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# 20 The Future of the Legal Profession: The Challenge of Change

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*A Report of the Young Lawyers' Conference*



## **The Future of the Legal Profession: The Challenge of Change**

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## **FOREWORD**

I am very pleased to introduce the most recent initiative of the Canadian Bar Association's Young Lawyers' Conference. *The Future of the Legal Profession: The Challenge of Change* provides its readers with an overview of the changes in demographics, technology and legal services which will affect lawyers in the new millennium.

The Young Lawyers' Conference is grateful for the dedicated work of Stephen Coughlan, who has worked tirelessly in the preparation of this book. Thank you also to Margaret Sasges, Stephanie Tynan and Jennifer Newbury, all of whom are past chairs of the Young Lawyers' Conference who have volunteered time and energy to this project. Also, we acknowledge and thank Hannah Bernstein, our staff liaison and the Director of Publishing at CBA National Office, who gave her time toward developing all aspects of this book. Finally, thank you to Barry Gorlick, Q.C., Past President of the CBA, who assisted the Young Lawyers' Conference with the fundraising which was necessary for the production of this book, as well as to all the members and Branches of the Canadian Bar Association who were so generous with their contributions.

It is hoped that this book will provide a practical and readable guide to the issues which will affect all lawyers in the future. Our goal is to provide the reader with some insight into the changes our profession will undergo as a result of our aging population as well as our society's ever evolving knowledge of computer technology. It is also hoped that this book will provide its readers with some understanding of the changes which are occurring and will continue to occur within the profession, such as alternative hiring arrangements and alternative billing arrangements, to name but two.

In addition to purchasing this book, we encourage all young lawyers (either under 40 years old or within 10 years of admission to the bar) to join the Branch Section of the Young Lawyers' Conference as this provides an invaluable opportunity to meet other new members of the profession and share views and experiences. For further information, please contact your local CBA Branch office, or the national Director of Membership at 1-800-267-8860.

J. Leanne Andree  
Chair, Young Lawyers' Conference  
1999-2000

## **Executive Summary**

This book attempts to predict trends likely to affect the practice of law over the next 20 years. Extrapolating from issues which have recently arisen or seem ripe to arise, the book offers advice on how lawyers can position themselves better to practise law in the future.

Demographic change will affect the types of legal services required in the future. Elder law is likely to become a recognized area of speciality, as the “Baby Boom” cohort ages. Immigration patterns making Canada a more multicultural society are also likely to affect the demand for legal services. Potential improvements in the economic situation of Canada’s Aboriginal peoples could create greater demand for legal services among that group, and changing definitions of the family will continue to have an impact on family law issues.

Technology is having a great impact on society, which will be felt in the legal profession as well. E-commerce is likely to create new business problems for which legal solutions will be required. More significantly, the practice of law itself could be radically transformed if there is a widespread consumer expectation that services, particularly information services such as providing legal advice, should be primarily sought on the World Wide Web. Even if the most revolutionary predicted changes do not come to pass, the Web still has the potential to be an important source of marketing, a way to group together with other lawyers, or a way to deliver legal services themselves.

Employment arrangements for lawyers tend to fall into two groups: one for the large group of lawyers who practise alone or in small firms, the other for the relatively smaller group of lawyers who practise in large firms. In large firm practice, recent years have seen changes in the time it takes to achieve partnership, and the types of employment arrangements between firms and lawyers. The economic pressures that drove those changes have in most regions relaxed, but the situation is unlikely to return to the past. However, there may be scope for new arrangements which better reflect the concerns of associates and new partners as well as of the firm. For lawyers in sole practice or smaller associations, the range of contractual arrangements with other lawyers has not been altered dramatically. The frequency with which some of the individual options within that range have been or can be pursued has changed in some areas, and so those possibilities are pursued.

In billing practices, the hourly rate is king. There may well be no strong pressures likely to displace that method, but there are a number of billing alternatives that could create a marketing advantage for lawyers who choose to pursue them. These include not only different ways of pricing “full service” legal assistance, but also the possibilities of cooperation in prepaid legal service plans, or the potentially controversial unbundling of legal services.

Finally, a number of issues concerning delivery of legal services are raised. Multidisciplinary practices are very much a part of the current legal agenda, and issues surrounding the area are briefly outlined. The General Agreement on Trade in Services, being

negotiated by the World Trade Organization, has the potential in a way not yet clearly defined to affect international barriers to delivery of legal services. Also, various pressures, market driven and otherwise, might well affect the practice of real estate law over the next few years. Lastly, there is discussion of the relationship between the legal profession and paralegals. When paralegals are employed within law firms, the options for unbundling services and providing better value to clients are increased. When paralegals work independently, there remain issues of whether the public is placed at risk, and whether lawyers can displace that risk by providing services at a more affordable rate.

One final note. The legal profession in Quebec includes both lawyers and notaries. Please note that when referring to the province of Quebec, the word “lawyer” is meant to include both lawyers and notaries.

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Chapter One

# Predicting the Future

“Everything that can be invented  
has been invented.”

Charles H. Duell, U.S. Office of Patents, 1899

“Can't act. Can't sing. Can dance a little.”

Fred Astaire's screen test result, 1928

“No matter what happens, the U.S. Navy  
is not going to be caught napping.”

U.S. Secretary of Navy, December 4, 1941

Bad predictions tend to be remembered much longer than good ones. What is the incentive, then, to try to predict the future of the legal profession over the next 20 years? Why, for example, take the risk of predicting the impact technology will have in a book that was written before, but not published until after, the Y2K bug disappeared into the history books?

Primarily, it is because better information makes for better decision-making. Whether considering a career in law, entering the profession, or contemplating a change in career path, informed speculation can be helpful. There may be no certainties in life, but it is possible to make some reasoned guesses about the direction in which the profession is heading. Understanding the forces which shape society and the profession will allow individual lawyers, and the profession as a whole, to make better choices now, or to be in a better position to plan for the future.

This book was sparked by a resolution of the Young Lawyers' Conference, passed by the Council of the Canadian Bar Association (CBA) at its August 1996 Annual Meeting, calling on the Association to undertake a study of the future of the legal profession. Terms of reference for a study were drafted<sup>1</sup>, and funds were raised. Since that time, a variety of CBA projects have looked at various ways in which the legal profession might change in the future.

The CBA's Emerging Professional Issues Initiative (EPII) has looked and continues to look at a number of factors affecting the profession, such as globalization, technology and privacy issues, and professional liability. Trends in these areas are likely to have an impact on the daily life of lawyers in Canada.

The Systems of Civil Justice Task Force issued an Implementation Report in 1998, making recommendations concerning alternative dispute resolution (ADR), court management, and issues affecting the profession such as professional standards, legal education and *pro bono* work. All these areas will affect how law is practised in the future.

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<sup>1</sup> Stephen Coughlan and T.A. Cromwell, *Lawyering in the 21st Century: The Challenge of Change*, (March, 1997: A Report to the Future of the Legal Profession Steering Committee, Canadian Bar Association).

Multi-disciplinary Practices (MDPs) are groupings of professionals from more than one discipline: lawyers and accountants working together, for example. In parts of the world, they are a well-established reality, and pressure from the “big five” accounting firms is likely to make them more of an issue in Canada. The International Practice of Law Committee issued a report at the CBA Annual Meeting in Edmonton in August 1999.<sup>2</sup> (See Chapter 8.)

Title insurance has the possibility of making a major change in the way real estate law is practised, and therefore to make a major change in the practice of many lawyers. This issue is under consideration jointly by the CBA and the Federation of Law Societies of Canada.

Technology, especially computer technology, is advancing rapidly and creating many social changes as a result. As a response to some of these changes, Parliament has introduced Bill C-54, the *Personal Information Protection and Electronic Documents Act*. The CBA has been active on this issue, submitting to Parliament a brief on the Bill prepared by the Information Technology and Law Reform Steering Committee.

Finally, in January 1999, the CBA was one of the sponsors of a Roundtable hosted by the University of Windsor Faculty of Law, entitled, “Access to Affordable and Appropriate Law Related Services in 2020” That Roundtable brought together experts in many fields from across the country, both inside and outside the legal profession, for two days of discussion on issues likely to change the delivery of legal services to the public over the next 20 years. The report of that Roundtable has been published and is available through the Canadian Bar Association.<sup>3</sup>

This book, then, is part of a much larger enterprise, aimed at predicting the impact of a variety of different influences on the way law will be practised in the future. This book’s aim is to offer, to the extent possible, practical advice to lawyers about how they can best position themselves to cope with and take advantage of the changes to come. It is particularly directed towards the likely interests and perspective of young lawyers, though it could prove useful to any member of the bar. This book does not create Canadian Bar Association policy in any of the fields discussed, nor necessarily represent the views of the CBA: it has been written at arm’s length and with external funding. Its focus is directed to predicting what is likely to happen, rather than taking a position on what ought to happen.

For the most part, this book does not attempt to predict areas of the law likely to grow in the near future. In other sources, there is much speculation about what the future “hot fields”

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<sup>2</sup> International Practice of Law Committee, *Striking a Balance* (Ottawa: Canadian Bar Association, 1999).

<sup>3</sup> W.A. Bogart (ed.), *Access to Affordable and Appropriate Law Related Services in 2020* (Report of a Roundtable Sponsored by the Department of Justice, the Law Commission of Canada, the Canadian Bar Association, and the Faculty of Law, University of Windsor, January 1999).

might be: travel law<sup>4</sup>, space law<sup>5</sup>, and information crimes<sup>6</sup>, for example, have all been pointed to as possible growth areas. Where this book does suggest areas which might grow, it is in the context of observing broader changes to society and assessing the likely impacts they will have.

This book also does not deal in any significant way with quality of life issues for lawyers. Many observers have commented on social changes within the profession<sup>7</sup>, and suggested that there is more pressure on lawyers today, less job satisfaction, and an increase in the “commercial” rather than “professional” approach to law.<sup>8</sup> Not everyone agrees that there is real change, as opposed to merely perceived change.<sup>9</sup> To the extent that these trends do exist now they are likely to continue. This is particularly likely to be so in areas where the increased demands of practice over private life arise from changing technology.<sup>10</sup> To satisfactorily deal with that topic, however, would require empirical research that is outside the scope of this project.

The book deals with six main areas. The first topic to be considered is demographic change. Although the future is necessarily hard to predict, changes in the age distribution of the population, the patterns of immigration to Canada, and similar factors do give some basis from which to judge what to expect.

The second issue for discussion is technology. That there will be continued technological change is certain; what is less certain is the way in which those changes will be embraced by society, and the way in which they will affect the practice of law. Some of the likelihoods are discussed here.

The third major topic is alternative forms of hiring. Changes have taken place in the past five to 10 years in the typical hiring arrangements within law firms. This might partly be due to the recent growth of “mega firms” through the merger of large law firms located in various cities, though that phenomenon itself is not the focus of the discussion. Rather, this book addresses some of the other factors leading to that change. Some of these seem likely to continue, while

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<sup>4</sup> J. Mucalov, “Vacations from Hell: Travel Law in Transition”, (Jan/Feb 1997) *6Nat'l* 11.

<sup>5</sup> T.F. Gibbons, “Law Practice in 2001”, (1990) *A.B.A.J.* 69.

<sup>6</sup> S. Raridon, “The Practice of Law: The Next 50 Years”, (April 1989) *7Legal Economics* 31.

<sup>7</sup> For example, Frank Iacobucci, “Striking a Balance: Trying to Find the Happy and Good Life Within and Beyond the Legal Profession” (1992) *The Law Society Gazette* 205.

<sup>8</sup> Demetrios Dimitriou, “The Individual Practitioner and Commercialism in the Profession: How Can the Individual Survive?” (1994), 45 *So. Car. L. Rev.* 965; Harry J. Haynsworth, “Alternatives to Value Billing: A Response to Demetrios Dimitriou” (1994) 45 *So. Car. L. Rev.* 981.

<sup>9</sup> Philip J. Nexon, “The Business of Law in the 1990s” (1994), 45 *So. Car. L. Rev.* 1063.

<sup>10</sup> Simon Chester and Marilyn Astin Tarlton, “Technology’s Dark Side - Has the Fun Gone out of Lawyering?”, [March 1995] *Law Practice Management* 38; Edward Greenspan, “The Quality of Life and the Practice of Law” (1992), 26 *L.Soc. U.C. Gaz.* 86.

## *Chapter One*

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others seem less likely to; in either case, the effect this will have on hiring patterns in the future can be a subject of speculation.

Alternative forms of billing are equally an issue to be addressed in looking at the future of the legal profession. It is less clear even that there will be widespread change in this area, but there is certainly scope for it, and it is useful for a practitioner to be familiar with the other possibilities and their ramifications.

Treated as a separate subject, though related to alternative forms of billing, is the issue of prepaid legal service plans. Such plans are similar to a form of legal insurance and are gathering more currency in the United States. They have made some inroads in Canada, and there is reason to believe they are a subject with which lawyers will want to be more familiar in the future.

The unbundling of legal services, especially in the family law area, is a concept which is just beginning to gain some attention. The benefits - and potential pitfalls - of that approach to providing legal services is also examined.

Finally, a variety of other issues relating to the delivery of legal services are addressed briefly. The current debate regarding multidisciplinary practices is outlined, and there is an overview of the potential impact of the General Agreement on Trade in Services on the legal profession. Current pressures with the potential to effect change in real estate practice are also discussed. In addition, the question of paralegals is considered. The exact border between the areas in which paralegals can provide services and those in which they cannot, and the issue of regulation of paralegals, is not foremost on the agenda right now, but seems likely to arise again. In looking at the future of the profession, this area is worth considering.

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Chapter Two

# Demographic Change

“Groups of guitars are on the way out.”

Decca Records turning down The Beatles, 1962

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## I) Introduction

Demographics explain “two-thirds of everything”, David Foot has written.<sup>11</sup> While this conscious overstatement might not literally be true, still it cannot be denied that demographics play an important role in the life of individuals, and as a result in the patterns seen in society as a whole.

While it is difficult to have any absolute confidence in predictions about what areas of law will be more lucrative in future years, there are trends in the Canadian population which can be predicted with reasonable certainty, and from which some inferences about the demand for legal services can be made. Noteworthy changes are occurring in the age structure of the Canadian population, in the cultural background of the population, and in the meaning of “family”. All of these changes have the potential to affect the market for legal services.

## II) The Aging Population

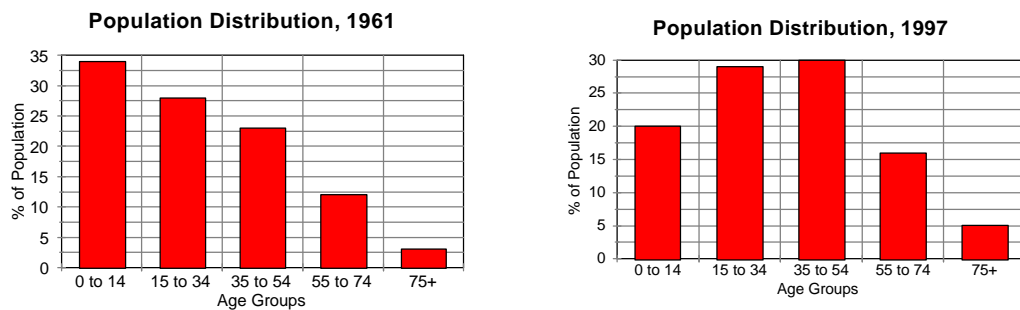
Everyone is familiar with the “Baby Boom” - the cohort of people born between 1947 and 1966.<sup>12</sup> As that group gets older, the average age of the Canadian population will rise as well. At present, for example, about 12 % of the Canadian population is 65 or over. By 2016, about 16 % of the population will be 65 and over, and by 2030, about 23 % will be 65 and over<sup>13</sup>. (See Tables 1 and 2.)

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<sup>11</sup> D.K. Foot, *Boom Bust & Echo: How to Profit from the Coming Demographic Shift* (Toronto: MacFarlane Walter & Ross, 1996) at 1.

<sup>12</sup> There is not perfect agreement on the exact dates of the Baby Boom in Canada, but these are the limits proposed by Foot, note 1 at 18. Others suggest different dates: see, for example, E.M. Gee, “Demographic Change in Canadian Society – Looking to 2020” in W.A. Bogart (ed.), *Access to Affordable and Appropriate Law Related Services in 2020* (Report of a Roundtable Sponsored by the Department of Justice, the Law Commission of Canada, the Canadian Bar Association, and the Faculty of Law, University of Windsor, January 1999), who suggests that 1946-62 are the defining years.

<sup>13</sup> Gee, *ibid.* at 2.



Source: Statistics Canada, *The 1997 Canada Year Book*

The movement of the Baby Boom generation through various age ranges has been affecting society for some years, and can be expected to continue to do so. People tend to move through certain stages in their lives at roughly the same age range. In most cases, children move out of their parents' house into rental accommodation, and about 10 to 15 years later are in the market to buy a house of their own. With a more stable age distribution, supply and demand at each stage would be more or less in equilibrium. But as the Baby Boomers began to seek rental accommodation in the mid 1970s, there were many more people looking for rental units than had previously been the case. Vacancy rates dropped, rents rose dramatically, and all 10 provinces introduced rent control legislation in response. By the mid 1980s, the Boomers were entering the next stage in their lives, and demand for houses rose dramatically, sending prices up. The rental market, on the other hand, eased up considerably because the new cohort entering that age was much smaller than the Boomers, and so supply exceeded demand. Rent control legislation in many jurisdictions was repealed because it was unnecessary.<sup>14</sup>

Demographics are not the complete explanation, of course, and other factors (most obviously the state of the economy) will affect the demand for housing, for example. Nonetheless, it can be useful to speculate about likely changes. Foot suggests, for example, that demand for rental accommodations should increase again around 2005, and demand for housing roughly a decade later. The reason for this is the "Echo Generation". There is another bulge in the population, which reflects the Baby Boomers reproducing themselves - a parent boom rather than a baby boom. The Baby Boomers had children and although that cohort is not as disproportionately large as the Baby Boom itself, still it does have the potential to create some of the same kinds of increased demands in particular markets. This will tend to be true only in Ontario, the Western provinces, and Halifax, however. Other parts of Canada do not have an echo generation.<sup>15</sup> Both an upswing in housing sales and an increase in the rental market - particularly if rent-control legislation is re-introduced - create more need for legal services.

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<sup>14</sup> Foot, note 1 at 31-32.

<sup>15</sup> Foot, note 1 at 32-34.

What other areas of legal services are more likely to be in demand with an aging population in, for example, the year 2020? The oldest of the Baby Boomers will be in their early 70s by then. While this places them into the “elderly” category, it leaves them well short of the “frail elderly” group of those 80 and over.<sup>16</sup> Although some different legal needs are more likely to be associated with the elderly, it is important not to stereotype, or to assume that the elderly as a group are typically frail in mind or body. Still, some predictions can be made.

Some financial and employment related issues arise more frequently, or in different ways, for the elderly. It is likely that there will be greater demand for estate planning advice, and for advice regarding pensions. Reverse mortgages are likely to become more common, and knowledge of them would be helpful to a lawyer. Employment issues might become important in the context of the elderly. The Supreme Court of Canada has determined that mandatory retirement policies do not violate the *Charter*<sup>17</sup>, but that does not mean that the issue cannot become important politically once again; indeed, as the Baby Boomers approach retirement age, one can expect that it will. Other employment issues, relating to layoffs or downsizing for example, have a much greater effect on workers who are approaching but have not reached retirement age than on younger workers. The same can be true of residential tenancy problems for the elderly. Awareness of these differences in the impact of legal problems related to employment would be worthwhile.

Legal issues related to physical or mental health could also become more important. Although the vast majority of the elderly are capable of living independently, some level of physical and mental disability is much more common as one ages. Over half of those aged 65 or over and living in the community have some permanent limitation on their major activities.<sup>18</sup> There will be greater need for advance directives, allowing individuals to direct who should make health care decisions on their behalf. There will be greater need for guardianship applications. Other issues surrounding elder abuse, to which there is an extremely wide variety of legislative responses across the country<sup>19</sup>, are likely to become more prominent.

These needs do not automatically translate into a greater market for legal services, of course. There is already a large unmet need for guardianship applications, advance directives or other assistance for the vulnerable elderly - an increase in that segment of the population will increase the need, but will not necessarily increase the ability of individuals to pay for such services. It is possible that the greater demand might affect government policy, changing the priorities for legal aid spending for example, but a change in the market for legal services would

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<sup>16</sup> Joan Harbison et al., “Mistreating Elderly People: Questioning the Legal Response to Elder Abuse and Neglect” (Halifax: Dalhousie University Health Law Institute, 1995) vol 1, at 1.

<sup>17</sup> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

<sup>18</sup> Victor W. Marshall, Barry D. McPherson, “Aging: Canadian Perspectives” (1993), 28 *Journal of Can. Studies* 3 at 6.

<sup>19</sup> Harbison et al. note 6.

depend on subsidiary change of this sort.

Further, other demographic changes suggest that there might be a greater ability in society to meet these legal needs privately. At present, this older portion of the population is predominantly made up of women, and a large percentage is below or just above the poverty line. Only about four percent of elderly couples are below the poverty line. However, that figure is much higher for unattached elderly women, of whom 38% are below the poverty line.<sup>20</sup> As women have a greater life expectancy than men, there is a higher percentage of unattached elderly women in the population.

By 2020, that financial picture might have changed somewhat. The financial situation of the elderly has been improving somewhat in recent years: from the early 1980s to the early 1990s, the percentage of the elderly whose incomes fall below the poverty line has been steadily declining, especially for elderly couples.<sup>21</sup> By 2020, the percentage of unattached elderly women in the population is not likely to be any smaller; indeed, given the increased divorce rate and higher rate of people who never marry, there might be more elderly people living alone.<sup>22</sup> However, a much greater percentage of women now work in the paid workforce than has been the case in the past.<sup>23</sup> As a result, by retirement age in 2020, many more women will have private pensions than have them today.<sup>24</sup> Further, investment tends to be correlated with education, and the Baby Boomers are more likely than previous generations to have invested part of their income towards retirement.<sup>25</sup> Accordingly, the poverty rate among unattached women seniors seems likely to be lower than today.

In sum, it appears that the legal needs of the elderly could become more important in the future. To be sure, there are already lawyers for whom all or much of their practice consists of serving the needs of elderly clients.<sup>26</sup> But to describe oneself as an “elder lawyer” would seem unusual, though many other informal specializations are readily recognized (“tax lawyer”,

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<sup>20</sup> Marshall, note 8 at 5. Other sources place the poverty rate for unattached elderly women even higher: the National Council of Welfare puts it at 47.3% (*Poverty Profile 1993* (Ottawa: National Council of Welfare, 1995)).

<sup>21</sup> Statistics Canada, *Canada Year Book 1997* (Ottawa: Minister of Industry, 1996) at 203.

<sup>22</sup> Odette Madore, “Demographic Aging: The Economic Consequences” (Ottawa, Library of Parliament, 1991), at 9-10.

<sup>23</sup> According to the Vanier Institute of the Family, *Profiling Canada's Families* (Ottawa: Vanier Institute of the Family, 1994), quoted in *Egan v. Canada*, [1995] 2 S.C.R. 513 per Cory J., in 1970, in 30% of married couples with children under the age of 19, both spouses worked in the paid labour force. In 1990, in 70% of such married couples, both spouses worked in the paid labour force. Similarly, *Canada's Families - They Count* (Ottawa: Vanier Institute of the Family, 1996) reports that in 1971, only 34% of Canadian married women with children under the age of 25 worked in the paid labour force. By 1995, 72.4% of married women with children under 16 worked in the paid labour force.

<sup>24</sup> Even between 1983 and 1993, the percentage of women in the paid work force covered by registered pension plans rose from 35.9% to 41.9% (Statistics Canada), note 11 at 221.

<sup>25</sup> Madore, note 11 at 8.

<sup>26</sup> The Advocacy Centre for the Elderly in Toronto is the most obvious example.

“criminal lawyer”, or “family lawyer”, for example). In the future, this designation is likely to be more familiar.<sup>27</sup>

### III) Immigration Patterns

Historically, the growth in Canada’s population has come not through immigration, but through natural increase where births outnumber deaths. The only previous exception to this rule was the period between 1901 and 1911, which saw the arrival of a large number of Eastern European immigrants. However, beginning in 1991, this trend has shifted. Immigration is now a greater source of population growth in Canada than is natural increase, and it is expected to remain so.<sup>28</sup> Accordingly, the profile of our immigrant population is of importance to predicting future legal needs.

In that regard, it is noteworthy how the profile of our immigrant population is changing. (See Tables 3 and 4.) About 17.5 % of the total population are first generation Canadians, and 52% of the total come from Canada’s traditional source countries, the United States and European countries. However, only 22% of the immigrants between 1991 and 1996 came from those countries.<sup>29</sup> One half of the recent immigrants came from Asia and India, which in even the recent past provided only 14% of our newcomers.<sup>30</sup>

“Immigrants” do not make up a single group, of course, and so their legal needs are quite various. On average, immigrants tend to have higher incomes than the Canadian-born.<sup>31</sup> At the same time, a higher percentage of immigrant-headed households live in poverty.<sup>32</sup> These trends reflect the different bases on which immigrants are admitted:

“Family class” immigrants include spouses, dependent children, parents and grandparents who join relatives already settled in Canada. “Refugees” include those who come to Canada and apply for safe haven, as well as people brought to Canada by the federal

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<sup>27</sup> In the United States, there is an academic journal devoted to the subject (the *Elder Law Journal*) and association (The National Academy of Elder Law Attorneys) but the term is still a relatively unfamiliar one: see Lawrence A. Frolick, “The Developing Field of Elder Law: A Historical Perspective” (1993) 1 *Elder Law Journal* 1. In the United States, elder law is taught as a subject in a number of law schools, but it appears that in Canada only the University of British Columbia has a course specifically structured around this subject.

<sup>28</sup> Statistics Canada, “Canada’s Population: Charting into the 21<sup>st</sup> Century” in *Canadian Social Trends* by T. Chui (Ottawa: Statistics Canada Catalogue No. 11-008, 1996).

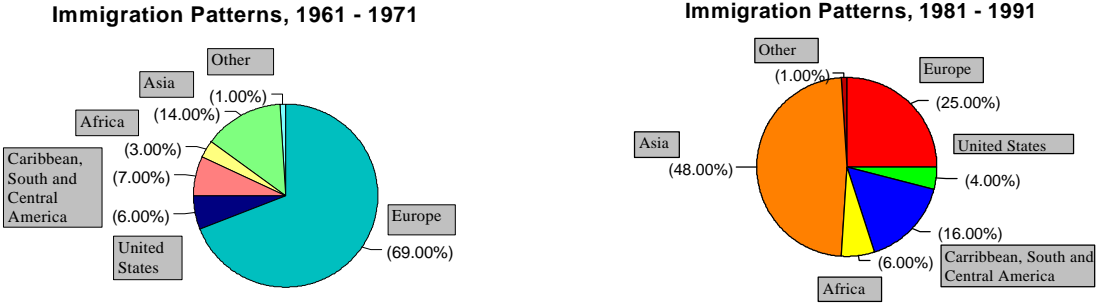
<sup>29</sup> Statistics Canada, *1996 Census of Canada*, available at <http://www.statcan.ca>.

<sup>30</sup> *Canada Year Book 1997*, note 11 at 67.

<sup>31</sup> E.M. Gee & S.G. Prus, “Income Inequality in Canada: A Racial Divide” in M. Kalbach & W. Kalbach, eds., *Ethnicity in Canada: A Reader* (Toronto: Harcourt Brace, forthcoming).

<sup>32</sup> National Council of Welfare, *Poverty Profile*, 1995 (Ottawa: National Council of Welfare, 1997).

government and/or private sponsors, such as churches. “Economic” immigrants include independents: that is, skilled workers and assisted relatives (and their dependents), live-in caregivers and retirees. This category also includes business immigrants (entrepreneurs, investors and others) and their families.<sup>33</sup>



Source: Statistics Canada, *The 1997 Canada Year Book*

At the very least, it is safe to say that greater awareness of the potential different legal needs of the various immigrant populations, coupled with a greater sensitivity to cultural and language differences, would stand any lawyer in good stead. The number of immigrants who cannot speak one of Canada’s official languages is relatively small in total<sup>34</sup>, because knowledge of an official language is one of the factors considered in admitting immigrants. However, the fact that a person has some command of English or French does not mean that they are sufficiently competent to deal with legal matters in that language. Equally, even people with reasonable command of one of Canada’s official languages might be more comfortable in their first language. A lawyer’s ability to provide legal services in other languages will always be an asset.

**IV) Aboriginal Persons**

Canada’s Aboriginal population is expected to increase rapidly in the near future, due to proportionately more women of child-bearing age and a generally higher rate of fertility than the population as a whole.<sup>35</sup> It is not perfectly clear what percentage of the population of Canada is of Aboriginal origin, but it is expected that that group will constitute roughly four percent of the total by 2016.<sup>36</sup>

<sup>33</sup> *Canada Year Book 1997*, note 11 at 67.  
<sup>34</sup> Less than 500,000 people: See Gee, note 2 at 5.  
<sup>35</sup> Gee, note 2 at 7.  
<sup>36</sup> Statistics Canada, *Projections of the Aboriginal Population, Canada, Provinces and Territories*, 1991. 2016 by S. Loh (Ottawa: Statistics Canada Catalogue No. 91-539, 1995).

On the one hand, one could look to the fact that social problems often exist in higher levels among Aboriginal communities, including suicide, divorce, poverty and crime rates. These problems create a higher need for legal services. However, just as with the elderly, those needs are largely unmet now and without significant change would be likely to remain unmet in the future.

This need not be a counsel of despair, however. Quite apart from any demographic change, the situation of Aboriginal people has been a matter of greatly increasing activity in courts recently, with a number of significant decisions being handed down by the Supreme Court of Canada since 1995. Most noteworthy among these is *Delgamuukw v. British Columbia*<sup>37</sup> dealing with land claims, though other decisions have also dealt with food fishing, commercial fishing and treaty rights.<sup>38</sup> In addition, issues of Aboriginal self-government have been coming to a head in recent years: the *Charlottetown Accord* would have amended the *Constitution* to provide for Aboriginal self-government, the federal government has committed itself to the principle of Aboriginal self-government<sup>39</sup>, a major self-government agreement has been reached with the Nisga'a people in British Columbia, and the *de facto* Aboriginal-run territory of Nunavut has come into being.

The result of this activity is potential significant change for many groups of Aboriginal people. One of the obstacles to economic development for many Aboriginal peoples has been their inability to raise capital: since they did not own their reserve land in the way that other Canadians own their own property, they were not permitted to sell or mortgage it.<sup>40</sup> Land claim agreements can change that; the Nisga'a settlement, for example, allows for private ownership of the lands concerned<sup>41</sup>, which creates the potential for using the land as collateral on commercial developments. The increased ability to carry on commercial enterprises will create an increased market for investment advice, real estate development, tax planning and other business advice.<sup>42</sup> The Nisga'a agreement also allows for greater measures of self-government than have existed in the past - a potential need for private assistance or advice in carrying out governmental functions therefore arises.

The *Delgamuukw* decision recognized the existence in principle of Aboriginal title to land, which, while it does not grant ownership of land to Aboriginal persons, does give them a measure of control over how land is to be used, and entitles them to compensation when that land is used for commercial purposes by others. Even in the absence of that decision, uncertainty about title is

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<sup>37</sup> [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

<sup>38</sup> See, for example, *R. v. Adams*, [1996] 3 S.C.R. 101, *R. v. Gladstone*, [1996] 2 S.C.R. 723.

<sup>39</sup> Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Government of Canada, 1991) at s. 4.

<sup>40</sup> *Indian Act*, R.S.C. 1985, c. 1-6, s. 37(1).

<sup>41</sup> *Nisga'a Final Agreement*, S.C. 1998, c. 2, s. 1.

<sup>42</sup> J. Giokas, "Aboriginal Self-Government: It's Déjà Vu All Over Again" (October 1994) 3 Nat'l. 22 at 28.

thought to have discouraged development.<sup>43</sup> With *Delgamuukw* having affirmed that there are potential Aboriginal claims, the federal, provincial and territorial governments have a strong incentive to reach further settlements. This can be expected to increase Aboriginal people's abilities to enter the marketplace.

This effect is most likely to be seen in British Columbia, where virtually no treaties were reached with Aboriginal peoples when the province was settled by Europeans.<sup>44</sup> Not all provinces face exactly this situation, but it is not unique to British Columbia. Aboriginal groups have recently called for re-negotiation of some of the Numbered Treaties in the Western provinces. Similarly, at the time of this writing, a claim by the Mi'kmaq is being made in Nova Scotia in relation to the Sable Gas Development Project.

### V) Changing Definitions of "Family"

Significant change has occurred in the last few decades in the nature of families. These changes seem likely to continue in the future. In essence, they mean that issues relating to the breakdown of family relationships are likely to be of increasing significance.

Most noteworthy is the increase in the number of common law couples. Approximately 12% of couples now live in common law relationships, compared to six percent in 1981.<sup>45</sup> As common law relationships have become much more part of the mainstream, it has become increasingly common for children to be born into them. For example, only 9.8% of children born in 1983-84 were born into a common law union, compared to 20.4% for 1993-94.<sup>46</sup>

The reason that this change is of significance to the need for legal services is that common law unions are significantly more likely to break up than marriages. For children born in 1983-84, the likelihood of family breakdown by the age of 10 was 13.6% for children born to married couples who had not cohabited. In contrast, the rate was 25.4% for children born to a cohabiting couple who had since married, 28.4% for children born after marriage to couples who had previously cohabited, and 63.1% for children born into a common law relationship.<sup>47</sup>

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<sup>43</sup> Tom Molloy, *Toronto Globe and Mail*, July 28, 1998, at A-15: "A 1991 Price Waterhouse study revealed that unresolved land claims in B.C. stood in the way of \$1-billion in investment and 1,500 jobs a year in the forestry and mining sectors alone".

<sup>44</sup> Only Vancouver Island is covered by any treaties, other than the recent Nisga'a treaty.

<sup>45</sup> C. LeBourdais and N. Marcil-Gratton, "Family Transformations Across the Canadian/American Border: When the Laggard Becomes the Leader" (1996) 28 J. Comp. Fam. Stud. 415.

<sup>46</sup> Statistics Canada, *Growing up with Mom and Dad?: The Intricate Family Life Courses of Canadian Children* by N. Marcil-Gratton (Ottawa: Statistics Canada Catalogue No. 89-566, 1998).

<sup>47</sup> *Ibid.*

Assuming these trends continue – and there is no immediate reason to think they will not – family law will continue to be an area where legal services are required, and indeed that need is likely to grow.

Added to this increase in common law unions are recent developments giving greater recognition to same-sex couples. For example, the Supreme Court of Canada in its recent decision *M. v. H* decided that Ontario's *Family Law Act* violated the *Charter* because that law extended the right to seek support only to members of unmarried opposite-sex couples, not to same-sex couples.<sup>48</sup> This decision alone does not mean that a flood of same-sex support claims will immediately follow, but it has opened the door. That door has been opened further by Parliament's recently-introduced Bill C-23, the *Modernization of Benefits and Obligations Act*.<sup>49</sup> That *Act*, although it specifically states that it does not affect the definition of "marriage",<sup>50</sup> extends to same sex couples the benefits now available to opposite sex couples under a number of federal acts, ranging from the *Agricultural Marketing Programs Act* to the *War Veterans Allowance Act*. The more the definition of "family" expands, the greater the legal consequences for members of society, and the greater the need for legal services on the breakdown of relationships.

Again, of course, there is not necessarily a direct correlation between a need for services and a market for services. On the breakdown of a relationship, it is not uncommon for one partner, typically the female partner, to find herself living in poverty. Approximately 21% of children under 18 live in poverty, compared to 15% in 1980.<sup>51</sup> Many of these children live in single-parent households, of whom 57% of those headed by females live below the poverty line.<sup>52</sup> These changes point to a need for more accessible legal aid for family law services.

## VI) Conclusion

The changing demography of Canada makes it possible to guess at some of the changes relevant to the legal profession that might come about in the future. We can make predictions today for how legal practice will look 20 years from now, and suggestions for how lawyers can best prepare themselves to be ready for practice in that time. In the hindsight of that day, will they have proven to be true?

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<sup>48</sup> *M. v. H.*, [1999] 2 S.C.R. 3.

<sup>49</sup> Bill C-23, *Modernization of Benefits and Obligations Act*, 2nd sess., 36th Parl. (first reading, February 11, 2000, House of Commons).

<sup>50</sup> *Ibid.*, s. 1.1.

<sup>51</sup> National Council of Welfare, note 22.

<sup>52</sup> National Council of Welfare, note 22.

## 2020 Hindsight

- 1) Elder law will have become a recognized area of practice. It will include a focus on issues of estate planning, pensions, reverse mortgages, residential tenancy, and employment law with a special focus on the needs of elderly clients, as well as guardianships, advance directives and other health-related issues.
- 2) A sensitivity to the legal needs of immigrants will be more important, as the percentage of the Canadian population who are immigrants continues to grow. Knowledge of other languages and familiarity with other cultures will be valuable to a lawyer in serving the varied legal needs of Canadians from a variety of origins.
- 3) Aboriginal peoples will continue to become legally and politically stronger. They will have an increased ability to enter the marketplace, and to finance economic ventures.
- 4) The need for family law services will continue to grow. Access to those services will continue to be difficult for many clients. At a systemic level, lawyers would do well to lobby for stronger legal aid plans which support the family law needs of Canadians. At an individual level, lawyers might want to investigate some of the alternative billing practices discussed in Chapters Five, Six and Seven.

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Chapter Three

# Technology, Society, and Law

“Computers in the future may weigh  
no more than 1.5 tons.”

Popular Mechanics, 1949

“There is no reason anyone would  
want a computer in their home.”

President, Digital Equipment Corp., 1977

## I) Introduction

Technology has an enormous potential to change society. When Gutenberg invented the moveable type printing press, all he wanted to do was create a more efficient method of printing. Observers in Gutenberg's time might well have thought that the invention would be of relatively little importance, because so few people could read.<sup>53</sup> In hindsight, we know the invention to have been one of the most significant agents of change in Western society.

That is not to say that technological change always brings social change. Automatic Banking Machines (ABMs) have proven very convenient and have been widely accepted, but outside the economics of their own industry they, have had no significant impact on society.<sup>54</sup>

The rate of technological change today is greater than it has ever been in human history. It has been estimated that technological knowledge "doubled in the half century between 1900 and 1950. It doubled again in the decade between 1950 and 1960. Knowledge quadrupled in the 1970s and again in the 1980s".<sup>55</sup>

This technological change brings potential change to society as a whole, and to the legal profession. Advances in computer and telecommunications technology over the past 20 years have changed the way law is practised and show all signs of effecting at least as much change over the next 20 years. Advances in technology bring new areas of human endeavour, which inevitably leads to new areas in which legal services are important. And most significantly for this discussion, the rise of the Internet has the potential to act on space, distance and the purveying of information in a way that could radically reshape the practice of law.

Two major topics will be discussed here. First, some brief discussion of the growth areas of law which are likely to arise from new technologies is necessary. However, the more

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<sup>53</sup> Arthur C. Clarke, *Report on Planet Three* (New York: Harper & Row, 1973).

<sup>54</sup> Eugene Volokh, "Technology and the Future of Law" (1995), 47 *Stanford Law Review* 1375 at 1376.

<sup>55</sup> Dr. A.J. Carty (President, National Research Council of Canada), "Impacts of Science and Technology in the 21<sup>st</sup> Century", a paper delivered at the opening of the Queen's Biosciences Complex, November 27, 1997, <http://www.nrc.ca/corporate/english/media/speeches/queen.html> at 3.

significant topic relates to the Internet. The Internet could have a major impact on the way in which lawyers group together to practise law, on the way in which legal services are made available to the public, or on the types of practice that will remain viable for lawyers.

### II) New Areas of Law

There are several ways in which technology can affect the practice of law. One is through technology that affects the way the business of law is practised. Fax machines have allowed written communication to proceed much more quickly; computerized word processing has simplified the task of typing documents. However, technology does not always reduce work; sometimes it simply changes it. In allowing changes to be made to documents more easily, word processing has made it more likely that a single document will be edited many times. Further, the “convenience” of technology of this sort is a double-edged sword. In making faster communication possible, fax machines have effectively mandated a faster response. Greater use of e-mail will only increase the demands for instantaneous responses that fax machines have begun.

In some ways, rather than making work easier, advances in technology can make it more difficult. “Between voice mail, electronic mail and remote access software, we can be fully in touch with clients and colleagues even when we are far away...The dark side of this convenience is that we never escape. A holiday isn’t really a holiday if one family member is deep in a pile of faxes, or if the poolside fun is shared with a notebook computer to cellular phone”.<sup>56</sup>

Technology can also change the practice of law by changing the rules. Courts have already had to create rules concerning the filing of documents by fax. Ontario has undertaken an “Integrated Justice Project”, aimed at computerizing that province’s justice system. Among other things, it permits the filing of documents with the court electronically.<sup>57</sup> In the proposed *Personal Information Protection and Electronic Documents Act*<sup>58</sup>, Parliament deals with the issue of electronic signatures, rules of evidence for electronic documents and filing of electronic affidavits. To the extent that it has not happened already, courts will need to sort out how disclosure rules apply to internal electronic communications.

New technology can create new legal markets in a variety of ways, some easy to foresee,

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<sup>56</sup> Simon Chester and Merrilyn Astin Tarlton, “Technology’s Dark Side - Has the Fun Gone out of Lawyering?” [March 1995] *Law Practice Management* 38.

<sup>57</sup> Jim Middlemiss, “Justice Goes Electronic”, (Jan/Feb 99) *National* 16.

<sup>58</sup> Bill C-54, *Personal Information Protection and Electronic Documents Act*, 1<sup>st</sup> Sess., 36<sup>th</sup> Parl., 1997-98 (first reading October 1, 1998, House of Commons).

some not. The mass-marketing of cars in the early part of this century, for example, has eventually resulted in some lawyers making a large part of their living representing drivers

charged with impaired driving and breathalyzer offences. It has also led to a great number of tort actions, new regulatory schemes, environmental law issues, and changes in many areas of commerce, not all of which would have been easy to foresee in 1900.

The same is true for technological change today. It is not clear, for example, what effect the human genome project, which expects to map virtually all 100,000 human genes by 2005,<sup>59</sup> could have on legal practice. Perhaps it will have little or none. Perhaps some key decision will be made early which limits the questions at issue. Policy-makers might decide that certain types of experimentation are unethical, or governments might make them illegal. On the other hand, there is the potential for a wide-ranging effect on society through gene therapy and genetic engineering. This could lead to an explosion of legal issues surrounding new treatments, patenting of genes, ownership of genetic information, use of such information for insurance purposes and similar questions.

The area likely to have the broadest impact, however, is rapidly increasing computer technology, and in particular the continued development of the Internet and the World Wide Web and electronic commerce. Legal issues are already arising and will continue to be of greater impact.

Legal issues relating to the Internet in general give rise to issues of copyright, freedom of expression and, most importantly, privacy. As information is more frequently gathered on the Web and available to more and more people, it becomes not only much more important that privacy be respected, but also much less likely that it uniformly will be. Parliament is already proposing some measures, with Bill C-54, the *Personal Information Protection and Electronic Documents Act*.<sup>60</sup> It seems likely that this issue will increasingly occupy the attention of courts, whether through action based on the new *Act*, or civil remedies arising in other contexts.

In addition, assuming that electronic commerce has even some of the potential held out for it (a topic pursued at greater length immediately below), it will become an increasingly important method of doing business. Wherever there are new ways of doing business, there is the need for legal assistance to facilitate that business. Further, increased commercial activity will inevitably

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<sup>59</sup> Carty, note 3 at 9.

<sup>60</sup> For further information on this subject, see Canadian Bar Association Information Technology and Law Reform Steering Committee, "Submission on Bill C-54" (March 1999).

lead to increased disputes about that commercial activity, in which legal services will again be necessary.<sup>61</sup>

Finally, apart from individual contracts entered into via electronic means, e-commerce brings a host of other legal issues on a broader level. Taxation questions will inevitably arise, as will the need for appropriate consumer protection legislation, competition and retail rules that reflect the new environment (laws governing days or hours of work, for example), and other regulatory issues.<sup>62</sup>

### III) The Internet and its Effect on the Legal Profession

It was noted above that some technology radically changes society while some does not. Before anything else, it is worth asking the question: Is the Internet a printing press, or an ABM - or is it a tulip?

#### 1) IS THE INTERNET A TULIP?

Many sources have predicted that consumers will make an increasingly large percentage of their purchases online in the near future. Trends change so quickly in this area that figures become out of date very quickly and are not always consistent with one another. However, U.S. consumers are reported to have spent \$3 billion in online purchases during the 1998 Christmas season.<sup>63</sup> Various sources have suggested that Canadians spent \$100 million over Christmas of 1998,<sup>64</sup> that the online market for Canada in 1998 was \$1.3 billion,<sup>65</sup> or that the online market for Canada in 1998 was \$5.3 billion.<sup>66</sup> By 2003, online consumer spending by Canadians has been predicted to reach \$12.8 billion, which would constitute 4.6% of total retail spending.<sup>67</sup>

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<sup>61</sup> M. Ethan Katsh, *Law in a Digital World* (Oxford: Oxford University Press, 1995) at 181.

<sup>62</sup> Organisation for Economic Co-operation and Development (OECD), *The Economic and Social Impacts of Electronic Commerce: Preliminary Findings and Research Agenda*, [http://www.oecd.org/subject/e\\_commerce/summary.htm](http://www.oecd.org/subject/e_commerce/summary.htm) at 22.

<sup>63</sup> David Akin, "Online Shopping During Holidays Soars", *Financial Post*, at C-1, January 5, 1999.

<sup>64</sup> Akin, note 11.

<sup>65</sup> Michael MacDonald, "Web Users Eager to Buy Canadian: Consultants", Toronto, Canadian Press, May 25, 1999, citing a study by Deloitte and Touche.

<sup>66</sup> Marina Strauss, "U.S. Web Sites Click with Canadian Shoppers", *Globe and Mail*, at B-1, June 15, 1999, citing a study by IBM Canada. In this study, \$4.6 Billion was accounted for by business-to-business sales: it is not clear whether the Deloitte and Touche figure referred to in the previous endnote was restricted to consumer spending, though there are significant differences in the total either way.

<sup>67</sup> Strauss, *ibid.* citing the IBM Canada study.

Certainly Canadians have an increasing capacity to shop online. Some figures suggest that up to 58% of families have personal computers, and that roughly a third of families have Internet access at home.<sup>68</sup> As computer technology becomes both more advanced over the next few years (when, for example, Internet access is available through handheld wireless devices) and more affordable, use of the Web is likely to increase even more than it already has.

Similarly, electronic commerce, or “e-commerce”, is gaining increasing attention. Dalhousie University has recently created a Master in Electronic Commerce degree, a cooperative program between the Faculties of Law, Computer Science and Management, which is supported in part by Industry Canada and has been endorsed by the G7.



In addition, stock prices for Internet companies have risen in a way that defies finding appropriate adjectives:

eBay, the online auction site, went public in September [1998] with an IPO price of \$18; three months later it was trading at \$321. Yahoo started 1998 at \$34; it closed last week at \$414--even after a two-for-one split. Amazon.com split two-for-one in June [1998] and three-for-one in January [1999], and the price still jumped from \$30 to \$184. Prices for Internet stocks--almost across the board--are jumping in multiples instead of percentages.<sup>69</sup>

However, others are more skeptical of how much promise the Web holds. For example, one of the most successful online companies, Amazon.com, the online bookstore, was founded in 1995. Although share prices have risen dramatically, the company has never made a profit<sup>70</sup>,

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<sup>68</sup> “Net Usage Rising Fast, Nielsen Finds”, CP Wire Service, February 25, 1999, citing an A.C. Nielsen Canada study. Statistics Canada figures estimate that 13% of homes used the Internet in 1997, compared to 7.6% in 1996. In the highest income brackets, Statscan places the figure at 26%:CP Wire Service, March 19, 1998.

<sup>69</sup> G. Burgess Allison, “Technology Update”, *Law Practice Management Magazine*, <http://scratch.abanet.org/lpm/magazine/tu992.html>.

<sup>70</sup> Gillian Livingston, “Chapters Ponders Taking its Internet Division Public”, CP Wire Service, April 23, 1999.

## Chapter Three

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and does not expect to do so until at least 2003.<sup>71</sup> Further, there is real resistance to shopping on the Web. Surveys continue to show that Canadians do not consider the Web secure and are reluctant to use it for commercial purposes for that reason.<sup>72</sup> Some suggest that Canadian patterns will follow those in the U.S. to increased consumer use of the Web.<sup>73</sup> However, others feel that differences between the two countries - the much lower rate of catalogue shopping or of consumer spending at all in Canada, for example, mean that the potential for growth here is much smaller than in the United States, if indeed it is as large as is thought in the United States.<sup>74</sup>

So is the Internet a tulip? In the 17th Century, tulips began to be cultivated in Holland, and particular sorts became highly prized. For nearly 15 years, prices for tulip bulbs rose dramatically, and bulbs changed hands again and again for increasingly higher prices, sometimes while still in the ground. Some sources report prices as high as the equivalent of \$150,000 for a single bulb. What was really being bought and sold, of course, was not the tulip bulb, but the expectation that one could sell the tulip bulb for more than one paid. Until 1637 purchasers were correct, but then the market crashed and some investors lost everything.<sup>75</sup>

This pattern is not unique. In the 18th Century, much the same thing happened in Great Britain with the "South Sea Bubble".<sup>76</sup> In the 1920s, the same pattern led to the Stock Market Crash. In the late 1960s, many technology stocks soared, only to become worthless by 1970.<sup>77</sup> Some feel that the same will prove true of the Internet, and that e-commerce "will be the junk bond of the new millennium".<sup>78</sup>

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<sup>71</sup> Mark Gimein, "Around the Globe, Net Stock Mania", *The Industry Standard*, December 21, 1998, [http://thestandard.com/articles/article\\_print/0,1454,2882,00.html](http://thestandard.com/articles/article_print/0,1454,2882,00.html).

<sup>72</sup> "Canadians Not Buying E-commerce Line Yet: Poll", CP Wire Service, March 30, 1999: "Canadian shoppers are still cautious about buying products online, but despite consumer reluctance more retailers are aiming to sell their wares on the Internet, a survey suggests. The poll by Ernst and Young consultants found 97 per cent of the individuals polled felt uncomfortable about sending credit card information across the Internet, and this was the overwhelming reason they gave for not buying online."

Michael MacDonald, "Web Users Eager to E-buy Canadian: Consultants", CP Wire Service, May 25, 1999: "Montreal-based LGS Group released a Gallup poll this month suggesting two-thirds of Canadians consider the Internet the least secure of all electronic services. LGS, a systems integration firm, coincidentally announced a new division specializing in Internet security... Another consulting firm, Ernst and Young, paid for a survey that found most people continue to avoid buying online because "the No.1 barrier is still security."

<sup>73</sup> Akin, note 11.

<sup>74</sup> Anthony Stokan, quoted in "Online Shopping Report Disputed", CP Wire Service, June 16, 1999.

<sup>75</sup> See, for example, iTulip.com, <http://www.itulip.com/knowyourmania.html> or Benicia Garden & Nursery <http://beniciagarden.com/tulip.htm>

<sup>76</sup> The South Sea Bubble: [http://www.historyhouse.com/stories/south\\_sea.htm](http://www.historyhouse.com/stories/south_sea.htm)

<sup>77</sup> iTulip.com™, Tech Stock Speculation Then and Now, <http://www.itulip.com/compare.html>.

<sup>78</sup> Stokan, note 22.

Another possibility lies in the middle ground. Most of the speculation about the Internet has focused on the business-to-consumer market. However, “nearly all sources indicate that business-to-business e-commerce dominates the market.”<sup>79</sup> Perhaps “the largest effects may be associated not with many of the impacts that command the most attention (e.g. customized products, the elimination of middlemen) but with less visible, but potentially more pervasive, effects on routine business activities (e.g. ordering office supplies, paying bills, and estimating demand), that is, on the way businesses interact.”<sup>80</sup> It is also noted that even if, as some have predicted, online sales to consumers reach \$1 trillion by 2003-05, that will still be “less than current sales by direct marketing in the United States using mail, telephone, and newspapers...It may become no more than another channel for retailers, like mail order, rather than a new dominant mode of commerce”.<sup>81</sup>

Most of the speculation about the Internet, and its potential effect on the legal profession, takes the most expansive view of the potential social impact of the technology. It assumes not only that technology will continue to advance dramatically, but also that there will be widespread consumer demand for online services. The first prediction seems almost certainly true; it is about the second that there is more room for doubt. It is worth remembering that both must be true for significant change to occur.<sup>82</sup>

## 2) DELIVERY OF LEGAL SERVICES

The most interesting issue for the effect of technology on the future of law is not the rise of e-commerce *per se*. Although no doubt that will bring about changes in areas of practice, the more fundamental question is, if consumers do widely come to expect to deal with service providers electronically, what effect will that have on the way legal services are delivered?

“The late sociologist Rose Golden once wrote that ‘it is still possible to turn off the television set. It is not possible to turn off the television environment.’ The same can now be said about the computer and the computer environment”.<sup>83</sup> The Internet’s most potentially broad effects on the practice of law arise from its potential to change the way information is used. “Law is, in almost all of its parts, dependent on communication and information. A change in

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<sup>79</sup> OECD, note 10 at 24.

<sup>80</sup> OECD, note 10 at 1.

<sup>81</sup> OECD, note 10 at 12.

<sup>82</sup> Carty, note 3, stresses that “usefulness” is a key factor, pointing out that “every one of us could have a jet propelled backpack. The technology is fairly straightforward. Like anything, if enough people wanted them, the cost would come down. The issue is what would you do with a bulky, heavy propulsion system strapped to your back? What need would it serve that is not being served well now?”

<sup>83</sup> Katsh, note 9 at 5.

how information is used, therefore, brings with it the potential for far broader change in law than does any other kind of technological shift”.<sup>84</sup>

Several topics are worth discussing: telecommuting, marketing legal services through the Web, providing legal services on the Web and virtual law firms.

### ***a) Telecommuting***

Telecommuting seems like a practical idea for many lawyers and law firms. Most associates are expected to bill a certain number of hours each year, but are not for the most part supervised on a close basis to determine exactly which hours they work. Some, though not all, legal work could be perfectly adequately done from another location, particularly if the lawyer were directly connected to the office over the Internet. The benefits to the lawyers are obvious in lower travel time and greater independence, and a firm which took telecommuting seriously ought to be able to reduce overhead as a result.

However, nothing said above is new. *Scientific American* predicted in 1914 that telecommunications would become so widespread that they would resolve traffic congestion problems.<sup>85</sup> The technology that would make telecommuting practical, with essentially instant communication between home and office, has been affordably available for at least 10 years. If law firms have not seen it in their interest over the past 10 years to promote telecommuting despite the cost savings that would have been useful during the recent recession, it seems sensible to conclude that other social factors militate against adopting what technology would permit. Simply put, employers seem to like having their employees on the premises, and technological change is not likely to change that.

### ***b) Marketing Legal Services through the Web***

The second issue is interprovincial and international marketing of legal services. The widespread penetration of the Internet can be expected to make direct connections between lawyers and potential clients that much more immediate. At present, clients are largely bound by geography in seeking a lawyer. In essence, no matter where their legal problem, a client is likely to retain a lawyer in the same city to deal with it. It might be necessary to retain legal help in the other province or country as well, but a local lawyer is likely to be involved.

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<sup>84</sup> Katsh, note 9 at 7.

<sup>85</sup> Carty, note 3 at 2.

If electronic business and personal dealings become mainstream, the likelihood increases that a client in Ontario who has a probate problem in British Columbia will simply retain a British Columbia lawyer to give advice about the matter. Indeed, in some ways that is a more natural use of the Internet than other e-commerce. For purchases of goods over the Net, shipping costs act as a disincentive to purchasing from another city. For services which are electronically deliverable, though, no such disincentive exists.<sup>86</sup>

This presents both an opportunity and a threat. The area in which one can market legal services over the Net is much broader, but for that same reason the number of people competing in that market is larger. Until consumer patterns become clearer in use of the Internet, it is difficult to say which segments are more likely to be lucrative. It might be that businesses will be more familiar with and comfortable about retaining services online, but consumers might equally be willing to do so. Similarly, although larger firms will be in a better position to invest money in producing a website, technology can have an equalizing effect between large firms and smaller ones or sole practitioners. It has been argued that with the shift away from centralized computer systems to individual PCs linked together, and with costs of technology dropping, there are now *diseconomies* of scale for large firms trying to keep up - it can be easier for the sole practitioner or small firm to stay on the leading edge.<sup>87</sup> But as one source has put it, "If someone invents a popular way to find a lawyer on the Internet, you'll want to be ahead of that curve - not behind it".<sup>88</sup>

### *c) Providing Legal Services on the Web*

A step beyond using the Internet to market traditional legal services is actually using the Internet to deliver those services. A number of initiatives in which mediation and other services are provided online already exist.<sup>89</sup> Whether they will prove popular has yet to be seen. There are various social factors militating for and against their acceptance.

On the one hand, there are obvious practical benefits to mediating or negotiating on-line. Parties who are in different physical locations from one another, or from the mediator, can meet in the same "place". The technology is already available to allow conversations to take place not

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<sup>86</sup> OECD, note 10 at 14.

<sup>87</sup> David Post, "The Virtual Law Firm?", [http://www.cli.org/DPost/X0019\\_VFIRM.html](http://www.cli.org/DPost/X0019_VFIRM.html), at 1-2.

<sup>88</sup> Allison, note 17.

<sup>89</sup> See, for example, Ethan Katsh, "Conference: Internet and the Law" (1996), 46*American University Law Review* 452 for discussion of the Online Ombuds Office (<http://www.ombuds.org>), the Center for Online Mediation (<http://www.mediate-net.org>) or the Virtual Magistrate Project (<http://vmag.law.vill.edu:8080>). See also Ellen Zweibel, "Models of Conflict Resolution", in W.A. Bogart (ed.), *Access to Affordable and Appropriate Law Related Services in 2020* (Report of a Roundtable Sponsored by the Department of Justice, the Law Commission of Canada, the Canadian Bar Association, and the Faculty of Law, University of Windsor, January 1999) for discussion of the use of on-line resources for estate planning, or for consensus-building on large, long-term public projects.

merely through text, but with accompanying images.<sup>90</sup> It is likely that full video interaction would become available if there is demand for it. But there are also potential advantages to communication which is less direct than face-to-face. Some parties might find it easier to give their opinions in a less intimidating forum. Mediating where the parties have time to think about their responses and reply less emotionally is also a potential advantage.<sup>91</sup> Some suggest that the impersonal nature of the Internet make a greatly streamlined mediation procedure possible.<sup>92</sup>

Against this, however, one must note that there are legitimate problems of privacy and confidentiality in mediation or negotiation, both of which are greater concerns for conversations conducted on-line. Further, some lawyers might feel that they prefer the ability to read the other side's body language, and so on, in a negotiation.<sup>93</sup>

The technology to allow some areas of law actually to be practised online is available now and is likely to improve. The limiting factor here is whether there really will be demand for it.

### *d) Virtual Law Firms*

If marketing legal services to consumers over the Internet is practical, so too is marketing one's legal services to other lawyers. But beyond simple marketing of services is the possibility of virtual law firms.

Many commentators have pointed out that the most important reasons lawyers work together in firms do not depend on physical space. Bringing together expertise, having access to advice from people whose opinion you trust, sharing resources and results of research, being in regular, daily communication no longer requires that all the partners in a firm be located in the same place. There is the potential for a variety of forms of virtual law firms, ranging from partnerships much like those which exist now but "decoupled" from any physical location, to a smaller more centralized "core" firm, which adds expertise on an as needed basis for particular

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<sup>90</sup> Although at present most "chat" rooms are text-based, there are some which incorporate the use of "avatars", graphic representations of the user. Some of these show a picture of the room with the figures moving about in it, while others allow each user to have an individual perspective on the room. See <http://www.doxresearch.com/macintro.htm> for a discussion of Active Worlds (<http://www.activeworlds.com/>), Worlds Chat (<http://www.worlds.net/3dcd/index.html>), The Palace (<http://www.thepalace.com/>), and Virtual Places (<http://www.vplaces.com/>), among other sites.

<sup>91</sup> Zweibel, note 37 at 13.

<sup>92</sup> See Mark Thompson "Settling Online: Litigation Without Lawyer Noise", <http://www.lawnewsnet.com/stories/A707-1999Apr15.html>, for a description of a web-based service that allows parties to confidentially submit a settlement figure to the site. The service automatically compares the figures and, if they are within a preset range, informs the parties they have a settlement. If the offers are not within range of one another, neither side learns the other's figure.

<sup>93</sup> Daniel Nyhart, "Conference: Internet and the Law" (1996), 46 *American University Law Review* 456 at 458.

litigation. There would be scope for an organization which simply brings together custom-designed teams of lawyers for individual cases, without any real on-going partnerships between them. At a less centralized level, there could simply be on-line organizations of lawyers who share information between themselves, and might make individual contacts for particular cases arising out of that ongoing relationship.

What is important to recognize is that none of these possibilities is speculative; they all exist now. In Canada, the United States and Great Britain, bodies of these sorts, some specifically calling themselves virtual law firms, can be contacted over the Internet.<sup>94</sup> Some of the sites also provide information to lawyers interested in joining the firm.

How common, and how successful, such firms will become is difficult to predict. Some of the skepticism expressed earlier about telecommuting might not apply in this context. The concerns do not seem to be as focused on employer-employee relationships as telecommuting typically would be. In other fields, business partnerships have been formed by people who know one another only through computer communications.<sup>95</sup> It is likely that virtual law firms, or at least greater cooperation between lawyers in disparate physical locations, will become much more common.

If that is so, young lawyers will want to position themselves “to take advantage of the opportunities for this kind of virtual collaboration when they start coming along... Forging working relationships based on mutual trust and confidence is no easier online than off; indeed in many ways it is more difficult, because electronic communication has its own unusual and unfamiliar features (the absence of visual cues can be disorienting), and it takes some time to discover ways to communicate expertise, trustworthiness, collegiality and the like via online interactions. Interacting with others online, in other words, is a skill that, like most, gets better with practice.”<sup>96</sup>

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<sup>94</sup> For examples or for more information, see: The electric.lawyer.com, <http://www.ElectricLawyer.com/>; The Virtual Law Firm Network, <http://aftab.com/vlfnetwork.html>; The Virtual Law Firm, <http://www.tvlf.com/>; Vance A. Fisher, Practising Law on the Internet: The Virtual Law Firm, <http://www.fisherlaw.com/internet.htm>; Richard S. Granat and David Levine, “Extranets: Creating the Collaborative Law Practice”, <http://digital-lawyer.com/Extranets.htm>; Alison Scammell, Virtual Organisations, <http://davisco.net/newspress.html>; Markus Cohen Law Office, <http://www.interlog.com/~virtual/>. See also Katsh, note 37, discussing Lexis Counsel Connect, and Post, note 35.

<sup>95</sup> In May 1999, Albert Lai, Michael Hayman and Michael Furdyk sold their online publishing company for more than US\$1 Million. Lai and Furdyk lived in Toronto, Ontario, and Hayman lived in Brisbane Australia when they began the venture. The three had been business partners for nearly two years before meeting face to face. See “Whiz Kids sell Web Site for more than \$1m”, CP wire service, May 26, 1999.

<sup>96</sup> Post, note 35 at 3.

### 3) THE MONOPOLY ON LEGAL KNOWLEDGE

The other area of great significance to legal practice is the way in which Internet technology may be a threat to the legal profession as a whole. The Internet, in particular the World Wide Web, has put access to information much more easily in the hands of any individual with Internet access - an ever-increasing number of people. Not all the information is accurate, not all is reliable, and there is no easy way to tell the wheat from the chaff. Already much legal information can be found on the Web, whether directly from authoritative sources such as the Supreme Court of Canada<sup>97</sup>, as research by individual law firms<sup>98</sup>, or as uninformed speculation by unqualified people.

In the future, some suggest, “legal information will be but one of countless sorts of information available on the global information infrastructure, although the compartmentalization of information into legal and other such conventional categories will itself fade away in time. The information products and services available...will be packaged and oriented towards providing practical and directly implementable guidance with little or no distinction between the disciplines from which the final product has been derived”.<sup>99</sup> In that event, lawyers must see themselves as “competing with others in the information business, some of whom are lawyers and some of whom are not”.<sup>100</sup>

Some see the Web as likely to lead to “disintermediation”, or the elimination of intermediaries.<sup>101</sup> Others suggest that restructuring of the roles of intermediaries is more likely than elimination.<sup>102</sup> Still, on the Web, free and easy access to information has become expected: “openness has emerged as a strategy”.<sup>103</sup> Sources which report themselves as aiming at making legal knowledge freely accessible on the Web have already appeared in Canada<sup>104</sup> and the United States.<sup>105</sup>

Simply having access to information, therefore, will become less important in the future. Any practice of law which is dependent on a “gatekeeper function, such as gathering routine

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<sup>97</sup> Supreme Court of Canada Website, <http://www.droit.umontreal.ca/doc/csc-scc/en/index.html>

<sup>98</sup> See for example <http://www.SmithLyons.ca/papers/index.htm>, <http://www.gglawcorp.com/info/>, <http://www.trytel.com/~pbkerr/> or <http://www.criminaldefence.com/index.html>

<sup>99</sup> R.E. Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford: Oxford University Press, 1996), at 269.

<sup>100</sup> Katsh, note 9 at 175.

<sup>101</sup> Thomas R. Bruce, “Conference: Internet and the Law” (1996), 46*American University Law Review* 368 at 371.

<sup>102</sup> OECD, note 10 at 15.

<sup>103</sup> OECD, note 10 at 11.

<sup>104</sup> World Wide Legal Information Association website, <http://wwlia.org:80homepage.html/>.

<sup>105</sup> American *Pro Se* Association website, <http://www.legalhelp.org/home.htm>.

information and filling out forms, is likely to change radically or disappear completely as a profitable enterprise.”<sup>106</sup> Legal software has existed in some fields, such as writing wills or

preparing tax forms, for more than a decade. In some parts of the United States, unauthorized practice of law prosecutions are taking place against their publishers.<sup>107</sup> In Australia, one law firm is marketing, along with a legal publisher, compact discs providing focused legal guidance concerning environmental legislation, insurance checklists and other areas.<sup>108</sup> Although the unauthorized practice point must be settled, it seems likely that this trend will continue and that software will become increasingly sophisticated. Some foresee the creation and marketing of software as “interactive forms” by law firms, which will allow clients to handle many tasks for themselves. This will “tend to diminish the value of the routine and repetitious tasks that are the bread and butter of legal practice”.<sup>109</sup>

In addition to software for consumers to use, there has also been much work done on “expert systems”. Expert systems are computer technology aimed at applying artificial intelligence techniques to various fields. They exist outside law and are being developed for some areas of the law. The point of an expert system is that it attempts to do more than simply gather relevant research on a fact pattern: it attempts to *understand* the cases that it gathers and reach a conclusion. Unlike a system which has been programmed to follow some predetermined course in asking questions (which could be useful in preparing a will or tax form), expert systems use what has been called an “inference engine” to chart a new course for each new problem. Computer programmers work with what is called “fuzzy logic” in fields where ambiguity and vagueness are more common than yes/no answers<sup>110</sup>, and law certainly seems like a field where that is true.

Expert systems take various approaches. Diagnostic systems take a fact pattern and draw conclusions; planning systems take a conclusion and suggest the factual or legal premises most likely to lead to that goal.<sup>111</sup> One Australian expert system, for example, deals with the law surrounding the recovery of chattels, an area which is solely a matter of case law. The system will take a fact pattern and find the closest match between those facts and the cases in its database. It will then find the closest match with an opposite result to the first case and compare the two. It

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<sup>106</sup> Mark Pruner, “Competing in Cyberspace: The Big 5 vs. The NLJ 250”, *The Internet Newsletter*, [http://www.ljx.com/newsletters/internet/1998/1998\\_11\\_00.html](http://www.ljx.com/newsletters/internet/1998/1998_11_00.html) at 2.

<sup>107</sup> For information from the perspective of HALT, an American organization describing itself as “challeng[ing] the legal establishment to improve access and reduce costs in our civil justice system”, see <http://www.halt.org/FLIP/upl-sum.html>.

<sup>108</sup> Susskind, note 47 at 217.

<sup>109</sup> Stephen T. Maher, “Law futures, or, Will You Still Need Me, Will You Still Feed Me When I’m Sixty-Four” (1995), 1 Rich. J.L. & Tech. 6, (<http://www.urich.edu/jolt/v1i1/maher.html>), para. 38.

<sup>110</sup> American Bar Association (ABA) website, Expert Systems Interest Group - Frequently Asked Questions (FAQ's), <http://www.abanet.org/lpm/catdiv/es-faq.html#TOP>.

<sup>111</sup> Susskind, note 47 at 121-122.

## Chapter Three

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will offer an opinion on the likely result, potentially suggesting that the case requires further research if the two cases compared are too similar.<sup>112</sup>

Expert systems depend on artificial intelligence research, which is proving to be more intractable than many researchers had expected. Predictions were made 15 years ago that such systems would have a dramatic effect on the legal profession by the end of the century, a prediction which has not come true.<sup>113</sup> Even now, expert systems for law are in their infancy and designed to be used by lawyers, not directly by consumers. That is the point of calling them “expert systems”; they are meant to be used by people who have some expertise in the field in question.

Still, although progress is slower than some had predicted, progress is being made. The American Bar Association Expert Systems Interest Group suggests that expert systems will be useful in a wide variety of fields, including bankruptcy, estate planning, family law, immigration, probate, real estate, patents, trademark, environmental law, labour law, securities and tax.<sup>114</sup> They do not foresee expert systems replacing lawyers, but they do suggest that “expert systems will likely replace the many transactional functions attorneys currently perform”.<sup>115</sup>

Others foresee electronic “legal kiosks” becoming more common in government offices or other places, which will dispense forms and provide assistance in filling them out. In several American states, some self-service court kiosks already exist. These machines resemble automatic banking machines, but have full-motion video screens. For a fee, users touch the screen to respond to questions which the machine asks (orally, in either English or Spanish). These machines dispense general information, allow users to pay traffic fines or file small claims complaints. They also allow for an interactive consultation concerning uncontested divorces, evictions and other matters. Based on that consultation, the kiosk can then print up a completed form ready for filing with the court. Similar machines also exist in Australia and Singapore.<sup>116</sup>

It might be that people will prefer to speak to a human being rather than a machine as one cannot help but consider the low regard in which telephone answering machines are held by many. In that case, economic factors have nonetheless made the machines a desirable option for businesses, and consumers have had little say. Whether legal kiosks will be a consumer choice to the extent that they threaten some areas of practice is uncertain, but initial feedback in the United

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<sup>112</sup> Graham Jefferson, “Legal Expert Systems” (1991), 10 *University of Tasmania Law Review* 71 at 80-81.

<sup>113</sup> John Miller, “Expert Systems - The End of the Legal Profession?”, March 1984 *New Zealand Law Journal* 85.

<sup>114</sup> ABA website FAQ, note 58.

<sup>115</sup> ABA website FAQ, note 58.

<sup>116</sup> See Katsh, note 8 at 173, or Susskind, note 46 at 212ff.

States is said to be positive. It is noteworthy that the machines have been developed by a private communications company, not at the initiative of either courts or lawyers.<sup>117</sup>

If possession of specialized knowledge alone will not be sufficient for lawyers in the future, then what will be necessary? It will be necessary to add value to that knowledge in some

way. How does one do that? Some argue that specialization will still be a good strategy - that if relatively routine knowledge is easily available, lawyers must see to it that they are expert in more sophisticated areas.<sup>118</sup> Others argue the opposite, that being a generalist will be a better strategy.<sup>119</sup> Where information itself is freely available, the service provided by the lawyer is making judgments about that information. To make judgments is to add value.

Changes in this approach to providing legal services will create other changes. “How much time does the average lawyer spend each day exercising judgment? Certainly not enough billable hours each day to stay in business”.<sup>120</sup> Accordingly, in a technology-intensive practice, lawyers must change the way in which they charge for their services.<sup>121</sup> Some suggest that a major change in approach is called for - that lawyers should focus on interpreting and repackaging formal sources of law. Such an approach would be different in a variety of ways. It would focus on information rather than advice; it would have a one-to-many, not a one-to-one, focus; it would be proactive, not reactive; and it would deal with lower, commodity-based prices.<sup>122</sup> This approach, it is claimed, will allow lawyers to tap the “latent legal market” - those people who would benefit from legal advice, particularly advice given in advance, but who cannot afford that advice now. By moving to an approach providing easier, quicker and cheaper access to advice, lawyers can position themselves to benefit from the Web.<sup>123</sup>

These changes imply potential challenges for law societies, as well. In what province are legal services in cyberspace provided? Who should appropriately regulate a lawyer in one province who provides legal services to a client in another province, through the means of an Internet service provider located (to the extent that it is physically located at all) in a third province? What type of practice or insurance status is required by a lawyer providing “interactive forms”, or tapping the latent legal market by providing more general advice on a high volume

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<sup>117</sup> North Communications website, <http://www.infonorth.com/home.html>.

<sup>118</sup> Susskind, note 46 at 274.

<sup>119</sup> Maher, note 56 at para 39.

<sup>120</sup> Maher, note 56 at para 39.

<sup>121</sup> The ABA Expert Systems Interest Group, note 56, also suggests that the use of expert systems, which reduces the time a lawyer is likely to spend on a file, but does not reduce the value of the information to the client, suggests that alternative billing techniques should be considered.

<sup>122</sup> Susskind, note 46 at 286-288.

<sup>123</sup> Susskind, note 46 at 268.

basis. None of these questions is unanswerable in principle, but they, and others like them, will become increasingly common as legal services move more thoroughly onto the Web.

Many lawyers might be unwilling to adopt a new approach, and perhaps it will prove unnecessary. It must be expected, however, that if lawyers do not begin to provide legal services

more easily over the Internet, others will. It could be that “the far graver and fundamental challenge is actually that of retaining market share in the provision of legal information”.<sup>124</sup>

#### **IV) Conclusion**

No other area demonstrates the difficulty of predicting the future so much as the issue of technological change. That technology will continue to advance seems certain; that many things not formerly possible will become so is not hard to predict. However, any large scale change in the way law is practised depends not just on the mechanical ability to perform tasks in a different way, but on a desire for that different way to become more common. That demand might come from lawyers or might come from clients, but it is needed for any major shift. Whether any of the alternatives that technology will make possible will prove to be popular is much harder to predict. However, it does seem fair to say that the risks involved in being ready for such change are relatively small and the potential benefits large.

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<sup>124</sup> Susskind, note 47 at 272.

## 2020 Hindsight

- 1) The use of a variety of new technologies will be essential, and commonplace. Becoming comfortable in that environment will be essential. It will not be necessary to be familiar with the “nuts and bolts” of new systems: to use a car you need only be a driver, not a mechanic.
- 2) The practice of law will be more heavily reliant on technology. This will take a variety of forms, including increased electronic communication between lawyers, with courts and with clients. Legal research will be increasingly electronic. Be aware of new approaches to research, such as expert systems. These new approaches might never completely replace current methods, but they will become more important.
- 3) Technology will give rise to new types of legal claims and new areas in which law is important. Privacy concerns and issues over the use of data are likely to become more important. E-commerce will give rise to new legal issues. These will relate to the formation of contracts and to their breaking down, as well as to new regulatory issues.
- 4) The World Wide Web will become increasingly important to legal practice. At the least it will be a means of marketing legal services over a wider area. This change will carry with it the opportunity to provide services in a larger market, as well as the threat of competition from a much larger pool. It will also give rise to issues concerning regulation of lawyers. The Web will likely be a means of communication in more significant ways than just e-mail. The Web will potentially be a means of carrying on at least some legal business. The technology to permit this readily will exist, and the issue will be consumer demand. There is a potential advantage to being among those in the vanguard of seeing whether there is such demand.
- 5) Virtual law firms will become more common. They are unlikely to replace traditional firms as a dominant mode of practice, but there will be a niche for them. By the same token, greater cooperation between some lawyers in disparate physical locations will become much more common.
- 6) The “disintermediation” of legal services is unlikely to happen on a large scale, but there are pressures toward it. Looking for ways in which the approach to delivering legal services can be restructured will be valuable for at least some lawyers, even if consumer demand does not force it on the entire profession.
- 7) “Routine” documentation type work - any tasks that can relatively easily be reduced to a series of steps that are readily assisted by a computer program - seems unlikely to be a growth area for legal practice, and lawyers would do well in the future to focus their energies elsewhere.

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Chapter Four

# Alternative Hiring Arrangements

“There is not much demand for  
animal stories in the U.S.A.”

**The Dial Press, rejecting George Orwell's offer of  
the American rights to *Animal Farm*, 1944**

## **I) Large and Medium Sized Firms**

### **1) THE CURRENT HIRING PATTERN**

Before trying to predict the future and what trends in employment practices might continue or appear, it is worth taking a moment to see how we got where we are today.

Much has been written in the past 10 years about changes in contractual relationships between lawyers and law firms. These discussions have alternatively lamented the changes, praised them, or called for further and more dramatic changes. These changes seem to be similar in Canada and the United States, with the changes typically occurring earlier in the United States. This allows us to infer to some degree the likely directions they will take in Canada.

The traditional model in the past for medium to large sized law firms has been the “up or out” system, in which associates joined a firm with the understanding that after some fixed period of time, they would cease to be associates and be invited to join the partnership. Those lawyers not invited to become partners were expected to leave the firm.

One of the key features of this system is that it created what has come to be called among commentators the “promotion-to-partnership tournament”.<sup>125</sup> The notion behind this description is that a tacit agreement exists between new associates and law firms. Firms need new associates to work as hard as possible, in order to guarantee the profitability of the firm and to cover the cost of hiring the new lawyer. Associates, on the other hand, need some guarantee that in the end there will be a reward for their hard work. Firms cannot guarantee each new associate a partnership, but they can, in effect, guarantee that a certain number of associates will eventually be elevated. Accordingly, it is accepted that after a period of time, some associates will become partners. Seeing that happen provides incentive to the associates in lower ranks.

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<sup>125</sup> M. Galanter and M. Palay, “Why the Big Get Bigger: The Promotion-To-Partner Tournament and the Growth of Large Law Firms” (1990) 76 Va. L. Rev. 747.

That an associate not offered partnership should be expected to leave is in some ways counter-productive. If the associate were not capable, he or she would have been asked to leave well before that point. Very likely it would still be profitable for the firm to continue to employ that lawyer as an associate, with no opportunity for partnership. In the past, however, it has been suggested that this did not occur because only by the departure of those who did not become partners could the law firm show that it was committed “not to do the only thing that would make later cheating on the initial promise of fair partnership consideration profitable to the firm”.<sup>126</sup>

An important feature of the “promotion-to-partnership tournament” is the pattern of growth it creates within law firms. In very general terms, it will be the case that a certain number of associates are necessary per partner for the firm - and especially for the partners - to make a profit. This leads to a type of exponential growth within law firms. Assume, for example, that a firm needs two associates for each partner. As associates become partners, it is necessary not only to fill that associate’s position in the lower ranks, but also to hire two additional associates to “support” the new partner. In several years as some of those associates become partners, three more associates need to be hired for each of their positions - one to replace the associate promoted, and two to support that associate as a new partner. Although of course other factors come to bear as well, it has been argued that the growth of law firms, and in particular the rapid growth in the 1970s and 1980s, corresponds to an exponential pattern.

This pattern combined with other trends throughout the 1980s and early 1990s, including increased globalization of markets, the growth of interprovincial “megafirms”, and the opening of overseas offices by many firms. These overseas offices were not for the most part profitable<sup>127</sup>, but seemed to be almost mandatory for larger firms.

From such a pattern, change was inevitable: growth could not be unabated. Combined with an economic recession in the 1990s, there was considerable pressure on law firms to change some of their practices. Pressure came as well from the increasing demands by lawyers for greater quality of life outside legal practice. In particular, calls for change came from the increasing number of women in the legal profession, and various reports and studies suggesting that change was needed to accommodate their concerns and aspirations.

As a result, the “traditional” model for medium and large firms has changed in a number of ways in recent years, and there are several pressures on it to change further.

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<sup>126</sup> R.J. Gilson and R.H. Mnookin, “Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns” (1989) 41 *Stan. L. Rev.* 567 at 581.

<sup>127</sup> R.J. Daniels, “Growing Pains: The Why and How of Law Firm Expansion” (1993), 43 *U.T.L.J.* 147 at 203.

## 2) NEW PATTERNS IN HIRING

### *a) Changes in Partnership Options*

The most obvious manifestation of change is in the increased time it takes for associates to become partners. At one time, five years might have been considered the norm. By the mid-1990s, six or seven years was more common, and at the time of this writing, lawyers joining a firm should not be surprised to find that they might be expected to wait up to nine or 10 years before full partnership.<sup>128</sup>

Further, there is a shift away from the “up or out” system, moderating both of its aspects. Lawyers do not necessarily move up in the same way any more. Two-tier partnership systems have become common in the United States, and are appearing in Canada as well. Known by various names, the fundamental feature of these systems is that some associates are promoted not to full partnership, but to something less, often known as a “non-equity partnership”. Essentially, a non-equity partnership recognizes the long-term commitment of the firm to the lawyer, but typically does not involve the lawyer in profit-sharing, or at least does not do so in the same way that full partnership would. A lawyer joining as a non-equity partner would not need to buy into the partnership, as might otherwise be the case, and might well continue to be on salary. In most cases, one would expect non-equity partners to have fewer voting rights, if any.

A lawyer joining a firm offering such an intermediate level, or negotiating to change to that status, will want to be clear on a variety of issues. These would include not only the questions of method of compensation and ability to participate in decision-making referred to above, but also the more fundamental question of whether this new status is an end in itself or a transition to full partnership. If it is transitional, what period of time should be expected to pass before he or she will be invited to full partnership?

But just as the “up” stream of “up or out” has changed, so has the “out” stream. When an intermediate position is not transitional, it is arguably not a form of partnership at all, but another relatively recent phenomenon of “permanent associateship”. Competing interests can motivate this type of arrangement, though at present it seems likely that economic factors have been the most important.

In a permanent associateship, the lawyer retains a long-term employment relationship with the firm, with no expectation that it will develop into a partnership some day. The trade-off for the lawyer for these diminished future prospects is lower expectations about the lawyer’s

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<sup>128</sup> “Productivity and Paranoia: The 1993 Compensation Survey” (June/July 1993), 17 Can. Law. 20 at 22; “The 1999 Canadian Lawyer Law Firm Associates Survey” (Nov/Dec. 1999), 23 Can. Law. 41.

contribution to the firm. In essence, it is expected that a permanent associate will perform well, but is likely only to work something more like 9 to 5. The potential benefits to both sides are the reduction of unlimited growth but continued benefit from the lawyer's services for the law firm, and an improved quality of life for the lawyer.

The nature of change depends largely on who has bargaining power, and to date permanent associateships seem primarily to have been controlled by law firms rather than by young lawyers. The mid 1990s saw a tight job market and dwindling revenues for law firms. The factor most motivating innovations has been the need for firms to keep costs down, and lawyers seeking work have had relatively little bargaining power. Accordingly, permanent associateships might not have been arranged on terms young lawyers would have liked. Indeed, there are instances of firms hiring lawyers on a 9-to-5 basis not as permanent associates, but as paralegals. At present, permanent associateships seem primarily to arise as cost-saving measures for law firms, rather than as something initiated by lawyers.

It is not an arrangement that most lawyers seek, though occasionally for various personal reasons a permanent, or at least long-term, associateship might be proposed by a lawyer. As something initiated by the lawyer, there seems still to be some resistance to the idea. It has been suggested that it is beginning to be acceptable for women to reduce their workload for child-rearing purposes, but that men do not typically have a reduced workload option, and women do not have it for other purposes.<sup>129</sup> For that reason, this option is often spoken of, dismissively, as the "mommy track".

However, this option could become more widespread. First, improvement in the economy generally, as is occurring, is associated with a greater market for legal services.<sup>130</sup> The accompanying greater need by firms for associates should help restore some bargaining power to young lawyers, who might therefore be able to negotiate arrangements more to their liking. For that smaller group of lawyers who might want to pursue a permanent associateship, this could translate into more equitable association.

Second, this option seems more frequently, though not exclusively, to be associated with young women lawyers. Although women make up 31% of the legal profession in total, their numbers are very much skewed toward young lawyers. Of those lawyers practising more than 21 years, roughly 10% are women; the group of lawyers practising five years or less is divided

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<sup>129</sup> Parental leave policies which are gender-neutral seem more common. See L. Marks, "Alternative Work Schedules in Law: It's About Time!" (1990) 35 N.Y.L. School L. Rev. 361 at 361.

<sup>130</sup> B.P. Pashigian, "The Market for Lawyers: The Determinants of Demand for and Supply of Lawyers", (April 1977) J.L. & Econ. 53.

almost exactly 50/50.<sup>131</sup> In hiring young lawyers, firms are therefore likely to have to recognize concerns which are more common to women.

This bargaining power in the hands of young lawyers can exist either at the time of initial hiring, or even a few years down the road. Law firms, after all, invest a great deal of time, energy and money to train new associates. It is to everyone's benefit, therefore, to create arrangements that make it less likely that an associate will leave the firm or leave the practice of law.

### ***b) Part-Time Work***

A further option that is sometimes spoken about, and which has appeared at least infrequently in the United States and Canada, is part-time work by lawyers. At one level, it is obvious what this means - a lawyer works for a firm on something less than a full-time basis and receives something less than full-time compensation. In fact, though, there are a considerable number of lurking issues that any young lawyer hoping to negotiate a part-time arrangement should consider in advance.

First, what counts as full-time work? Should this be measured by the hours that other lawyers are typically in the office each week<sup>132</sup>, by the hours they typically bill each week, or by the yearly quota of billable hours? The easiest measure is annual billing hours. But measuring work on this basis makes it less likely that a part-time lawyer can have a fixed schedule. In some areas of specialization, it might be possible for a lawyer to arrange to work mornings, or to work three days a week. For example, a lawyer who primarily does research could likely arrange a reasonably regular schedule of attendance. But litigation practice typically demands that a lawyer work full time while matters are in court. This does not mean that a litigation practice cannot be conducted on a part-time basis - indeed, experience suggests otherwise.<sup>133</sup> But it does mean that the lawyer must be flexible about the schedule, making up the time off at less busy periods.<sup>134</sup>

The basis for compensation should also be considered carefully. Possibilities include paying the lawyer on an hourly basis for hours worked, paying based on the hours actually billed, or paying an agreed salary based on anticipated billings. The last option is the most

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<sup>131</sup> Federation of Law Societies of Canada, "1998 Law Societies' Statistics" Federation of Law Societies of Canada website, <http://www.flsc.ca> (last modified: November 11, 1999).

<sup>132</sup> One commentator has suggested that all lawyers can be seen as having flextime arrangements already: "They can work their seventy to eighty hours per week any time, as long as they are there during the core hours of nine to five." Marks, note 5 at 363.

<sup>133</sup> J. Mucalov, "The Flex-Timers" (February 1991), 15 Can. Law. 22.

<sup>134</sup> Marks, note 5 at 364.

similar to the way full-time compensation is calculated, and might seem appealing because it has the greatest

certainty. However, it is also the option that creates the greatest incentive for the law firm to give the lawyer more work than can realistically be done on a part-time basis.<sup>135</sup> Experience suggests that the greatest danger in a part-time working arrangement is that it will gradually drift back into full time, because it is difficult for the lawyer to turn down work. Indeed, a lawyer negotiating a part-time work arrangement is well-advised to account for this from the start: if you hope to work 30 hours a week, commit to working 25.<sup>136</sup>

There are trade-offs for negotiating a part-time position. It can lead to the lawyer receiving less challenging, more routine work, resulting in disillusionment. It can also, as noted, lead to the lawyer actually working more than anticipated, but still being compensated at a lower level. A lawyer seeking to negotiate a part-time position should try to account for these factors.

It is also worth recognizing the legitimate concerns a law firm will have about entering into a part time arrangement with a lawyer. Most noteworthy is the question of overhead. The cost of office space and other equipment which is available full time but only used part time, as well as secretarial support, must still be covered. Paying half an associates' salary for half-time work does not account for the overhead costs: at the same time, paying half the salary after a deduction for overhead might be an unattractively low figure.<sup>137</sup> One option that a lawyer might propose is the hiring of a contract lawyer (discussed in more detail below) to "fill up" the vacant time and see to it that the overhead costs are not lost.<sup>138</sup>

### *c) Creating Options*

A final piece of advice for a lawyer interested in any of these alternatives is to act early. That is, don't wait until you personally are looking to make a change to negotiate an *ad hoc* arrangement for yourself. Lobby in advance for your firm to create a policy about such arrangements. Part-time work, reduced workloads, a "mommy track" can all be made to seem beneficial to the firm, and to help in recruitment of new lawyers. Support for alternative arrangements might come not only from young lawyers, but from senior partners who want a phased retirement, from partners who now have children practising law and can see the benefits such a policy might give those children, or from others.<sup>139</sup>

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<sup>135</sup> S. Nielsen, "The Balancing Act: Practical Suggestions for Part-Time Attorneys" (1990) 35 N.Y.L. School L. Rev. 369 at 381.

<sup>136</sup> *Ibid.* at 381.

<sup>137</sup> Mucalov, note 9 at 23.

<sup>138</sup> Marks, note 5 at 364.

<sup>139</sup> Nielsen, note 11 at 379.

Will these options become more equitable and more available over the next 20 years? As with any predictions, it is hard to be certain. But the door to these possibilities has been opened

by necessity during the mid-1990s. As noted before, greater demand for legal services is leading to greater competition to hire young lawyers, which gives firms an incentive to make these options more inviting if they are demanded. More women are entering the profession now than in past years, which is likely to increase demand for these options. Further worth noting, since the desire for these options is associated with young lawyers generally, is that young lawyers are coming to be a more numerous part of the profession.

At present, the largest single group of lawyers is those who have practised for 21 years or more: they make up roughly one-third of the lawyers in Canada. But the next most populous group, at approximately 20%, is lawyers who have practised five years or fewer.<sup>140</sup> Over the next 20 years, the older group will begin to retire. That group, of course, consists largely of the “Baby Boom” generation.

The “Baby Boom” had a significant effect on the internal structure of virtually all large businesses. The effect has been described as “pushing a rectangle through a triangle”, as the traditional structure of organizations - a few senior people at the top, more middle level employees, and even more junior workers - has been distorted by the large group of people in the same age range creating a bulge at each new step of the hierarchy.

That the same thing has happened in law firms seems clear and is reflected in the significant number of lawyers with more than 21 years’ practice. But as they retire, the triangle shape can return. This does not automatically mean that young lawyers are more powerful because they are more numerous: they will still of course be the most junior members of the firm. But the absence of the bulge in the middle and toward the top - that is, the decrease in “excess” members of the firm at that level - will restore the need for more recruitment at junior levels, and may make it necessary for firms to have attractive options in place.

## II) Small Firms - Contractual Arrangements

There seems at least to be reason to believe that more flexible and more equitable options will arise as alternatives to the traditional practice of law. But that having been said, it is worth recognizing the limits on the sense in which it has ever been the “traditional” practice at all.

The “up or out” system has characterized the practice in large and medium-sized firms. But that is not the context in which the great majority of lawyers actually practice. About two-

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<sup>140</sup> Federation of Law Societies of Canada web page, note 7.

## Alternative Hiring Arrangements

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thirds of lawyers across Canada practice alone or in firms of 10 or fewer lawyers.<sup>141</sup> That percentage is unlikely to shrink. Many commentators feel that the legal profession is already

divided into two separate “hemispheres”, with large corporate firms making up one group, and lawyers in small firms or sole practice in the other.<sup>142</sup> It has been suggested that this trend is likely to continue, and that the days of mid-sized firms are numbered.<sup>143</sup>

Although large firms might set trends for the profession in many ways, their hiring practices are not the same as in small firms. In smaller groupings of lawyers, “alternative” hiring arrangements are much more common. In these cases, the alternatives focus not so much around hours of work as around compensation. As these types of arrangements are likely to be more common in the future, it is worth taking a moment to look at them.

Many types of financial arrangements other than a straight salary exist. These range from lawyers being paid a base salary plus a percentage of billings, to arrangements where the lawyer and the firm split the lawyer’s billings, to options where the firm keeps (or even requires the lawyer to pay) a certain amount each month, with some sharing of billings beyond that amount.

There are a number of issues a lawyer should consider before negotiating any such arrangement. Most lawyers just starting practice are unlikely to have any type of client base, while others might bring a certain number of clients with them. A lawyer should assess realistically her or his prospects for bringing in business. Someone confident of that ability might want to negotiate a graduated scale, with the lawyer receiving an increased share of billings over a certain amount. Some type of split can work reasonably for both sides when the firm refers sufficient work to the lawyer. Fifty-fifty or 60/40 splits in favour of the firm are common, but anyone entering such an arrangement should investigate the local market standard. Arrangements where the firm keeps money off the top gives them little incentive to refer work beyond that minimum level.

A lawyer should accordingly seek to have an explicit guarantee of the amount of work that will be referred from the firm each month - a 50/50 split is of no use if there is nothing to be split. Similarly, the parties should consider when the lawyer will be paid - when the bill is submitted, or when the fees are collected. Not unreasonably, the firm will prefer to have the

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<sup>141</sup> Federation of Law Societies of Canada web page, note 7.

<sup>142</sup> H.W. Arthurs, “Changing World - Challenging Times: Lawyering in Canada in the 21<sup>st</sup> Century” (1996) (A Study prepared for the Canadian Bar Association Task Force on Systems of Civil Justice); Margaret A. Ross, “2001: A Legal Odyssey” (1996) (A Paper prepared for the Civil Justice :Reform for the 21<sup>st</sup> Century National Conference, February 1-3, 1996); Ronald J. Daniels, “Growing Pains: the Why and How of Law Firm Expansion” (1993), XLIII U. of T. L. J. 147; David A.A. Stager, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990); H.W. Arthurs, R. Weisman, F.H. Zemans, “The Canadian Legal Profession”, [1987] Am. Bar Foundation Res. J. 447.

<sup>143</sup> Stager, note 18; Daniels, note 18; Arthurs (1987), note 18.

## Chapter Four

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split occur once fees are collected, but in that event there should be clear consideration of who will have responsibility for collecting the fees, and what administrative support the lawyer will receive in this area.

Administrative support generally should also be considered. Will the lawyer be provided with secretarial support, word processing, computer access and so on? Who will pay for services such as computer-assisted research? Will they be billed to the client, covered by the firm or come from the lawyer's share?

It is also worth contemplating in advance the circumstances in which the firm can reduce the lawyer's bill for individual clients. A firm might place a regular client's file in the lawyer's hands but then want to give the client a reduction in the overall fee to encourage future business. Should this reduction be shared equally, or come from the firm's portion? Issues like these are worth anticipating and settling in advance of an individual dispute.

A non-competition clause is also likely. The firm is entrusting clients to the lawyer, but wants some guarantee that the lawyer will not leave the firm, taking those clients. Although some restriction is reasonable, the lawyer should look for it to be limited in time and location - that he or she will not do any work for those clients for six months after leaving the firm, for example.

### III) Sole Practitioners

Finally, there are alternatives that a lawyer can consider if she or he is a sole practitioner. Although the usual form of this practice is simply to open an office and look for clients, there are other possibilities.

Some lawyers, for example, work as "freelance lawyers", hiring their services out primarily to other lawyers rather than to clients.<sup>144</sup> Some such lawyers specialize in particular types of work, while others remain generalists, doing research, court appearances or collections as the call arises. Although this option is more likely to be taken up by younger lawyers, it is possible for senior lawyers with a particular specialization to profitably follow this route as well.<sup>145</sup>

Pursuing this option involves a number of other decisions. Not renting office space is less expensive but has the disadvantage that one has nowhere to entertain clients. Further, having an office can increase visibility, which can help with marketing.

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<sup>144</sup> D. Lundy, "Freelancing 101" (September 1996), 20 Can. Law. 32.

<sup>145</sup> S. Gordon, "New Ways to Practice" (October 1995), 4 Nat'l 24.

Marketing of course must be a major concern for a freelance lawyer. Advertising, personal contact, mailouts, and staying in touch with past clients are all possibilities.

Researching the local market to decide what types of services are most likely to be in demand should help direct a marketing strategy.

In addition, a freelancer must decide what fees to charge. Freelancing must be affordable enough from a law firm's perspective that it makes sense to ship work out. At the same time, the fees must cover the costs the lawyer incurs in setting up the business, insurance in particular, and provide a sufficient standard of living. In all likelihood, some flexibility in setting fees will be advisable, depending on the nature of the work, the relationship with the client and other factors.

Any lawyer contemplating freelancing as a method of practice would be particularly well advised to become familiar with the Internet and the options that it presents. Maintaining a creative presence on the Internet could be one useful way of generating business. Becoming associated with a virtual law firm might also be advisable. Such firms, which are likely to rely in large part on the presence of "on-call" lawyers to be brought in as work demands, will be a natural fit for anyone freelancing.

A similar option to freelance work is the use of a lawyer placement agency. Like placement agencies in any other line of work, lawyer placement agencies provide lawyers to law firms for temporary contracts. These contracts typically last for a period of several months, as individual law firms, government agencies or corporate law departments find themselves in need of additional assistance for particular projects.<sup>146</sup> Lawyer placement agencies exist in some larger cities, though they are not found all across Canada.

Though not necessarily so, these options for practising law are likely to be less well paying than some, and are accompanied by a certain amount of insecurity. But for the lawyer who places a high emphasis on independence and control over one's own time, that could be a reasonable exchange.

## IV) Conclusion

The "up or out" system has predominated in large firms for some years, though alternatives have long existed in smaller firms. Recently, the "up or out" system has begun to change in a variety of ways. These changes have not necessarily been favourable to associates, but they are capable of taking associates' interests into account. Various economic and demographic pressures affecting the profession make it likely that these alternatives will become

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<sup>146</sup> J. Mucalov, "The New Lawyer Temps" (April 1994), 3 Nat'l 17 at 22.

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more common in large firms. Many people expect mid-sized firms to become less common, with the result that an even greater percentage of lawyers will practise either with big firms, with

small ones or in private practice. In either event, alternative hiring arrangements will become more common and more important.

## 2020 Hindsight

1) Current trends affecting the change in hiring and career patterns will have continued at large firms. There will be further movement away from the “up or out” system. Lawyers can expect to see the following:

- a) longer times to reach full partnership;
- b) more “intermediary” stages between associate and full partner;
- c) options for permanent associateship that reflect the interests of lawyers as much as they reflect the interest of the law firm; and
- d) greater opportunities for part time work.

2) Lawyers will be well advised to research the separate and more complex issues involved in some of these “alternative” hiring arrangements, in order to be prepared to negotiate around the important questions. Lawyers who might be interested in such alternatives would be wise to try to create such options within their firms as a general policy, rather than wait and negotiate a single arrangement.

3) Lawyers in small firms should investigate and be familiar with the range of considerations involved in negotiating hiring arrangements other than straight salary. Such arrangements already exist and are likely to become more widespread. They can benefit both sides if everyone’s interests are properly considered.

4) Lawyers in private practice will increasingly be able to look to expand their work options by investigating virtual law firms, freelance work or lawyer placement services.

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Chapter Five

# Alternative Billing

“Stocks have reached what looks  
like a permanently high plateau.”

**Irving Fisher, Professor of Economics,  
Yale University, 1929**

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## **I) The Current Approach to Billing**

### **1) HOURLY BILLING CREATES SOME PROBLEMS...**

What can be expected in the future for methods of billing? “More of the same” is a pretty likely answer, but there is scope for a change to other alternatives.

At present, the great majority of billing is done on the basis of an hourly rate. One U.S. study found that 97% of lawyers used hourly billing as their primary method.<sup>147</sup> Indications are that the situation in Canada is much the same.<sup>148</sup>

Still, given the dominance of hourly billing, it is worth remembering that it is a relatively recent phenomenon. In the past 25 to 30 years, hourly billing has become the accepted practice, as a way to allow lawyers to keep track of how much of their time particular clients took, and to allow fees which reflected the time spent. This method made the practice of law more efficient and business-like, but it also brought a set of problems all its own. These problems create the potential for a shift, whether on a large scale or a small one, to some alternative forms of billing.

The fundamental problem with hourly billing is that it assumes that time spent is uniformly an adequate measure of value delivered to a client. While this assumption is not a ridiculous one, too great a reliance on hourly billing (which is very common, perhaps the norm) gives the assumption greater prominence than it deserves.

The point of any fee should be to attach an appropriate value to the lawyer’s service. A successful lawyer is one who can provide a service at a fee which is reasonable to the client, but which exceeds the lawyer’s costs of performing that service. The fee, therefore, should be an attempt to charge what the service is worth. An hourly rate should be a technique to help calculate what that value is.

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<sup>147</sup> W.G. Ross, “The Ethics of Hourly Billing By Attorneys” (1991) 44 Rutgers L. Rev. 1 at 91-100.

<sup>148</sup> J. Middlemiss, “Alternative Billings Systems” (May 1994) 18 Can. Law. 24.

Hourly billing was initially proposed only as a tool. It should not be an end in itself, but as one commentator has put it:

We have been suckered. The billable hour wasn't just a record keeping concept. Rather it has fundamentally affected how we practice and, most importantly, how we think about what we do and how much we enjoy what we do.<sup>149</sup>

Hourly billing tends to put process ahead of results.<sup>150</sup> At the most basic level, time spent does not necessarily translate into service delivered. Computerized billing techniques now allow time to be kept very precisely, and precision is easily confused with accuracy. But "there is no room in the computer for any judgment about the quality of the service, the efficiency with which it was performed, the result which it generated or, for that matter, whether it generated any result at all."<sup>151</sup>

In some cases, extremely valuable service could be rendered to a client in a very short time: the right lawyer, for example, might be able to help close a multi-million dollar contract with only a phone call. A criminal law expert might see immediately a fundamental flaw in the Crown's case that most lawyers would not see at all or only discover after hours of research. In each of these cases, the value of the service to the client, and a reasonable fee, cannot be properly assessed from the fact that the lawyers spent only a short time. And yet that is precisely the result that hourly billing leads to. In the criminal law case, the less expert lawyer who discovered the problem only after many hours of work could legitimately bill for many more hours, but the service would have been no more valuable.

Hourly billing creates a "productivity paradox".<sup>152</sup> By one measure, a lawyer who can accomplish a task twice as quickly as another lawyer is more productive and more efficient: that ought to be a good thing, and would be desirable from the client's point of view. But if that lawyer's performance is measured by hours billed, on paper he or she has been less productive, by billing only half as many hours.

This paradox is undesirable not only from the lawyer's point of view, but from the client's point of view as well. Hourly billing creates an incentive for inefficiency: it encourages over-researching points of law, or pursuing 100% certainty when 95% would do.<sup>153</sup> This is especially so when one considers the administrative pressures created by billing targets in law

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<sup>149</sup> J.P. Merrick, "The Curse of the Billable Hour" (1997) 15(1)*N.S. Barristers' Society Record* 3 at 3.

<sup>150</sup> Z. Baird, "A Client's Experience with Implementing Value Billing" (1994) 77*Judicature* 198 at 198.

<sup>151</sup> C. T. Beeching Jr., "The Billable Hour is Dead. Long Live... What?" (1995) 67 *N.Y. State Bar J.* 12 at 12.

<sup>152</sup> G. Blackwell, "Technology in the Small Firm: The Productivity Paradox" (1996) 20 *Can. Law.* 29.

<sup>153</sup> W.G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Durham: Carolina Academic Press, 1996) at 4. See also R.E. Litan and S.C. Salop, "Reforming the Lawyer-Client Relationship Through Alternative Billing Methods" (1994) 77 *Judicature* 191 at 192.

firms: “Trained to be ultra-thorough in the performance of their work, many lawyers often forget that their efforts yield sharply diminishing returns for their clients. And the prospect of earning higher fees by doing more work does not encourage them to remember this.”<sup>154</sup> One need not assume most, or even many, lawyers to be unethical to concede that hourly billing creates a conflict of interest between the lawyer and client. Even the negative public image generated by the perception that lawyers are motivated to overcharge is a legitimate source of concern.<sup>155</sup>

This conflict is not new, but advances in technology have exacerbated it. Technology allows lawyers to perform many tasks more quickly. Computer-assisted research, for example, can significantly reduce the amount of time needed to determine the case law. Computerized word processing allows standard forms and documents to be produced very quickly. Those tasks are still just as valuable to the client as they were before, but an hourly billing approach does not permit them to be charged at the same rate. Technology saves time, but hourly-billing lawyers do not necessarily want to save time: “If this associate stays up all night I get rich, but if he does the job in seconds and goes home with his family, I do not”, as one partner in a law firm put it.<sup>156</sup> When your only measure of value is time spent, you do not want to save time.

Hourly billing, then, although it is not completely divorced from the goal of determining the value of service, creates problems from the point of view of both lawyers and clients. That problem is exacerbated both by recent advances in technology and by a trend among lawyers to want more well-rounded lives.<sup>157</sup> Those lawyers want to be able to provide quality service by working more efficiently, but not to lose income simply because they provide that quality service with fewer hours. Various factors combine to make the times ripe for alternatives to hourly billing.

## 2) ...BUT IT IS DEEPLY ENTRENCHED

Nonetheless, there are reasons to think that change will not readily occur. Most importantly, it must be recognized that hourly billing has become more than simply a method of setting fees. It has insinuated itself quite fundamentally into the practice of law. Goals for associates, for example, are usually set according to the number of hours the associate is expected to bill annually. Assessments of how valuable associates are, and decisions about who should be promoted to partnership, are therefore intimately tied up with hourly billing. Hourly billing affects cost accounting in firms, decisions about staffing for both lawyers and support

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<sup>154</sup> *Ibid.*, at 53.

<sup>155</sup> Committee on Lawyer Business Ethics, “Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements” (1998) 54 *Bus. Law.* 175 at 178.

<sup>156</sup> Ross, note 7 at 70.

<sup>157</sup> C. Kentridge, “Serving the God, Making the Sacrifice: The Legal Profession in the Nasty 90’s” (November 1992) 15 *Can. Law.* 16.

staff, and can be a factor when bills are taxed. “The vast majority of us are now governed by the practice (in most cases requirement) that we track and account for all of our working day... It has caused us to change our perception of what we are doing”.<sup>158</sup>

Further, although hourly billing is not always a good measure of productivity, it is a simple one. Clients who receive a heavily itemized bill detailing the precise time spent can easily understand the basis on which the fee was calculated: it does not seem “pulled from a hat” the way a bill suggesting merely that the service rendered was worth \$5,000 to the client might.

Finally, compared to many of the alternatives to be discussed below, a retainer based on an hourly rate is easily set up. Other than quoting the hourly rate, it is possible to get away with doing little else up front.

Accordingly, although there are problems with hourly billing, there is a certain inertia to it which means that it is not clear any natural change away from it will occur. There are suggestions that corporate clients, especially in the United States, are pushing for more alternatives<sup>159</sup>, but there are strong factors, outlined above, which militate against change.

Nonetheless, whether change will occur naturally or not, offering alternative forms of billing could be a good strategy for a lawyer to use in marketing in the future. Especially, as the problems with hourly billing are exacerbated by technology<sup>160</sup>, such alternatives could be attractive to clients and lawyers.

What is the goal of an alternative billing method? Although in large measure it should be to create greater client satisfaction, the goal cannot simply be to reduce the fee charged. If that were the case, no alternative method would be necessary. The hourly rate could just be lowered, or the final bill could be discounted. Instead, the goal must be more sophisticated. It must be to find a method that still provides a reasonable compensation to the lawyer for the service rendered, but at a reasonable and understandable fee to the client. The incentives to work efficiently must be made to run in the same direction for both clients and lawyers.

## II) Alternative Approaches to Billing

### 1) TASK-BASED BILLING

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<sup>158</sup> Merrick, note 3 at 3.

<sup>159</sup> Committee on Lawyer Business Ethics, note 9 at 178.

<sup>160</sup> Beyond the issues already discussed here, there are questions raised in Chapter Three of this book, “Technology, Society and Law”, suggesting that legal services could be delivered on a very different basis to the “latent legal market”, in a fashion that would not lend itself to hourly billing.

A variety of options fall under this category. On one approach, the various tasks in a legal action are separately delineated, and a cost is arrived at for each item. In the simplest form, a client and lawyer could agree that the client would pay a certain amount for drafting pleadings, a certain amount for legal research, a certain amount for interviewing possible witnesses, and so on. If a fixed amount is set for each task “the attorney bears the risk that the task might take more time than estimated, but reaps the reward if he can do it in less...the client gains protection against escalating expenses he cannot easily control.”<sup>161</sup> If this approach is taken, of course “the scope of the task must be carefully defined and every effort made to ensure that the charge for the task is fair.”<sup>162</sup>

Another possible advantage of this approach is that it gives greater potential for control to the client. It would be possible, for example, to allow a client direct input into whether to pursue particular lines of inquiry, either through interviewing witnesses or legal research. A client who knows that some sub-argument is unlikely to succeed and will be expensive to pursue might choose to have the lawyer focus on other approaches.

Indeed, in some areas of law, the task-based approach could give the client even greater responsibility. In family law or small claims matters, for example, it might be affordable for a client to hire a lawyer to do research, based on which the client will appear personally in court.

It is not essential to task billing that a firm figure be arrived at for each step. Another option would be for estimates of the cost of each step to be provided in advance, with the understanding that the lawyer will contact the client if it appears that the estimate might be inaccurate, or perhaps as a matter of course when 75% of the total has been reached. This approach still depends very largely on hourly billing and so does not address the tension of efficient use of time that system creates, but it does give the client greater awareness and control.

Another option which is sometimes discussed under this heading, involving even less of a change from hourly billing, is using a system where bills are prepared based on standardized billing codes, rather than on hours. Lawyers will still calculate their fees based on an hourly rate, but the bill presented to the client will show the fee for filing pleadings, the fee for formulating a strategy and so on. In the United States, the Uniform Task-Based Management System (UTBMS) has been developed, and has the support of the American Bar Association’s litigation section as well as the American Corporate Counsel Association. That system creates a standardized set of codes to be used by all outside counsel providing legal services to participating corporate clients. Although the underlying billing method still depends on an

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<sup>161</sup> S.W. Jones and M.B. Glover, “The Attack on Traditional Billing Practices” (1998) 20 U.A.L.R.L.J. at 293 at 306.

<sup>162</sup> *Ibid.* at 306.

hourly rate, the standardized bills will allow these clients to compare quite readily the different amounts they are charged by law firms. In the long run, these clients are likely to “form very firm opinions about what each stage of an average file should cost”.<sup>163</sup> Lawyers spending more time than the norm on various tasks “can expect to be quizzed by the assignment in-house counsel”.<sup>164</sup> An indirect incentive to complete tasks as efficiently as possible is created in this way. Other concerns arising from the hourly billing method, such as inadequate compensation for brief but valuable services, are not necessarily taken into account by this approach.

### 2) FIXED-FEE BILLING

Fixed-fee billing is in effect task-based billing where the entire file is treated as the task. Other perhaps than contingency fees, it is probably the most common alternative to hourly billing that is currently in use. It is not appropriate to all types of files, but for tasks which can be done in high volume in a relatively similar way - such as simple wills, some real estate closings or incorporations - it is a workable method.

To operate on a fixed-fee (or “flat-fee”) basis, a lawyer must determine a price that will be profitable in the long run but also attractive to potential clients. For the first few files, this will probably mean that the actual cost is greater than the fee earned. However, the idea is that the forms, systems and expertise built up over time allow the task to be done quickly and efficiently, but the charge for the service is still based on something like its inherent value to the client, rather than simply the time spent.<sup>165</sup> A lawyer trying to create such “packages” should take into account not only all the factors affecting cost noted above, but also the nature of the work. If it is more specialized, or depends on unique characteristics of the lawyer, a higher charge might be reasonable. If it is “commodity” work (i.e. work that most lawyers could do equally well), the price will need to be more competitive.<sup>166</sup>

This approach can be looked on as a “value-based” billing method. The fee is determined not by the time spent, but by the value of the service to the client. Although it promotes efficiency on the lawyer’s part, since the profit comes from doing a large volume quickly, this factor creates its own set of potential problems. Where hourly billing creates an incentive to over-prepare, fixed-fee billing creates an incentive to cut corners, particularly when a file turns out to be more complex than originally thought.<sup>167</sup> For this reason, any fixed-fee arrangement

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<sup>163</sup> S.S. Hanna, “Task-Based Billing: It’s Coming...” (January 1996) 20*Canadian Lawyer* 29 at 29.

<sup>164</sup> *Ibid.* at 29.

<sup>165</sup> W.L. Anderson and M.J. Headrick, “Value Billing: A Service to the Attorney and the Client” (1992-93) 33 *Law Off. Econ. & Mgmt.* 418 at 425.

<sup>166</sup> *Ibid.* at 421-22.

<sup>167</sup> R.D. Seefeld, “Billing Alternatives” (1991-92) 33 *Law Off. Econ. and Mgmt.* 139 at 140.

should very clearly delineate what the lawyer is expected to do, and what kinds of factors could take the file outside the fixed fee.

If fixed fees became more common than they are, there would be other potential influences on the practice of law. Under an hourly billing system, the training of new lawyers is at least partly paid for by clients: under a fixed-fee system, any inefficiency in handling files as the lawyer learns the ropes comes directly out of profits. Accordingly, law firms might be more likely to make lateral hires than to take on and train new lawyers. Equally, there could be pressure to retain trained lawyers who are not promoted to partnership as permanent associates.<sup>168</sup>

### 3) HOURLY BILLING VARIATIONS

Other proposed alternatives do not dispense with hourly billing as the foundation of the fee, but incorporate other considerations to try to counteract the problems which arise from too close an adherence to that method.

Some blended options, or hybrid billing methods, for example, set a cap on the total fees, but also provide a bonus to the law firm if the file is brought in under that amount - in essence, the lawyer and client split the remainder. The potential benefit to clients is that they know the maximum fee they face; the potential benefit to lawyers is that they earn what amounts to a higher hourly rate by working more efficiently. This begins to address the conflict of interest over efficiency, though some argue that clients are entitled to expect lawyers to work efficiently, and should not have to pay extra for it.<sup>169</sup>

Others propose applying this general approach in a more limited way, to blend hourly rates with some value-based rates. Where a lawyer has developed a set of computer precedents which allow a task to be done in .2 hours instead of the one hour it would normally take, some fee more than .2 hours but less than one hour might be charged. This lets the client benefit from the greater efficiency, without penalizing the lawyer for it.<sup>170</sup>

Another option, at least for some types of files, is incentive-based billing. In effect this is a type of modified contingency arrangement. Where acting for a plaintiff, for example, the client and lawyer could agree on a reduced hourly rate that covers the lawyer's costs, but provides no profit: however, the lawyer will receive a bonus based on a percentage of the ultimate settlement (or amount saved from some target figure, for defense-side lawyers). The lawyer and client now both have an interest in the file being settled as quickly and efficiently as possible.<sup>171</sup>

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<sup>168</sup> Litan and Salop, note 7.

<sup>169</sup> Middlemiss, note 2 at 141.

<sup>170</sup> Seefeld, note 21 at 200.

<sup>171</sup> Baird, note 4.

### III) Implementing Alternative Billing Systems

No matter what alternative is used, some practical steps must be taken. First, a lawyer must determine the real costs of providing services, taking into account all relevant factors. The hours spent are a relevant consideration, but far from the only one. In addition, a lawyer or firm must take into account the amount of total billings actually likely to be realized; the cost of overhead; the cost of development of various systems that will reduce the time spent on individual files; the cost of training associates or support staff; the capital cost of new technology; the reduction in time spent because of that new technology; and any compensation that must be earned for partners because of the file.<sup>172</sup> This type of calculation is needed before a reasonable price on some alternative basis can be proposed.

Second, whatever basis for billing is agreed on, the lawyer should draft a clear and complete retainer letter setting out the agreement. Where some basis other than time spent will be charged at some stages, that must be clear. Where the fee is intended to cover a particular task, the limits of that task must be defined as closely as possible. Where fees are charged based on steps along the way, those steps must be accurately predicted and priced.

Alternatives to hourly billing generally require more work up front in determining the fee, whether that time is spent developing “packages” to bill out at a fixed fee, determining the real cost of performing various tasks, or anticipating and negotiating the fee for individual steps in advance. Nonetheless, doing that work could put the lawyer at a competitive advantage in the future.

### IV) Conclusion

A wide range of alternatives to hourly billing are already available, if little used. The current system of hourly billing can create problems for both lawyers and clients. Although the system is deeply entrenched, it would be worthwhile for lawyers to consider alternative methods of billing as a way of positioning themselves well for the future.

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<sup>172</sup> Anderson and Headrick, note 19 at 424.

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## 2020 Hindsight

- 1) A large scale shift away from hourly billing is unlikely to occur naturally. However, that creates a marketing opportunity for lawyers interested in pursuing options that could be more satisfactory to both clients and lawyers.
- 2) Lawyers who succeed at creating workable alternatives will have calculated their real costs for providing legal services, including overhead, training, support staff, technology and so on. They will have done more work “up front” in establishing the cost - and therefore the appropriate price - of the service, rather than leaving that calculation to the end.
- 3) Workable alternatives will depend on clear retainer letters, which define exact tasks to be performed and the exact basis for billing, whatever it should prove to be.

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Chapter Six

# Prepaid Legal Service Plans

“This ‘telephone’ has too many shortcomings to be seriously considered as a means of communication.”

Western Union memo, 1876

## I) Introduction

There is always the possibility of change in legal services where there are unmet needs; what is needed is a way for those services to be supplied at a cost that meets their demand. Prepaid legal service plans have the potential to allow the “latent legal market”<sup>173</sup> to be tapped, providing legal services to people who would not otherwise be able to afford them, and providing business to lawyers that they would otherwise not have.

Legal services to individual clients, as opposed to business clients, are generally paid for in one of two ways. If the client has an income that falls below a certain level, and if the type of legal problem is one the local legal aid plan covers, some provincial scheme for providing those services at no cost to the client will be available. Failing that, the client will have to pay for service personally. In that event, given the cost of legal services, many people avoid hiring a lawyer unless there is no other choice. Many others do not hire a lawyer at all, even when it would be very beneficial to do so, because they simply cannot afford it.

In some ways, middle income consumers are in the worst position when it comes to obtaining legal services. Despite an estimated \$1 billion unmet demand for legal services in Canada, “the suppliers and consumers can’t agree on a price. Many people simply can’t afford to hire a lawyer at the current prices”.<sup>174</sup> It has been suggested, for example, that one in three Canadian families experiences a legal need each year, though many do not hire a lawyer.<sup>175</sup> Accordingly, it would seem that there is a market and a potential for change, in a system that would allow consumer need to be met in a way that meets the financial needs of both sides.

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<sup>173</sup> R.E. Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford: Oxford University Press, 1996) at 272.

<sup>174</sup> O. Lippert, “Consumer Demand for Legal Services” (1996) 20 Can.Law. 14 at 16.

<sup>175</sup> S. Ginsberg, “Legal Services Plans in the Year 2020” (Roundtable on Accessible and Appropriate Law-Related Services in 2020, Faculty of Law, University of Windsor, 14-16 January 1999) at 1[unpublished].

## II) The Market for Prepaid Legal Service Plans

Legal service plans are held out by many as having the ability to bridge that gap. In essence, prepaid legal service plans are a form of insurance: a large group of people subscribe to the same plan, and can receive legal services as they need them. There is nothing innovative about the notion of consumers all paying a small premium to avoid a large risk. These plans simply apply that concept in the context of legal services. The Canadian Bar Association has recommended the use of prepaid legal service plans in appropriate circumstances.<sup>176</sup>

The basic structure of prepaid legal service plans was developed in the United States in the early 1970s. Since then, the market for legal service plans has grown substantially in the U.S. As of 1996, it was estimated that approximately 98 million Americans were covered by legal insurance.<sup>177</sup> One company, Prepaid Legal Services Inc., was ranked number five of the top 200 best small companies in 1998, and ranked number 29 out of America's 100 fastest growing companies in the September 29, 1997, issue of *Fortune Magazine*.<sup>178</sup>

While the market for prepaid legal insurance has exploded in the United States, the development of legal service plans in Canada is still in an early stage. The first major plan in Canada, the Canadian Auto Workers Legal Services Plan, was only established in 1985. As of 1989, there were fewer than a dozen plans in Canada.<sup>179</sup> By 1999, the number of plans had not grown significantly.<sup>180</sup>

The Barreau du Quebec, in early 2000, undertook a campaign to make prepaid legal service plans in that province better known to the general public. The Barreau is not involved in the running of plans, but has issued pamphlets and put information on its website publicizing the privately run plans which are available in various parts of the province.<sup>181</sup>

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<sup>176</sup> Albert Strauss, Q.C. (Chair), Recommendations of the Special Committee on the Status of Paralegals to the CBA Council (Ottawa: Canadian Bar Association, 1989), recommendation 3. The recommendations in the Strauss Report were endorsed by CBA Council resolution 89-25-A. Recommendation 3 reads that the "CBA both encourage and, if appropriate, sponsor through its Provincial Branches open panel prepaid legal insurance programs based on sound insurance principles to provide for the payment of routine legal services such as wills, mortgages, residential property real estate transactions, matrimonial agreements and similar defined services" .

<sup>177</sup> Eric Fisher, "Legal Alternatives Balance Interests of Business, Worker: Prepaid Plans Court Both with Time, Money Savings", *The Washington Times* (March 24, 1997), p. D12, quoting figures from the National Resource Center for Consumers of Legal Services.

<sup>178</sup> "America's Fastest-Growing Companies: The Top 100", *Fortune Magazine* 136:6 (29 September 1997) 86.

<sup>179</sup> M. Kideckel, "Legal Help for Less or Less Help?" (1989) 13 Can. Law. 22 at 22.

<sup>180</sup> Information provided by Stephen Ginsberg, Executive Director, Canadian Auto Workers Legal Services Plan, August 5, 1999.

<sup>181</sup> Barreau du Quebec, "Assurance Protection Juridique", <http://protectionjuridique.com/> { GOTOBUTTON BM\_1\_ <http://protectionjuridique.com/> } or { GOTOBUTTON BM\_2\_ <http://legalprotectioninsurance.com/> } <http://legalprotectioninsurance.com/> (June 7, 2000).

Most prepaid legal service plans are employer-based and are negotiated by a union as part of a collective agreement. However, there are some private plans offered by insurance companies and credit card companies to which individual consumers can subscribe.

Prepaid legal service plans can take a variety of forms, but the essential feature is that all subscribers to the plan pay a small premium on a regular basis, for which they are entitled to various services. Prepaid access plans provide coverage for initial advice and consultations, and may also include some simple legal services such as the preparation of a will. Comprehensive prepaid plans provide coverage for a much broader range of legal services and are designed to cover most of a person's legal needs. They often involve caps on fees or co-payments, depending on the type of legal problem. Additional services not covered under prepaid plans are offered to subscribers at a reduced rate. Most prepaid plans are designed for individuals, although some plans in the U.S. have been designed for small businesses.

Lawyers who participate in the plan can be compensated in a variety of ways. A lawyer who gives telephone advice, for example, might be able to submit a bill to the plan, or might receive a certain amount per month for providing telephone advice, regardless of the number of calls actually handled. If a lawyer handles a matter for the client, either by appearing in court, preparing a will or handling a real estate transaction, the bill is submitted to the plan for payment.

In reaching the “latent legal market”, the plan can provide benefits to both clients and lawyers. Clients receive legal services in a variety of situations where they simply would not have done so otherwise. Where telephone advice is free, there is not the disincentive to contact a lawyer that the uncertainty about a bill would bring; in that event, a client is much more likely to seek the advice. Similarly, many people might undertake simple legal tasks, like preparing a will, that they would leave undone if they had to pay for it. Services which are of value to the clients, and which they could not otherwise afford, become affordable.

In addition, quite apart from the issue of cost, contacting a lawyer can be intimidating for many people. Some argue that having access to legal services in a familiar way, analogous to programs like a health or dental plan, reduces that intimidation and makes it more likely clients will seek services.<sup>182</sup>

There are two main ways that lawyers can become involved with a prepaid legal services plan. On the one hand, a group of lawyers can establish their own plan. This approach involves

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<sup>182</sup> Ginsberg, note 3 at 3.

a large initial investment in time and capital, as well as proficiency with marketing techniques, and is unrealistic for most lawyers.<sup>183</sup>

Alternatively, a lawyer could become a legal service provider under an existing plan. Depending on the plan, there are several ways in which lawyers can be associated. In the CAW plan, for example, there are staff lawyers, cooperating lawyers and non-cooperating lawyers. Staff lawyers work for the plan and only provide legal services to plan members. The other two categories are lawyers in private practice who spend some of their time dealing with plan members. Cooperating lawyers are associated with the plan and have agreed to accept the fee payments under the plan as full payment for their services. However, plan members have the right to approach any lawyer they wish, not just those associated with the plan. A plan member who obtains legal services from a non-cooperating lawyer can be reimbursed by the plan up to the plan's fee schedule.

Some lawyers choose not to be cooperating lawyers because the fees allowed under the CAW plan are lower than the fees they would normally charge. In their view, the benefits of joining as a cooperating lawyer do not outweigh this loss. For lawyers who are building a client base, however, or who are in a position to work for something less than the full market rate (the market rate which largely excludes lower to middle income earners), joining the plan might be worthwhile.

The major disadvantage, as noted, is that the fees paid are at a lower rate. However, the reasons noted above, in combination with some other factors, create potential advantages for lawyers who associate themselves with prepaid plans. First, participating lawyers receive clients they would not otherwise have had. The prepaid legal service clients are often people who would not otherwise have sought legal services, and so no lawyer would have had their business. In making those services affordable for the client, the plan also makes them a source of income for the lawyer.

Further, plans have the potential to generate a steady flow of business. They provide a chance for lawyers who are starting out in private practice to build a client base. For lawyers with an established client base, they serve as an additional source of business. Any associated referrals from the members of the plan also provide another source of business external to the fee schedule of the plan itself.

In addition, payment for services is guaranteed under a plan. For services that are covered under the plan, lawyers do not have to worry that clients may not pay their legal bills. Also, plans serve an educational function whereby plan members become more likely to

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<sup>183</sup> P.J. Keating and A.M. Schwartz, "How to Get into a Prepaid Legal Insurance Plan" (1984) 70 A.B.A. J. 84 at 85.

recognize when legal guidance would be helpful. This serves to increase the likelihood that plan members will seek legal advice. It also increases the likelihood that plan members will advise their friends to seek out legal help when it would be beneficial.

Finally, the plans bring in business without any associated marketing costs. Some argue that when the money a firm spends on marketing is taken into account, the difference between the legal services plan fee and other fees is much reduced.<sup>184</sup>

### III) Conclusion - Will Legal Service Plans Become More Common?

While proponents of prepaid plans predict that they will dramatically alter the way in which legal services are delivered in Canada, others are more skeptical. The CAW plan in Ontario/Quebec was greeted with resistance from the legal community and the suggestion from the Law Society of Upper Canada that participation in the plan might be professional misconduct. Members of the local Bars feared that the plans would have an adverse impact on their client base. They also feared that the lower fee schedules under the plan would lower the fees for legal services in the region generally. Litigation launched by both sides ensued, though a settlement was eventually reached.<sup>185</sup>

While the implementation of the CAW plan did not have the devastating effects on the legal community in Ontario/Quebec that some had predicted, it is possible that it had some effect on fees.<sup>186</sup> Regional resistance within legal communities is quite possible when new plans are proposed.

Besides institutional resistance within the legal community, there are other regulatory and taxation issues that may prevent prepaid plans from catching on in Canada. There are still unresolved issues with respect to Law Society rules in certain provinces: for example, whether the plan must allow clients to choose any lawyer, or whether a “closed panel” is permissible.<sup>187</sup> There are also unresolved issues as to the regulatory classification of legal plans. If, for example, a prepaid legal service plan is a form of insurance, provincial insurance regulations will apply to it. Whether this is so has not been determined yet.<sup>188</sup>

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<sup>184</sup> J. Dhalgren, “Consulting the Future” (1994), 80 A.B.A. J. 76 at 78.

<sup>185</sup> C. J. Wydrzynski, K. Hildebrandt and D.J. Blonde, “The CAW Prepaid Legal Services Plan: A Case Study of an Alternative Funding and Delivery Method for Legal Services”, (1990) 10 Windsor Y.B. Access Just. 22 at 29-30.

<sup>186</sup> Ibid. at 69.

<sup>187</sup> Ginsberg, note 3 at 9.

<sup>188</sup> The 1991 Report of the Insurance Legislation Review Project to the Ontario Insurance Commission recommended that prepaid legal service plans should be excepted from the definition of “insurance” in the *Insurance Act*. This recommendation was not acted on, leaving the situation ambiguous: Ginsberg, note 3 at 8.

Furthermore, there is a lack of consistency in certain regulatory policies and exemptions that may hamper the inter-provincial spread of a plan. In addition, prepaid plans are not exempted from employees' taxable income under the *Income Tax Act* in Canada. Taxable benefits are less likely to appeal to both employees and employers. This factor has been cited as a major stumbling block to the widespread development of plans in Canada thus far.<sup>189</sup>

Two main factors increase the likelihood of prepaid legal service plans becoming more common. The first is the primary justification for such plans noted above: they create new business for lawyers while providing affordable service to clients. Second, there is the growth of prepaid legal service plans in the United States. Companies there are growing and seeking new markets. For example, PrePaid Legal Services Inc., one of the leading U.S. prepaid legal service companies, has recently bought TPN Inc., a marketing company with a sales force of 30,000 and a television channel. It also has an independent sales force of 123,000 people in the United States.<sup>190</sup> As of July 1999, that company began operating in Ontario through a wholly-owned Canadian subsidiary, and expected to begin operating in British Columbia shortly.<sup>191</sup>

In one sense, then, there is no doubt that the future holds prepaid legal services plans in it. The only question is whether those plans will be operated by Canadian or American-owned companies.

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<sup>189</sup> Ginsberg, note 3 at 9.

<sup>190</sup> Ginsberg, note 3 at 2.

<sup>191</sup> Yahoo! Finance website, [http://biz.yahoo.com/bw/990707/ok\\_pre\\_pai\\_1.html](http://biz.yahoo.com/bw/990707/ok_pre_pai_1.html) (July 10, 1999).

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## **2020 Hindsight**

1) Prepaid legal service plans will become more common in Canada, at least in larger markets. They will allow lawyers to tap into the “latent legal market”, providing services at an affordable price to members of the public who otherwise would have gone without representation.

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Chapter Seven

# Unbundling Legal Services

“I'm just glad it'll be Clark Gable who's  
falling on his face and not Gary Cooper.”

**Gary Cooper, after turning down a lead role  
in "Gone With the Wind"**

## **I) Introduction**

There has already been discussion of the possibility of a “latent legal market”<sup>192</sup>. Similarly, the gap between the public’s need for legal services and its ability to afford legal services has also been noted.<sup>193</sup> This chapter pursues another option for providing legal services in a way that makes them more accessible: a process that is coming to be known as “unbundling”. The unbundling of legal services consists of being retained to perform only some limited portion of the work to be done on a client’s behalf. This is not a completely new concept, of course. In one way or another most lawyers have probably undertaken only some portion of a client’s case at one point, whether that be to give initial legal advice to a client but not represent him or her further, or to examine documents after a settlement has been proposed to the client. However, the conditions which make unbundling desirable from a client perspective have grown in recent years and seem likely to continue to grow.

The practice seems to be more common in the United States than in Canada at present, and there is very little Canadian literature on the subject. Nonetheless, unbundling seems likely to become more a part of the legal consciousness in Canada soon. The practice is not free from practical and ethical concerns. Still, if they can be adequately addressed, unbundling could become a useful approach to providing legal services and meeting the needs of clients and lawyers alike.

As a distinct approach to providing legal service, unbundling is beginning to appear in Canada, particularly in the family law area. The demand for it is likely to increase. Lawyers preparing to practise over the next 20 years will want to be familiar with the concept.

## **II) The Increase in Self-Represented Litigants**

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<sup>192</sup> See Chapter Three, Technology, Society and Law.

<sup>193</sup> See Chapter Six, Prepaid Legal Service Plans.

Although authoritative figures are not available, it seems that recent years have seen an increase in the number of people representing themselves in court (often called “*pro se*

litigants”), particularly in the family law area. Figures from Ontario’s Unified Family Court, for example, show an increase between 1995 and 1999 of nearly 500% in the number of people representing themselves.<sup>194</sup>

Litigants choosing to represent themselves does not have to be a bad thing, but it does come with some disadvantages. Many people represent themselves simply because they do not qualify for legal aid but cannot afford a lawyer.<sup>195</sup> Those people, it seems, would be better off if they had counsel. Other people choose to represent themselves because they prefer to do so. Though that is not objectionable in its own right, some figures suggest that self-represented litigants do not fare as well, often without knowing it. An American Bar Association study of *pro se* litigants in divorce proceedings, for example, found that they received lower maintenance orders, obtained tax advice less frequently, did not use temporary orders as frequently and were less informed about alternative dispute resolution mechanisms.<sup>196</sup>

Some litigants are self-represented only because they cannot afford counsel. Others prefer to represent themselves, but would likely benefit from legal advice at some stage. These situations create a new niche for providing legal services.<sup>197</sup> Unbundling legal services is aimed at filling that niche.

### III) How to Unbundle Legal Services

Forrest Mosten, the major proponent of unbundling, describes a number of discrete services lawyers can provide to clients, short of being retained to handle the entire file. Lawyers can advise about out-of-court settlement options, advise the client about strengths and weaknesses in the case, role-play strategies in a simulated negotiation, prepare letters or documents for the client to use, or assist in preparing budgets or analyzing income, among other things.<sup>198</sup> In the United States, some lawyers have already built practices around an unbundled model.

For example, it is possible to focus the services provided to clients around coaching them to conduct a negotiation personally. Properly advised, a client will be in a better position to

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<sup>194</sup> Jim Middlemiss, “Who Needs a Lawyer”, (Oct 1999) 8*The National* 12 at 14. Middlemiss advises caution regarding that figure, which might in part simply reflect court files not noting the name of counsel, rather than a litigant actually being unrepresented.

<sup>195</sup> Middlemiss, note 3 at 14.

<sup>196</sup> See Forrest S. Mosten, “Unbundling of Legal Services and the Family Lawyer”, (1994) 28 *Fam. L. Q.* 421 at 428. Forrest Mosten is the person most responsible for popularizing the term “unbundling” in this context. See also Dianne Molvig, “Unbundling Legal Services: Similar to Ordering A La Carte, Unbundling Allows Clients to Choose From a Menu the Service Attorneys Provide”, 70-SEP *Wis. Law* 10 (1997).

<sup>197</sup> Mary Helen McNeal, “Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients” (1997), 32 *Wake Forest Law Review* 295 at 298.

<sup>198</sup> Mosten, note 5 at 428-430.

represent him or herself in negotiations over separation or divorce issues, whether with the other spouse or a lawyer for that spouse. The lawyer can advise on the legal strengths and weaknesses of the client's situation, help the client understand some of the emotional dynamics of separation and how those can interfere with negotiations, and help the client develop a negotiating style. Some lawyers have clients do self-administered personality tests to help them determine what style is most likely to suit that person. Lawyers can also help prepare for the negotiation through role-playing, and even remain on-call to be consulted during the negotiation if necessary.<sup>199</sup>

Similarly, some lawyers play a role like this with regard to mediation. A lawyer can meet with a client for the sole purpose of developing a plan to take into a mediation. The lawyer can take a factual history, and help the client clarify his or her goals and priorities. The lawyer can also advise on appropriate mediators to select.<sup>200</sup> After the fact, the lawyer can advise on the form of any settlement agreement or assist in drafting any necessary documents.<sup>201</sup>

In addition, this same type of unbundling can be applied to the court process. Some lawyers do not represent clients in court, but assist them in preparing to handle the case personally. This preparation can include giving an overview of court processes, advising on legal issues likely to arise, drafting documents for the client to use, and advising on the types of questions to ask in cross examination or on the types of arguments that will be relevant to the judge's decision.<sup>202</sup>

The common link to all these approaches is that whether the client is seeking to resolve the issue through negotiation, mediation or litigation, he or she can be better prepared with the involvement of a lawyer. Even if, whether for reasons of cost or just personal preference, the client prefers to be self-represented in the actual process, early assistance and advice is likely to improve the client's result. From the lawyer's perspective, it is possible to create a niche and market legal services specifically to this group of clients.

From the lawyer's perspective, this type of practice would depend on being high volume, but with a low investment of time in any one case and the opportunity to develop real expertise. From the clients' point of view, for a much smaller investment than would be involved in being fully represented, he or she has been placed in a much better position for the upcoming proceeding, whatever its form.

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<sup>199</sup> Forrest S. Mosten, "New Mediation-Related Service Products" in *The Complete Guide to Mediation* (ABA Family Law Section, 1997) at 328-330.

<sup>200</sup> Mosten, note 8 at 327-328.

<sup>201</sup> Mosten, note 5 at 437.

<sup>202</sup> Mosten, note 8 at 331.

In this regard, it would be well to recall the discussion in Chapter Three of the use of technology to serve the latent legal market. It was noted there that some commentators feel that the World Wide Web creates a market for proactive services, focusing more on providing information to many people than advice tailored to a single client. Though not exactly the same, the unbundling of legal services shares some of the characteristics of the “commodity-based” approach described there. The unbundling of legal services and the potential for the greater use of technology in practising law may well come together in this way.

### IV) Concerns about Unbundling Legal Services

Not everyone is convinced that unbundling legal services is a wise choice; at the least, it should be done with caution, if at all. The central concern is whether lawyers will be acting for clients based on inadequate information, with potential unfortunate consequences. These consequences include the possibility of worse results for the client, and possible disciplinary complaints or legal action against the lawyer.

In the “ordinary” case, after all, it is clear that a lawyer is not simply to do what a client requests.<sup>203</sup> A lawyer has a duty to advise the client about the likely success of a claim and propose alternatives where appropriate. A lawyer should not just be a “mouthpiece” for a client and should not pursue useless litigation merely because he or she is instructed to do so.<sup>204</sup> A lawyer should not remain silent when a client is pursuing an unwise course of action.<sup>205</sup> A lawyer is supposed to have sufficient knowledge of the facts before offering an opinion.<sup>206</sup>

At a certain level, it can seem difficult to reconcile these ethical obligations with unbundling of services. Unbundling is, after all, simply doing only what the client requests the lawyer to do. Although that does not preclude the lawyer from being fully informed about the case, and possibly advising against the course of action the client intends to pursue, it is also not perfectly amenable with those obligations. Those who are cautious about unbundling fear that there is too great a risk to the client and the lawyer from the less-than-complete retainer.

A lawyer might, for example, assist a client by preparing an affidavit for a custody hearing. The lawyer might do a perfectly good job of taking the client’s instructions and preparing the document, but not know enough about the background to realize that the approach being taken by the client will harm, rather than help, the cause. Similarly, what if a client only wants assistance in drawing up a document reflecting the settlement that has been agreed to? A client might be settling for access in circumstances where he or she would likely be able to get

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<sup>203</sup> McNeal, note 6 at 310.

<sup>204</sup> Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1988) Ch. III(6).

<sup>205</sup> *Neushal v. Mellish & Harkavy* (1967), 111 Sol. J 399 (C.A.), quoted in Canadian Bar Association, note 13, Ch. III.

<sup>206</sup> Canadian Bar Association, note 13, Ch. III(1).

custody, or agreeing to less maintenance than might be obtained. Shouldn't the lawyer first be satisfied that the settlement is a reasonable one, and that the client understands what he or she is giving up?<sup>207</sup> There is a danger that the level of inquiry necessary to be assured of that fact is not consistent with the restricted notion of the retainer involved in unbundling.

In any of these hypothetical instances, the client has obtained more affordable legal service, but might not have been well served by that service. The client's interests might have suffered. The lawyer might be subject to discipline for failing to discharge the duty to a client adequately.

However, it is not clear how great these fears need to be. One might claim that a client who wants to pursue the bulk of a file personally takes the risk of being inexperienced and is entitled to do so. He or she is probably no worse off for having had some legal advice, even if choosing to have had more advice would have been better. And the basis for the lawyer's liability, or failure in any ethical duty, is unclear. Most ethical duties which talk about a lawyer's obligation to advise clients presuppose that the lawyer has been retained to handle the whole matter. In that context of course, the lawyer must be fully informed and must advise of alternatives. But the *Code of Professional Conduct* has not been drafted to consider very explicitly what duties arise where the retainer is quite limited. Rule III(3), for example, says that:

The lawyer should clearly indicate the facts, circumstances and assumptions upon which the lawyer's opinion is based, particularly where the circumstances do not justify an exhaustive investigation with resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than merely make comments with many qualifications.<sup>208</sup>

One might take this Rule to affirm the lawyer's obligation to offer well-informed advice. Equally, one might take it to recognize that the lawyer and client can agree that the lawyer's role is limited and the advice based on incomplete information.

It is always hard to say that something has never happened, but there do not appear to be circumstances in which a Canadian lawyer has been disciplined for failing to see and advise upon matters outside the terms of a limited retainer. Discipline for failure to do things for a client more typically results from not taking steps that were clearly expected by the client.<sup>209</sup>

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<sup>207</sup> McNeal, note 6 at 325.

<sup>208</sup> Canadian Bar Association, note 13, Ch. III(3).

<sup>209</sup> See for example *Law Society of British Columbia v. Bjorkman*, [1994] L.S.D.D. No. 121, where the lawyer received a summary of deliberations from the British Columbia Human Rights Commission, and failed to seek instructions from the client to file a response.

That there are no discipline cases to date, however, might only be a reflection of the fact that, at least in the family law context, the practice is new. In other contexts, such as business law, it might be more common to do only a portion of the work for a client. However, in that context there is an ongoing relationship with the client, and the lawyer can realistically judge the expertise of the client. That could be quite different from offering “one-time-only” service to a family law client.<sup>210</sup>

Some argue that the risk of client complaints or dissatisfaction is actually lower with unbundled services. First, it is argued, clients are more likely to complain about a lawyer when higher fees are involved. Since fees for unbundled services are lower, the risk of complaint is lower.<sup>211</sup> As a practical matter, this could be correct, though it is hardly a principled argument that the lawyer has behaved properly. It is also argued that the risk of complaint with unbundled services is low because there is much less that can go wrong. Many complaints, for example, arise from failure to communicate regularly with clients or from failing to meet necessary deadlines. Those are just the sort of duties a lawyer is much less likely to have when providing unbundled service, so there is less opportunity to go wrong.<sup>212</sup> Again, this might be correct, but it does not address the central question of what additional obligations a lawyer does take on if he or she offers unbundled services, nor of whether a lawyer might be responsible for results which he or she had only a limited role in bringing about.

What are those obligations? Is it correct, for example, to claim:

I have no problem with the client saying “I want you to do only these three things” out of the 11 that need to be done. But I do think it remains the lawyer’s obligation to point out that these are the 11 things that need to be done. The client isn’t going to know that.<sup>213</sup>

At present, that remains unclear. And understandably, no lawyer is anxious to be the person by whose actions the issue is cleared up. That does not mean, however, that some lawyers will not be interested in creating a niche for legal services by unbundling them. The challenge is in finding a way to do so that protects, as much as possible, the interests of both client and lawyer.

### V) How to Cautiously Unbundle Legal Services

The advantage to unbundled legal services is that the client pays a lower fee by obtaining only the limited services he or she wants. The trade-off is the service the client could have had but does not receive. As long as the client is genuinely fully informed about the nature of the

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<sup>210</sup> McNeal, note 6 at 334.

<sup>211</sup> Molvig, note 5 at 2.

<sup>212</sup> Molvig, note 5 at 3.

<sup>213</sup> Molvig, note 5 at 3.

arrangement and understands clearly what is given up, it should be possible to provide such services effectively and ethically. Indeed, it can be seen as consistent with the duty to provide services “in an efficient and convenient manner”.<sup>214</sup> A clear retainer letter is wise in any case; for unbundled legal services it is essential.

Mosten proposes a “limited scope engagement agreement”, designed to make clear to the client all of the services potentially available from the lawyer, and therefore showing all the things that need to be done on a particular file. His model form includes 17 services, ranging from “advice about availability of alternative means to resolve the dispute” or “evaluation of the client’s self-diagnosis of the case” to “assisting with substantive legal argumentation in an appeal” and “providing preventive planning”.<sup>215</sup> The specific services to be performed by the lawyer are checked off. Those not checked off are the responsibility of the client personally. Thus it is intended to be clear, once the limited scope engagement agreement is signed, that in a particular case, for example, the client is responsible for contacting and interviewing witnesses, but it is the lawyer’s job to do the legal research. Therefore the agreement not only serves to define the lawyer’s role, but also tells the client other steps that need to be performed.

Anyone planning to unbundle legal services on a large scale, however, would be well advised to inform the client in more ways than through the engagement agreement itself. Different types of cases require different evidence, and so simply leaving the responsibility with the client to contact witnesses gives that client insufficient guidance. It would be best to make sure that a client understands the nature of the particular dispute and the types of considerations that are relevant (and irrelevant, in family law matters).

However, anyone pursuing unbundling as a serious option, not simply as an occasional sideline, is likely to find the same types of cases arising regularly. There should be scope not only for building up expertise in the types of cases that arise, but also to develop tools for explaining matters to clients that could be regularly re-used. In Chapter Five, Alternative Billing, there was discussion of the use of “fixed-fee” billing for services that could be performed in high volume in a relatively similar way. Some aspects of unbundled legal services might lend themselves well to this approach.

## VI) Conclusion

Unbundling of legal services will continue to make some lawyers nervous because of the unsettled issues of liability. However, the need for unbundled services, especially in the family law area, is likely to increase. Whether one interprets that situation as a demand by clients or a

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<sup>214</sup> Canadian Bar Association, note 13, Ch. XIV.

<sup>215</sup> Mosten, note 8 at 324.

marketing opportunity for lawyers, the potential to create a new way of providing limited legal services exists. Provided lawyers are careful to see that client interests are adequately protected, it should be possible to unbundle legal services in a way that minimizes the risk to both parties.

## 2020 Hindsight

- 1) Unbundling of legal services will have become more commonplace, particularly for family law cases, with some lawyers carrying on practice largely or exclusively through delivery of such services.
- 2) Lawyers who successfully unbundle legal services in a way that serves clients well and avoids ethical problems will create very clear retainer agreements. These agreements will outline unambiguously the steps involved in whatever matter is being pursued and make clear who - the client or the lawyer - is responsible for each step.
- 3) Lawyers offering unbundled legal service will also advise on the specific steps involved in particular types of litigation, and on the legal and factual issues relevant to the case. The lawyer will make clear to the client what is required for steps that the lawyer is not undertaking.
- 4) Unbundled legal services are likely to be offered on a high volume basis, because the level of involvement with each client is notably less than with a full retainer. Fixed-fee billing is likely to be beneficial to both lawyer and client.
- 5) The marketing, and potentially even providing, of unbundled legal services, is likely to lend itself well to the use of the World Wide Web.

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Chapter Eight

# Delivery of Legal Services

“You ain't goin' nowhere, son.  
You ought to go back to driving a truck.”

**Jim Denny, Manager of the "Grand Ole Opry "  
to Elvis Presley, September 25, 1954**

## **I) Introduction**

There are a number of areas related to legal services where significant change is possible, but not certain, over the next 20 years. In some cases, these are areas where regulatory change is possible and contemplated, but whether such change will occur, and if so what form it will take, is not known. In some cases, this change is desirable for some groups, less desirable for others. These changes may close some options for lawyers, open others, or might simply change in various ways the manner in which law is practised.

## **II) The Possible Rise of Multi-disciplinary Practices**

A major potential for change in the practice of law arises from Multi-disciplinary Practices (MDPs). Exactly what change might result is particularly difficult to predict, however, since major policy issues around MDPs are being debated at this very time. The results of that debate are likely to settle the direction of any future change.

Where the traditional practice of law has assumed that lawyers form partnerships only with other lawyers, MDPs consist of groupings of several types of professionals within a single firm. Such groupings aim at providing a more complete range of services to clients. In the loosest sense, an MDP might really only constitute agreements between professionals to refer clients to one another. However, the more controversial forms of MDPs involve greater formal degrees of integration between the various professions. The most integrated, and most controversial, form would consist of partners drawn from several different professions, employing associates from different professions within a single management and financial structure.

At present, rules such as those preventing lawyers from sharing fees with other professionals prevent such organizations everywhere in Canada except Ontario.<sup>216</sup> Less integrated arrangements would include what are often referred to as “Captive Law Firms”, where, for example, an accounting firm establishes an associated law firm, which is administratively separate but serves exclusively clients of the accounting firm.

MDPs raise a variety of possible concerns for lawyers and for the legal profession generally. Issues about the independence of the legal profession, client confidentiality, privilege, conflict of interest, and unauthorized practice of law all arise, with competing views as to whether they can be satisfactorily dealt with. Some feel that the difficulties arising from the specific ethical obligations of lawyers, and the potential differences between those obligations and the obligations of other professionals, create too great a risk.

For reasons like these, the CBA’s International Practice of Law Committee Interim Report had recommended that MDPs should only be permitted if controlled by lawyers. However, MDPs have become increasingly common elsewhere in the world. Further, many people feel that the ethical concerns that will confront lawyers in MDPs are no greater than those now confronting lawyers employed in a variety of other circumstances, indicating that any potential professional responsibility issues can be adequately dealt with.

In August 1999, the International Practice of Law Committee of the CBA issued a Report on MDPs. The Committee recommended that:

- MDPs should be recognized to provide greater scope for choice and innovation regarding the provision of services by lawyers and others.
- Lawyers in MDPs must be subject to the rules of professional conduct of the law societies and remain responsible for ensuring that the services they deliver comply with all such requirements.
- The CBA and law societies will need to address specific regulatory issues regarding lawyers’ participation in MDPs, with a particular focus on the preservation of solicitor-client privilege in MDPs.

- Subject to the above:

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<sup>216</sup> International Practice of Law Committee, Canadian Bar Association *Striking a Balance* (Ottawa: Canadian Bar Association, 1999), at 11.

There should be no distinction drawn between MDPs involving “practices”, such as Captive Law Firms (CLFs), and fully integrated partnerships; and There should be no restriction on the kinds of services provided by MDPs.

- There should be no requirement of control of MDPs by lawyers.
- With respect to licensing, the majority of the Committee believes that at the present time MDPs should not be required to obtain a licence as a precondition to offering legal services, although circumstances may evolve which may require licensing of certain types of MDPs. The Chair believes that a licensing regime should be established as a precondition to MDPs offering legal services.<sup>217</sup>

However, the CBA has not yet taken a final position on the subject. A final report is expected at the CBA Annual General Meeting in August 2000. How matters will develop from there, and whether regulations in various provinces and territories will change, cannot be predicted at present.

### **III) Globalization and Legal Services**

Much is written about the globalization of the world’s economy. This trend is as true of legal services as it is of any other sector of the economy. In recent years, many larger Canadian firms have opened overseas offices, and even mergers with American firms are beginning to occur.

One likely focus for future change affecting the legal profession is the World Trade Organization, of which Canada is a member, and its negotiations over the General Agreement on Trade in Services (GATS). GATS is a trade agreement similar to the General Agreement on Tariffs and Trade (GATT), but dealing with trade in services. Among these are professional services, which include among others legal, accounting, engineering and architectural services. Specific rules under the broad framework still need to be worked out, which could take some time: the “Uruguay Round” of GATT negotiations, for example, took seven years.

There are several ways in which the GATS negotiations could affect the practice of law. One potentially relevant issue is the question of qualification to practise law in Canada, or in other countries, and the transferability of qualifications. Qualification requirements are the most significant barrier for providing services across borders. They are also generally the easiest to

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<sup>217</sup> Canadian Bar Association, “Multi-Disciplinary Practices: Summary of Striking a Balance”, Canadian Bar Association Home Page, [http://cba.org/MDP/SAB\\_Summary.asp](http://cba.org/MDP/SAB_Summary.asp).

justify as serving a legitimate objective, rather than being an unnecessary barrier to trade, because the content of law and of legal education differs from country to country. However, not all qualification requirements are essential. In Canada, for example, the rule that only Canadian citizens and British subjects could be admitted to a provincial bar society was struck down under the *Charter*.<sup>218</sup> Citizenship requirements still exist in some countries, but these types of restrictions might be the most likely to be eliminated in GATS negotiations.

Short of practising law more broadly in a country, however, it is possible for a lawyer to act as a foreign law consultant. A Canadian lawyer offering advice in Singapore on Canadian law would be a foreign law consultant. Equally, a lawyer from Singapore offering advice in Canada about the law in Singapore would be a foreign law consultant. Typically, foreign law consultants can also offer advice about international law. Rules about foreign law consultants will also need to be addressed in GATS negotiations. Even within Canada, there is variation among the different jurisdictions over what foreign law consultants are allowed to do, or the qualifications they require.<sup>219</sup>

Making international borders easier to cross in providing legal services carries both opportunity and risk. On the one hand, there will be a bigger market in which Canadian lawyers can try to sell their services. On the other hand, there will be a lot more players in the market, and Canada will have become part of it. On a global scale, even the largest Canadian firm is relatively small<sup>220</sup>, though that fact need not mean Canadian law firms cannot compete in the international market.

To the extent that globalization, and especially GATS, has an effect on the practice of law in Canada, it is likely to be in certain fields. It seems unlikely that lawyers or firms from out of the country will be competing in family law, criminal law, general litigation or real estate practices.<sup>221</sup> That there would be increased competition in these fields is more plausible if qualification requirements are relaxed due to GATS, in the sense that more lawyers might be practising in these fields, but that is not the likely result. More probable is that there will be greater competition in those areas that large firms handle, and which have a transnational dimension, for example, international business transactions, financial services, and large-scale mergers and acquisitions.<sup>222</sup>

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<sup>218</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

<sup>219</sup> Canadian Bar Association, "The World Trade Organization General Agreement on Trade in Services Negotiations: What It Means to Canadian Lawyers", Canadian Bar Association Home Page, <http://cba.org/EPIIgram/February2000/>.

<sup>220</sup> According to a recent survey, the largest law firm in the world is the US based Baker and McKenzie, with 2,487 lawyers, while second place is held by the United Kingdom's Clifford Chance at 1,958 lawyers. The only Canadian firm among the 50 largest was McCarthy Tetrault, in 36<sup>th</sup> place with 613 lawyers. Baker and McKenzie has 34 offices around the world, and almost 80% of their lawyers are located outside the United States. McCarthy Tetrault, by comparison, has only 1.1% of its lawyers outside of Canada: "Street Talk", April 2000 *Canadian Lawyer*, at 7.

<sup>221</sup> Canadian Bar Association, note 4.

<sup>222</sup> Canadian Bar Association, note 4.

## IV) Changes in Real Estate Practice

There is potential for major change, likely to affect more lawyers than will globalization, in the area of real estate law. In the past few years, title insurance, which has existed for many years in the United States, has begun to be marketed in Canada. Title insurance is a scheme allowing home buyers to insure against the risk of buying a house, and later having it transpire that they do not have good title, due to an improper survey, an undischarged security against the property, an undiscovered lien, or other such risks. Title insurance might be purchased in addition to having the title searched by a lawyer, though it is often marketed as an alternative to all or part of the work a lawyer would do before offering an opinion that the buyer is receiving good title. Because title insurance is likely to mean that titles are not searched as fully, the risk to home buyers is greater. If title insurance is successfully marketed in Canada nonetheless, it has the potential to have a major impact on real estate practice.

Title insurance has been and continues to be the subject of some study by lawyers. In 1997, the Federation of Law Societies of Canada created a National Title Insurance Committee. This committee was intended to monitor the impact of title insurance on conveyancing practices, and to identify significant issues arising from the changes occurring.

In 1998, the Canadian Bar Association decided to create a national program for real estate transactions. In consultation with the Federation of Law Societies, it was decided that the two organizations should undertake a joint project. In early 1999, a joint advisory committee, the National Real Estate Committee, was created. The Committee has a mandate which extends beyond just issues of title insurance: a number of emerging trends in real estate have been identified, including electronic registration, alternative service delivery models, changing financial services by lending institutions and the potential for a national title certificate.

The Committee “is committed to protecting the public’s interests, to the safeguarding of the interests of the real estate bar, and to the preserving of the integrity and reliability of the existing public land registration systems.”<sup>223</sup>

In particular, the project’s goals are:

- to provide a clearinghouse for information on evolving real estate practice issues in Canada;

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<sup>223</sup> Canadian Bar Association, “National Real Estate Project”, Canadian Bar Association Home Page, <http://cba.org/RealEstateProject/>.

- to promote public awareness of, and lobby provincial and territorial governments on, the importance of a continued role for lawyers and Quebec notaries in conveyancing;
- to promote the continued integrity of public land registration systems in Canada;
- to provide a liaison at a national level with other professions and institutions on issues relating to conveyancing;
- to promote uniformity of real property statutes and practices in Canada; and
- to develop national standards or products for lawyers and Quebec notaries, as appropriate.<sup>224</sup>

The Committee has a three-year mandate to pursue its work. Further reports on changes in the way real estate law is developing, and ways in which it should develop, can be expected to come out of the Committee's report.

### V) Legal Services Provided by Paralegals

Like lawyers, paralegals deliver legal services for a fee. Unlike lawyers, they operate without a license from a law society, and generally without a law degree. The situation is not uniform across the country, because of differences in provincial and territorial legislation. Still, in most provinces paralegals are able to deliver a few legal services.

Typically, these services will include appearing as an "agent" on summary conviction matters, in small claims court or before some administrative tribunals. Paralegals are neither regulated nor insured and, therefore, there are no standards for education, competence, registration or ethical conduct. The exact boundaries of practice between lawyers and paralegals are also sometimes in dispute and differ from jurisdiction to jurisdiction.

It is worth distinguishing between paralegals in two situations: supervised and independent. Supervised paralegals operate under the supervision of a lawyer, within a law firm or for an in-house counsel. Independent paralegals work, as the name says, independently.

#### 1) SUPERVISED PARALEGALS

Over the last 20 years, there has been major growth in the number of paralegals in the United States.<sup>225</sup> Supervised paralegals are now commonplace within American law firms. In contrast,

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<sup>224</sup> Canadian Bar Association, note 8.

<sup>225</sup> A. Schneeman, *Paralegals in American Law: Introduction to Paralegalism* (New York: Delmar Publishers, 1994).

although there are paralegals within many firms, their use has not grown in the same way in Canada.<sup>226</sup>

There are, however, several advantages that may spark future interest in employing paralegals within law firms. Supervised paralegals allow lawyers to make more efficient use of their time, by attending to routine matters and administrative work. This allows lawyers to focus on more complex legal services that they alone can provide. By ‘unbundling’ transactions in this way and delegating simpler tasks, a law firm can reduce its own costs and also bill the client at a lower hourly rate for the tasks performed by the paralegal. Well-informed clients will be reluctant to pay expensive hourly rates for routine services that could be delivered just as effectively by paralegals.<sup>227</sup> Ideally, the net result of employing paralegals is a lower cost to the client at no loss to the law firm, which allows the firm to be more competitive.

This use of paralegals should be uncontroversial and encouraged. Indeed, the CBA Special Committee on the Status of Paralegals (the “Strauss Report”) specifically recommended that CBA members “utilize, where appropriate, the services of paralegals in law firms in order to pass along the cost-saving to the legal services consuming public”.<sup>228</sup>

Paralegals may also be attractive to the in-house counsel departments of corporations. Internal pressures to reduce costs may lead to hiring paralegals for certain tasks, rather than more costly junior lawyers.<sup>229</sup> This could be true of any law firm, of course, but is particularly the case for in-house legal departments, which do not have the competing consideration of the rate at which the service can be billed out to a client.

There has been some concern that the growing numbers of supervised paralegals will compete for jobs with lawyers in Canada. For routine and administrative work, paralegals represent a cheaper alternative to hiring another lawyer. However, it is unlikely that supervised paralegals will be a real competitive threat to lawyers because they don't have the training necessary to deal with more complex legal matters. Supervised paralegals are useful for maximizing efficiency and cost effectiveness within a law firm, but only as assistants to lawyers. Unlike a lawyer, a supervised paralegal does not have the training to comprehensively deal with legal problems. In addition, junior lawyers have high billing-out value that paralegals do not.<sup>230</sup>

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<sup>226</sup> R. Black, “Corporations Take a Shine to Paralegals” (Nov/Dec 1996) 20 Can. Law. 9; D.W. Philips, “The Paralegal” (1986-87) 1 Can. Fam. L. Q. 173.

<sup>227</sup> Philips, note 11 at 174.

<sup>228</sup> Albert Strauss, Q.C. (Chair), Recommendations of the Special Committee on the Status of Paralegals to the CBA Council (Ottawa: Canadian Bar Association, 1989), recommendation 5. The recommendations in the Strauss Report were endorsed by CBA Council resolution 89-25-A.

<sup>229</sup> Black, note 11 at 9.

<sup>230</sup> J. Middlemiss, “Independent Paralegals: Friends in Need or Foes at the Gate?” (February 1993) 17 Can. Law. 26 at 28.

If there is any trend to be noted (though ruefully) it is the opposite - lawyers are competing with paralegals. It is already the case that some firms hire law graduates as paralegals. The real concern that lawyers, especially young lawyers, should have is not that supervised paralegals will take positions that would otherwise have gone to lawyers, but that people who are qualified to be lawyers will only be offered positions as paralegals, or as lawyers but at salaries comparable to an experienced paralegal.<sup>231</sup> This trend is similar to the “permanent associateship” track noted in Chapter Four, “Alternative Hiring Arrangements”.

### 2) INDEPENDENT PARALEGALS

While supervised paralegals are not used as commonly as they might be, there seems to be no real challenge to the legality of doing so. Quite a different situation has prevailed with independent paralegals. Legislation in each province defines the functions of law societies and tries to prevent unauthorized practice by people who are not members of those societies - as paralegals by definition are not.

In Ontario, paralegals are permitted to appear in court on trials of summary conviction charges. The Ontario Court of Appeal has ruled that judges have a duty to be certain that an accused is aware of the right to counsel and has made an informed choice to be represented by a paralegal rather than a lawyer. The judge should be sure the accused realizes that the paralegal is not required to have any training, that no minimum standard of competence is demanded of a paralegal (as it would be of a lawyer), and that the “accused will not have recourse to various remedies which might be available to him if the agent were a lawyer and performed inadequately”.<sup>232</sup> Once the judge is satisfied that the accused made an informed choice, however, the judge has no duty to ascertain that it is a wise choice, or to ascertain whether the paralegal is competent. If the accused chooses to be represented by a paralegal but it transpires that that was a bad choice, that is simply unfortunate for the accused. He or she cannot obtain a new trial based on incompetent representation, as would be possible if the accused had been represented by incompetent counsel.<sup>233</sup>

In some provinces, paralegals have been prosecuted for unauthorized practice.<sup>234</sup> As a result, the relationship between lawyers and independent paralegals has been largely defined

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<sup>231</sup> Black, note 11 at 11.

<sup>232</sup> *R. v. Romanowicz* (1999), 45 O.R.(3d) 506 (C.A.).

<sup>233</sup> The court acknowledged that in exceptional cases where representation by a paralegal would interfere with the proper administration of justice, the court retains a discretion to refuse to let the paralegal undertake the matter, or to declare a mistrial, but stressed that this would be out of the ordinary, and did not impose a general obligation on judges to assure that paralegals appearing in front of them were competent.

<sup>234</sup> See CBA Young Lawyers' Conference, *A Discussion of the Status of Paralegals in Canada* (Ottawa: Canadian Bar Association, 1994), in Chapter VII, “The Provincial Experience”.

through the court system rather than through negotiation. Different provinces have drawn the line in different places.

With respect to barrister-type services, the British Columbia Court of Appeal ruled that independent paralegals cannot represent people in court.<sup>235</sup> In contrast, the Ontario Court of Appeal held in the POINTTS case that independent paralegals can appear as agents before certain courts and tribunals.<sup>236</sup> That particular case dealt with a paralegal representing an accused in traffic court, but other paralegals appear in front of small claims courts, residential tenancy boards or other administrative tribunals. The aftermath of that decision led the Ontario government to create a Task Force on Paralegals (the Ianni Report), which recommended that paralegals should be permitted to practise in some fields, but should be regulated, and should be required to complete a two-year course of study.<sup>237</sup> The Canadian Bar Association has similarly recommended that independent paralegals should be regulated with regard to education and training and be subject to a code of professional conduct.<sup>238</sup> These recommendations have not been adopted to date in any province. The Ontario Court of Appeal has recently taken the unusual step of commenting on this failure, which it said “suggests indifference to the proper administration of criminal justice in summary conviction proceedings”.<sup>239</sup>

A larger concern is jurisdiction with respect to solicitor-type services.<sup>240</sup> Simple to moderately difficult solicitor-type services such as preparing wills, incorporating companies, performing real estate transactions and overseeing uncontested divorces translate into millions of dollars in legal fees annually.<sup>241</sup> If the courts decide that paralegals are entitled to perform these types of services, lawyers may lose a great deal of business if they cannot compete. In addition, since paralegals are not insured and are not necessarily trained, the risk to the public is greater when paralegals perform these tasks.

The impact of paralegals on the future of the legal profession is also likely to vary between jurisdictions depending on how common paralegals are in each jurisdiction. In some parts of Canada, there are few independent paralegals. In larger provinces, they are more common. The Ontario government recently asked former Justice Cory of the Supreme Court of Canada to make recommendations concerning areas of practice, governance, and educational requirements for paralegals. His report, released in June 2000, recommends that paralegals in Ontario should be

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<sup>235</sup> *Law Society of British Columbia v. Lawrie*, (1991) 84 D.L.R. (4th) 540.

<sup>236</sup> *R v. Lawrie & POINTTS Ltd.* (1987), 32 C.C.C. (3d) 549. The Ontario and British Columbia Law Society statutes differ in that Ontario’s statute restricts the practice of law to lawyers “except where otherwise provided by law”, while British Columbia’s statute has no such qualification.

<sup>237</sup> R.W. Ianni, *Task Force on Paralegals* (Toronto: Ontario Ministry of the Attorney General, 1990).

<sup>238</sup> CBA Council resolution 95-05-A. The resolution arose from a draft report prepared by the Young Lawyers’ Conference, *A Discussion of the Status of Paralegals in Canada*, note 19.

<sup>239</sup> *R. v. Romanowicz*, note 17 at 531.

<sup>240</sup> Middlemiss, note 15 at 28.

<sup>241</sup> Middlemiss, note 15 at 28.

permitted to appear before some courts and tribunals, and should be permitted to perform some solicitor services such as uncontested divorces and simple wills. He also recommends that paralegals should be governed by an independent body, and should be licensed. Licensing would require that paralegals take a two year community college course and spend three months in a mentoring program with a lawyer or licensed paralegal.<sup>242</sup>

At present, however, it is not clear to what extent lawyers lose business because of paralegals, and to what extent paralegals primarily serve clients who would otherwise remain unrepresented. The Ianni Report found many instances of clients choosing to leave their legal problem unsolved rather than pay the fees they expected a lawyer to charge.<sup>243</sup> It is not that a lawyer's higher fee cannot be justified: "lawyers offer a more complete, knowledgeable, and sophisticated quality of service".<sup>244</sup> However in many cases, clients "neither want nor require the degree of sophistication or detail provided by lawyers".<sup>245</sup>

The fact that a market for independent paralegals exists at all suggests that lawyers are not satisfying the full legal needs of the public, or at least are not perceived to do so. The Ianni Report suggested several reasons consumers use the services of independent paralegals.<sup>246</sup> The most commonly cited reason was that paralegals charged lower fees than lawyers. This was especially important in Small Claims Court matters, where the cost of a lawyer would make any potential recovery essentially meaningless, and in the defence of minor traffic matters, where the cost of a lawyer is generally not warranted as compared to the potential penalty that may be incurred. Secondly, some consumers felt that a lawyer would treat their relatively simple problem as a low priority matter, but that a paralegal would give their problem more immediate attention. Thirdly, some consumers reported that they felt more comfortable in the simple office setting of a paralegal as opposed to the intimidating atmosphere of a legal office.

There is room to question whether the public is fully informed on these issues, however. The Canadian Bar Association - Ontario (CBAO) has argued that the costs of hiring a paralegal are not necessarily lower than those of hiring a lawyer, both because paralegal fees can be higher than expected and legal fees can be less than the public might believe.<sup>247</sup> Further, the CBAO points out that many members of the public, at least in Ontario, are under the mistaken impression that paralegals are regulated.<sup>248</sup>

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<sup>242</sup> The Honourable Peter Cory, "A Framework for Regulating Paralegal Practice in Ontario" (Toronto: Publications Ontario, 2000).

<sup>243</sup> Ianni, note 22 at 29.

<sup>244</sup> Ianni, note 22 at 30.

<sup>245</sup> Ianni, note 22 at 30.

<sup>246</sup> Ianni, note 22 at 28-31.

<sup>247</sup> Canadian Bar Association - Ontario, "Response to a Request for Comments on the Paralegal Practice in Ontario", Submission to the Honourable Peter Cory, March 3, 2000, <http://www.cbao.org/Content/CORY-submission.pdf>, p.1, p. 23.

<sup>248</sup> The CBAO commissioned an Environics poll which found that more than three in ten Ontarians thought paralegals were subject to the same amount of regulation as lawyers: *ibid.*, p.2.

These expectations on the part of the public might not be correct, but it is incumbent on lawyers nonetheless to recognize them. If paralegals are primarily performing services that are not cost-effective for lawyers to perform (and whether this is so will differ greatly from lawyer to lawyer and from jurisdiction to jurisdiction), then paralegals represent relatively little challenge to the legal profession. They will be primarily operating in a niche not served by lawyers in any case. If, on the other hand, lawyers can affordably provide services that clients are seeking, then they will need to make that fact clearer.

Indeed, there is scope for lawyers to contemplate more formal arrangements of some sort with paralegals. There are already cases of law firms regularly referring work which they cannot economically do to a paralegal, and even of paralegals operating from the same premises as the law firm.<sup>249</sup> As with any other referral, the referring lawyer will want to be certain that the person receiving the work will perform it in a competent manner. This aspect of the relationship will be more complicated when a paralegal is involved, and a lawyer will want to be much more cautious because of the danger to the public that the absence of licensing and insurance brings. Still, in appropriate circumstances it could be an option worth pursuing.

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<sup>249</sup> J.G. Kelly, "The Case for Paralegals" (Oct 1997), 21 Can. Law. 15.

## 2020 Hindsight

- 1) Pressure to authorize MDPs is likely to increase. Whether they become more common will depend on the presence or absence of regulatory change.
- 2) National barriers to trade in legal services will be lowered but not eliminated. Qualification requirements might be relaxed, both in Canada and abroad, but in general are the types of rules easiest to justify.
- 3) Rules surrounding foreign legal consultants are most likely to be relaxed. This will be of greatest benefit to law firms that have established overseas offices. It will also increase the potential for foreign lawyers to provide some legal services in Canada.
- 4) The areas of practice most likely to be affected by globalization are international business transactions, financial services, and large-scale mergers and acquisitions. There is much less likelihood of an effect on the more usual practice areas of sole practitioners and small firms, such as family law, criminal law, general litigation or real estate.
- 5) There is scope for significant domestic change in the way real estate law is practised. Title insurance will be increasingly marketed by private companies, and other changes such as electronic registration or national title certificates could arise. These changes might reduce the need for legal services in some cases, but in others might simply affect the way those services are provided.
- 6) Lawyers should look for ways to unbundle legal services and delegate appropriate portions of the work to supervised paralegals: this approach will reduce fees to the client while remaining affordable to the lawyer.
- 7) Regulation of paralegals is desirable in the interests of the public, and at a systemic level lawyers should continue to lobby for such regulation.
- 8) In areas where paralegals practise, lawyers should try to determine the reasons that members of the public choose paralegals over lawyers. If the public is mistakenly of the view that such services would be unaffordable from lawyers, then lawyers should market their services in a way to clarify this misconception.

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Chapter Nine

# Conclusion

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**“I never make predictions,  
especially about the future.”**

**Variously attributed<sup>1</sup>**

<sup>1</sup>Eugene Volokh, "Technology and the Future of Law" (1995), 47 Stanford Law Review 1375 at 1403 notes that this saying has been attributed to Yogi Berra, Casey Stengel, Samuel Goldwyn, Will Rogers, Leo Durocher, Mark Twain, and Niels Bohr.

It is impossible to say to those early in their legal careers “pursue this field, and your practice will thrive”. There are too many ways in which society can change, and too many unpredictable events in one’s life, to be certain of the best course to set.

In addition, Canada is a large country, with a great deal of variation in circumstances from one part of the country to another. As well, lawyers practise in a wide collection of arrangements, ranging from sole practice to mega-firms.

Accordingly, no very specific advice can be useful to many people, and no general predictions can cover all lawyers.

Nonetheless, it is possible to observe trends that exist today or are beginning to emerge. Some of these trends already have an impact on the legal profession, which is likely to grow in the future. Others are only just beginning to be felt, and might or might not turn out to be significant. Others, like the rapid rate of technological change, have the potential to be a juggernaut, completely redefining a number of fields. For any lawyer, no matter where in the country, and no matter what the employment arrangement, being educated about these trends and being ready to react to them, or to anticipate and take advantage of them, will be beneficial.

This book is aimed at that goal, at making lawyers more aware of some of the factors likely to affect the practice of law over the next 20 years. This book is not the end point in preparing for practice over that time. However, it should serve as a useful starting point, and alert lawyers to issues with which they will want to become involved, markets they will want to explore, ways of practising with which they will want to be familiar, and policies they will want to pursue.

For ease of reference, the specific predictions and recommendations from the previous seven chapters are assembled here.

### Summary of Predictions and Recommendations

#### CHAPTER TWO: DEMOGRAPHIC CHANGE

- 1) Elder law will have become a recognized area of practice. It will include a focus on issues of estate planning, pensions, reverse mortgages, residential tenancy, and employment law with a special focus on the needs of elderly clients, as well as guardianships, advance directives and other health-related issues.
- 2) A sensitivity to the legal needs of immigrants will be more important, as the percentage of the Canadian population who are immigrants continues to grow. Knowledge of other languages and familiarity with other cultures will be valuable to a lawyer in serving the varied legal needs of Canadians from a variety of origins.
- 3) Aboriginal peoples will continue to become legally and politically stronger. Aboriginal peoples will have an increased ability to enter the marketplace and to finance economic ventures.
- 4) The need for family law services will continue to grow. Access to those services will continue to be difficult for many clients. At a systemic level, lawyers would do well to lobby for stronger legal aid plans which support the family law needs of Canadians. At an individual level, lawyers might want to investigate some of the alternative billing practices discussed in Chapter Five.

#### CHAPTER THREE: TECHNOLOGY, SOCIETY AND LAW

- 1) The use of a variety of new technologies will be essential and commonplace. Becoming comfortable in that environment will be essential. It will not be necessary to be familiar with the “nuts and bolts” of new systems: to use a car you need only be a driver, not a mechanic.
- 2) The practice of law will be more heavily reliant on technology. This will take a variety of forms, including increased electronic communication between lawyers, with courts and with clients. Legal research will be increasingly electronic. Be aware of new approaches to research, such as expert systems. These new approaches might never completely replace current methods, but they will become more important.
- 3) Technology will give rise to new types of legal claims and new areas in which law is important. Privacy concerns and issues over the use of data are likely to become more important. E-commerce will give rise to new legal issues. These will relate to the formation of contracts and to their breaking down, as well as to new regulatory issues.
- 4) The World Wide Web will become of increased importance to legal practice. At the least it will be a means of marketing legal services over a wider area. This change will carry with it the

opportunity to provide services in a larger market, as well as the threat of competition from a much larger pool. It will also give rise to issues concerning regulation of lawyers. The Web will likely be a means of communication with others in more significant ways than just e-mail. The Web will potentially be a means of carrying on at least some legal business - the technology to permit this readily will exist, and the issue will be consumer demand. There is a potential advantage to being among those in the vanguard of seeing whether there is such demand.

5) Virtual law firms will become more common. They are unlikely to replace traditional firms as a dominant mode of practice, but there will be a niche for them. By the same token, greater cooperation between some lawyers in disparate physical locations will become much more common.

6) The “disintermediation” of legal services is unlikely to happen on a large scale, but there are pressures toward it. Looking for ways in which the approach to delivering legal services can be restructured will be valuable for at least some lawyers, even if consumer demand does not force it on the entire profession.

7) “Routine” documentation type work - any tasks that can relatively easily be reduced to a series of steps that are readily assisted by a computer program - seems unlikely to be a growth area for legal practice, and lawyers would do well in the future to focus their energies elsewhere.

#### **CHAPTER FOUR: ALTERNATIVE HIRING ARRANGEMENTS**

1) Current trends affecting the change in hiring and career patterns will have continued at large firms. There will be further movement away from the “up or out” system. Lawyers can expect to see the following:

- a) longer times to reach full partnership;
- b) more “intermediary” stages between associate and full partner;
- c) options for permanent associateship that reflect the interests of lawyers as much as they reflect the interest of the law firm; and
- d) greater opportunities for part time work.

2) Lawyers will be well advised to research the separate and more complex issues involved in some of these “alternative” hiring arrangements, in order to be prepared to negotiate around the important questions. Lawyers who might be interested in such alternatives would be wise to try to create such options within their firms as a general policy, rather than wait and negotiate a single arrangement.

3) Lawyers in small firms should investigate and be familiar with the range of considerations involved in negotiating hiring arrangements other than straight salary. Such arrangements

already exist and are likely to become more widespread. They can benefit both sides if everyone's interests are properly considered.

4) Lawyers in private practice will increasingly be able to look to expand their work options by investigating virtual law firms, freelance work or lawyer placement services.

### **CHAPTER FIVE: ALTERNATIVE BILLING**

1) A large scale shift away from hourly billing is unlikely to occur naturally. However, that creates a marketing opportunity for lawyers interested in pursuing options that could be more satisfactory to both clients and lawyers.

2) Lawyers who succeed at creating workable alternatives will have calculated their real costs for providing legal services, including overhead, training, support staff, technology and so on. They will have done more work "up front" in establishing the cost, and therefore the appropriate price, of the service, rather than leaving that calculation to the end.

3) Workable alternatives will depend on clear retainer letters, which define exact tasks to be performed, and the exact basis for billing, whatever it should prove to be.

### **CHAPTER SIX: PREPAID LEGAL SERVICE PLANS**

1) Prepaid Legal Service Plans will become more common in Canada, at least in larger markets. They will allow lawyers to tap into the "latent legal market", providing services at an affordable price to members of the public who otherwise would have gone without representation.

### **CHAPTER SEVEN: UNBUNDLING LEGAL SERVICES**

1) Unbundling of legal services will have become more commonplace, particularly for family law cases, with some lawyers carrying on practice largely or exclusively through delivery of such services.

2) Lawyers who successfully unbundle legal services in a way that serves clients well and avoids ethical problems will create very clear retainer agreements. These agreements will outline unambiguously the steps involved in whatever matter is being pursued, and make clear who - the client or the lawyer - is responsible for each step.

3) Lawyers offering unbundled legal service will also advise on the specific steps involved in particular types of litigation, and on the legal and factual issues relevant to the case. The lawyer will make clear to the client what is required for steps that the lawyer is not undertaking.

4) Unbundled legal services are likely to be offered on a high volume basis, because the level of involvement with each client is notably less than with a full retainer. Fixed-fee billing is likely to be beneficial to both lawyer and client.

5) The marketing, and potentially even providing, of unbundled legal services is likely to lend itself well to the use of the World Wide Web.

#### **CHAPTER EIGHT: DELIVERY OF LEGAL SERVICES**

1) Pressure to authorize MDPs is likely to increase. Whether they become more common will depend on the presence or absence of regulatory change.

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7) Regulation of paralegals is desirable in the interests of the public, and at a systemic level lawyers should continue to lobby for such regulation.

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