
\textsuperscript{112} Trebilcock, \textit{supra} note 96 at 95-96.
Overall, it seems that an internally stimulated increase in the activity of the Bar would be insufficient to address Ontarians’ civil justice needs, and that the Honourable Justice Osborne is correct: “[a]s a general finding… it is clear to me that the needs of the unrepresented should not and cannot be met by the spirit of volunteerism of the Ontario bar alone.”

A different solution would be for the government to unilaterally impose requirements increasing the level of free (or affordable) professional assistance as a requirement of maintaining a legal licence. However, in addition to being the subject of powerful professional lobby noted above, such an increase may not be sufficient to cover the public’s needs, and may lead to decreased economic output (based on the cost to the lawyers) even if successful. Such an action would call into play the self-regulating nature of the profession, presaging a larger discussion on whether lawyers should be self-regulating which would be counter-productive to the goal of simply increasing access to counsel. Furthermore, without a comprehensive regulatory system, a lawyer compelled to provide pro bono work could simply provide that work to a non-needy client, without entering the market for civil legal services. The Canadian Bar Association vehemently opposes access to justice issues being transferred to lawyers only:

[legal services must be considered a right in this nation. To suggest that such legal services ought to be performed on a pro bono basis, whether partially or wholly, is to put such services on the level both of charity vis-à-vis the government’s funding obligation and vis-à-vis lawyers’ time, energy and effort. The profession cannot support a return to the charitable concepts standing alone as were present in 1495. The government’s obligation is of primary importance.]

A contentious debate on which group should bear responsibility will be unproductive. Finally, the ad hoc nature of the remedy is clear: there is no guarantee that individuals would not fall through the cracks in the increase of Bar activity system, nor that they would have any redress if they did. The only alternative, forcing lawyers to take specific cases, would endanger paying clients of a private legal practice and is too draconian to consider.

113 The Hon. Mr. Justice Coulter Osborne, supra note 90 at 48.
The danger of less-competent lawyers being delegated to “free” legal consultation, the inevitable debates on how much *pro bono* work should be mandated, and the lack of any entrenched solution in the complexity and length of time inherent in the litigation all militate against government-imposed *pro bono* as a comprehensive solution. While all lawyers licenced by the Law Society of Upper Canada are deemed to have baseline competence, lawyers who exhibit the least skill may be the most attracted by a mandatory *pro bono* system, since they will have the least opportunity cost to working for free. If all lawyers are equally required to fulfill *pro bono* requirements, highly-skilled lawyers may re-direct many of their tasks to a lesser-skilled lawyer, ending up with the same problem of comparative price disadvantage for civil legal aid clients. Although in some cases less-skilled representation is preferable than no representation, given the complex and discretionary nature of legal assistance (often more than one action by a legal representative will be defensible), less-skilled lawyers are not always adequate. Moreover, any lawyer will have less incentive to work diligently for a client who is not paying, resulting in a possible downgrade in zeal and time spent on the needy client.

In addition, the problem of mandating *pro bono* work would also encounter the problem of the diversity of legal services in Ontario. Some areas of law lend themselves to the less-trained, such as “tax discounters, traffic-ticket agents, title-searchers, patent and trade-mark agents, paralegals and companies that provide legal forms of wills and leases, for example, [that] already flourish on the margins of legal regulation…These are almost all high-volume, transaction-related, low-planning endeavours.” However, more technically complex areas of the law, or complex proceedings in any area of the law, cannot be completed in the same amount of time or by the same representatives. Moreover, different needs in different regions may militate against uniformly requiring some standard: the standard will either be too high or too low, and may threaten some firms’ financial stability. Lawyers forced by the government to

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provide *pro bono* legal aid services in civil cases will have incentive to minimize the amount of work and time they spend on a compulsory client’s case. This is not an insurmountable problem, as lawyers are still monitored and have liability under both contractual and fiduciary duties to all clients, but would nonetheless represent a potential conflict of interest. The down-grading of responsibility for access to affordable or free civil legal services from the government to the legal profession is not the optimal solution for ensuring all citizens have access to civil justice. However, as Faisal Bhabha writes, “[t]he exclusion of the poor and other disadvantaged people from the justice system can exacerbate and entrench their already marginal position in the political, social and economic structures of society. It can also destabilize the political system and engender disillusionment with democratic institutions.” Lawyers can and must speak out against such exclusion and inform the public in order to avoid this result.

### The Third Potential Solution: Deregulation

One solution to the problem of lack of access to civil justice in Ontario is to reshape the cartel which the legal profession currently enjoys through a de-regulation of the restrictions on who may be a legal representative. Protection of the public interest cannot be abandoned to the extent of a completely laissez-faire system. However, an increase in paralegal representation (reinforced by the Law Society of Upper Canada now regulating paralegals), combined with the creation of the ability to become certified in only one area of the law, could increase the supply of legal assistance, lower cost, and provide more commonly sought legal services. Paralegals are now regulated by the Law Society of Upper Canada, a process described in that organization’s By-Law 4. While paralegals are able to “[g]ive a party advice on his, her or its legal interests, rights or responsibilities with respect to a proceeding or the subject matter of a proceeding,” the extent of paralegal representation in civil cases is limited to Small Claims Court and

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117 Law Society of Upper Canada *By-Law 4*, Section 6(2), Paragraph 1
Tribunal proceedings.\textsuperscript{119} Because of this restriction and the comparatively limited educational experience for paralegals,\textsuperscript{120} they do not represent a complete solution to the legal cartel, which retains control over many aspects of legal assistance.

The fact that only a small percentage of the population is licenced to act as a legal representative results in higher prices and supply shortages for unpopular or non-lucrative areas of the law. Following the logic for the creation of licenced paralegals, many civil law issues do not need a traditionally-trained lawyer to provide relief. Millemann makes this argument through a rights-based critique:

although government’s interest in avoiding a universal appointment of counsel requirement in civil litigation is very substantial, its interest is less in avoiding the selective appointment of trained lay advocates to civil litigants who are incapable of representing themselves and who face the loss of substantial property or liberty interests…Thus, the due process balance might be struck quite differently in such cases, supporting the development of qualified rights to legal help from lay advocates in some civil cases.\textsuperscript{121}

One goal for a system of access to civil justice is to ensure that legal remedies are available no matter how minor the relief might seem. Macdonald writes that “the role of law is to take the unarticulated hurts and frustrations of life and give them form whereby they may be framed, argued about and channelled into productive exercises of social learning for those in conflict. Every human event can be a means for symbolising conflict; and every human conflict has transformative possibilities.”\textsuperscript{122} In this view, lawyers will often be unnecessary, necessitating intermediate service providers for the less complex yet legally actionable hurts and frustrations of life. Good points out that “the primary understanding of access to justice in the courts is in overcoming economic barriers. The sheer frequency with which the term ‘economic’ and its permutations appears points to the marginalization of other meanings.”\textsuperscript{123} This trend shows the preoccupation in access to justice discourse with financially-viable services, and non-licenced

\textsuperscript{118} Ibid., Paragraph 2(i)
\textsuperscript{119} Ibid., Paragraph 2(iv)
\textsuperscript{120} A community college education; for full requirements see the Law Society of Canada page <http://rc.lsuc.on.ca/jsp/licensingprocessparalegal/index.jsp?language=en>
\textsuperscript{121} Millemann, supra note 30 at p. 55, note 190.
\textsuperscript{122} Macdonald, \textit{Access to Justice and Law Reform \#2}, supra note 105 at 320-321.
\textsuperscript{123} Good, \textit{supra} note 88 at 196.
or partially-licenced individuals would benefit the system by providing cost-effective trained legal advice, furthering the common conception of access to justice as access to a representative.

Since law has become increasingly specialized, allowing practitioners to become licenced in only one area of law would mirror the diversification of the medical profession in allowing differently-credentialed service providers such as Nurse Practitioners and Registered Nurses. A properly-licenced and insured person who gave advice solely on pre-nuptial agreements, for example, would not necessarily need to be a full lawyer. This idea finds support in a paper by Macdonald:

The cost of legal services can also be lowered by removing the lawyers’ monopoly (at least in certain areas) so as to increase supply. By increasing the number of service providers, and by letting into the system a number of people who do not have either the capital costs or the ongoing overhead of lawyers, the conditions for meaningful price competition are created. In addition, by providing for alternative service providers, the occasions where services are provided by overqualified professionals and billed accordingly are significantly reduced.”124

Hadfield inquires, “[w]hy is law so complicated that legal training is so expensive? Is the public better off with inexpensive low quality legal advice or high quality legal advice it cannot afford?”125

Subject to the above discussion on the problems with simply qualifying more lawyers, the idea that competency in one area of law would not be as expensive to obtain leads to the inference that the legal service provider benefitting from the cheaper education would charge less for the legal services, without a diminution in the quality of the service provided. The main difficulty with a limited licence is likely supervision, as a limited licence may tempt people to stray outside their prescribed area in complicated circumstances.

A standard argument for the necessity of a legal cartel is protection of the public. It is a compelling concern: unscrupulous legal service providers (whether lawyers or not) can irreparably harm clients, through malice or ignorance. Nor can the public be relied upon to distinguish between real legal expertise and the credentials of a charlatan. Government oversight of anyone giving legal assistance is necessary (as

125 Hadfield, supra note 22 at 954.
there are significant downsides to a pure caveat emptor system), but service provision need not be as exclusive as it is now. Coupled with greater public knowledge of the legal system, flexible licencing could address most access to civil justice concerns which exist in Ontario today. As Woolley notes, “[i]n essence, lawyers are no different from pharmacists, dentists, speech therapists, physiotherapists, accountants, or any other licensed practitioner who has educational and licensing requirements after the satisfaction of which they compete for clients.”\textsuperscript{126} As long as licencing and educational requirements are satisfied, there is no need for an overly-rigid designation of who can provide trained legal service. Many of the licenced professions Woolley mentions are complemented by differently-licenced assistants, providing precedents for law. The ability to have a legal representative who is not a lawyer would lower costs and enhance competition, resulting in a situation where average citizens reap the benefit.

Increasing educational resources for the public would also create less dependence on lawyers for minor civil activities. It is difficult to disagree with Justice Osborne when his Honour recommends that:

\begin{quote}
a reasonable modicum of resources and assistance ought to be made available to assist those with legal problems who cannot afford counsel or choose not to retain counsel, to permit them to more easily represent themselves in a system that can be foreign and complex for those without formal legal training. At a minimum, they should be able to obtain basic information about the civil justice system and early summary advice as to whether it makes sense to pursue or defend a case.\textsuperscript{127}
\end{quote}

Part of these resources could include deregulated service providers, especially in conjunction with the informational segment of the recommendation. Economic rents are present in Ontario’s current system, when a legal advisor must be either a lawyer or paralegal. While it is important for the people of Ontario to be protected against malpractice, this protection should not come at the cost of shutting vulnerable Ontarians out of the civil justice system. Limited deregulation of the cartel lawyers currently enjoy should be carefully considered and cautiously implemented.

\textsuperscript{126} Woolley, \textit{supra} note 19 at 112.

\textsuperscript{127} The Honourable Mr. Justice Osborne, \textit{supra} note 90 at 44.
Conclusion

A functioning and accessible justice system operating with informed consent from those subject to it is a necessary component of the rule of law. Current resources in Ontario are understandably focussed on the pressing issues of criminal and government-initiated children’s aid litigation, but an examination of the mainstream civil systems of tort, residential, private family, small business and contract law reveals that these areas require modification to make them more accessible, through provision of counsel and educational resources, to the average citizen. Examination of these areas also reveals that the provision of legal civil support for those who cannot currently afford it begets practical (efficiency) and theoretical (the law as truly egalitarian) benefits. Civil law in Ontario concerns diverse needs, but a common thread underlies all aspects of civil law: the need for the average citizen to access their civil law remedies. Possibilities for improving access to civil justice include increased government involvement in funding or shaping private litigation, an increase in the amount of pro bono work by the legal profession, and a restructuring of current legal licencing requirements. Access to civil justice—the average citizen being able to understand civil law and have at his or her disposal legal remedies—is essential to a just society.
Bibliography

LEGISLATION

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SECONDARY MATERIAL-MONOGRAPHS


**SECONDARY MATERIAL-ARTICLES**


