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Book Review

MIDDLE INCOME ACCESS TO JUSTICE, by Michael Trebilcock, Anthony Duggan, and Lorne Sossin (eds)¹

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THE LARGE MAJORITY OF CANADIANS who occupy the middle income bracket live, in large part, in an access-to-justice vacuum. This is a fundamental national problem.³ Most people in Canada cannot afford a lawyer to help them with many of their legal issues.⁴ Even if they can afford a lawyer, many people cannot find one who will assist them because the lawyer may judge their legal issues to be too insignificant or insufficiently lucrative to be attractive to the lawyer. This gap in the middle income bracket's access to the Canadian civil legal system is noticeably broad when one considers just how often family law matters or simple employment law matters touch on the lives of many ordinary Canadians.⁵

Access to justice has become the concern of the day for lawyers, legal academics, and politicians. Most Canadians presently do not have the ability to trigger a means to solve fundamental legal challenges in their lives, and yet

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1. (Toronto: University of Toronto Press, 2012) 556 pages.
 2. Associate Professor, Faculty of Law, Queen's University.
 3. A problem also echoed by the Chief Justice of the Supreme Court of Canada, the Right Honourable Beverley McLachlin, PC. See "Foreward" in *supra* note 1, ix.
 4. See *e.g.* Sujit Choudhry, Michael Trebilcock & James Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance," in *supra* note 1, 385 (stating that "[m]arket rates for legal services continue to rise, and representation by legal counsel is unaffordable for a majority of Ontarians") (at 385); Erik S Knutsen, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36 *Queens LJ* 113 (outlining the serious deterrent effect that Canada's significant cost of legal fees and its fee-shifting, loser-pays costs regime has on clients seeking legal representation for litigation matters).
 5. Jamie Baxter, Michael Trebilcock & Albert Yoon, "The Ontario Civil Legal Needs Project: A Comparative Analysis of the 2009 Survey Data" in *supra* note 1, 55 at 78 (noting that family law matters had the greatest frequency as a legal problem among the sample survey respondents; employment law matters was the fifth most frequent legal problem).

we have a public civil justice system that is supposed to be doing just that. Or is it? Access to justice is about more than simply the affordability of a lawyer in the traditional sense.⁶ It is about generating options for public problem-solving mechanisms. It is about thinking creatively about alternatives both within and outside the traditional lawyer-centric delivery of legal services. The solutions may be market-based, like contingency fees or legal expenses insurance. They may come from additional public programs, like ombudspersons or specialized and streamlined courts or procedures, or perhaps from something we have not yet thought about.

Middle Income Access to Justice is a collection of essays by some of the leading thinkers about civil justice issues from Canada, Britain, the United States, and Australia. The collection arose from a colloquium on “Middle Income Access to Civil Justice” held at the University of Toronto Faculty of Law on 10-11 February 2011. This collection is a fundamental and welcome contribution to the civil justice reform literature because it targets the largest and most prevalent group of people affected by the access to justice dilemma—the middle income group. This group has been largely understudied to date, as most scholarly efforts have focussed on legal aid issues for the indigent⁷ or on reforms directed at fostering pro bono work or similar efforts.⁸ The essays are an imperative read not only for lawyers and academics interested in civil justice reform issues, but also for policy-makers, politicians, social scientists, and judges. The collection captures the access-to-justice issue in a new way by asking contributors to think broadly and comparatively about how best to address the legal needs of those populating the middle income bracket. Despite the fact that there are essays on a diverse

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6. As this collection of essays in *Middle Income Access to Justice* (*supra* note 1) make abundantly clear.
 7. See *e.g.* Faisal Bhabha, “Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions” (2007) 33 *Queens LJ* 139 (suggesting efforts to improve access to justice for poor and marginalized groups, including adequate legal aid, government-funded court challenges programs, and interim costs awards).
 8. See *e.g.* Alice Woolley, “Imperfect Duty: Lawyers’ Obligation to Foster Access to Justice” (2008) 45:5 *Alta L Rev* 107 (calling for a levy on lawyers to contribute to legal aid as part of the duties lawyers have to provide legal services to needy clientele and detailing the problems of relying strictly on pro bono and reduced-fee arrangements to address access to justice) [Woolley, “Imperfect Duty”]; Richard Devlin, “Breach of Contract? The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession” (2002) 25 *Dalhousie LJ* 335 (exploring mandatory pro bono legal services as a substitute for underfunded legal aid programs); Lorne Sossin, “The Public Interest, Professionalism, and Pro Bono Publico” (2008) 46 *Osgoode Hall LJ* 131 (exploring the dynamic of lawyers’ and clients’ interests in pro bono legal services).

number of topics within this broad mandate, the collection hangs together well because it consistently highlights three major issues facing any solutions to the access to justice problem for middle-income individuals in Canada (or elsewhere).

First, the authors in the collection frankly recognize that the middle-income earners' challenges in accessing solutions to their legal problems are not simply about the perceived high cost of lawyers' fees and the resulting difficulty in accessing traditional legal services like litigation representation. This was largely the topic of the first phase of access-to-justice literature in Canada, as noted above. In the past, lawyers' fees have been among the most popular targets in the access-to-justice crusade with the corresponding solutions being either that lawyers lower their fees and take on more pro bono work or that governments increase the availability of legal aid.⁹ This has resulted in little to no tangible reform because such suggestions have yet to incorporate the powerful market forces at work in the legal services sphere.

The contributions in *Middle Income Access to Justice* have rightly moved beyond these issues because the access problem is far more complex than simply the monetary market rate for lawyer services. For example, in her essay, Rebecca Sandefur posits that legal problems are largely socially constructed and people discover how to access the appropriate legal services through social networks.¹⁰ She suggests that perhaps cost is not the primary barrier to accessing legal services—the main barrier may be social perceptions of when it is necessary to engage legal services. Many contributors in the collection advocate for a number of legal services solutions to promote access to justice that are targeted beyond traditional lawyer-client solutions. These include suggestions such as more advanced front-end consumer education and corresponding consumer protection reforms,¹¹ the inclusion of a pre-screening facility to provide initial advice and direction to those facing legal challenges,¹² and industry-run ombudsperson schemes.¹³

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9. See *e.g.* Alice Woolley, "Time for Change: Unethical Hourly Billing in the Canadian Profession and What Should Be Done About It" (2004) 83 Can Bar Rev 859 (exploring the incentive problems inherent in the practice of hourly billing for legal services); Woolley, "Imperfect Duty," *supra* note 8; Devlin, *supra* note 8; Sossin, *supra* note 8.
 10. "Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services" in *supra* note 1, 222.
 11. Anthony Duggan & Iain Ramsay, "Front-End Strategies for Improving Consumer Access to Justice" in *supra* note 1, 95.
 12. Roger Smith, "Middle Income Access to Civil Justice: Implications of *Proposals for the Reform of Legal Aid in England and Wales*" in *supra* note 1, 173.
 13. Justin Malbon, "Access to Justice for Small Amount Claims in the Consumer Marketplace: Lessons from Australia" in *supra* note 1, 328.

The suggested reforms to legal institutions also do not directly target the matter of legal fees but instead offer tangible alternatives to combatting the middle-income access-to-justice issue. Suggestions include the expansion and reform of fast-tracked unified family courts for family law issues,¹⁴ the revision of small claims court so that its procedural landscape operates on a sliding scale of complexity depending on the cost and complexity of the matter at stake,¹⁵ and the adoption of specialized tribunals for many issues prevalent in the middle income bracket, such as landlord and consumer-related issues.¹⁶ Finally, even within the realm of legal fees, the potential reforms catalogued are innovative and include thoughtful analysis of a variety of possible market reforms. They include the proliferation of public legal expense insurance,¹⁷ pre-paid legal services,¹⁸ and the unbundling of legal services so that clients can avail themselves of certain targeted legal services only for those tasks for which the client feels such expertise is necessary (as opposed to full legal representation for the scope of an entire matter).¹⁹

The second prevalent issue about middle-income access to justice highlighted in the collection is the fact that, to date, effective reforms have been ploddingly slow because there is a severe collective action problem on a number of fronts.²⁰ The influential players in the civil justice system—governments at various levels, lawyers, courts, legal professional regulatory bodies, politicians, nonprofit organizations, and private-market entrepreneurs—are so fragmented in their influence on the system that they appear almost institutionally designed to maintain a momentum that impedes access to justice for the middle-income earner. This is likely because the current civil justice system has been predominantly focussed on court process and is underpinned by several assumptions that are simply not true for the middle-income user. For example, because the system operates under the adversary model, the system is designed with the assumption that all parties have, and are able to afford, a lawyer. The Ontario Civil Legal Needs Project has revealed that this

14. Nicholas Bala, "Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts" in *supra* note 1, 271; Justice George Czutrin, "Some Reflections on Family Dispute Resolution in Ontario" in *supra* note 1, 316.

15. Shelley McGill, "Challenges in Small Claims Court Design: Does One Size Fit All?" in *supra* note 1, 352.

16. Malbon, *supra* note 13.

17. Choudhry, Trebilcock, & Wilson, *supra* note 4.

18. Paul A Vayda & Stephen B Ginsberg, "Legal Services Plans: Crucial-Time Access to Lawyers and the Case for a Public-Private Partnership" in *supra* note 1, 246.

19. Samreen Beg & Lorne Sossin, "Should Legal Services Be Unbundled?" in *supra* note 1, 193.

20. The "Introduction" does a superb job of explaining how the complex and intricate set of players in the civil justice web has made reform a challenge to initiate. See Michael Trebilcock, Anthony Duggan & Lorne Sossin, *supra* note 1, 3.

is not the case.²¹ Additionally, the current system assumes that all parties are equal and that time is relatively immaterial. The increasing incidence of self-representation in court and the slow, expensive chug of today's civil justice system prove that these are not accurate assumptions. There is also the incorrect notion that courts can somehow take action in invoking some access-to-justice solutions. This is far from true, as courts are limited to dealing only with the parties and disputes before them and operate using hindsight through the precedent system. They are not equipped to tackle market-based solutions on a systemic and holistic level.

A number of essays in *Middle Income Access to Justice* attempt to break down these assumptions and the accompanying institutional inertia by offering both public and market-based reforms that avoid the collective action problem, while still working around the fragmentation of the present-day divisions among players in the system. For example, a widespread public legal expenses insurance program, as suggested by Sujit Choudhry, Michael Trebilcock, and James Wilson²² is a promising notion and can work within many constraints posed by the framework of current legal institutions. However, as the authors recognize, there would need to be strong public buy-in, likely through a coerced opt-out default model, where citizens do not have a choice to join but may opt out. Samreen Beg and Lorne Sossin suggest unbundling legal services to allow for modular use of lawyers and paralegals on an as-needed basis. They argue that the middle-income client may be more able to afford and may more readily choose legal assistance when needed, simply because the option can be invoked in a targeted, affordable manner by the client.²³ While these solutions work around the present-day functioning of the legal institutions involved in the civil justice system, the entire collection of essays hints that more needs to be done.

This leads to the final issue underpinning each essay in this book: It is time to take some risk and holistically experiment with sweeping reforms to the provision of legal services. To truly solve the collective action problem created by institutional fragmentation, all institutions involved need to be prepared to take serious innovation risks to solve the access-to-justice problem for the middle-income earner. All institutions involved also need to be prepared to fail on occasion in experimenting with some of these innovations. Experimenting entails economic and political costs, but there is reason to hope that it will lead to greater gains in solution-generation in the longer term.

21. Baxter, Trebilcock & Yoon, *supra* note 5.

22. *Ibid.*

23. Beg & Sossin, *supra* note 19.

Perhaps this innovation may call for a complete transformation of the civil justice system and the accompanying provision of traditional legal services. Shelly McGill suggests that the current small claims court procedures could operate on a sliding scale of complexity depending on the size and intricacy of the matter involved.²⁴ Instead of relying on the current small claims court system at all, what if there were another forum to which a middle-income earner could take his or her issues?²⁵ What if that forum had very few procedural steps, the hearing (if any) was conducted within a matter of hours, and the average middle-income user of such a system would have no issue navigating this system without legal representation? What if the enforcement of the results of this forum were also streamlined and simplified to put an end to further delays and proceedings? Such a system would require leaving behind the current court system, including its trappings and its procedural comforts. It may require an increased public and institutional comfort level with a rougher process but a faster, cheaper and perhaps even more just result, in that the system may actually be used by more people.

Short of a system like this, which divorces itself from prior court-like incantations and the provision of traditional legal services, one area that might deserve more examination is the present business model underpinning the cost of legal services provision. While a handful of the essays in *Middle Income Access to Justice* touch on this issue, two simple market-based solutions might be able to work around the collective action problem of institutional fragmentation as mentioned above. One is the contingency fee. The other is a greater influx of legal professionals in the legal services marketplace.

Pascoe Pleasence and Nigel J. Balmer find that there is some correlation between the use of lawyers by citizens and citizens' income level.²⁶ This correlation disappears, however, in two instances: where legal aid is available and where contingency fees are available. Increasing the availability of legal aid requires a significant state commitment, which is not easily forthcoming. However, fostering use of contingency fees for a greater variety of legal matters does offer an alternative model with some potential. Contingency fees are typically used for plaintiff personal injury matters or class actions. A lawyer underwrites the risk of litigating and, if the

24. McGill, *supra* note 15.

25. Not unlike the revisionary tribunal system designed to simplify legal disputes as suggested by Kent Roach and Lorne Sossin. See Kent Roach & Lorne Sossin, "Access to Justice and Beyond" (2010) 60 UTLJ 373.

26. "Caught in the Middle: Justiciable Problems and the Use of Lawyers" in *supra* note 1 at 27; Baxter, Trebilcock & Yoon, *supra* note 5.

litigation is unsuccessful, the lawyer, not the client, absorbs most of the cost of such a loss.²⁷ Contingency fees work in terms of access-to-justice goals. Income level has little bearing on whether or not a lawyer will take the case.²⁸ The class action and plaintiff personal injury bars have grown comfortable with the business model of taking a case on a risk basis. The reason plaintiff personal injury and class action litigation have operated with contingency fees is simply that the high dollar value at stake on a per file basis makes the risk-taking worthwhile. A lawyer must take on a large volume of cases to be able to balance the wins with the losses and still turn a profit.

This type of business model requires that the legal professional become more comfortable with taking a profit risk. If a plaintiff's case involves a significant degree of risk, even if the case is meritorious, it may be likely that the plaintiff will not be able to secure legal representation because no lawyer wants to underwrite that risk of losing. The legal professionals currently working in the personal injury and class action areas are still able to find cases that have the degree of risk they are willing to underwrite, such that they can reject those they deem too risky.

It may be worthwhile to explore the contingency fee model and how it functions to promote access to justice in personal injury and class actions contexts. Perhaps it could be exported in some manner to other areas of law where similar risk is involved, such as employment disputes, social benefits disputes, and consumer contracts. The nature of legal practice in these areas would have to adjust to a more risk-based business model but perhaps this is one solution to the access-to-justice challenge for the middle-income earner.

This potential for such innovative market-based solutions as novel fee structures is tied to the ongoing gap, documented by all essays in the collection, between the need for legal services for middle-income earners and the realistically available provision of those services. In short, there is a serious market gap for legal services available to middle-income earners, priced and marketed accordingly. The ultimate solution may be simply to have more providers of legal services who operate at various price points in the market under various fee structures, and who are better equipped to educate the public through marketing about the services they provide. This has an effect similar to unbundling legal services or public legal expenses insurance but may perhaps guarantee more access for more

27. See *e.g.* Knutsen, *supra* note 4 at 119.

28. One downside is, of course, that the plaintiff is not fully compensated by the end result damages award, as a percentage is paid to the lawyer taking the case as a contingency fee. However, such issues can be corrected by making contingency fees a percentage uplift on the damages award in the loser-pays fee shifting process. See *ibid* at 155.

middle-income-earner clients than relying on the current landscape—which features a limited number of legal professionals in segmented markets, who are incentivized to cater to a smaller number of more financially lucrative client interests. Currently, the supply of lawyers in the province is tightly controlled. Perhaps if there were more lawyers or other legal professionals such as paralegals or some other incarnation not yet created, some professionals would be incentivized to differentiate themselves creatively to assist more clients who populate the middle income bracket. The market model for service provision would change. Of course, this comes with risk, pressure, and fundamental change of longstanding professional norms and turfs, from law societies and regulators to law schools and beyond. But perhaps it might work.

Middle Income Access to Justice lays much of the groundwork for launching the second phase of the study of access-to-justice problems in Canada. It is a hopeful phase and one that calls for and likely will complete the much-needed empirical work so that better problem definition can lead to more targeted solution generation. At the same time, the essays in the collection hint at the serious holistic and innovative risk-taking that is required if anything is ever to be done about this challenging issue.