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BUSINESS STRUCTURES

The Future of Legal Services



# Unmet Legal Needs in Ontario

## Alternative Business Structures Working Group Members

Malcolm Mercer, Co-Chair | Susan McGrath, Co-Chair

Constance Backhouse | Marion Boyd | Ross Earnshaw | Susan Elliott | Carol Hartman | Jacqueline Horvat

Brian Lawrie | Jeffrey Lem | Jan Richardson | James Scarfone | Alan Silverstein | Peter Wardle

The Law Society  
of Upper Canada

Barreau du  
Haut-Canada

# THE FUTURE OF LEGAL SERVICES

## UNMET LEGAL NEEDS IN ONTARIO

### Introduction

In *The End of Lawyers: Rethinking the Nature of Legal Services*, Richard Susskind describes “innumerable situations” in which individuals would benefit from legal guidance, but do not seek out help because of cost, lack of time, inconvenience, and even fear. He refers to “unmet legal needs”, which he identifies as a “large untapped market”.<sup>1</sup> This paper describes unmet needs in the Ontario and Canadian contexts based on various reports.

The February 2014 report of the ABS Working Group to Convocation observes that

..for day to day legal needs, individuals are well served in many respects by lawyers and paralegals. It is also clear however that there are gaps and that in many cases significant legal needs are not being served. This is sometimes referred to as latent demand for legal services, usually in circumstances where those seeking the services are middle income earners, but the cost of some of the services are beyond their ability to afford.<sup>2</sup>

The February report of the Treasurer’s Advisory Group on Access to Justice to Convocation noted the following three national reports released in 2013:

- *A Roadmap for Change: Report of the National Action Committee on Access to Justice in Civil and Family Matters* (October 2013);
- *Reaching Equal Justice: An Invitation to Envision and Act (Report of the Canadian Bar Association’s Envisioning Equal Justice Initiative* (November 2013)); and
- *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, Final Report, Dr. Julie Macfarlane (May 2013).

This paper also reviews the findings of a study completed by Ab Currie, Senior Research Fellow, Canadian Forum on Civil Justice for the Department of Justice in 2009 (*The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*) as well as of a survey conducted by LAWPRO’s TitlePLUS title insurance program regarding the percentage of Canadians with a signed will and power of attorney.

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<sup>1</sup> Richard Susskind, *The End of Lawyers: Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2010), pp. 234-245.

<sup>2</sup> Alternative Business Structures Report to Convocation, February 2014, paragraph 109, online at [http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2014/convfeb2014\\_PRC\(1\).pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/convfeb2014_PRC(1).pdf).

## Report of the National Action Committee on Access to Justice in Civil and Family Matters

According to the National Action Committee report on Access to Justice in Civil and Family Matters, over 20% of the Canadian population takes no meaningful action with respect to their legal issues. Over 65% “think that nothing can be done, are uncertain about their rights, do not know what to do, think it will take too much time, cost too much money or are simply afraid”.<sup>3</sup> Of those who do not seek legal assistance, between 42% and 90% identify cost – or perceived cost – as the reason for not doing so. A proportion of these issues subsequently require expensive legal services and court time.<sup>4</sup> Approximately 50% of people try to solve their problems on their own or with minimal non-legal assistance. Many – in some cases over 50% depending on the court and the jurisdiction – represent themselves in judicial proceedings. Statistics also indicate that individuals who receive legal assistance are more likely to receive better results than those who do not.<sup>5</sup>

The NAC report also identifies “making essential legal services available to everyone” as one of nine goals as part of the access to justice roadmap.<sup>6</sup> Alternative business and delivery models are identified in the report as a component of the modernization and expansion of the legal services sector to achieve this end.<sup>7</sup>

## Canadian Bar Association’s Envisioning Equal Justice Initiative

The CBA report (*Reaching Equal Justice: An Invitation to Envision and Act*) describes unmet legal needs in terms of “justiciable events”, defined as

A matter experienced by a respondent which raised legal issues whether or not it was recognized by the respondent as being ‘legal’ and whether any action taken by the respondent to deal with the event involved the use of any part of the civil justice system.<sup>8</sup>

Most justiciable problems are resolved outside the formal justice system.<sup>9</sup> Other barriers to finding solutions to civil legal problems include the complexities of the legal system, fear of becoming involved in the legal system, particularly for those who had had previous experience with the civil or criminal system, the stress of pursuing legal problems, concerns about

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<sup>3</sup> *A Roadmap for Change: Report of the National Action Committee on Access to Justice in Civil and Family Matters*, October 2013, at [http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf) p. 4

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid., p. 10.

<sup>7</sup> Ibid., p. 14.

<sup>8</sup> *Reaching Equal Justice: An Invitation to Envision and Act, Report of the Canadian Bar Association’s Envisioning Equal Justice Initiative* (November 2013), online at [http://www.cba.org/CBA/equaljustice/secure\\_pdf/EqualJusticeFinalReport-eng.pdf](http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf), p. 32.

<sup>9</sup> Ibid.

damaging relationships, being intimidated by the court system and generally afraid to take action, and embarrassment and fear of stigmatization for having a legal problem.<sup>10</sup>

### **The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Persons**

A study of self-represented litigants in family and in civil law matters in Ontario, British Columbia and Alberta conducted by Professor Julie Macfarlane of the University of Windsor reported that the most consistently cited reason for self-representation was the inability to afford to retain, or continue to retain, a lawyer.<sup>11</sup> There have been dramatic increases in self-representation in family and civil court over the past decade. In some family courts the number now reaches 80% and is consistently 60-65% at the time of filing.<sup>12</sup>

The Ontario data regarding self-represented litigants includes filings in the Ontario Court of Justice and the Superior Court (both family and divorce matters). Throughout the province, in 2011-12, 64% of individuals involved in applications under the *Family Law Act*, the *Children's Law Reform Act* or the *Divorce Act* were self-represented at the time of filing. In two of the busiest court houses in Toronto (Jarvis Avenue and Sheppard Avenue) the figures were 73% and 74%, respectively.<sup>13</sup>

More than half (53%) of participants in a survey conducted by Professor Macfarlane had retained a lawyer at some point in their case. Three-quarters had retained a private lawyer. The remainder had been legally aided, but legal aid was no longer available.<sup>14</sup>

### **Survey Regarding Percentage of Canadians with Wills and Powers of Attorney**

By-Laws of the Law Society of Upper Canada require Ontario lawyers to purchase professional liability insurance from LAWPRO. (Paralegals are also required to purchase professional liability insurance, although they are not covered by LAWPRO unless they are partners in a Multi-Disciplinary Partnership or a combined licensee partnership). In 2012, TitlePLUS, LAWPRO's title insurance program, conducted a survey of 2,000 Canadians which revealed that 56% of Canadian adults do not have a signed will and 70% of Canadian adults do not have a signed power of attorney.<sup>15</sup>

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<sup>10</sup> Ibid, p. 34.

<sup>11</sup> Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, p. 8, p. 14, p. 39, and p. 121, online at [http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2014/Self-represented\\_project.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf).

<sup>12</sup> Ibid., p. 15.

<sup>13</sup> Ibid., p. 33.

<sup>14</sup> Ibid., p. 42.

<sup>15</sup> "More than half of Canadians do not have a signed will", Press Release, LAWPRO, May 7, 2012, online at <http://www.newswire.ca/en/story/968857/survey-more-than-half-of-canadians-do-not-have-a-signed-will>.

## **The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians**

In 2009, the Department of Justice released a report regarding the prevalence of justiciable problems in Canada. A “justiciable” problem is “a matter experienced by a respondent which raised legal issues whether or not it was recognized by the respondent as being “legal” and whether any action taken by the respondent to deal with the event involved the use of any part of the civil justice system”.<sup>16</sup> The study involved a survey of 6,665 adults age 18 and over conducted in March 2005.

The report concluded that consumer, employment and debt were the most common justiciable problems. About one-fifth of the adult population could be expected to experience at least one problem in each of these three problem categories within a three year period. The fourth most common justiciable problem involved wills and powers of attorney. With respect to money and debt issues, because of the amounts at issue, the report concluded that “sensible ways of resolving problems involving these amounts of money would probably not include engaging private counsel at normal rates”.<sup>17</sup>

According to the report, which relies on data gathered in 2006, respondents turned to legal assistance for only 11.7% of the justiciable problems they experienced.<sup>18</sup> “Legal assistance” in this context referred to help from a lawyer or legal aid. Respondents with problems relating to family relationship breakdown sought legal assistance for almost half of these issues (48.8%). Legal assistance was sought with respect to only 3.3% of discrimination problems, 5.3% of consumer issues, and 7.5% of employment problems. Respondents experiencing personal injury issues sought legal assistance in 15.5% of cases. Individuals with wills and powers of attorney questions sought legal help in only 21.2% of cases.<sup>19</sup>

### **Ontario Civil Needs Project Report**

#### *Methodology*

In 2008, the Law Society of Upper Canada, Legal Aid Ontario and Pro Bono Law Ontario undertook a joint research project to identify and quantify the civil legal needs experienced by low and middle-income Ontarians (low and middle-income Ontarians were defined as having family incomes of less than \$75,000 per year).

As part of the project, Environics Research conducted a quantitative survey in June 2009 with 2,000 residents of Ontario, age 18 or older, with household incomes of less than \$75,000.

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<sup>16</sup> *Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*, (Ottawa: Department of Justice, 2009), p. 6.

<sup>17</sup> *Ibid.*, p. 39.

<sup>18</sup> *Ibid.*, p. 60.

<sup>19</sup> *Ibid.*, p. 60.

Participants were asked whether anyone in their household experienced problems or issues for which they did or did not seek legal assistance. Respondents were then asked to identify problem types, without being prompted or presented with a list of possible categories. The survey also contained a number of questions regarding individuals' perceptions of the fairness and efficacy of the justice system and their satisfaction with problem resolution strategies.

### ***Findings***

The final report, entitled *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (*Listening to Ontarians*) indicated that 35% of low and middle-income Ontarians said that they had experienced a civil legal problem or issue during the previous three years.<sup>20</sup> The areas mentioned included issues with a family relationship, wills and powers of attorney, real estate transactions, housing, employment, personal injury, debt, disability-related issues, traffic offences, immigration and small or personal business issues. Problems with family relationships were the most prevalent. Over 12% reported issues in this category. Personal security, employment and personal relationship problems were most frequently reported as “severe”.<sup>21</sup>

Fourteen per cent (or one in seven survey participants) said that they had a civil legal problem or issues during the previous three years for which they had not sought legal assistance although it would have been helpful.<sup>22</sup> The main reason (cited by 42% of respondents) for not seeking out assistance for a legal issue was the “perception that legal assistance would cost too much or that they could not afford a lawyer”.<sup>23</sup>

Approximately one in seven Ontarians who experienced a civil legal problem and who recognized that they needed legal assistance did not seek any. Overall, legal advice was sought for 65.4% of the total legal problems experienced. Among the individuals surveyed, three in ten respondents had a legal problem for which they had sought some form of legal advice. Within this group of legal advice seekers, two-thirds had engaged a private lawyer.

The group that was most likely to cite cost or inability to afford a lawyer included people living outside the Greater Toronto Area and particularly residents of Eastern Ontario, women, middle-aged people, and those with legal problems relating to wills and powers of attorney, real estate, housing or land issues. Almost one in ten low and middle-income Ontarians indicated that they did not seek legal assistance for their civil legal problem because they believed that they would not qualify for such assistance.<sup>24</sup>

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<sup>20</sup> *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project*, p. 20, online at [http://www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf).

<sup>21</sup> Jamie Baxter, Michael Trebilcock, Albert Yoon, “The Ontario Civil Needs Project”, *Middle Income Access to Justice*, (Toronto/Buffalo/London: University of Toronto Press, 2012), eds. Michael Trebilcock, Anthony Duggan, and Lorne Sossin, p. 65.

<sup>22</sup> *Ibid.*

<sup>23</sup> Ontario Civil Legal Needs Project, *Listening to Ontarians*, *supra* note 22, p. 39.

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

The report also suggested that low and middle-income Ontarians believed that in the future, they would likely experience legal problems relating to wills and powers of attorney (17%), family relationships (14%), and real estate transactions (12%). Only 21% did not anticipate that they would experience a legal problem.<sup>25</sup>

### **Access to Services and Sole and Small Practitioners**

Almost 10 years ago, the 2005 *Final Report of the Sole Practitioner and Small Firm Task Force* to Convocation describes some of the challenges faced by sole practitioners and small firms (referred to as the “target group”) who service clients in day to day legal matters:

[C]ompetition from a wide range of non-traditional sources has exacerbated the financial pressure on their practices. In certain practice areas, in particular, clients are unwilling to pay what services are worth and do not appreciate the skill and value lawyers bring to legal services. In varying degrees, target group lawyers are caught between the upward pressure on all their costs (rent, equipment, staff, research materials) and the downward pressure on revenues (low legal aid rates, clients who cannot afford to pay for services or pay on a timely basis, clients who are unwilling to pay). This is coupled with difficulty in obtaining financing for the capital and cash flow requirements of running a practice. The lawyer may not be able to afford office resources that could potentially reduce costs.<sup>26</sup>

It appears that these challenges continue.

### **Innovation in Legal Service Delivery to Address Unmet Needs**

Many lawyers and paralegals in Ontario are already innovating. These innovations may reach a new market of consumers who are currently not able to afford, or are not interested in obtaining, traditional legal services. This is an opportunity for licensees and clients. For example,

- Several law firms provide the services of experienced in-house counsel on an as-needed basis. Services available include commercial, transactional and corporate, and intellectual property law advice. In some cases, the lawyer on contract can become “embedded” on a temporary basis in the client’s legal department.

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<sup>25</sup> Ibid.

<sup>26</sup> Law Society of Upper Canada, *Final Report of the Sole Practitioner and Small Firm Task Force*, March 24, 2005, online at <http://www.lsuc.on.ca/media/convmar05solepractitioner.pdf>.

- Another law firm has developed a web site where legal forms are available online for download. The available forms include a Statement of Claim, a Statement of Defence, a Power of Attorney, and wills. The web site will also put clients in touch with a lawyer.
- Real estate law services are available until 11 p.m. daily by a Toronto-based law office serving southern Ontario. A staff of several dozen work in a number of offices and are supervised by a lawyer.
- Legal services (including employment and rental agreements, wills, business name registrations, powers of attorney, and residential real estate services) are available at various retail locations. The website of this professional corporation advertises wills at a fixed price.

## **Summary**

Considering what is known about unmet legal needs and the pressure on legal service providers, to what extent could regulatory changes that expand the range of practice structures enable lawyers and paralegals to meet these needs? As discussed in the Law Society February 2014 ABS report, lawyers and paralegals may benefit from enhanced access to technology and business process innovation to respond to these competitive pressures through practice structures that permit non-licensee ownership and management. An ABS environment may support greater access to these tools. Lawyers and paralegals are already innovating, and so a question arises as to whether a more flexible regulatory environment encourage additional investments in technology to meet client needs.

For a discussion on the impact of regulatory change in other jurisdictions on sole practitioners and small firms, see the Law Society [backgrounder](#).