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Regulatory sandboxes are all the rage. They were piloted in the financial technology ("fintech") arena, first by the United Kingdom's Financial Conduct Authority in June 2016.[3] In the years since, they have emerged in other areas including energy,[4] drug approvals and health policy,[5] autonomous vehicles,[6] and innovative technology generally.[7] There are surely more examples to

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[3] *See* FIN. CONDUCT AUTH. (FCA), "REGULATORY SANDBOX" ¶ 2.2 (2015), https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf. *Also see* Chang-Hsien Tsai et al., *The Diffusion of the Sandbox Approach to Disruptive Innovation and Its Limitations*, 53 CORNELL INT. L.J. 261 (2020).

[4] The U.K.'s Office of Gas and Electricity Markets launched a regulatory sandbox in 2017. *Innovation Sandbox Service Overview* (Feb. 17, 2020), https://www.ofgem.gov.uk/publications/innovation-sandbox-service-overview.

[5] For a review of the use of sandboxes in the healthcare sector, see Emily Leckenby et al., *The Sandbox Approach and its Potential for Use in Health Technology Assessment: A Literature Review*, 19 APPLIED HEALTH ECON. & HEALTH POL'Y 857 (2021). Since it mobilizes real-world deployment as a means for information gathering, some have compared the U.S. F.D.A.'s Emergency Use Authorization (E.U.A.) program for COVID-19 treatments and vaccines to a regulatory sandbox. *See* Jacob Sherkow, *Regulatory Sandboxes and the Public Health*, U Ill. L. Rev. 357 (2022). In the Canadian context, see Ipek Eren Vural, et al., *From Sandbox to Pandemic: Agile Reform of Canadian Drug Regulation*, 125 HEALTH POL'Y 1115 (2021).

[6] In 2017, Singapore amended its Road Traffic Act to create a regulatory scheme for testing autonomous motor vehicles. *See* Si Ying Tan & Araz Taeihagh, *Adaptive governance of autonomous vehicles: Accelerating the adoption of disruptive technologies in Singapore*, 38 Gov't. Info. Q. 101546, 5-6.

[7] In June 2018, Japan's Ministry of Economy, Trade and Industry introduced the Act on Special Measures for Productivity Improvement Enforced. This law created an overarching regulatory sandbox system open to disruptive, productivity-enhancing innovations in all kinds of industries, such as fintech, mobility, and healthcare. *See* "Part of the Act for Partially Amending the Industrial Competitiveness Enhancement Act and Other Related Acts Has Come into Effect", Ministry Econ., Trade & Indus. (June 26, 2021), https://www.meti.go.jp/english/press/2021/0616_002.html.

come. Now, the sandbox concept has moved into the staid realm of legal professional regulation.[8] This move holds real potential to modernize legal services provision and its regulation, in the interest of access to justice.[9]

Financial regulators have accumulated considerable experience around effective sandbox design, logistics, and implementation, and this experience can and should be brought to bear on legal innovation sandboxes too. At the same time, extending the sandbox model into legal services regulation requires both extrapolating from and modifying it relative to the model's original context. Transplants from one regulatory regime to another require careful thought, if they are to achieve the objectives the new context's regulators have in mind for them.

The legal services context actually lacks one of the main raisons d'être for sandboxes in the fintech context: interjurisdictional competition. Countries, regions, and cities compete globally to be the jurisdiction of choice for innovative, and presumably lucrative and beneficial, new business models.[10] Unlike financial services, which are global, legal services generally operate in contexts characterized by regulatory barriers to entry, making legal services provision less open to

[8] In North America, legal sandboxes have launched in Utah, and the Canadian provinces of British Columbia, Ontario, and Alberta. THE OFFICE OF LEGAL SERVICES INNOVATION, utahinnovationoffice.org (last visited Feb. 12, 2022) [hereinafter INNOVATION OFFICE]; *Innovation Sandbox*, L. SOC'Y BC, https://www.lawsociety.bc.ca/our-initiatives/innovation-sandbox (last visited Feb. 12, 2022); *Access to Innovation*, L. SOC'Y Ont., https://lso.ca/about-lso/access-to-innovation (last visited Feb. 12, 2022) [hereinafter ONTARIO SANDBOX]; *Law Society of Alberta Introduces Innovation Sandbox*, L. SOC'Y Alta. (Oct. 1 2021), https://www.lawsociety.ab.ca/law-society-of-alberta-introduces-innovation-sandbox [hereinafter ALBERTA SANDBOX]. The UK also has a legal sandbox. *The LawTech Sandbox*, TECH NATION, https://technation.io/lawtech-sandbox/ (last visited Feb. 12, 2022).

[9] For a cross-jurisdictional comparison of legal services regulation, see Louise Lark Hill, *Alternative Business Structures for Lawyers and Law Firms: A View from the Global Legal Services Market*, 18 OREGON REV. INT'L L. 135 (2017).

[10] At the country level, see e.g., *Overview of Regulator Sandbox*, MONETARY AUTH. SING., https://www.mas.gov.sg/development/fintech/regulatory-sandbox (last visited Feb. 21, 2022). At the regional level, see, e.g., the Canadian province of Ontario: *OSC LaunchPad support for innovative businesses*, ONT. SEC. COMM'N, https://www.osc.ca/en/industry/innovation-osc/osc-launchpad-support-innovative-businesses (last visited Feb. 21, 2022). At the city level, London is the most prominent example. *See* FIN. CONDUCT AUTH., *supra* note 3.

competition and incumbents less vulnerable to challenge.[11] The fintech space, like many aspects of financial regulation, is also characterized by a market-oriented, consumer choice driven understanding of value. Legal services regulation is much more focused on protecting the public from unauthorized practitioners than it is on providing that public with the ability to make its own, market-driven choices about whom to hire.

The legal services space also lacks another key driver, relative to fintech: the regulator's need for visibility into what innovative players are doing. In a context like fintech, which is characterized by fast-moving innovation and within which congruence between reality and regulatory constructs may be low, fragile, or diminishing, the sandbox offers regulators crucial access to information that they might not otherwise have.[12] By contrast, lawyers, especially in North America, have long enjoyed statutorily-created monopolies over the provision of legal services. Lawyers' business models, including fee and partnership structures, traditionally have generated disincentives for lawyers to find more efficient, cost-effective, or forward-looking solutions in providing legal services. This means that innovation, fast-moving or otherwise, has been relatively stunted. (This is changing, particularly among national US mid-market firms who have adopted new client service and project management strategies in response to competition.[13]

[11] Down the road, it is possible that subnational legal regulators could compete with one other on the basis of how innovative or open their legal services regulatory regimes are. The competitive advantages of doing so are less obvious at this point, but an innovative jurisdiction could attract innovation-oriented legal services providers. Lawyers in Canada enjoy professional mobility rights between provinces.

[12] This is not to say that sandboxes have no potential downsides. *See, e.g.*, *infra* note 47. On fast-moving innovation as a regulatory challenge, see CRISTIE FORD, INNOVATION AND THE STATE: LAW, FINANCE, AND JUSTICE 218-238 (Cambridge Univ. Press 2017) . On the tension between transparency, accessibility, and congruence in drafting administrative rules, see Colin Diver, *The Optimal Precision of Administrative Rules*, 93 Yale L.J. 65 (1983). *See also* Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235 (2017) (arguing that at any one time, regulators can only achieve two of three objectives: providing clear rules, maintaining market integrity, and encouraging financial innovation).

[13] Conferences and resources have sprung up to meet these needs, prominently including the International Legal Technology Association's annual conference: ILTACON,

Yet, the competition remains among lawyers – whether in firms, housed in accounting firms, or working as in house counsel – and not between lawyers and other legal service providers.) Acquiring information about challenging, fast-moving innovation in their sector is not a problem that legal services regulators tend to have.

Our somewhat counterintuitive claim here is that these factors actually strengthen, not weaken, the argument for deploying sandboxes to foster innovation in legal services. The controlled, small-scale, experimental sandbox format is probably especially well-suited to opening up a closed or over-regulated industry. Sandboxes create opportunities for keen-eyed entrepreneurs to pluck the low-hanging fruit of untapped market sectors and new efficiencies. By contrast, making a sophisticated and innovative industry like London's fintech space even more innovative calls for much more sweeping, systemic reforms. Sandboxes are also able to carve out defined exemptions, in the interest of increasing access to justice, within an otherwise comprehensive statutory prohibition on non-lawyers providing legal services. This is a reasonable first step that allows a legal services regulator to permit some competition from non-lawyer legal services providers, without opening the public up to potential harm from entirely unregulated providers. The sandbox also allows the regulator, and sandbox participants, to learn from experience. It can give other legal service providers, such as independent paralegals, the ability to "scale up" and develop viable business models, while the regulator identifies and seeks to mitigate possible risks to the public. Each of these attributes stands to have a significant impact in the legal innovation context.

https://www.iltacon.org/home (last visited Feb. 21, 2022). For smaller firms, see CLIO CLOUD CONFERENCE, https://cliocloudconference.com (last visited Feb. 21, 2022).

We also argue that the notion that animates fintech sandboxes, of increasing competition in the service of "consumer benefit," is probably a useful, if unorthodox, way of thinking about opening up legal services provision. It is true that assessing outcomes by reference to "consumer benefit" relies on a market-centering understanding of how to identify beneficial innovations. This is in some tension with a legal regulator's traditional understanding of "public benefit," which captures priorities such as safeguarding the public interest and the rule of law. It is also in substantial tension with the justice-oriented and equity-oriented convictions that underlie our own concerns about access to justice. We are not claiming that market forces (that is, consumer choices) alone would be sufficient to achieve these fundamental priorities.[14] They would not be. Even in an innovation-fostering sandbox context, within which some regulatory requirements are lifted or lightened temporarily, substantive regulatory requirements must still exist and be enforced. The regulatory obligation to safeguard the public and the rule of law should not be whittled down to an assumption that the market, or consumers themselves, will be able to distinguish a high-quality product from a poor one.[15] All the same, while this will not be true in all contexts, in our view these tensions are not fatal here: in a context in which competition from non-lawyers has been stifled, consumer choice and public benefit can and plausibly do overlap.

Just as importantly, legal innovation sandboxes must be *structured* thoughtfully to ensure that they protect the particular values and obligations that are fundamental to the justice sector,

[14] Cass R. Sunstein, *Social Norms and Social* Roles, 96 COLUM. L. REV. 903 (1996); Daphna Lewinsohn Zamir, *Consumer Preferences, Citizen Preferences, and the Provision of Public Goods*, 108 YALE L.J 377 (1998). *See also infra* note 96.

[15] Both legal services and financial services are to some extent credence goods. *See* Loukas Balafoutas & Rudolf Kerschbamer, *Credence Goods in the Literature: What the Past Fifteen Years Have Taught Us About Fraud, Incentives, and the Role of Institutions*, 26 J. BEHAVIORAL & EXPERIMENTAL FINANCE 100285 (2020). *See also* Hilary Allen, *Regulatory Sandboxes*, 87 GEO. WASH. L. REV. 579, 587 (2019).

while also making space for new business models, and trying to address the access to justice crisis.[16] Whether legal innovation sandboxes live up to their potential will come down substantially to how they are built – including how well they are resourced, how thoughtfully they are designed, and how well-suited they are to their particular context. As is so often the case with regulation, the difference between a permissive free-for-all that undermines regulatory priorities, and a careful experiment that stands to enhance legal service provision while also enhancing regulatory understanding, comes down to implementation.[17] Effective implementation requires that the regulator permit innovation while appropriately mitigating risk, and staying attuned to fundamental regulatory goals such as the protection of the public.

Sandboxes will not be an all-purpose panacea for what ails justice, access to justice, or the legal profession in North America. They do, however, hold real potential as a response to the particular structural problems in this sector. Drawing on global experience, this article offers practical and conceptual considerations for developing and structuring an effective yet responsible legal sandbox. Parts One and Two survey the emergence of the sandbox concept, in fintech and now as extended into legal services and regulation. We set out four key normative priorities and assumptions that underpin the sandbox concept, particularly around the perceived value of innovation. These assumptions, which are unremarkable in the financial regulation context, seem

[16] Access to justice captures more than access to the formal justice system (courts, tribunals, judges, and lawyers). Taking a user-centered and expansive approach, access to justice means that all people have adequate and equitable access to the institutions, knowledge, resources, and services needed to avoid, manage, and resolve their legal problems and disputes, with results that align with substantive and procedural norms (whether or not lawyers are involved). *See* ACTION COMMITTEE ON ACCESS TO JUSTICES IN CIVIL AND FAMILY MATTERS, ACCESS TO CIVIL & FAMILY JUSTICE: A ROADMAP FOR JUSTICE (Canadian Forum on Civil Justice 2013), www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf; Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49 (2019).

[17] Cristie Ford, *Principles-Based Securities Regulation in the Wake of the Global Financial Crisis*, 55 McGill L.J. (2010); European Parliament, *supra* note 20.

unconventional and even utterly novel when transposed to legal services regulation. We then highlight a nested set of salient differences between the fintech and legal services contexts: these really go to the fact that legal services tend to be self-regulated, by lawyers or courts, in the interest of lawyers, who can be expected to have a predisposition in favor of their own profession over whatever innovative new solution competitors may have to offer. This poses a substantial threat to the feasibility of using sandboxes to permit innovation in legal services, and may call for some form of independent sandbox administrator.

Drawing on this point and on lessons from fintech sandboxes, Part Three explores the sandbox process, which can be conceptualized as a journey with four phases: application, preparation, experiment, and authorization. Because good implementation is so crucial, our goal here is to begin to develop a useful roadmap for designing and running a functional, effective sandbox. Before we conclude, Part Four lays out additional considerations for operating an effective, iterative, equity-aware, and robust sandbox that has the potential to generate prosocial change in the legal services sector, without losing sight of the public protection and access to justice concerns that must always animate regulation.

1: WHAT IS A SANDBOX? THE MOTIVATION BEHIND THE FINTECH SANDBOX

The innovation sandbox has been described as a "genuinely new addition to the regulatory arsenal."[18] It is a formal, structured policy tool that has been established by a regulatory authority and that, in Jiménez and Hagan's evocative description, offers a "a safe playground in which to experiment, collect experiences, and play without having to face the strict rules of the real world."[19]

[18] Brummer & Yadav, *supra* note 12, 291.

[19] JORGE GABRIEL JIMÉNEZ & MARGARET HAGAN, A REGULATORY SANDBOX FOR THE INDUSTRY OF LAW 2 (Thomson Reuters Legal Executive Inst. 2019),

Alongside innovation hubs, statutory experiments, and other similar initiatives, sandboxes are part of a suite of novel, innovation-friendly regulatory initiatives that have been developed over the past five years.[20]

Individuals and entities apply to enter the sandbox. Once admitted, sandbox participants live test services, products, and business models that do not easily fit within, or are blocked by, the existing regulatory framework. While in the sandbox, participants abide by specifically-tailored supervision and data sharing requirements, scale limitations, and other risk-mitigating safeguards that are designed to protect the public. In this way, the sandbox offers a controlled environment for innovation that emphasizes, depending on the language used in the sector, consumer, investor, and/or public protection. Once a participant's sandbox trial comes to an end, the regulator reviews the evidence and decides whether to authorize the participant to roll out its product, service or

https://law.stanford.edu/publications/a-regulatory-sandbox-for-the-industry-of-law.

[20] Other complementary or alternative strategies for fostering innovation include regulatory forbearance and information-gathering (wait-and-see and test-and-learn regimes, as well as learning from other jurisdictions), regulatory and other support units (innovation hubs, accelerators, guidance units), ad hoc pilots of specific projects, the move to more proportional or risk-based licensing regimes, and broader legislative and/or regulatory reform. Greg Chen, *What Should We Realistically Expect from Regulatory Sandboxes?*, CGAP (Oct. 30, 2017), https://www.cgap.org/blog/what-should-we-realistically-expect-regulatory-sandboxes; U.N. Secretary-General's Special Advocate for Inclusive Finance for Development (UNSGA) FinTech Working Group & Cambridge Centre for Alternative Finance (CCAF), *Early Lessons on Regulatory Innovations to Enable Inclusive FinTech: Innovation Offices, Regulatory Sandboxes, and RegTech* (Office of the UNSGSA and CCAF 2019), https://www.unsgsa.org/sites/default/files/resources-files/2020-09/UNSGSA_Report_2019_Final-compressed.pdf [hereinafter UNSGA & CCAF] . *See also* European Securities and Market Authority (ESMA), European Banking Authority (EBA) & European insurance and Occupational Pensions Authority (EIOPA]), *FinTech: Regulatory Sandboxes and Innovation Hub*s, JC 2018 74, https://www.esma.europa.eu/sites/default/files/library/jc_2018_74_joint_report_on_regulatory_sandboxes_and_innovation_hubs.pdf [hereinafter Joint Report]; European Parliament, Policy Department for Economic, Scientific and Quality of Life Policies, *Regulatory Sandboxes and Innovation Hubs for FinTech*, PE 652.752 (Sept. 2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652752/IPOL_STU(2020)652752_EN.pdf (contrasting "innovation hubs" and "regulatory sandboxes"); Stefan Philipsen et al., *Legal Enclaves as a Test Environment for Innovative Products: Toward Legally Resilient Experimentation Policies*, 15 REGUL. GOVERNANCE 1128 (2021) (contrasting statutory experiments and regulatory sandboxes).

model beyond the sandbox.[21] Informed by what it learns from sandbox interactions, the regulator may also choose to introduce more sweeping regulatory reforms. On its own, a sandbox cannot be expected to drive transformational regulatory change. However, it can catalyze reform, particularly in contexts which are relatively closed to innovation or competition; or, where conservative, unclear, or excessively burdensome approaches to regulation dominate.[22] A sandbox has the potential to spark the kind of dialogue, cultural shifts, and consensus that are essential to making subsequent, broader regulatory reform feasible.

Propelled by the rise in fintech, regulatory sandboxes began to emerge in the financial sector in the mid-2000s.[23] As of November 2020, 73 financial sandboxes were in operation, in 57 jurisdictions around the world.[24] Fintech sandboxes have attracted a good deal of interest from international and transnational bodies,[25] think tanks and regulatory capacity-building institutions,[26] and scholars.[27] Empirical evidence related to sandbox effectiveness, as measured in different ways,

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[21] Generally this requires some form of regulatory change (e.g., explicit authorization for an experiment to continue outside the sandbox, individual or general waivers, regulatory or supervisory reforms, or regulatory guidance). REGULATORY SANDBOXES 8 (Toronto Centre 2017), https://res.torontocentre.org/guidedocs/Regulatory%20Sandboxes%20FINAL.pdf [hereinafter Toronto Centre].

[22] Mandepanda Sharmista Appaya et al., *Global Experiences from Regulatory Sandboxes*, World Bank Group (WBG), Fintech Note No. 8, at 28 (Nov. 12 2020), https://documents.worldbank.org/en/publication/documents-reports/documentdetail/912001605241080935/global-experiences-from-regulatory-sandboxes; Chen, *supra* note 20.

[23] Deirdre Ahern, *Regulators Nurturing Fintech Innovation: Global Evolution of the Regulatory Sandbox as Opportunity-Based Regulation* (European Banking Institute, Working Paper Series No. 60, 2020); UNSGSA Fintech Sub-Group on Regulatory Sandboxes, *Briefing on Regulatory Sandboxes* (UNSGA 2020), www.unsgsa.org/sites/default/files/resources-files/2020-09/Fintech_Briefing_Paper_Regulatory_Sandboxes.pdf; UNSGA & CCAF, *supra* note 20.

[24] *Key Data from Regulatory Sandboxes Across the Globe*, WORLD BANK GROUP (WBG) (Nov. 1 2020), www.worldbank.org/en/topic/fintech/brief/key-data-from-regulatory-sandboxes-across-the-globe.

[25] *See, e.g.*, Joint Report, *supra* note 20; European Parliament, *supra* note 20.

[26] *See e.g.*, Toronto Centre, *supra* note 21.

[27] *See e.g.*, Allen, *supra* note 15; Brummer & Yadav, *supra* note 12; Dirk A. Zetzsche et al., *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, 23 FORDHAM J. CORP. FIN. L.

is still relatively thin.[28] For our purposes, however, at least as important as measures of effectiveness is the question of what the word "effectiveness" is measuring. What, exactly, is a regulator seeking to accomplish when it establishes a sandbox?

Significantly, sandboxes – as a product of the financial regulation context from which they come – foreground market-oriented mechanisms and techniques, rather than explicit normative commitments in the way that we might expect to see in some other regulatory arenas.[29] This is not to say that financial regulators do not potentially have genuine and sincere commitments to achieving normative goals, such as financial inclusion.[30] They may well do.[31] However, financial regulation since the American *Securities Act of 1933* and the *Securities Exchange Act of 1934*[32] has been premised on the assumption that a fair and efficient market, enabled through boundary

31 (2017).

[28] A useful survey is Christopher Chao-hung Chen, *Rethinking the Regulatory Sandbox for Financial Innovation: An Assessment of the UK and Singapore in* REGULATING FINTECH IN ASIA: GLOBAL CONTEXT, LOCAL PERSPECTIVES 11 (Mark Fenwick, Steven Van Uytsel & Bi Ying, eds., 2020). *See also* Ahern, *supra* note 23, at 13 (discussing fintech sandboxes as pro-innovation market intervention); Brian R. Knight & Trace E. Mitchell, *The Sandbox Paradox: Balancing the Need to Facilitate Innovation with the Risk of Regulatory Privilege*, 72 S.C.L. REV. 445, 475 (2020) (raising concerns about inequality in treatment between sandbox participants and non-participants). In terms of evidence related to sandbox failures, it is still early days. With time, any unsuccessful, or less successful, sandboxes will present learning opportunities for regulators, including perhaps evidence of what contexts are more or less suited to sandboxes.

[29] Of course, different financial regulators adopt different stances, and financial regulatory structures vary between, e.g., the "twin peaks" model in Britain and Australia and the institution-driven models in North America. In general, fintech sandboxes seem to adopt more of the market-oriented stance from securities regulation than the prudential stance from banking regulation (as we would divide regulatory regimes in North America).

[30] In the legal innovation space, the goal equivalent to improving financial inclusion would be improving access to justice.

[31] *See e.g.*, Ivo Jenik et al., *Do Regulatory Sandboxes Impact Financial Inclusion? A Look at the Data*, CGAP (April 30, 2019), www.cgap.org/blog/do-regulatory-sandboxes-impact-financial-inclusion-look-data. In emerging markets, financial inclusion may be a central focus because sandboxes can enable innovations that are likely to benefit excluded and underserved customers. Such sandboxes are in the minority, however, far outnumbered by fintech sandboxes in established economies that are geared toward fostering innovation in general.

[32] 15 U.S.C. § 77a (1933); 15 U.S.C. § 78a (1943).

conditions like disclosure mechanisms, and a degree of high-level prudential and registrant regulation, will itself be the kind of creative force that is best placed to devise solutions to such problems.

In finance, in major capital markets like London's (as well as in securities regulation generally), market forces play a significant role and innovation in new products and practices is not subject to quality-based (as opposed to disclosure-based) regulatory scrutiny. Regulation operates within a generally pro-innovation environment, so long as disclosure to customers and prudential safety and soundness rules are observed. The high water mark may be the recent assertion by an Australian government Minister regarding its fintech sandbox (albeit before that country's banking and financial services scandal), to the effect that "'it is competition – not regulation – that is the best means of ensuring consumers get value for money in financial services.'"[33] As Deirdre Ahern has pointed out, the concept of the regulatory sandbox is premised on "a public interest role for regulators in *improving consumer choice, price and efficiency* … a completely different driver than a regulatory model predicated on risk-reduction."[34]

With this in mind, the obvious goal of a fintech sandbox is to "facilitate financial innovation."[35] This is sometimes also described as equivalent to or consistent with promoting competitive innovation, market development, and presumably thus economic growth.[36] Publications by the United Kingdom's Financial Conduct Authority (FCA), which established the first fintech sandbox, bear this out while also drawing a more explicit link between competition,

[33] As quoted by Anton N. Didenko, *A Better Model for Australia's Enhanced FinTech Sandbox*, 44 U.N.S.W.L.J. 1078, 1079 (2021). On Australia's banking scandal, see the ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY (HAYNE ROYAL COMMISSION), FINAL REPORT, vols. 1–3 (Commonwealth of Australia 2019).

[34] Ahern, *supra* note 23, at 2-3 (emphasis added).

[35] *See, e.g.*, Joint Report, *supra* note 20, at 5.

[36] Zetzsche et al., *supra* note 27, at 45-46, 68.

innovation, and consumer outcomes, and identifying the burden that "regulatory uncertainty" could present for innovators in particular. In its initial November 2015 policy paper recommending that a fintech sandbox be established, the FCA noted that it wanted "to promote competition by supporting disruptive innovation."[37] It noted that regulatory uncertainty could discourage or slow down innovation, make it more difficult for innovators to raise funds, and limit the number of innovative products that entered the market.[38] As a result, by reducing regulatory uncertainty, the proposed sandbox "should lead to better outcomes for consumers through, for example, an increased range of products and services, reduced costs, and improved access to financial services."[39]

After one year of fintech sandbox operation, the FCA concluded that the sandbox had indeed reduced the time and cost of getting innovative ideas to market, had helped facilitate access to finance for innovators, had enabled products to be tested and introduced to the market, and had allowed the FCA to work with innovators to build appropriate consumer protection safeguards into new products and services.[40] In 2019, the UK FCA further reported that its fintech sandbox was having a beneficial impact on firms, which could bring innovations to the market more quickly and with greater regulatory certainty; on consumer outcomes, as both new and incumbent firms improved their offerings as a result of increased competition; and on "contributing to the UK's supportive regulatory environment for Fintech" and bringing "positive innovation" to market on a broad scale.[41]

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[37] FIN. CONDUCT AUTH., *supra* note 3.

[38] *Id.* ¶ 2.3.

[39] *Id.* ¶ 2.4.

[40] FIN. CONDUCT AUTH. (FCA), REGULATORY SANDBOX LESSONS LEARNED REPORT 5 (2017), www.fca.org.uk/publications/research/regulatory-sandbox-lessons-learned-report.

[41] FIN. CONDUCT AUTH. (FCA),THE IMPACT AND EFFECTIVENESS OF INNOVATE 12 (2019),

As the FCA's reference to the "UK's supportive regulatory environment" suggests, at the macro level, sandbox regimes are often expected to contribute to national economic growth or serve to maintain the competitiveness of a market as a financial centre."[42] Indeed, simply because it signals that a regulator is pro-innovation, a sandbox can spark innovation within and beyond the sandbox, not only in the regulator's jurisdiction but also potentially in other jurisdictions.[43] Given the economic promise that fintech can bring, regulators are motivated to produce tangible results, and to compete with other jurisdictions for fintech business (including by acting more as "consultant and ally" than as gatekeeper).[44] The benefits seem to flow not only at the national economic level, but at the level of innovative fintech ecosystem: a country-level comparison across nine leading fintech jurisdictions found that, relative to countries without sandboxes, the presence of a sandbox can increase the scale of venture capital investment in a country, and increase the probability that innovators will be able to raise funding to support their initiatives.[45] Individual sandbox participants can also expect other benefits, like personalized regulatory guidance (what

www.fca.org.uk/publication/research/the-impact-and-effectiveness-of-innovate.pdf.

[42] Chen, *supra* note 20; Zetzsche et al., *supra* note 27 (also discussing innovation hubs as serving these purposes).

[43] Ahern, *supra* note 23, at 12-13; Zetzsche et al., *supra* note 27, at 61-62.

[44] Ahern, *supra* note 23, at 11.

[45] Jayoung James Goo & Joo-Yeun Heo, *The Impact of the Regulatory Sandbox on the Fintech Industry, with a Discussion on the Relation between Regulatory Sandboxes and Open Innovation*, 6 J. OPEN INNOV. TECHNOL. MARK. COMPLEX. 43 (2020). *But see* KPMG, THE PULSE OF FINTECH 2018: BIANNUAL GLOBAL ANALYSIS OF INVESTMENT IN FINTECH 51 (2018), assets.kpmg/content/dam/kpmg/xx/pdf/2018/07/h1-2018-pulse-of-fintech.pdf; FCA 2019, *supra* note 41, at 18-19; Giulio Cornelli et al., *Inside the Regulatory Sandbox: Effects on Fintech Funding* (Bank for Int'l Settlements Working Paper No. 901, 2000). However, a 2019 survey by the World Bank and Cambridge Centre for Alternative Finance found that relative to sandboxes, innovation offices had assisted 12 times more firms enter the market. World Bank & CCAF, *Regulating Alternative Finance: Results from a Global Regulator Survey* (2019), openknowledge.worldbank.org/bitstream/handle/10986/32592/142764.pdf . *See also* R.P. Buckley et al., *Building Fintech Ecosystems: Regulatory Sandboxes, Innovation Hubs and Beyond*, 61 WASH. UNIV. J.L. & POLICY 55 (2020) (arguing that innovation hubs are more effective than regulatory sandboxes, in building fintech ecosystems).

the FCA calls the "informal steer").[46] These kinds of results can theoretically generate knock-on effects, such as attracting other innovators to the jurisdiction in order to take advantage of the sandbox.[47]

There may be benefits that extend beyond these competition-oriented ones. A regulatory sandbox can also potentially enhance firms' understanding of regulatory and supervisory expectations, can increase regulators' knowledge about financial innovations, and, through direct testing, could inform regulators' approach to regulating and supervising innovative financial business models, products, and services.[48] Because improved understanding should lead to improved regulatory outcomes, some sandbox jurisdictions have identified their improved capacity to meet their fundamental statutory objectives (contributing to financial stability, promoting confidence, and ensuring consumer protection) as a justification for a sandbox.[49] In the 2019 Global Fintech Survey (GFS), 85% of regulators also reported that sandboxes helped them to assess the

[46] FIN. CONDUCT AUTH., *supra* note 41, at 15-16.

[47] We are not underplaying the potential risks, including that interjurisdictional competition can lead to a "competition in laxity," meaning regulatory arbitrage, a "race to the bottom," and lower standards overall. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX L. REV. 227 (2010-2011); Dale D. Murphy, *Interjurisdictional Competition and Regulatory Advantage*, 8 J. INT'L ECON. L. 891 (2005). *See also* Hilary J. Allen, *Sandbox Boundaries*, 22 VAND. J. ENT. TECH. L. 299 (2020) (arguing that, given competition between jurisdictions for fintech business, financial innovation sandboxes exacerbate problems of regulatory arbitrage). The Joint Report and the European Parliament, (both *supra* note 20, at 37-39 and 38-51 respectively) advocate for greater interjurisdictional regulatory cooperation and knowledge sharing to address this challenge, and the challenge of unequal standards across jurisdictions, as do Brummer & Yadav *supra* note 12, at 297-304. Nor are we claiming that sandboxes can create what Julia Black once described as the fantasy of a "regulatory Utopia" in which public and private actors work in perfect synchrony. Julia Black, *Forms and Paradoxes of Principles Based Regulation*, 3 CAPITAL MARKETS L.J. 425 (2008). Our point here is to describe the purposes that fintech sandboxes have been claimed to advance. And, as discussed further below, we do also claim that the controlled, time- and scope-limited nature of experiments within a sandbox (as opposed to, say, a freestanding innovation hub) mitigates some concerns about generating a race to the bottom.

[48] Joint Report, *supra* note 20, at 19.

[49] *Id.* (identifying Denmark, the Netherlands, Lithuania, Poland, and the UK).

appropriateness of their legal/regulatory frameworks, and 73% reported that the sandbox contributed to building their own capacity.[50]

Using a sandbox to try to achieve more comprehensive or systemic reform, however, may be less effective. In contexts where there is already considerable dialogue around and receptivity to innovation – which may be the case by now in London's fintech sector, and elsewhere – the incremental, case-by-case approach that defines the sandbox may be less effective than more comprehensive reform that, for example, tackles financial, legal, technical, or other barriers to innovators' business success.[51] One study of sandbox effectiveness in fostering the particular goal of financial inclusion found little evidence that they had driven the necessary formal regulatory change.[52] Formal regulatory change is not always the only meaningful indicator of regulatory change. The impact of sandboxes on regulatory practice could also occur at a more informal level (e.g., by helping regulators reinterpret existing rules), and those subtler changes could take time to develop and become apparent to outsiders.[53] Yet it is clear is that innovation sandboxes were not *designed* to catalyze comprehensive reform. They were and are designed to permit specific, controlled experiments, tailored only to each of the particular sandbox participants that apply to them.

[50] Appaya et al., *supra* note 22.

[51] Zetzsche et al., *supra* note 27; Chen, *supra* note 20; Simone di Castri & Ariadne Plaitakis, *Going Beyond Regulatory Sandboxes to Enable FinTech Innovation in Emerging Markets* (BFA Global, Working Paper, 2018).

[52] Jenik et al., *supra* note 31.

[53] *See, e.g.*, Julia Black, *Regulatory Conversations*, 29 J.L. SOC'Y 163 (2002).

2: WHY A SANDBOX TO STIMULATE LEGAL INNOVATION?

Legal innovation sandboxes are sometimes thought to be a very recent extension of the fintech sandbox concept. In North America, the first legal sandbox was introduced in Utah in 2020. However, part of the United Kingdom has had an operating legal innovation sandbox virtually as long as it has had a fintech sandbox. In 2016, the same year that the FCA launched the world's first fintech sandbox, the Solicitor's Regulatory Authority (SRA) of England and Wales launched the legal sector's first sandbox. Dubbed the Innovation Space, the SRA's sandbox set out to enable current providers to develop their businesses in new ways, and to support new types of providers in delivering new types of legal services for the first time.[54] In early 2020, the SRA joined forces with other UK legal regulators, the UK Ministry of Justice, and UK tech incubator Tech Nation to create LawtechUK, a taxpayer-funded innovation program with two key components: a Lawtech Sandbox, which "provides pioneers who are looking to push the boundaries in legal industries with one-on-one support, unique connections and practical support to help them maximise their output and drive change at the highest level"; and a Lawtech Hub, described as "a space to learn and explore for all involved in the future of law."[55] The Lawtech sandbox also includes several units that support participants: a Regulatory Response Unit, made up of relevant regulators and policymakers, which provides a coordinated and expedited response to live challenges; a Business Unit, made up of leaders from the business and legal communities, which provides technical, operational input, and relevant datasets; and an Ethics Unit that provides applied ethics input as

[54] *SRA Innovate*, SOLICITORS REGULATION AUTHORITY (July 2021), www.sra.org.uk/solicitors/resources/innovate/sra-innovate. One topic of great interest to North American observers – non-lawyers' ability to own and manage law firms – is not to be found in the SRA sandbox because it has already been implemented. The *Legal Services Act of 2007* has permitted non-lawyer ownership/management in England and Wales since late 2011,

[55] TECH NATION ANNUAL REPORT 2021, at 31, 35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/10/Tech-Nation-Annual-Report-2021.pdf.

needed.[56] It also connects participants to mentors and experts within the LawTech network.[57] The LawTech sandbox welcomed cohorts of five and eight participants respectively in each of 2020 and 2021.

The Utah Supreme Court, with the support of the Utah State Bar, was indeed the first North American jurisdiction to establish a sandbox for innovation in legal services.[58] Initially planned as a two-year pilot, the sandbox has now been extended to August 2027.[59] Its overarching goal is to improve access to justice by ensuring that consumers "have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services."[60] Both non-traditional legal service providers and traditional providers are welcome to apply to test out their ideas in the sandbox. The sandbox describes its method as data-driven and risk-based.

As of November 2021, the Utah sandbox had received 52 applications and authorized 32 entities to offer services in the sandbox, including services provided by nonlawyers and by software.[61] For example, Rocket Lawyer offers software-supported legal document creation and business incorporation services, complimented by human lawyer-provided legal services. [62] The

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[56] *The Lawtech Sandbox*, TECH NATION, technation.io/lawtechuk-vision/#the-lawtech-sandbox (last visited Feb. 13, 2022).

[57] *The Lawtech Sandbox: Transforming the UK Legal Sector Through Tech*, TECH NATION, technation.io/lawtech-sandbox (last visited Feb. 13, 2022).

[58] *See* Utah Supreme Court Standing Order No. 15 (amended June 3, 2021), utahinnovationoffice.org/wp-content/uploads/2021/07/Signed-Utah-Supreme-Court-Standing-Order-No.-15-Amended-June-3-2021.pdf*;* INNOVATION OFFICE, *supra* note 8.

[59] News Release, Admin. Office of the Courts, Utah Supreme Court to Extend Regulatory Sandbox to Seven Years (April 30, 2021), utahinnovationoffice.org/wp-content/uploads/2021/05/Sandbox-Extension-PR-4-21.pdf.

[60] Utah Supreme Court Standing Order No. 15, *supra* note 58, at 7. The sandbox documents refer primarily to "consumers," and less commonly to "Utahns."

[61] OFFICE OF LEGAL SERVICES INNOVATION, INNOVATION OFFICE ACTIVITY REPORT: NOVEMBER 2021 (Dec. 20, 2021), https://utahinnovationoffice.org/knowledge-center.

[62] *See* ROCKET LAWYER, www.rocketlawyer.com (last visited Feb. 13, 2022). For a history and analysis of Rocket Lawyer's prior battles with state bars (as well as those of LegalZoom and Avvo Legal Services), see Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services:*

Timpanagos Legal Certified Advocate Partner Program empowers non-lawyer advocates to provide low income clients with limited advice and representation related to protection orders and stalking injunctions. [63] In a novel business structure experiment that would not otherwise be permitted, a full-service law firm has partnered with a financial services company to provide clients with more comprehensive legal and financial services. [64]

In California, as of mid-2021, a State Bar Working Group was exploring the development of a sandbox and making recommendations about sandbox scope and structure.[65] In June 2021, a Florida Bar Committee recommended the creation of a sandbox, called the Law Practice Innovation Lab Program, to test alternative ways of providing legal services, including through non-lawyer ownership, fee sharing models, and a limited assistance paralegal pilot program.[66]

New Technologies Meet Bar Regulators, 70 HASTINGS L.J. 955 (2019).

[63] *See Certified Advocate Partners Program*, TIMPANOGOS LEGAL CENTRE, www.timplegal.org/legal-services/certified-advocate-partners-program (last visited Feb. 13, 2022).

[64] *See* PEARSON BUTLER, www.pearsonbutler.com (last visited Feb. 14, 2022).

[65] *Closing the Justice Gap Working Group*, THE STATE BAR OF CALIFORNIA, www.calbar.ca.gov/About-Us/Who-We-Are/Committees/Closing-the-Justice-Gap-Working-Group (last visited Feb. 14, 2022). More recently, the Closing the Justice Gap Working Group (CTJG) seems to have paused its meetings following forceful pushback from the Chair of the state Judiciary Committee, who warned the group that "[a]ny proposal that would materially change current consumer protections for clients receiving legal services and fundamentally alter the sacrosanct principles of the attorney-client relationship would be heavily scrutinized by our Committees." *See* Letter from Assemb. Mark Stone, Chair, Assembly Comm. on Judiciary & Sen. Tom Umberg, Chair, Senate Comm. on Judiciary to Ruben Duran, Board of Trustees Chair, State Bar Cali. (Dec 7. 2021), https://www.lawnext.com/wp-content/uploads/2021/12/state-bars-ctjg-concerns-12-7-21.pdf. In response, see Letter from CTJG members to Assemb. Mark Stone & Sen. Tom Umberg (Dec. 16, 2021), http://law.stanford.edu/wp-content/uploads/2021/12/2021-12-17-Letter-to-Judiciary-Committee-Chairs.pdf. *Also see* Letter from Karen Thomas Stefano, Admin. Director, Consumer Protection Policy Center, Univ. San Diego Law Sch. to Assemb. Mark Stone & Sen. Tom Umberg (Dec. 16, 2021), https://www.sandiego.edu/cppc/documents/20211216-Letter-Re-CTJG-FInal.pdf.

[66] JOHN STEWART ET AL., "FINAL REPORT OF THE SPECIAL COMMITTEE TO IMPROVE THE DELIVERY OF LEGAL SERVICES" (Florida Bar 2021), https://www-media.floridabar.org/uploads/2021/06/FINAL-REPORT-OF-THE-SPECIAL-COMMITTEE-TO-IMPROVE-THE-DELIVERY-OF-LEGAL-SERVICES.pdf.

In Canada, the Law Society of British Columbia (LSBC)[67] has been accepting applications to its Innovation Sandbox, whose objective is "to improve access to justice by improving access to legal advice and assistance," since November 2020.[68] It is Canada's first legal innovation sandbox. As of January 2022, eighteen applicants had been authorized to participate. These pilots include a legal coaching service for self-represented civil litigants; an online platform that enables parties to submit confidential settlement offers, which the platform will match where possible; a digital process for creating wills and powers of attorney; a family law document creation and legal information platform; and more than one paralegal who is being permitted, within defined parameters, to provide legal advice and conduct negotiations without lawyer supervision.[69] In October 2021, the Law Society of Ontario launched Access to Innovation (A2I), a five year regulatory sandbox pilot project focused on innovative technological legal services.[70] That same month, the benchers of the Law Society of Alberta approved the creation of its own Innovation Sandbox.[71] The Barreau du Québec is also in the process of developing a sandbox, reportedly focussed on the use of technology and artificial intelligence in law.[72] While Canadian law societies

[67] Through the Legal Profession Act, S.B.C. 1998, c 9 (Can.), the provincial government of British Columbia delegates the regulation of the practice of law to the Law Society of British Columbia (LSBC). As part of its mandate, the LSBC protects the public interest in the administration of justice by setting and enforcing standards of professional conduct for lawyers. It also brings a voice to issues affecting the justice system and the delivery of legal services. The LSBC is governed by 25 elected lawyers and up to 6 appointed non-lawyers, collectively known as Benchers.

[68] *Innovation Sandbox*, L. SOC'Y B.C, www.lawsociety.bc.ca/our-initiatives/innovation-sandbox (last visited Feb. 14, 2022).

[69] *Approved Participants*, L. SOC'Y B.C, www.lawsociety.bc.ca/our-initiatives/innovation-sandbox/approved-participants (last visited Feb. 14, 2022).

[70] *Access to Innovation (A2I)*, L. SOC'Y ONT., lso.ca/about-lso/access-to-innovation (last visited Feb. 14, 2022).

[71] *Law Society of Alberta Introduces Innovation Sandbox*, L. SOC'Y ALTA. (Oct. 1, 2021), www.lawsociety.ab.ca/law-society-of-alberta-introduces-innovation-sandbox.

[72] BARREAU DU QUEBEC, RAPPORT ANNUEL 2020-2021, at 33 (2021), www.barreau.qc.ca/media/2862/4-rapport-annuel-2020-2021.pdf; ACTION COMM. ON ACCESS TO JUST. IN CIVIL & FAM. MATTERS, CANADA'S JUSTICE DEVELOPMENT GOALS: 2020 CHALLENGE AND CHANGE 34

have not historically been global innovation leaders, they have moved quickly to build on the UK's and Utah's examples in the time since the Utah sandbox was established.

A. FOUR KEY ASSUMPTIONS UNDERPINNING THE LEGAL INNOVATION SANDBOX

When it comes to innovation, there can be a somewhat romantic tendency to imagine that innovation itself can offer some kind of transcendent solution to longstanding policy challenges. To avoid underspecified objectives and unexpected outcomes, however, regulators have an obligation to scrutinize particular regulatory strategies with reference to the policy objectives they are charged with advancing. No regulatory move will resolve all policy questions or normative choices, and trade-offs inevitably accompany any policy or regulatory choice. There are better and worse regulatory design choices, and better and worse choices for a particular context, but neither innovation on its own, nor regulation designed to deal with innovation, can possibly improve outcomes across all conceivable metrics at once.[73]

For this reason, it is important to understand clearly *what* a regulatory regime – in this case, the legal innovation sandbox – is hoping to generate, *why* the sandbox is believed to be the right mechanism for trying to achieve those ends, and *how* to design a legal innovation sandbox in a way that stands the best chance of achieving those ends. We have some sense of what counts as "effectiveness" in the fintech context, as described above. Before launching a legal innovation sandbox, the sandbox authority should also have at least a provisional understanding of what goals it intends to pursue through the sandbox, and what assumptions it is making about the links between, for example, innovation and access to justice. Although these are still early days in the

(2020), https://www.justicedevelopmentgoals.ca/reports.

[73] *See, e.g.*, FORD, *supra* note 12, at 7-9, 79-84, 115-20, 131-35.

development of legal innovation sandboxes in North America, we can identify some assumptions underpinning the move.

First, in establishing a legal innovation sandbox, its champions must be assuming that *innovation in legal services (including products, practices, and business models) is actually something that should be pursued*. Sandboxes promote innovation by eliminating or reducing regulatory barriers, thus empowering individuals and entities to innovate without worrying about (or worrying less about) fines, liability, and other disciplinary actions.[74] The fundamental principle motivating legal experiments like sandboxes is that innovation, which could be stifled by regulation in the absence of a sandbox, has the potential to be publicly beneficial. This observation may seem trite and obvious. In fact, it is borrowing unfamiliar, innovation-friendly assumptions from a very different regulatory space. This signals a significant and completely underappreciated move, relative to how the legal profession has traditionally understood its obligation to protect the public interest.

As Hilary Allen has pointed out, however, not all innovations are necessarily welfare-enhancing enough to be promoted as a matter of public policy.[75] What justifies allocating public regulatory resources to a legal innovation sandbox is a second significant assumption operating here: that *innovation in legal services provision promotes the policy objective of increasing access to justice*.[76] Put another way, it assumes that the legal innovation sandbox strategy should be

[74] Brooke MacKenzie, *Regulatory Innovation with a Legal Tech Sandbox*, SLAW (May 3, 2021) www.slaw.ca/2021/05/03/regulatory-innovation-with-a-legal-tech-sandbox; Toronto *Centre*, *supra* note 21, at 9-10.

[75] Allen, *supra* note 15, at 605-12; Hilary J. Allen, *Experimental Strategies for Regulating Fintech*, 3 J.L. INNOVATION 1 (2020).

[76] Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, DUKE L.J. 277, 317-22 (1982) (describing public interest policy exceptions to general rules, and their procedural and substantive ramifications). There may be other specific priorities operating, too, which are seen as mechanisms for advancing access to justice. For example, in British Columbia, the Law Society's

preferred to, for example, more direct regulatory responses (such as mandating that every lawyer provide a certain amount of pro bono services, allocated through some kind of public roster), or more public funding (for example, funding legal aid regimes better or even "socializing" legal services as Canada long ago socialized healthcare). The sandbox approach could theoretically be assumed to be the best option for any number of reasons: (a) because it is cheaper, especially if existing regulators develop the sandbox "off the sides of their desks", (b) because other options, especially more public funding, are unrealistic, (c) because sandboxes are *à la mode*, or (d) because the sandbox actually offers real advantages, in access to justice terms, that the other options do not. In fact, the fourth option is at least in play here. Because the sandbox allows non-lawyers to offer legal services notwithstanding the statutory monopoly otherwise granted to lawyers, it stands a chance of increasing both the *volume* and the *variety* of legal services available beyond what lawyers alone could provide.

Third is the assumption that *a sandbox can enhance access to justice, specifically by freeing market forces to operate in legal services, thereby increasing consumer choice*. Sandbox advocates argue that they can fuel a cascade of positive changes in the legal services market by spurring competition, pushing established players to adapt, and attracting investors and newcomers, as well as enhancing regulatory guidance.[77] As in the fintech context, we see an emphasis on consumer choice and competitive market forces as a strategy for increasing the range, quality, and

Paralegal Task Force promoted the idea that the sandbox could help generate a ground-up, economically viable paralegal sector and avoid what it perceived to be the failings of Ontario's more top-down strategy for licensing paralegals. JO ANN CARMICHAEL ET AL., LICENSED PARALEGAL TASK FORCE REPORT (LSBC 2020), https://www.lawsociety.bc.ca/about-us/committees,-task-forces-and-working-groups/committee-and-task-force-reports.

[77] Toronto Centre, *supra* note 21, at 9-10. Conversely, but still based on market-for-innovation principles, sandbox critics worry that sandboxes may deter investors and providers from doing business with or in the same market as sandbox participants because of the risks associated with regulatory changes. See also Zetzsche et al., *supra* note 27 at 39-40 (discussing fintech sandboxes).

accessibility of legal services for the public. Like the emphasis on innovation, this emphasis on the mechanisms of consumer choice and market competition is a new transplant into legal services regulation. Given the fundamental social importance of access to justice and the rule of law, the pivot to a consumer choice centered model deserves careful scrutiny.

Mechanisms that advance access to justice are generally, and appropriately, understood to also advance the rule of law. At the same time, whether or not it is explicitly stated, the idea of a regulatory sandbox within which certain rules can be suspended also raises fundamental rule of law concerns around equality of treatment, certainty, public accountability, and transparency.[78] Equality is undermined because sandbox participants are, almost by definition, granted privileges that their competitors outside the sandbox do not enjoy.[79] Certainty is compromised because sandboxes offer case-by-case rule relaxation. Public accountability suffers where the role of the regulator becomes blurred. Indeed, through dialogue with participants and by setting an experiment's parameters, the regulator arguably even acquires a certain stake in its success and becomes less than "arm's length" in respect to the sandbox.

Poor communication can exacerbate transparency and equality challenges. For example, investors, the media, and consumers may come to see sandbox participants' practices as having been de facto endorsed by the regulator, both while the participant is in the sandbox and after it exits.[80] An important fourth assumption behind the regulatory sandbox must therefore be that *rule*

[78] Philipsen et al., *supra* note 20. The authors reference the legality principle, noting that legality is threatened when the regulator, exercising delegated discretionary powers, establishes a sandbox without explicit authorization by the legislature. The scope of rulemaking authority that administrative agencies possess in the relevant contexts make this concern less salient here. *See e.g.*, *infra* note 132 and accompanying text; Legal Profession Act, S.B.C. 1998, c 9, § 3 (Can.)

[79] Knight & Mitchell, *supra* note 28, at 446-49, 462-75; Zetzsche et al., *supra* note 27, at 41.

[80] Ahern, *supra* note 23, at 11-12; Knight & Mitchell, *supra* note 28, at 462-75; Joint Report, *supra* note 25, at 35-37; Ivo Jeník & Kate Lauer, *Regulatory Sandboxes and Financial Inclusion* 10 (CGAP, Working Paper, 2017), www.cgap.org/sites/default/files/Working-Paper-Regulatory-Sandboxes-

of law trade-offs either can be mitigated, or are justified at least on a temporary basis, in order to advance the objectives above.

In this context, the details of *how* a sandbox is designed are clearly crucial.

B. LEGAL SERVICES INNOVATION VERSUS FINTECH: IMPORTANT CONTEXTUAL CONSIDERATIONS

Regulatory tools will have different effects depending on context. The legal and financial innovation contexts are not identical, or perhaps even all that similar. Importing sandboxes into the legal services context assumes that the sandbox model can work effectively in spurring legal services innovation, in spite of significant contextual differences. As should be clear from the four assumptions discussed above, the prospect of relying on innovation and improved consumer choice as a mechanism for improving access to justice and safeguarding the rule of law is new and unfamiliar. The sandbox mechanism is also being transplanted into a particular regulatory and economic environment, whose characteristics explain both why a sandbox might be especially well-suited to this environment, and why it is likely to encounter powerful headwinds.

In our view, the sandbox is especially well-suited to legal services innovation precisely because there has been so little innovation to date. The legal profession has traditionally been a particularly inaccessible, even monopolistic, industry characterized by legislatively created barriers to entry. The widespread prohibition on non-lawyers practising law in North America (also described as engaging in the "unauthorized practice of law", or "UPL") is a significant, statutorily-imposed, and generally scrupulously enforced boundary protecting existing means of delivering

Oct-2017.pdf. Sandboxes can also distort the market's signaling function, causing separate transparency problems: because of the benefits available in the sandbox, firms within and outside the sandbox may succeed or fail even though consumer preferences on their own would have led to a different outcome.

services. Even innovation by lawyers has been limited as a result.[81] As well, unlike the fintech context, interjurisdictional competition for legal services has been minimal because of geographic limits on bar membership and practice.[82] In this way, legal services regulation may have more in common with financial regulation in less developed capital markets than with the environment in an innovation-intensive capital markets hub like London. As the World Bank has suggested, in contexts with relatively closed or conservative approaches to regulation and innovation, and/or where regulatory requirements "are unclear or missing or create barriers to entry disproportionate to the risks," a sandbox may be the first step to opening up a dialogue, promoting cultural shifts, and building the "stakeholder consensus needed to endorse or support broader regulatory understanding and change."[83]

On the other side of the ledger, literally posing risks to a sandbox's survival, is the structure of legal regulation itself, not least in Canada. Bold, innovation-friendly legal regulators in the United States may face lobbying and pressure by lawyers, including as channeled through legislators, as may have happened in California.[84] Law in Canada, however, continues to be a self-governing profession in a way that is now uncommon in other Anglo-American jurisdictions.[85] This makes lawyer-centric preferences more pervasive throughout the regulatory regime itself.

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[81] *See e.g.*, Julian Moradian, *A New Era of Legal Services: The Elimination of Unauthorized Practice of Law Rules to Accompany the Growth of Legal Software*, 12 WM. & MARY BUS. L. REV. 247; MARY JUETTEN & BILLIE TARASCIO, THE FIGHT AGAINST UPL: WINNING WITH TECHNOLOGY (Clio), http://files.clio.com/marketo/ebooks/the-fight-against-upl.pdf.

[82] *But see* Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953 (2012).

[83] Appaya et al., *supra* note 22, at 26.

[84] *See supra* note 65 and accompanying text.

[85] Hill, *supra* note 9. In Canada, through enabling legislation, each province delegates the regulation of the legal profession to a law society (i.e., a governing body) charged with upholding and protecting the public interest. Each law society is governed by Benchers, a volunteer board of governors. Most Benchers are lawyers elected by other lawyers.

Canadian legal regulators (who are called "Benchers" of "Law Societies") are overwhelmingly lawyers, elected by their fellow lawyers. A Law Society's primarily obligation is to protect the public; it is not an industry association. However, the fact that the majority of Benchers are elected by their lawyer peers arguably generates a de facto conflict when it comes to new business models in particular, and to legal services offered by non-lawyers, such as paralegals.[86]

The awkward reality is that lawyers are not universally financially successful even now.[87] While sandbox initiatives may help make some of those lawyers' practices more efficient and potentially more profitable, in any time of change there will be winners and losers. For example, some would argue that, relative to a full-service solo practitioner who only occasionally practises in areas like real estate or wills, software based guided decision pathways and/or software-assisted practice checklists and protocols implemented by a group of independent paralegals could produce not only cheaper, but also more consistent and higher-quality services. Lawyers as a group will not necessarily behave in entrepreneurial ways, and their concerns about access to justice could pale in comparison to their concerns about their livelihoods. In this context, Benchers' structural position may limit how bold any Canadian Law Society might be prepared to be, if innovations that advanced access to justice also had the potential to undermine lawyers' profitability.

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[86] Described another way, regulator-facilitated entry for new market participants "could be seen as constituting a breach by the regulator of the regulatory contract" with existing market participants, i.e., lawyers. Heikki Marjosola, *The Problem of Regulatory Arbitrage: A Transaction Cost Economics Perspective*, 15 REGUL. & GOVERNANCE 388, 401 (2019). For one discussion of paralegal regulation, and the question of whether paralegals should be regulated by lawyers, see BRUCE LE ROSE ET AL., FINAL REPORT OF THE LEGAL SERVICE PROVIDERS TASK FORCE (LSBC 2013), https://www.lawsociety.bc.ca/about-us/committees,-task-forces-and-working-groups/committee-and-task-force-reports.

[87] *See* CLIO, LEGAL TRENDS REPORT 2016, www.clio.com/resources/legal-trends/2016-report; Clio, Legal Trends Report 2020, www.clio.com/resources/legal-trends/2020-report. This has been exacerbated in British Columbia by the government's decision to establish a "care-based" (or "no-fault") regime for motor vehicle claims, which has forced some smaller firm and solo practitioners to pivot their practices and planning. *See Enhanced Care: New Auto Insurance for B.C.*, ICBC, enhancedcare.icbc.com.

In British Columbia, section 13 of its *Legal Profession Act* further sharpens Benchers' dilemma, because it provides Law Society "members" (that is, lawyers) with the power to demand a referendum and, if successful, to bind the Benchers to a particular course of action.[88] These structural and governance arrangements could have significant, adverse implications for increasing people's access to a broader range of legal services. For example, "meeting unmet need" – as the British Columbia sandbox describes one of its objectives[89] – may not actually be a perfect proxy for "addressing access to justice crisis": it does not address the possibility that a need, which lawyers may currently be meeting in an expensive yet imperfect way, could be more cheaply and comprehensively met by other practitioners or through other means. In our view, addressing the concerns above requires that an independent sandbox administrator be established. We discuss this further below.[90]

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[88] Legal Profession Act, S.B.C. 1998, c 9, § 13 (Can.): "A resolution of a general meeting of the society is not binding on the benchers except as provided in this section . . . the resolution is binding on the benchers if at least (a) 1/3 of all members in good standing of the society vote in the referendum, and (b) 2/3 of those voting vote in favour of the resolution . . ." No other Canadian legal profession act includes the equivalent of section 13. In fact, Alberta's Legal Profession Act explicitly states that "[a] resolution passed at an annual general meeting or special meeting of the Society shall be considered by the Benchers at their next meeting but is not binding on the Benchers": Legal Profession Act, R.S.A. 2000, c L-8 § 29. Pressure on the LSBC from its members is counterbalanced to some degree by the pressure from the BC provincial government, which in 2018 expressed its intention to amend the title of the Legal Profession Act to become the Legal Professions Act (plural), and has signaled a strong interest in creating a licensing regime for paralegals. S*ee* Bill 57, Attorney General Statutes Amendment Act, 3rd Sess., 41st Parl., B.C., 2018. Regarding fettering, see Trinity Western University v. Law Society of Upper Canada, 2018 SCC 33 (Can.).

[89] *About the Innovation Sandbox*, LAW SOC'Y B.C., www.lawsociety.bc.ca/our-initiatives/innovation-sandbox/about-the-innovation-sandbox (last visited Feb. 15, 2022) ("To respond to that unmet need, the Law Society has established the innovation sandbox . . . The goal of the innovation sandbox is to develop effective legal service providers to address the legal needs of those BC citizens who do not get legal help or get it from someone other than a lawyer"). Compare this with, e.g., Utah, whose Supreme Court describes the goal of its Innovation Sandbox as follows: "The overarching goal of this reform is to improve access to justice. With this goal firmly in mind, the Innovation Office will be guided by a single regulatory objective: To ensure consumers have access to a well-developed, high-quality, innovative, affordable, and competitive market for legal services." *See* Utah Supreme Court Standing Order No. 15, *supra* note 58, at 7.

[90] *See infra* Section V. E.

Even leaving these structural challenges aside, the fact that Benchers – like legal profession regulators in many Anglo-American jurisdictions – are predominantly lawyers will affect their orientation toward change, as well as their comfort and expertise in dealing with fast-moving innovation. Regulators may require different training, a re-examined mindset, and new kinds of (completely teachable) skills to deal as effectively as possible with the changes that a more innovation-friendly legal services environment may demand. These are the kinds of lessons that resonate well beyond the particular context of legal services regulation, in any single jurisdiction. Legal innovation sandboxes are an opportunity for legal services regulators to improve their own methods. One could even hope that, in addition to potentially spurring innovation and increasing access to justice, a legal innovation sandbox can be a mechanism through which to re-imagine not only how legal services could be better provided, but also how they could be better regulated. Legal regulators could use the sandbox to generate evidence and develop a risk-based, evidence-based regulatory approach that has the potential to be more congruent with regulatory goals.[91]

The distinction between the rule of law priorities of lawyers and the market-perfecting or capitalist priorities in finance is also potentially significant. There has been ongoing debate (among lawyers) about the extent to which addressing the "justice gap" through alternative legal service providers risks undermining the legal profession's "core values."[92] In contrast, others like Rebecca Sandefur argue that the profession's perspective should not define the debate. She argues that we should instead be imagining a more equitably distributed, resolution-focused, multidisciplinary approach to justice that is not so myopically focused on "defin[ing] and diagnos[ing] peoples'

[91] On the LSBC's current approach to risk management, see *id.* ¶ 6.3-6.5, 7.6-7.6.5.

[92] Alberto Bernabe, *Justice Gap vs. Core Values: The Common Themes in the Innovation Debate*, 41 J. LEGAL. PRO. 1 (2016).

problems as legal, and provid[ing] the services that treat them."[93] From this perspective, although Dr. Sandefur herself would disagree, others might conclude that the whole sandbox experiment risks distracting us from unresolved justice problems writ large, of which formal legal needs are just one, sometimes secondary, part.

Even optimism about sandboxes' potential to increase access to legal services could be shot through with equity concerns. Service providers operating within a sandbox could potentially be creating assembly-line, second-best forms of service for those that cannot afford bespoke services. Form-filling software like that offered by Rocket Lawyer, arguably the legal services equivalent of the "big box" store, are probably in a better position to take advantage of sandbox opportunities than are individuals or smaller, more local groups (including independent paralegals, for whom a viable business model is still emerging).[94] Moreover, the ability to apply to a sandbox early and to scale up quickly will have enormous knock-on effects if it turns out that the market for commodity legal services, like many online markets today, is characterized by network effects and winner-take-all outcomes.[95] Any legal services are likely better than no legal services, if that is the choice – but is that the choice? What if the tradeoff additionally comes with subtle but profound longer term consequences for the rule of law or its perceived legitimacy at the local level. We do not know if this is the case. But the fact that neither law societies nor sandboxes at present have an established

[93] Sandefur, *supra* note 16, at 50.

[94] *See* Barton & Rhode, *supra* note 62. While Rocket Lawyer is an authorized entity in Utah's Legal Sandbox, local and smaller-scale entities have also been authorized, such as the Timpanogos Legal Centre and Utah Legal Advocates. *See Authorized Entities*, OFFICE OF LEGAL SERVICES INNOVATION, utahinnovationoffice.org/authorized-entities (last visited Feb. 15, 2022). To date, the LSBC has approved only individuals, not corporations, to enter its Innovation Sandbox, with one of those individuals supported by a law firm. See *Approved Participants*, LAW SOC'Y BC, https://www.lawsociety.bc.ca/our-initiatives/innovation-sandbox/approved-participants/ (last visited Feb. 18, 2022).

[95] *See e.g.*, K. Sabeel Rahman & Kathleen Thelen, *The Rise of the Platform Business Model and the Transformation of Twenty-first-century Capitalism*, 47 POL. & SOC'Y 177 (2019).

role for some sort of Public Interest Advocate, or an Access to Justice Advocate, means that sandboxes will not have an in-built public-oriented perspective as part of their decision making. Over the longer term, surely, we should not just be resigned to the idea that cheaper services for ordinary people, and bespoke services for corporations and the wealthy, are the best outcome that we could aspire to.

Working toward social justice more broadly, and working to create a more innovative environment for legal services, are not mutually exclusive goals. We argue that in spite of their risks and shortcomings, legal innovation sandboxes can be a promising tool for spurring market competition and consumer choice. Moreover, if we are serious about addressing the access to justice crisis, we should not discount the potential value of enhanced competition. We are not suggesting that consumer preferences on their own are adequate to determine which innovative products or services should come to dominate. As Cass Sunstein argued a generation ago, the notion of "preferences" is reductive, if not meaningless, in trying to describe the multiple, conflicting, socially constructed, and dynamic ways in which actual humans (as opposed to abstract "consumers") make choices in the world.[96] We also say that legal service regulators must continually re-examine their models and assumptions, to ensure they remain mindful of potential disconnects between these market-oriented mechanisms and their fundamental regulatory obligations to the public and the rule of law. The point here is only that, in descriptive and instrumental terms, making more choices available to people who currently lack choices is a legitimate objective. It is one that a thoughtfully-designed legal innovation sandbox can potentially meet.

[96] Sunstein, *supra* note 14.

3: THE SANDBOX JOURNEY

A thoughtfully designed, explicitly access-to-justice-oriented sandbox design has the potential to maximize benefits and minimize risks for members of the public and society as a whole. An ill-conceived design is far more likely to turn those risks into reality. The sandbox is a controlled testing ground for actual experiments, and so it is crucial that the experiments be controlled. For these reasons, the actual design and implementation of a sandbox initiative – those seemingly mundane logistical details that in fact are the backbone of effective regulation[97] – deserve to be considered carefully. Because fintech sandboxes have been operating for longer, it makes sense to learn where possible from their experiences, even while holding in mind the access to justice, rule of law, and public protection concerns that animate the legal innovation space. Rule of law concerns should be mitigated to the extent possible, including through transparency, thoughtful messaging, regulatory attention to the public interest, and carefully designed scope, monitoring, and reporting requirements.[98]

Before opening a sandbox, a sandbox authority will often establish general participation terms that stipulate which conditions are and are not negotiable.[99] *Parameters* limit the scope of sandbox pilots. For example, a sandbox authority could set a maximum pilot duration, or impose

[97] A parallel can be seen in ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS (UNIV. CHI. PRESS 2011) (discussing the underappreciated role of collateral contracts as scaffolding for global financial markets).

[98] Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1541-45 (2018) (identifying criteria for evaluating administrative non-enforcement choices including, *inter alia*, the clarity of the criteria for non-enforcement, its breadth across entities, its breadth for a single entity, and the extent of public disclosure).

[99] Some sandbox authorities reportedly maintain a controlled list of which regulatory requirements can be lifted or modified, and which must be followed: Jiménez & Hagan, *supra* note 19, at 5; *but see* Zetzsche et al., *supra* note 27, at 76-7 (suggesting that most sandboxes do not specify which mandatory provisions may be lifted).

scope limitations on the type of practice that a participant may engage in.[100] *Conditions* mitigate risks and protect the public by stipulating the terms that all participants must comply with in order to remain in the sandbox.[101] For example, sandbox participants often have an obligation to report regularly to the sandbox authority, sometimes using a reporting template, as a condition of participating.[102] As a best practice, a newly created sandbox may also want to establish a set of guiding principles to ensure that participants will act ethically and fairly and collaborate openly with the regulator, while upholding the public interest and other core (in this case, legal) values.

Transparency throughout the sandbox process fosters public accountability and public trust, and is consistent with rule of law principles including certainty, predictability, and non-arbitrariness.[103] For example, prior to launching, the regulator may choose to make a public announcement about the sandbox that provides details about sandbox goals, sandbox duration, and rule relaxation limits.[104] Regulators and sandbox authorities should also disclose, in a public and timely manner, information about sandbox entry processes, criteria, and decisions, as well as the parameters and privileges under which sandbox participants are operating.[105] On its website, for example, Utah's Innovation Office publishes monthly sandbox reports and maintains an updated list of authorized sandbox entities, with links to their Orders of Authorization.[106]

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[100] Toronto Centre, *supra* note 21, at 6.

[101] *Id.*

[102] *See, e.g.*, INNOVATION OFFICE MANUAL, at 29-41 (Office of Legal Service Innovation 2021), utahinnovationoffice.org/knowledge-center.

[103] Ahern, *supra* note 23, at 19-21; Zetzsche et al., *supra* note 27.

[104] Ahern, *supra* note 23; Philipsen et al., *supra* note 20.

[105] Ahern, *supra* note 23; Chen, *supra* note 28, at 22.

[106] *See Authorized Entities*, OFFICE OF LEGAL SERVICES INNOVATION, utahinnovationoffice.org/authorized-entities (last visited Feb. 15, 2022).

Regulators should also insist, as a condition of sandbox participation, that participants provide them on with granular, high-quality data on an ongoing basis. As innovation arrives to legal services, as is has to other sectors, it will be important that the sandbox operators understand new technologies and the risks they generate. Regulators should ensure that systems are in place to aggregate and analyze the data they are collecting, in order to learn not only about emerging products, services, models, and their risks but also about evidence-based ways to improve their own regulatory practice. When thoughtfully built, adequately resourced, and operated effectively, sandboxes have the potential to encourage transparent and open dialogue between regulators and service providers.[107]

Although sandboxes vary in terms of their structures, processes and rules, an entity's journey through the sandbox can be broadly conceptualized as moving through the four phases discussed below: the application phase, the preparation phase, the experimentation phase, and the validation phase.[108] Each raises its own set of considerations for a sandbox regulator or administrator. The design choices they make will directly influence the sandbox's effectiveness, both as an innovation-fostering initiative and as a regulatory information-gathering and public-protecting strategy.[109]

[107] Chen, *supra* note 20; Toronto Centre, *supra* note 21, at 9-10.

[108] Joint Report, *supra* note 20, at 22.

[109] As discussed later on, some regulators delegate partial or full sandbox responsibility to an arm's length sandbox administrator. The term 'sandbox authority' will be used here to identify the entity involved in developing and running the sandbox, whether arm's length or not.

PHASE 1: APPLICATION TO ENTER THE SANDBOX

Most innovation sandboxes are designed to have an ex ante application process and qualitative scrutiny of both applications and ongoing results.[110] Common sandbox entry criteria address the fit between an applicant's proposal and the sandbox's scope and goals, the potential benefits to consumers, the potential risks to consumers, the applicant's preparedness, the proposal's innovativeness, and the extent to which the proposed idea or thing actually needs to be tested in the sandbox. Table 1 provides a visual overview of these criteria. Although "innovation" is often included as an entry criterion, assessing innovation is a challenging and imprecise task; depending on how it is defined, an otherwise qualified applicant may be denied entry if it is not the first mover in the market.[111] For this reason, some jurisdictions do not impose innovation criteria and even include provisions to favour first movers' competitors' admission.[112]

The "need" consideration is another interesting one, in that it suggests that regulation "must" be lifted because it is a barrier to a potentially helpful innovation. In this respect, not all "regulatory barriers" are created equal. The varieties of regulatory obstruction to innovation could include, for example, the barrier to entry posed by having to understand and apply a complicated set of regulatory requirements.[113] This kind of regulatory barrier, which is often alluded to in the fintech context, disproportionately affects (smaller, newer, start-up) firms that have lesser resources to retain compliance and legal experts. As such it can insulate established incumbents

[110] Joint Report, *supra* note 20, at 22-4. A notable exception is the unique non-authorization model adopted by the Australian Securities and Investments Commission, which does not involve any screening of applicants upon entry, for innovativeness or otherwise: *Enhanced Regulatory Sandbox*, ASIC, https://asic.gov.au/for-business/innovation-hub/enhanced-regulatory-sandbox (last visited Feb. 15, 2022; *see also* Didenko, *supra* note 33, at 1085-87, 1100. Firms must however notify the regulator of their intention to use the sandbox provisions.

[111] Ahern, *supra* note 23, at 9; Knight & Mitchell, *supra* note 28, at 455-57.

[112] Knight & Mitchell, *supra* note 28, at 455-57.

[113] Allen, *supra* note 27, at 588-91.

from potentially beneficial competition by new entrants. In the legal services arena, the prohibition on non-lawyers engaging in the practice of law is a much more significant barrier to entry than the regulatory regimes' complexity.[114] In our view, the substantive regulatory obligation to protect the public can be attended to, in a structured sandbox context, in other ways including scope limits and ongoing reporting.[115] The prohibition on the unauthorized practice of law is a proxy for protection of the public, not an end unto itself. The point here is that regulatory mechanisms that are designed to protect the public or safeguard the rule of law should not be assumed, without reflection, to be regulatory "barriers," and they should not be eliminated unless other methods to safeguard the same objectives are put in place.

TABLE 1: GENERAL ENTRY CRITERIA[116]

Fit	Has the applicant presented a coherent vision of what it wants to test? Does the proposed product, service, or model fall within the sandbox's scope and will it advance the sandbox's objectives?
Innovation	Is the proposed product, service, or model innovative, novel, or sufficiently different? Has the applicant explained how its proposal will promote innovation?

[114] *See, e.g.*, Legal Profession Act, S.B.C. 1998, c 9, § 15 (Can.).

[115] There is an analogy here to new governance regulation, principles-based regulation, and analogous mechanisms under which regulators articulate and require compliance with high-level goals, while leaving the means of achieving those goals up to industry participants. The analogy is not direct or complete but see, e.g., Allen, *supra* note 15, at 600-05; Marjosola, *supra* note 86, at 398.

[116] We derive the criteria in Table 1 from *Applying to the regulatory sandbox*, FIN. CONDUCT AUTH. (FCA) (last updated Dec. 21, 2021), www.fca.org.uk/firms/innovation/regulatory-sandbox-prepare-application; Jiménez & Hagan, *supra* note 19; Zetzsche et al., *supra* note 27.

Need	Does the applicant's product, service, or model *need* to be tested in the sandbox because it does not easily fit within or is blocked by the existing regulatory framework? Has the applicant identified what regulatory relief instruments (e.g., rule waivers) will be required?
Preparedness	Is the applicant adequately prepared to enter the sandbox, meaning that its product, service or model is ready to be tested with a clear plan, measurable success criteria, and adequate allotted resources? Does an evidence-base already exist?
Consumer / Public Benefit	Will the proposed product, service or model benefit consumers, either directly or indirectly through increased competition and choice?
Consumer Protection	Has the applicant outlined how it will interact with the public, identified the risks, and considered appropriate safeguards?

Along with establishing baseline application criteria, a sandbox administrator may want to consider ways to make the most efficient use of its available resources. In any regulatory initiative, it makes sense to operate as efficiently as possible so long as efficiency does not supplant substantive goals (which might be the case, for example, if a sandbox's operations were assessed in terms of throughput or outputs without reference to underlying priorities). In the sandbox case, efficiency-enhancing tactics could include developing streamlined applications, intake cohorts, and thematic sandboxes.

Some jurisdictions have adopted streamlined application processes, under which applicants meet with sandbox staff before applying. Staff assist with troubleshooting and assess fit, which can

help manage intake and improve the quality of sandbox applications.[117] Some have also adopted a cohort approach. Instead of accepting applications and admitting participants on a rolling basis, the cohort approach limits applications to one or a few windows of time per year, after which newly accepted participants begin and run sandbox tests simultaneously. This can help to conserve limited regulatory resources.[118] With each new cohort, the sandbox's design and operation can also be refined to reflect learnings from the previous cohort.

Some jurisdictions have introduced thematic sandboxes, either temporarily or permanently limiting sandbox eligibility to target specific issues or promote identified policy priorities or technologies.[119] In Spring 2021, for example, the working group behind California's legal sandbox considered whether its sandbox should be open only to "firms that offer services to the unserved and underserved," or if its sandbox should be open to all service providers, including businesses that focus on wealthy clients.[120] While thematic sandboxes can help target resources, at least one leader of Utah's sandbox initiative has argued that new sandboxes should start with the broadest possible set of subject matter entry criteria.[121] Before sandbox experimentation begins, it is very

[117] UNSGA & CCAF, *supra* note 20. *See also, e.g., Fintech Supervisory Chatroom*, H.K. MONETARY AUTH., www.hkma.gov.hk/eng/key-functions/international-financial-centre/fintech/fintech-supervisory-sandbox-fss/fintech-supervisory-chatroom-chatroom (last visited Feb 15., 2022) (Hong Kong's fintech "Contact Point"); MAS Launches Sandbox Express for Faster Marketing Testing of Innovative Financial Services, MONETARY AUTH. SING. (Aug. 7, 2019), www.mas.gov.sg/news/media-releases/2019/mas-launches-sandbox-express-for-faster-market-testing-of-innovative-financial-services (Singapore's "Sandbox Express"). It also increases the risk, alluded to above, that sandbox administrators will either be perceived or will in fact become invested in the success of particular sandbox initiatives. *See supra* note 80 and accompanying text.

[118] Appaya et al., *supra* note 22, at 23; Toronto Centre, *supra* note 21, at 9.

[119] For example, within the financial sector, the Bank of Sierra Leone and the Bank Negara Malaysia limited sandbox entry to innovations designed to advance financial inclusion. Jenik et al., *supra* note 31.

[120] Memorandum from Tom Greene & Becky Sandefur to the California State Bar's Closing the Justice Gap (CTJG) Working Group (April 2, 2021).

[121] Gary Blankenship, *Is It Time For Florida to Play in the Legal Lab/Sandbox*, THE FLORIDA BAR (May 11 2020), www.floridabar.org/the-florida-bar-news/is-it-time-for-florida-to-play-in-the-legal-

difficult, if not impossible, to predict exactly how innovation might develop.[122] Targeting a particular policy objective in advance could be counterproductive.

Once an entity submits an application to enter the sandbox, the sandbox authority evaluates the application, potentially exercising considerable discretion.[123] Sandbox administrators should establish practices that qualitatively assess proposals to determine whether they meet statutory and sandbox objectives. Subjective entry criteria should be minimized for rule of law reasons. The exercise of discretion is of course a fraught area in Anglo-American and common law Administrative Law.[124] While administrative discretion is inevitable, and is probably especially essential in contexts defined by uncertainty or fast-moving change, unbridled discretion runs contrary to basic rule of law principles.[125] The essential point must be that, as with exercises of public power generally, the exercise of discretion in sandboxes as elsewhere should not be arbitrary.[126] It must be constrained by the limits of statutory authority, must be justified with regard to relevant priorities, and should be conditioned through explicit and accessible reasons or rationales; that is, exercises of discretion should meet the compelling requirement that in Canada

lab-sandbox (quoting Utah Supreme Court Justice Deno Himonas).

[122] *See, e.g.*, Josh Lerner & Peter Tufano, *The Consequences of Financial Innovation: A Counterfactual Research Agenda*, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 523-78 (Josh Lerner & Scott Stern, eds., 2012).

[123] Knight & Mitchell, *supra* note 28.

[124] A recent American intervention is Cary Coglianese et al., *Unrules*, 73 STAN L. REV. 885 (2021). In Canada, see especially Mary Liston, *Witnessing Arbitrariness: Roncarelli v. Duplessis Fifty Years On*, 55 MCGILL L. REV. 689 (2010). See also Philipsen et al., *supra* note 20 (making general observations about the rule of law in OECD countries).

[125] Shin-yi Peng, *The Rule of Law in Times of Technological Uncertainty: Is International Economic Law Ready for Emerging Supervisory Trends?*, 22 J. INT'L ECON. L. 1 (2019) (reviewing scope of administrative discretionary power with reference to degree of technological uncertainty).

[126] At the same time, sandbox administrators should resist the urge to overspecify and reify admission requirements. *See* Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803 (2004).

is described as the "ethos of justification":[127] that "the exercise of public power must be *justified, intelligible and transparent*, not in the abstract, but to the individuals subject to it."[128] Beyond the individuals subject to it, clear information about what is taking place in the sandbox will also help inform potential future applicants and will defend the sandbox authority against charges of overreaching, undermining regulatory objectives, arbitrariness, or favoritism.[129]

Justification for allowing a participant to "play" in a sandbox should include a determination about risk. Risk can, however, be assessed in different ways. Some authorities adopt a proportionality test, which tries to weigh possible benefits against possible risks.[130] For example, to gain entry to Utah's legal sandbox, applicants must as a threshold matter demonstrate that they meet all requirements. For example, the proposal should advance the sandbox's access to justice objectives. Once threshold conditions are met, the sandbox committee assesses three kinds of risk that the proposal could raise: the risk of "(1) inaccurate or inappropriate legal result, (2) failure to exercise legal rights through ignorance or bad advice, and (3) purchase of an unnecessary or inappropriate legal service." Significantly, risk of harm is measured not relative to an ideal state but relative to the status quo in which, depending on context, the consumers in question might not otherwise be able to access adequate or any legal services at all. In other words, to be admitted, sandbox authorities must be satisfied that within each risk area, "the likelihood that the average person will experience a harm using the applicant's service is *not greater than* the likelihood that

[127] Beverley McLachlin, *The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law*, 12 CAN. J. ADMIN. L. PRAC. 171,175 (1998- 1999).

[128] Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, at para 95 (Can.) [hereinafter Vavilov] (emphasis added); on discretion see also paras 108-10.

[129] Coglianese et al., *supra* note 124, at 911-18.

[130] *See, e.g.*, European Parliament, *supra* note 25, at 34-35.

the average person who might use their service will experience harm without the service."[131] In keeping with principles of intelligibility and transparency, these criteria are made publicly available, as is information on proposals that have qualified for entry to the sandbox.

After reviewing an application, the sandbox authority must decide whether to admit or deny entry. In Utah, a legal sandbox committee makes a recommendation to the sandbox Board, and the Board makes a recommendation to the Supreme Court. The Supreme Court then has the discretion to decide whether to authorize or deny an application.[132] In British Columbia, the Law Society exercises its rulemaking authority to provide No Action letters to sandbox participants.[133] If an application is declined, some sandboxes provide applicants with written reasons and the opportunity to modify their application or to re-apply.[134] (Canadian administrative law does not require written reasons in every case.[135]) Several sandboxes, including Utah's legal innovation sandbox and Ontario's, also provide for appeal or review of these decisions.[136]

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[131] INNOVATION OFFICE MANUAL, *supra* note 102, at 1-2 (italics added).

[132] Under article VIII, section 4 of the Utah Constitution, the Utah Supreme Court has the plenary and exclusive authority and responsibility to govern the practice of law. In accordance with this authority, the Utah Supreme Court created the Office of Legal Services Innovation (Innovation Office) to "assist the Supreme Court in overseeing and regulating non-traditional legal services providers and the delivery of non-traditional legal services", including by establishing and administering a pilot sandbox: *see* Utah Supreme Court Standing Order No. 15, *supra* note 58. The Order sets out the Innovation Office's authority, which is always subject to the Supreme Court's ultimate authority and control, makes clear that "[a]s with the licensing of lawyers and Licensed Paralegal Practitioners, the Utah Supreme Court will ultimately be responsible for approving or denying authorization to nontraditional legal service providers" (at 13).

[133] *See* Legal Profession Act, S.B.C. 1998, c 9 (Can.).

[134] For example, if the Utah Innovation Office denies a sandbox application, it must include a brief written explanation supporting the finding: *see* Utah Supreme Court Standing Order No. 15, *supra* note 58, at 12-13 and INNOVATION OFFICE MANUAL, *supra* note 102, at 6-7. If its application is denied, an entity can submit a request for reconsideration. If the Innovation Office denies the reconsideration, then the entity can appeal to the Utah Supreme Court.

[135] Vavilov, *supra* note 128, at paras 77, 119.

[136] INNOVATION OFFICE MANUAL, *supra* note 102; see also *Access to Innovation: FAQs*, L. SOC'Y ONT. (LSO), lso.ca/about-lso/access-to-innovation/faqs (last visited Feb. 15, 2022)

PHASE 2: PREPARATION TO ENTER THE SANDBOX

If an application is accepted, the sandbox administrator then determines the terms that will govern the participant's "play" in the sandbox. In addition to the general parameters and conditions described above, the sandbox authority works with each admitted participant to establish parameters and conditions tailored to the specific pilot.[137] These case-by-case parameters and conditions, each of which is described further below, could address regulatory relief instruments, scale limitations, risk mitigation and consumer protection requirements, reporting and evaluation terms, and liability and insurance issues. Individuals and entities admitted to the sandbox are often provided with a letter or agreement that sets out these parameters and conditions.[138]

A. REGULATORY RELIEF INSTRUMENTS

The sandbox authority can apply special regulatory instruments, sometimes described as "sandbox tools," to limit, alleviate, suspend, waive, or delay the application of existing regulatory or licensing requirements on a case-by-case basis, while a product or service is being tested in the sandbox.[139] Trade publications[140] and academics[141] have developed taxonomies for distinguishing the various forms of regulatory relief that can be offered in sandbox and similar contexts. In general they include authorizations, licenses, and charters (which affirmatively authorize a participant to

[137] Toronto Centre, *supra* note 21, at 6-7; Joint Report, *supra* note 25, at 25-26.

[138] CARMICHAEL ET AL, *supra* note 76, at 7.

[139] Toronto Centre, *supra* note 21, at 6-7.

[140] *See, e.g.*, *Id.*

[141] *See, e.g.*, Coglianese, *supra* note 124, at 898-900 (which would describe sandbox tools as "dispensations," not "carveouts" because the operate on a case-by-case basis to waive a pre-existing legal obligation); Brummer & Yadav, *supra* note 12, at 282-97 (describing a range of regulatory options "along the regulatory frontier" that include informal guidance, pilots, licenses and charters, and regulatory sandboxes).

do a particular thing, usually with restrictions, without the having to assume the burden of seeking a full regulatory license);[142] rule waivers (which waive the application of a particular rule);[143] and "No Action" letters (which assure the participant that the regulator will not bring enforcement action against the participant's conduct, so long as the participant complies with agreed-upon parameters).[144] Any of these mechanisms could be accompanied by informal regulatory guidance.[145] As well, any of them could help form the evidentiary foundation to justify subsequent, more comprehensive regulatory or legislative change.[146] In the legal innovation sandbox context, the most obvious mechanism for regulatory relief would be the No Action letter, which the British Columbia legal innovation sandbox uses. A sandbox could also waive the application of the

[142] *E.g.*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, EXPLORING SPECIAL PURPOSE NATIONAL BANK CHARTERS FOR FINTECH COMPANIES (2016), www.occ.gov/publications-and-resources/publications/banker-education/files/exploring-special-purpose-nat-bank-charters-fintech-companies.html.

[143] *E.g.*, *CSA Regulatory Sandbox*, CAN. SEC. ADMIN'RS, www.securities-administrators.ca/resources/regulatory-sandbox (last visited Feb. 15, 2022)(Canadian Security Administrator's fintech sandbox). In the United States, states can use waiver authorities to test new or existing ways to deliver and pay for health care services in federally financed health coverage programs such as Medicare, Medicaid, and the State Children's Health Insurance Program. *See, e.g*., Frank J. Thompson & Courtney Burke, *Federalism by Waiver: MEDICAID and the Transformation of Long-term* Care, 39 J. FEDERALISM 22 (2009); Colleen M. Grogan et al., *Rhetoric and Reform in Waiver States*, 42 J. HEALTH POL., POL'Y L. 247 (2017); CYNTHIA SHIRK, SHAPING PUBLIC PROGRAMS THROUGH MEDICARE, MEDICAID, AND SCHIP WAIVERS: THE FUNDAMENTALS (National Health Policy Forum Paper No. 114, 2003); Diana L. Velott et al., *Medicaid 1915(c) Home- and Community-Based Services Waivers for Children with Autism Spectrum Disorder*, 20:4 AUTISM: INT J. RSCH. PRAC. 473 (2016). A key difference between these waiver programs and sandbox programs is who initiates the experiment: it is the state, in the waiver context, but a private sector actor in the sandbox context.

[144] The United States Securities and Exchange Commission regularly issues no action letters. *See, e.g.*, *Staff No Action, Interpretive and Exemptive Letters*, U.S. SEC. & EXCH. COMM'N (last updated Jan. 8, 2021), www.sec.gov/regulation/staff-interpretations/no-action-letters. In Canada, the Competition Bureau does so as well. *See, e.g.*, News Release, Competition Bureau will not challenge Postmedia's acquisition of Sunmedia, (Mar. 25, 2016), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03898.html.

[145] Brummer & Yadav, *supra* note 12, at 283, consider no action letters to be a form of informal guidance.

[146] *But see* Saule Omarova, *Technology v Technocracy: Fintech as a Regulatory Challenge*, 6 J. FIN. REGUL. 75 (2020) (arguing for a more sweeping normative reorientation for financial regulation, and arguing that "technocratic" strategies like sandboxes and charters are inadequate for achieving that objective).

"unauthorized practice of law" rule for one or a defined group of applicants.[147] Both tools would probably be comparable in practice, so long as the waiver was accompanied by the same kinds of prescribed parameters and conditions that would be incorporated into a No Action letter.

There will also be also times when a proposed innovation does not in fact require regulatory relief because, though it may be novel, strictly speaking it is not prohibited by existing regulatory requirements. In that case, it is still open to the regulator to provide a party with formal, individualized guidance as to how existing regulatory requirements would apply to its proposed new product or practice.

B. SCALE LIMITATIONS

To protect consumers and the market, fintech sandbox authorities are advised to limit the scale of a participant's operations in terms of duration and geographical scope, the number and type of customers, the number or value of transactions, the value of capital, etc.[148] In the legal innovation sandbox context, the equivalent is probably the goal of protecting members of the public, and the rule of law. But scope limitations, including on number of clients and the nature of legal services provided, will be just as important in order to control the size of an untested new product or practice, and any attendant risks.[149] As part of defining the experiment's scope, sandbox administrators should ensure that sandbox participants have in place the capacity, skills, resources,

[147] In Utah's legal sandbox, the Utah Supreme Court issues an order that authorizes the entity to practice law in Utah and sets out the scope and terms of that practice. *See* Utah Supreme Court Standing Order No. 15, *supra* note 58, at 13. Since as a general rule, Utah lawyers working with or for Sandbox entities must maintain their compliance with the Utah Rules of Professional Conduct, the authorization order can include additional rule waivers: see INNOVATION OFFICE MANUAL, *supra* note 102, at 3.

[148] Ahern, *supra* note 23, at 15-16; Toronto Centre, *supra* note 21, at 6-7; Zetzsche et al., *supra* note 27.

[149] Salient policy issues, and potential risks, may vary with a sandbox's scope, such as the areas of legal practice in which services are being offered (e.g., family law versus business law versus criminal law). Some risks, like the risk of bad legal advice, are generic and apply across the board; others, perhaps flowing from the seriousness of the issue at stake, may not.

and infrastructure (including adequate data storage and data security measures) needed to function responsibly at the defined scale.

A participant should spend only as much time in the sandbox as necessary to achieve the sandbox's goals, especially since permitting a firm to "hang out" in the sandbox can exacerbate what we might think of as the regulatory privilege that sandbox participants enjoy.[150] According to the World Bank, speaking about fintech sandboxes, testing periods should be long enough to allow sandbox authorities to understand the impact of the new product or practice being tested, but not so long as to mimic licensing without having met the full requirements.[151] The appropriate testing period for legal innovation sandboxes may not, at this stage, be amenable to a one-size-fits-all temporal limit. Utah's legal innovation sandbox, for one, makes determinations about timing on a more case-by-case basis.[152] In any event, the general principle articulated by the World Bank – ensuring adequate testing but not establishing a *de facto* parallel licensing regime – should apply.

C. STRATEGIES TO MITIGATE RISK AND PROTECT CONSUMERS

In addition to scale limitations, the sandbox authority should work with sandbox participants to develop explicit risk mitigation and public safeguard strategies. Ultimately it is the regulator's responsibility to ensure that the risk associated with the sandbox is mitigated appropriately. However, given that the sandbox is an optional program premised on participants' ongoing engagement with the regulator, the scope for working in a collaborative, outcome-oriented way with sandbox participants should be relatively broad.

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[150] Knight & Mitchell, *supra* note 28; Philipsen et al., *supra* note 20.

[151] Appaya et al., *supra* note 22, at 22; Coglianese, *supra* note 124, at 915-18 (describing situations in which "the exception swallows the rule"). Fintech sandbox testing periods reportedly range from three to 36 months: IVO JENÍK & SCHAN DUFF, HOW TO BUILD A REGULATORY SANDBOX: A PRACTICAL GUIDE FOR POLICY MAKERS 12 (CGAP 2020), https://www.cgap.org/research/publication/how-build-regulatory-sandbox-practical-guide-policy-makers.

[152] *See infra* Section III. D.

The sandbox authority should develop explicit, ex ante risk-mitigating and public-safeguarding regulatory priorities. In order to ensure that the sandbox remains flexible and its outcomes congruent with its goals, and bearing in mind that each sandbox experiment will be unique, the details of exactly how each participant will ensure those regulatory goals are met can and should be left for the participants to fill out (with input and approval from the regulator).[153] This kind of high-level, principles-based approach to mitigating risks and meeting regulatory objectives is not appropriate in all environments. However, the sandbox seems particularly well suited to it: experiments are characterized by uncertainty about the best ways to mitigate risk and protect the public, since they involve new products and practices; experiments are controlled and limited in scope, and receive case-by-case attention from the sandbox authority; and the sandbox requires ongoing communication and reporting of participants. Allowing participants to develop their own detailed means for achieving the regulatory objectives allows the regulator, too, to learn about what seems to work best in a variety of new contexts about which it would not otherwise have granular information.

Of course, this is not to say that there is nothing to be learned from how other sandbox experiments have sought to mitigate risk. Past practice is a useful baseline and a source of information. For example, in some fintech sandboxes, participants have been required to disclose the fact of their sandbox participation to consumers, to outline foreseeable risks, and to obtain consumers' informed consent.[154] A complaint mechanism could also be established, through which

[153] This is consistent with the management-based or new governance approach: *see, e.g.*, Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. SOC'Y REV. 691 (2003); Sharon Gilad, *It Runs in the Family: Meta-regulation and its Siblings*, 4 REGUL. GOVERNANCE 485 (2010).

[154] Ahern, *supra* note 23, at 15-16; Jiménez & Hagan, *supra* note 19. In situations with algorithmic products or services (e.g. automated or 'robo' advice), a possible risk mitigation strategy might be to have qualified humans confirm or oversee all or some of that advice. *See e.g.*, the European Union's General

consumers could submit concerns to the sandbox participant and/or directly to the sandbox authority.[155] The sandbox authority could also require participants to develop consumer-safeguarding exit strategies, somewhat like the "living wills" that were developed in the banking context, which could be implemented at the planned end of the pilot or in the event that unforeseen circumstances or unacceptable risk materialize.[156]

D. REPORTING AND EVALUATION REQUIREMENTS

The sandbox authority should require that participants report regularly on their progress. It should specify the expected form and frequency of reports, as well as the metrics that will be used to evaluate pilots while in and when exiting the sandbox.[157] Although many elements of the risk-versus-benefits assessment are unknown or speculative before actual experimentation takes place, sandbox authorities should have the capacity to at least set reporting requirements that are proportional to assessed risk, erring on the side of caution and reviewing them as evidence accumulates.

Data Protection Regulation (GDPR), Reg. (EU) 2016/679, 2016 O.J. (L 119) 1, art. 12; also Government of Canada, *Directive on Automated Decision Making*, GOV. CAN. (last modified Apr. 1, 2021), https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592. *Also see* Wolf-Georg Ringe & Christopher Ruof, *A Regulatory Sandbox for Robo Advice*, (European Banking Institute Working Paper, Series No. 26, 2018).

[155] The website for Utah's innovation sandbox features a link to a consumer complaint mechanism on its homepage. *See* INNOVATION OFFICE, *supra* note 8.

[156] Toronto Centre, *supra* note 21, at 6-7. On "living wills" for banking institutions, see, e.g., the international Financial Stability Board: *Key Attributes of Effective Resolution Regimes for Financial Institutions* (Oct. 15, 2014), www.fsb.org/2014/10/key-attributes-of-effective-resolution-regimes-for-financial-institutions-2; the Bank of England's resolvability framework: *The Bank of England's Approach to Assessing Resolvability* (July 30, 2019), www.bankofengland.co.uk/paper/2019/the-boes-approach-to-assessing-resolvability; the American resolution regime for systemically important bank and non-bank financial institutions: Dodd-Frank Wall Street Reform & Consumer Protection Act, 12 U.S.C.A. § 5301 (2010); the Bank of Canada's resolution regime: *Resolution Regime for Canada's Financial Market* Infrastructures, www.bankofcanada.ca/core-functions/financial-system/resolution-regime-for-canadas-financial-market-infrastructures (last visited Feb. 15, 2022) .

[157] Jiménez & Hagan, *supra* note 19.

Participants should also be required to disclose, in a timely manner, any significant issues that have arisen whether or not they were specifically contemplated by the established reporting requirements, and any consumer complaints. These are not details that can be delegated to the participant: they are essential components of regulatory oversight. Reporting requirements should provide the sandbox authority with sufficient, timely information to monitor experiments, ensuring a degree of proportionality between the risks being run and the regulatory obligations imposed. The sandbox approach allows the intensity of reporting requirements to be calibrated to each specific experiment.[158] For example, participants in Utah's legal sandbox are assigned one of four risk levels, each of which comes with different reporting requirements.[159] Depending on their assigned risk level, Utah sandbox participants must submit reports on a quarterly basis (for the low-risk category) or a monthly one (for the other three categories).[160]

E. LIABILITY AND INSURANCE ISSUES

Sandbox regulatory waivers do not insulate sandbox participants from civil liability to consumers harmed by their activities.[161] Questions around liability, insurance, and indemnification are best addressed before the sandbox begins accepting participants.[162] The authority may require participants to be insured, or to set aside resources for a compensation fund, as a condition for entering the sandbox.[163] However, insisting on insurance for a novel product, or on a compensation

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[158] Toronto Centre, *supra* note 21, at 6-7.

[159] INNOVATION OFFICE MANUAL, *supra* note 102.

[160] *Id*. The sandbox also requires certain non-traditional products or services delivered by nonlawyers to undergo a "satisfactory legal expert review of representative selection of work product for accuracy and quality", for their first twenty consumer services or products delivered and on a more ad hoc basis thereafter.

[161] Toronto Centre, *supra* note 21, at 6-7.

[162] Philipsen et al., *supra* note 20.

[163] Ahern, *supra* note 23, at 66-67; Toronto Centre, *supra* note 21; Philipsen et al., *supra* note 20. Vermont's insurance regulatory sandbox requires participants to make "deposit of cash or marketable securities with the State Treasurer in an amount, subject to such conditions, and for such purposes as the

fund from an early-stage start-up, could prevent otherwise promising access to justice initiatives from being able to participate. In those situations a sandbox authority could decide that insurance is not required, in which case sandbox participants should disclose the fact that they are not insured as part of obtaining consumers' informed consent.

PHASE 3: EXPERIMENTATION IN THE SANDBOX

Once an individual or entity is granted entry, it can experiment in the sandbox for the agreed-upon duration, so long as it fulfills all conditions and reporting obligations. While experimentation is ongoing, the sandbox authority monitors and supports participants. It should review participants' reports, hold informal check-ins, regularly communicate with participants, reduce or increase reporting requirements as the authority deems necessary based on the information it is gathering, and look for indicia of possible consumer harm. Monitoring may also involve receiving consumer complaints, conducting consumer surveys, reviewing media reports, and taking more proactive actions, such as running announced audits and "secret shopper tests."[164] This ongoing reporting, monitoring, and evaluation can take on a collaborative and iterative spirit. For example, participants in the UK's FCA sandbox are assigned a dedicated case officer to support the success of the pilot, to assist with navigating the regulatory framework, and to ensure that the

Commissioner determines necessary for the protection of Vermont consumers." *See* Insurance Regulatory Sandbox: Innovation Wavier Regulation, Reg I-2019-03 § 4, Vt. Dept. Fin. Regul., dfr.vermont.gov/reg-bul-ord/insurance-regulatory-sandbox-innovation-waiver-regulation.

[164] *See e.g.*, STEWART ET AL, FINAL REPORT OF THE SPECIAL COMMITTEE TO IMPROVE THE DELIVERY OF LEGAL SERVICES app. E at 6-7, (Florida Bar 2021), www-media.floridabar.org/uploads/2021/06/FINAL-REPORT-OF-THE-SPECIAL-COMMITTEE-TO-IMPROVE-THE-DELIVERY-OF-LEGAL-SERVICES.pdf.

appropriate safeguards are in place. The result, in theory at least, is an experimental model based on ongoing discussion and cooperation.[165]

That said, the overriding objective of protecting the public interest must not be compromised for the sake of cooperation. As functional as the consumer-oriented lens may be in assessing innovative potential and benefit, regulators also have a distinct and irreducible obligation to try to advance their regulatory goals. They must be able to bring enforcement action where necessary.[166] Enforcement action – meaning, primarily, suspension from or termination of a participant's sandbox experiment – must be available where a sandbox participant is exceeding the scope of its regulatory relief, failing to comply with other applicable regulatory requirements, failing to cooperate with the authority, engaging in misrepresentations, or otherwise violating the spirit or the terms of its sandbox agreement.[167] A participant could also be removed if the risks of the pilot are demonstrated to exceed the benefits, or if sandbox objectives are clearly not being achieved.[168]

In Utah's legal sandbox, the sandbox authority uses reporting data as well as any evidence of non-compliance to assign participants one of four consumer harm ratings: Green (Satisfactory), Yellow (Under Watch), Red (Suspended), or Black (Terminated).[169] The categories help determine what actions, on the part of the sandbox authority, may be warranted. For example, if the category

[165] Ahern, *supra* note 23, at 14-15; Ahmed Alaassar et al., *Exploring How Social Interactions Influence Regulators and Innovators: The Case of Regulatory Sandboxes*, 160 TECH. FORECASTING SOC. CHANGE 120257 (2020) (describing the potential mutual benefit flowing from social interactions in a sandbox).

[166] *See, e.g.*, MALCOLM SPARROW, THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS & MANAGING COMPLIANCE (Brookings 2000).

[167] *See, e.g.*, INNOVATION OFFICE MANUAL, *supra* note 102, at 18-19.

[168] Zetzsche et al., *supra* note 27.

[169] INNOVATION OFFICE MANUAL, *supra* note 102, at 19.

is Yellow, the Utah sandbox authority works with the participant to determine a remediation plan. An entity will only be categorized as Black and removed from the sandbox after "continued failure to remediate past evidence of consumer harm or for evidence of intentional bad acts (fraud, theft, etc.)."[170]

PHASE 4: AUTHORIZATION TO EXIT THE SANDBOX

As noted above, some fintech sandboxes have established defined testing periods, after which the fintech innovator must either move "up" (to be regulated normally outside the sandbox), or "out" (that is, to wrap up operations). Utah's legal innovation sandbox generally authorizes participants for an initial term of 24 months from the date they launch their services.[171] However, Utah's sandbox authority has also developed qualitative and quantitative assessment methods to assess whether a participant is ready to exit the sandbox. Before applying to exit, sandbox participants must have provided a certain number of legal services, and been categorized as 'Green' for a certain number of consecutive months.[172] (Actual numbers depend on the participant's initial assigned risk level.) Once a participant becomes eligible to exit, the sandbox authority reviews its application and reporting, and decides whether to recommend that the Utah Supreme Court authorize the participant to continue operating outside the sandbox. This authorization can be full or restricted.[173] After exiting, former participants must continue to submit reports, and must comply with the operational scope outlined in their original, or modified, authorization order from the

[170] *Id.* at 19-20. The strategy is reminiscent the enforcement pyramid described in IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Oxford Univ. Press 1992).

[171] INNOVATION OFFICE MANUAL, *supra* note 102, at 14.

[172] *Id.* at 19-20.

[173] Toronto Centre, *supra* note 21, at 8; UNSGSA Fintech Sub-Group on Regulatory Sandboxes, *supra* note 23.

Supreme Court.[174] Utah's legal sandbox decision standard is risk-based: participants are allowed to exit the sandbox and continuing operating without having to demonstrate consumer benefit, unless the data show that the tested product, service, or model causes harm to consumers.[175] This approach reflects an appropriate regulatory focus on risk, leaving consumer benefit to be determined through the mechanism of consumer choice. It also provides some certainty for sandbox participants, allowing them to make longer term investments into the development of their new product or service, and to improve it based on ongoing feedback from customers.

Drawing on sandbox results and its own learning, the regulator can also take more comprehensive action, such as authorizing a class of entities to provide a particular service, pursuing regulatory reform within the scope of its statutory authority, and/or issuing guidance to clarify how certain regulatory requirements apply to certain products, services, or models.[176] When a participant exits Utah's sandbox, the sandbox authority can recommend that the Utah Supreme Court authorize only that participant to do a particular thing, or authorize a class of entities to do that thing.[177] Broader authorizations will not, of course, be automatic. Where possible, however, translating sandbox learning into a broader, potentially sector-wide regulatory move increases the positive impact of that learning, evens the competitive playing field for sandbox non-participants, reduces actual or perceived unfairness, and is more likely to ensure across the board, in an evidence-based way, that "the burden imposed on those being regulated is proportionate to, and an intelligent and effective response to, the risk of harm."[178]

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[174] INNOVATION OFFICE MANUAL, *supra* note 102, at 20-21.

[175] MacKenzie, *supra* note 74.

[176] Toronto Centre, *supra* note 21.

[177] Utah Supreme Court Standing Order No. 15, *supra* note 58, at 13-14.

[178] CRAIG FERRIS ET AL., ANTICIPATING CHANGES IN THE DELIVERY OF LEGAL SERVICES AND THE LEGAL PROFESSION: THE FINAL REPORT OF THE FUTURES TASK FORCE 18 (LSBC 2020),

4: CONSIDERATIONS FOR DESIGNING AND OPERATING A LEGAL SANDBOX

While fintech sandbox participants, and those in the Utah legal sandbox, generally work through the same four-phase journey described above, every jurisdiction will face its own particular challenges and opportunities. One of the benefits of the sandbox model is that it can be purpose-built in a way that uniquely reflects its context.

The sandbox is not just a tool for permitting innovation in legal services provision. It is an innovative tool unto itself. Accordingly, those involved in developing, running, and experimenting in the sandbox may themselves benefit from exposure to some of the more iterative design strategies, like human-centered design, that have been developed outside the legal profession.[179] As well, below are a few final design considerations that a sandbox authority may wish to bear in mind.

CONSIDERATION 1: BALANCING PLANNING WITH AGILITY

Best practice guidelines suggest that before announcing a sandbox, a regulator should take the time to evaluate its feasibility, demand, and risks, and to define its objectives.[180] The sandbox planning process could also include an assessment, if appropriate, of what other innovation-

www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/2020FuturesTaskForceReport.pdf.

[179] For a human centered-design field guide, along with a repository of mindsets, methods, and case studies, see *Design Kit*, IDEO, https://www.designkit.org (last visited Feb. 21, 2022). *See also* Don Norman, The Design of Everyday Things (Basic Books 2013). For a practical guide to applying human-centered design in the legal context, see MARGARET HAGAN LAW BY DESIGN, https://lawbydesign.co.

[180] Appaya et al., *supra* note 22, at 11; UNSGSA Fintech Sub-Group on Regulatory Sandboxes, *supra* note 23; Letter from Crispin Passmore to the California State Bar's Closing the Justice Gap (CTJG) Working Group Scope Subcommittee (Feb. 1, 2021) (in CTJG Working Group Email Compilation for Feb. 19, 2021 Meeting). A survey of financial regulators found that one quarter reported launching their fintech sandbox without first assessing sandbox viability or articulating sandbox goals: UNSGA & CCAF, *supra* note 20.

promoting tools could be used in conjunction with the sandbox; a mapping of the full sandbox journey; and consultation with consumers, relevant profession(s), and regulators in other jurisdictions. As a guideline, it may be helpful to know that fintech sandbox development in advanced markets has usually taken a minimum of six months.[181]

Lawyers are trained to aim for perfection, not continuous improvement of their services through live testing in the world. However, design thinking would suggest that after an initial development phase, regulators should launch a sandbox relatively quickly as an MVP (minimal viable product), and then iterate as needed.[182] Sandboxes tend to evolve after launch, in response to local conditions and the results of ongoing testing and evaluation. While core consumer protections and legal profession values should be maintained through a sandox's lifespan – they are the non-negotiable guardrails bounding the experiment – too much rigidity will hamper the sandbox's effectiveness.[183]

CONSIDERATION 2: LEGITIMACY, REPRESENTATION, AND JUSTICE

Both as it plans the sandbox and throughout a sandbox's lifespan, the regulator and/or sandbox authority should engage with the public and key stakeholders, including members of the legal profession who may have concerns about the initiative.[184] It is at least as important, however,

[181] UNSGA & CCAF, *supra* note 20.

[182] Schan Duff, *A Better Way to Create a Regulatory Sandbox*, CGAP (Dec. 18, 2018), https://www.cgap.org/blog/better-way-create-regulatory-sandbox; Margaret Hagan, *Legal Design as a Thing: A Theory of Change and a Set of Methods to Craft a Human-Centered Legal System*, 36 DESIGN ISSUES 3 (2020).

[183] Allen, *supra* note 15, at 600-05; Marjosola *supra* note 86, at 397-98; Cristie Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AMERICAN BUS. L.J. 1, 27-36 (2008).

[184] *See, e.g.*, Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 19 HARV. J.L. GENDER 247 (2006) (describing the need for champions with credibility in a professional environment to help produce change).

to consult with those who represent vulnerable or marginalized populations, such as people who experience barriers to accessing justice (due to geography, low income, disability, and other factors) and their community advocates, and self-represented litigants. In the United States and beyond, sandboxes should be developed and implemented in a way that advances equity, civil rights, and racial justice.[185] In Canada, in keeping with the legal profession's (and individuals') obligation to work toward reconciliation with Indigenous peoples, it should be essential to ensure that Indigenous voices are consulted, especially in evaluating any proposal that could plausibly affect Indigenous people.[186] Fintech sandboxes have not generally built out comprehensive consultation mechanisms, especially for ensuring that marginalized populations are given a voice in sandbox design or operations. Especially in the access to justice context, however, and given the broader public concerns about legitimacy, fairness, and justice that attend the legal innovation context, representativeness, equity, and diversity require more careful and structured attention here.[187]

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[185] *See* Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13895 86 FR 7009 (Jan 5. 2021); Sandefur, *supra* note 16, Rebecca Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339 (2008).

[186] *See* TRUTH & RECONCILIATION COMMISSION OF CANADA, "CALLS TO ACTION" (2015), see Calls to Action 27, 42 & 50; *Indigenous Justice Program*, GOV'T CANADA, www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html (last visited Feb. 15, 2022); Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c 44; *The BC First Nations Justice Strategy*, BCFNJC, bcfnjc.com/landing-page/justice-strategy (last visited Feb. 15, 2022)

[187] For the importance of considering equity and diversity in access to justice solutions, see Patricia Hughes, *Advancing Access to Justice Through Generic Solutions: The Risk of Perpetuating Exclusion*, 31 WINDSOR Y.B. ACCESS TO JUST. (2013). Some sandboxes are beginning to encourage diversity and representation. On its sandbox applications webpage, the UK Financial Conduct Authority says that it is "taking steps to accelerate the pace of meaningful change in diversity and inclusion in the financial services sector. We encourage firms led by underrepresented groups to apply to the sandbox, and also welcome applications from firms that are looking to address issues of diversity and inclusion in financial services." *Applying to the regulatory sandbox*, FCA (last updated Dec. 21, 2021), https://www.fca.org.uk/firms/innovation/regulatory-sandbox-prepare-application.

CONSIDERATION 3: ALLOCATING SUFFICIENT RESOURCES

Sandboxes, like evidence-based, learning-oriented, and iterative regulatory approaches generally, can be resource intensive. A poorly resourced sandbox could actually endanger consumers and undermine regulatory goals.[188] A sandbox does not necessarily require vast resource to run, but it will require some additional resources.[189] A sandbox authority should not aim to conserve resources by skimping on oversight, or uncritically accepting participants' own accounts of their capacity or bona fides.[190] The sandbox authority should carefully consider what resources are available and then adapt sandbox ambitions and design accordingly, with conscious attention to ensuring that it is not compromising the public interest or professional ethical obligations. For example, a sandbox with less funding may want to implement a cohort model with rigorous pre-application vetting, narrower eligibility criteria, and shorter testing windows.[191]

Sandbox administrators should have, or have access to, the expertise needed to design and operate a robust and adaptable sandbox, to advise sandbox applicants and participants, to assess complex applications, to understand and mitigate risks, to define testing plans and performance metrics, and to supervise and evaluate sandbox participants.[192] Technology and subject matter experts should be on the sandbox team or consulted as needed. While legal profession regulatory

[188] Appaya et al., *supra* note 22, at 20-21; UNSGSA Fintech Sub-Group on Regulatory Sandboxes, *supra* note 23; UNSGA & CCAF, *supra* note 20.

[189] In a survey of 28 financial regulators in 31 countries, the financial resources required to run a fintech sandbox ranged from $25,000 to $1 million, and the human resources required ranged from 1 to 25 people, with 73% of respondents reassigning internal resources rather than bringing on new hires. Sharmista Appaya & Ivo Jenik, *Running a Sandbox May Cost Over $1M*, CGAP (Aug. 1, 2019), www.cgap.org/blog/running-sandbox-may-cost-over-1m-survey-shows.

[190] Ford, *supra* note 17, at 288-93.

[191] Jenik & Duff, *supra* note 151, at 14.

[192] *Id*. at 21.

staff will already have some of these skills, there are almost certainly aspects of sandbox operation for which additional training or staffing is warranted.

CONSIDERATION 4: COLLECTING DATA AND EVALUATING OUTCOMES

Sandbox design should incorporate a detailed data collection and evaluation plan. Not only does data enable the sandbox authority to monitor and evaluate individual sandbox participants, but it also allows it to assess overall sandbox impact and functioning and to develop evidence-driven regulations and responses. The data that a regulator can gain access to through a sandbox is perhaps its greatest benefit, from a regulatory quality perspective, and yet experience from the fintech sector suggests that sandboxes do not always take advantage of it.[193]

A 2020 World Bank paper proposed a measurement framework for evaluating the impact of fintech sandboxes, which could be adapted and applied to legal sandboxes.[194] As depicted in Figure 1, the framework consists of three measurement stages, and four measurements levels that cut across them. The stages indicate *when* measurement occurs, while the levels capture *what* is being measured. Data are collected at an initial stage, on an ongoing basis, and at pre-determined points in time (e.g., after a certain duration, or at the end of a sandbox process). At each of these stages, metrics are employed to assess four outcome types: country and sector level outcome metrics assessing how well the sandbox contributes to overarching policy goals;[195] regulatory

[193] But see the Utah Regulatory Sandbox, which employs a full-time PhD data scientist. *Board & Staff*, OFFICE OF LEGAL SERVCIES INNOVATION, utahinnovationoffice.org/about/staff-list/ (last visited Feb. 15, 2022).

[194] Appaya et al., *supra* note 22, at 21, 41-42.

[195] In legal sandbox context, this measurement level could focus on provincial and legal-sector level outcomes, such as the access to justice goals outlined in Access to Justice BC (A2JBC)'s Triple Aim Measurement Framework. *See The A2J Triple Aim*, A2JBC, accesstojusticebc.ca/the-a2j-triple-aim (last visited Feb. 15, 2022).

outcome metrics including changes implemented and insights gleaned; firm-level or industry-level outcome metrics;[196] and, operational or institutional outcome metrics that "assess the ongoing appropriateness of the sandbox internally, analyze the resources and capacities used during implementation, and evaluate if the sandbox is contributing to overarching institutional goals."[197]

The World Bank paper emphasizes that relevant data should be collected from a diversity of sources including sandbox participant reports, consumer surveys, consumer complaint forms, media reports, and market research. To ensure impartial evaluation, the sandbox authority may choose to employ a third-party evaluator. The Utah legal sandbox does so: its independent evaluator is the Institute for the Advancement of the American Legal System (IAALS), a research center at the University of Denver. The Utah Supreme Court says that ultimately, it intends to use the collected data to test the hypothesis that "allowing non-traditional legal models will lead to improvements in both the accessibility and affordability of legal services."[198]

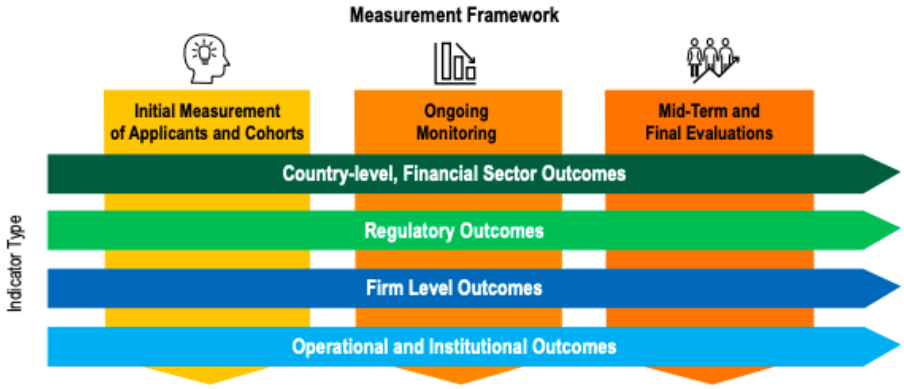
FIGURE 1: SUGGESTED MEASUREMENT FRAMEWORK FOR A REGULATORY SANDBOX[199]

[196] In British Columbia, where fostering a viable independent paralegal industry is one of the sandbox's goals, outcome metrics geared toward that development would fall under this category.

[197] Appaya et al., *supra* note 22, at 46. Allen argues that innovation sandboxes should be subject to sunset clauses, to force learning and reflection on the sandbox's effectiveness and to ensure that unsuccessful pilots do not become entrenched regulatory structures. Allen, *supra* note 15, at 641; *see also* Sofia Ranchordás, *Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation*, 55 JURIMETRICS 201 (2015). In that case, outcome data would be essential to determining whether the pilot should be extended, modified, or augmented with other regulatory tools. Our own view is that, given that the sandbox is itself is an iterative entity, sandboxes should not necessarily have automatic sunset clauses. That decision is probably best made over time, based on context-specific evidence, and in a manner consistent with a given sandbox's purpose.

[198] Memorandum from the Office of Legal Services Innovation to the Utah State Bar (Feb. 23, 2021), utahinnovationoffice.org/wp-content/uploads/2021/04/Open-Letter-to-Bar-Committee-Feb-2021.pdf.

[199] This figure is taken from Appaya et al., *supra* note 22, at 42 fig. 4.1.



CONSIDERATION 5: INTRODUCING AN ARM'S LENGTH SANDBOX ADMINISTRATOR

Both because they have a potential vested interest in the existing legal services provision model, and because legal regulators' training is not obviously suited to running an innovation sandbox, regulators should consider establishing some form of independent oversight or sandbox operator.[200]

Some jurisdictions have adopted a bifurcated model under which a regulator maintains its traditional role, and its sandbox is largely run by an arm's length, specialist body presumed to have the necessary expertise, resources, and independence to oversee the sandbox.[201] The regulator might retain final authorization and licensing authority. For example, the Utah Supreme Court created the Office of Legal Service Innovation ("Innovation Office") as an independent body to oversee and develop its sandbox. The Innovation Office is made up of court-appointed volunteer lawyers and other professionals, including those with backgrounds in economics and data

[200] Even when doing their best to act in the public interest, Benchers may be subject to an implicit, unconscious lawyer-centric bias. MacKenzie, *supra* note 74.

[201] Ahern, *supra* note 23.

analysis.[202] The Innovation Office includes staff, an Executive Committee, and a Board, each with different responsibilities.

In British Columbia, the Law Society has established an Independent Advisory Board for its innovation sandbox, comprised of a majority of non-Benchers.[203] Law Society Staff prepare materials and make recommendations to the Advisory Board, which then deliberates and either refers matters back to the staff, or itself makes a recommendation that goes to the Executive Committee of the Benchers for a final decision. The BC model does not provide the same degree of arm's length decision-making that Utah's Innovation Office provides, although it offers a degree of independence.

CONCLUSION

Regulatory sandboxes are not a magic regulatory reform bullet. They are one tool in the toolbox and, like any other tool, they will not be ideal for all situations. In the legal innovation context across Anglo-American jurisdictions, where innovation within the regulatory sphere has long been statutorily limited, the structured, experimental, and time-limited sandbox strategy holds promise as a controlled and effective mechanism for catalyzing change.[204] Given that innovation in legal services is nascent at best while fintech has become a fast-moving global phenomenon, the sandbox model is in fact better suited to the legal innovation context than to the fintech context in which it originated. Legal innovation sandboxes also present the opportunity to consider what provisions in legal regulation may be formalistic or protectionist, and what novel strategies for

[202] *Id.* at 4-7.

[203] *Innovation Sandbox*, LSBC, www.lawsociety.bc.ca/our-initiatives/innovation-sandbox (last visited Feb. 15, 2022).

[204] Appaya et al., *supra* note 22, at 37.

delivering legal services may be congruent with the objectives of protecting the public and fostering the rule of law. The sandbox itself is an experiment, which can be in a position to learn from its own experience and to improve its own performance. And, as time goes on, regulators may find that the knowledge they have acquired through sandbox projects will also point to other policy options as well.

Innovation and regulation are in a reflexive relationship; each affects the other on an ongoing basis. Sandboxes can not only increase the relevance and quality of legal services, but also the relevance and quality of regulation. As a best-case scenario, where any potential conflicts of interest on the part of legal sandbox regulators or administrators are mitigated, the enhanced regulator-participant collaboration the sandbox offers could help nurture a sector-wide mindset and ecosystem that is more open to novel initiatives. This could catalyze meaningful change in how legal services are delivered.[205] At its most ambitious, a sandbox may hold the potential to meaningfully reshape the relationship between regulator and regulated without compromising regulatory commitments or authority. It may hold the potential – if and only if well implemented – to free a regulator from literalism and some of its least justified rule-policing obligations, while still ensuring that the public interest is safeguarded, strengthening its regulatory information base, and working to manage the extent of disruption to an existing industry.

Lawyers' obligations to the public and the rule of law, in a changing world, may require all of us to consider new ways of delivering legal services. In North America and elsewhere, the access to justice crisis has stubbornly resisted most other efforts to date. Lawyers' and legal profession regulators' social license at this stage depends on their willingness to take these problems seriously. When properly designed, resourced, and implemented, the legal innovation sandbox holds real

[205] Jeník & Lauer, *supra* note 80, at 10; Zetzsche et al., *supra* note 27.

potential to foster creative thinking about how legal services can be provided to the public in more accessible, affordable, and equitable ways.