



CBA LEGAL
FUTURES
INITIATIVE

FUTURES:
**TRANSFORMING THE DELIVERY
OF LEGAL SERVICES IN CANADA**



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION



Executive Summary

The legal profession in Canada is entering a period of major change. The combined forces of globalization, technology, and market liberalization are creating new services, new delivery mechanisms, and new forms of competition. Those changes are altering client needs and expanding client expectations. Clients want services to be quicker, cheaper, and smarter. They want more transparency and involvement, and they want to be and stay connected.

At the same time that the demand from existing clients is changing, there are still many individuals and communities in Canada with inadequate access to any type of legal services. In many cases, the Canadian legal profession still does not reflect or understand the needs of an increasingly diverse population.

The key to establishing a viable, competitive, relevant and representative legal profession in Canada in the future is **innovation** — not just the development and adoption of technology-driven platforms and service delivery models, although they are critical, but also through new ideas about how lawyers are educated and trained, and how they are regulated to maintain professional standards while protecting the public.

Because the legal profession is not homogeneous, it is important to build **flexibility** and **choice** into any proposed changes for the future. One size does not fit all.

The 22 recommended actions in this report are based on seven key findings:

In terms of business models, lawyers need to be freed to work differently through new structures and in conjunction with other professionals (including alternative business structures).

Lawyers should be allowed to practise in business structures that allow ownership, management and investment by persons other than lawyers or other regulated professionals. Multi-disciplinary practices and fee-sharing with non-lawyers should be allowed. All of these proposed changes must be carried out under the oversight of an enhanced regulatory framework.

A shift toward the introduction of new business models requires regulation of entities in addition to the regulation of individual lawyers. This form of dual oversight would allow continued innovation in legal service structures and delivery to provide better quality services to clients, while maintaining the rules of professional conduct expected from lawyers.

A commitment to diversity in the Canadian legal profession should also be embedded within the entities delivering legal services to Canadians. In addition, diversity should be part of the construction of the

governing bodies of law societies to ensure that there is more meaningful representation of the diverse Canadian society within the profession.

In this dynamic future environment, it will be important for lawyers to obtain lifelong education and training. This will require more flexibility and choice in the way new lawyers are educated and trained, as well as innovative models and courses of study for pre-call training and continuous professional development.

There will also be new legal disciplines created, such as legal knowledge engineers, legal process analysts, legal support system managers, and legal project and risk managers. Parallel legal programs should be developed at existing legal education institutions or through new legal education and training providers.

To facilitate all forms of innovation, there is a need for more data on the Canadian legal profession. There is also a need for a central place where the information can be examined, validated, and distributed, as well as where information about innovative practices and solutions can be collected, endorsed, and celebrated. The establishment of a centre of expertise would fulfill this purpose.

The transformation of legal services in Canada represents an outstanding **opportunity** for lawyers — whether they practise in large, medium, small or solo firms, as in-house counsel, in government, or in not-for-profit organizations — to provide valuable new services to an expanding client base. The liberalization of the legal profession also provides a unique opportunity for legal educators and legal regulators to revisit their existing structures and methods and re-invent them to support the lawyers and law organizations of the future.

Finally, the Canadian Bar Association, as the voice of the legal profession in Canada, will continue advocating for a flexible, dynamic and responsive legal marketplace, and preparing lawyers and their clients to benefit from these changes. As a champion for innovation, the CBA can facilitate a national dialogue on the possibilities, as well as the practicalities, of transforming the legal profession in Canada.

Summary of Recommendations



1 Flexibility in Business Structures

Lawyers should be allowed to practise in business structures that permit fee-sharing, multidisciplinary practice, and ownership, management, and investment by persons other than lawyers or other regulated legal professionals.

2 CBA Promotion of Innovation

The CBA should take a leadership role in promoting innovation as follows:

- support and facilitate innovation incubation;
- facilitate a national dialogue on innovation in the legal profession;
- consider the development of an investment fund for innovations;
- create an innovation chair and/or an innovation scholarship; and
- establish innovation awards.

3 Centre of Expertise and Information

The CBA should establish a professional centre of expertise and information on the legal profession in Canada that would be the pre-eminent and authoritative source of data on all aspects of the legal profession in Canada, including its organization, demographics, volumes and types of services, and national and international comparators.

4 Alternative Business Structures

Non-lawyer investment in legal practices should be permitted, but only on a carefully regulated basis as follows:

A business or not-for-profit corporation should be eligible for registration as an alternate business structure (ABS) within which the fee-sharing rule would not apply.

An ABS should be permitted to deliver legal services on the following basis:

- (a) the ABS itself would have fiduciary and legal ethics obligations in respect of clients receiving legal services through the ABS. The legal advice should be provided to clients solely in the interests of the client and not in the interests of the ABS or its owners;
- (b) the ABS would be subject to law society entity regulation;
- (c) the ABS would be subject to other existing FLSC Model Code rules, such that:
 - (i) the confidentiality rules apply;
 - (ii) the conflicts rules apply, including where other services are offered by the ABS to clients receiving legal services; and
 - (iii) the candour rule applies, including with respect to any conflicts of interest that may exist.
- (d) the lawyers working within an ABS should continue to be regulated persons;
- (e) the provision of legal services would be required to be carried out by lawyers or other regulated legal professionals as permitted, or provided by legal or non-legal professionals who are effectively

- supervised and controlled by lawyers;
- (f) material owners of ABS shares should be deemed to be clients for the ABS for the purpose of applying the conflicts rules;
- (g) privileged information should not be accessible for purposes of the ABS, including by the management and directors of the ABS, without informed express client consent and then only for the benefit of the client;
- (h) the ABS would be required to purchase insurance covering claims from clients in respect of legal services with current per claim coverage and with aggregate limits being no less than currently required for lawyers but increasing with the size of the ABS.

5 **Fee-sharing with and Referral Fees to Non-Lawyers**

The FLSC Model Code Rules should be amended to permit fee-sharing with non-lawyers and paying referral fees to non-lawyers, subject to the following:

- (a) the conflict rules apply;
- (b) the confidentiality rules apply and privilege must be protected;
- (c) the candour rule applies, meaning full disclosure of the shared fee and of the nature of the relationship with the entity with which the fee is shared must be made to the client;
- (d) the referral fee must be fair and reasonable and fully disclosed;
- (e) shared fees may not be contingent on the revenue or profitability of specific matters or as the result of such matters;

- (f) the lawyer shall not accept the referral unless the lawyer and the client discuss any client expectations arising from the referral and mutually agree on the basis of the retainer;
- (g) an accounting record is required of referral fees paid and received indicating the amounts and counterparties to each payment; and
- (h) referral fees shall not be accepted where the lawyer is aware that the referral is exploitive.

6 **Delivery of Non-Legal Services by MDPs and ABSs**

MDPs and other forms of ABSs should be permitted to deliver non-legal services together with legal services on the basis that the rules should require protection of privileged information by requiring that non-lawyers, including partners/owners, not have access to privileged information except with express informed client consent. The rule or the commentary should provide that:

- (a) the confidentiality rules apply and privilege must be protected;
- (b) the conflicts rules apply, including where other services are offered by the MDP to clients receiving legal services; and
- (c) the candour rule applies, including with respect to any conflicts of interest that may exist.

Breach should attract entity and individual sanction. If the public interest demonstrably requires that some non-legal services should not be provided together with legal services, the rules should so provide. Otherwise there should be no restrictions.

7 Independence of Lawyers' Opinions

In response to concerns about lawyers' independence, including their independence in new liberalized structures for legal service delivery, the Commentary to Model Rule 3.1-2 should be amended to add Commentary 8.1 and to revise Commentary 9 as follows:

[8.1] A lawyer should only express an opinion to a client that the lawyer genuinely holds and that is reasonable in the circumstances.

[9] A lawyer should be wary of bold and overconfident or unreasonable assurances to the client, especially when (i) it is foreseeable that the client may rely on the lawyer's advice as to the legal propriety of proposed conduct or (ii) the lawyer's employment may depend upon advising in a particular way.

8 Compliance-Based Entity Regulation

Compliance-based regulation of legal practices should be adopted to promote ethical best practices as a supplement to existing rule-based regulation of individual lawyers. Under compliance-based regulation:

- (a) law firms would be required to register with the law societies;
- (b) law firms become regulated entities upon registration;
- (c) law firms would be required to designate a lawyer with whom the law society may deal on behalf of the law firm and who is responsible for overseeing law firm regulatory compliance; and

(d) regulation of law firms would include the requirement of supplementary compliance-based regulation to promote ethical best practices.

9 Compliance and Reporting on Diversity

Law societies should require law firms, and ABSs if permitted, to comply with diversity-related principles that reflect legal and ethical requirements. Law societies should also uniformly collect qualitative and quantitative data about the demographic composition of all licensed legal service providers (lawyers, law firms, and ABSs), and publish the data in aggregate form.

10 Effective Supervision of Non-Lawyers

The FLSC Model Code Direct Supervision rule should be revised to require effective supervision rather than direct supervision. The requirement of effective supervision would be satisfied either by direct supervision or by the establishment of a well-designed process, automated or not, which:

- (a) gathers all appropriate client information;
- (b) identifies for consideration and action by a lawyer:
 - (i) issues requiring the legal expertise of a lawyer; and
 - (ii) "red flags" indicating legal, ethical and other similar legal issues.
- (c) requires the lawyer to undertake tasks not permitted to be delegated to a non-lawyer;
- (d) provides for effective quality assurance; and
- (e) protects confidentiality and privilege.

11 Law Society Directors

The governing bodies of law societies should be made up of elected lawyers, as well as a significant number of appointed lawyers and non-lawyers. The appointed governors should be selected by an independent appointment process designed to fill gaps in experience, skills, and diversity.

12 Expanding Criteria for Law School Admission

Law school admission criteria should consider other factors, including applicant life experience, as an alternative to the present minimum two-year pre-law university study.

13 Debt Forgiveness Programs

Debt forgiveness programs should be established for graduates who practise within under-served communities, with low-income individuals, or primarily in the public interest.

14 Law School Entry and Exit Data

Law schools should gather and publish qualitative and quantitative data on the composition of students entering and exiting law school.

15 New Models for Legal Education

Legal education providers, including law schools, should be empowered to innovate so that students can have a choice in the way they receive legal education, whether through traditional models or through restructured, streamlined or specialized programs, or innovative delivery models.

16 Problem-solving in the Practising World

An integrated, practical approach, including multidisciplinary skills training, should be incorporated into curricula to provide “translational knowledge” — the ability to turn critical knowledge of legal concepts, regulatory processes, and legal culture into actual problem-solving ability in practice.

17 Focus on Learning Outcomes

The curriculum for academic legal education should focus on learning outcomes and should be developed in consultation with key stakeholders.

18 Easing Restrictions on Law Students in Legal Clinics

Where they exist, legal and other constraints should be minimized to broaden the participation of law students in appropriate services in legal educational clinics.

19 **Structured, Rigorous and Consistent Pre-call Training**

There should be a structured, rigorous, and consistent approach to pre-call training to ensure new lawyers have all the skills and knowledge required to practise safely and effectively.

20 **Consistent Knowledge and Skills Standards for Certification**

Consistent knowledge and skills standards should be applied to Canadian law degrees and National Committee on Accreditation certificates of qualification.

21 **Parallel Legal Programs**

Educational providers should consider creating parallel programs in areas such as legal technology, in college or other environments, or incorporated into law school education, to educate and train new streams of legal service providers which may include lawyers.

22 **Continuing Professional Development**

Continuing professional development should be designed to meet lawyers' needs through the stages of their careers and reflect identified and emerging client needs. Legal regulators should adopt consistent outcome-based national standards for CPD. Research should be undertaken to measure any link between quantity or input-based CPD and competence.

