

CBA LEGAL FUTURES INITIATIVE

CONTRIBUTING PERSPECTIVE

KEY TRENDS IN THE LEGAL MARKETPLACE

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its Legal Futures Initiative



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FOREWORD

I was asked by the Canadian Bar Association (CBA) to prepare a report on trends and developments in the legal marketplace, with particular reference to Canada. This initiative was conceived as an early stage in the CBA's recently announced 'Inquiry into the Future of Legal Practice' (Inquiry).

The purpose of this report, accordingly, is to lay out a series of issues that the Inquiry may choose to address in the course of its work. My intention is to widen horizons, draw attention to areas of concern and opportunity, provoke debate and thinking, and to set the scene for Inquiry members and others who are seeking to understand existing and emerging trends in the Canadian legal world.

I organize my analysis and observations under the following six headings:

- market conditions;
- access to justice;
- alternative sourcing;
- information technology;
- in-house lawyers; and
- legal education.

Under each of these broad categories I consider a range of particular issues, each of which, in my view, raises some crucial questions about the future of legal practice.

It is not my purpose in this report to provide solutions or recommendations in respect of all of the issues that I raise. Although I have done this in my published work, I am aware that my conclusions and predictions do not command universal support across the Canadian legal profession. It is not my job here to defend my own position. Instead, it is to draw attention to a wide range of vital issues and to encourage the Canadian legal profession to come to its own conclusions and identify its own path ahead.

This report is not intended as a contribution to the academic literature on the future of legal services. Nor is it held out as a piece of rigorous social science. Instead, it reflects my own experience of the Canadian legal profession since late 2008, when the CBA first invited me to speak at one of their conferences. Because my thinking seemed to resonate, they invited me in 2009 to become their Special Adviser and, in turn, I have met many lawyers across Canada and have received many invitations to speak and consult with law firms and in-house legal departments. I have visited Canada more than 15 times in the past few years, and given over 30 presentations, at a wide range of events: at public conferences; and at workshops and seminars with practitioners in law firms, in-house lawyers, judges, academics, and government officials. From feedback, interaction, and discussion on these occasions, and from my consulting work, I have gained a fair sense of the Canadian legal world, and have been able to supplement this insight with perceptions of the Canadian market from my UK and US clients, and from UK and US academics. In preparing this report, I have drawn on all of this recent experience.



1. MARKET CONDITIONS

The legal market in Canada (and in most advanced jurisdictions), is progressing through a period of considerable change. There are few lawyers and commentators who believe that the practice of law and the administration of justice will be much as they are today in, say, ten years' time. Instead, there is a growing and widespread expectation that the legal marketplace is set to undergo substantial change, if not transformation. In this section I identify those factors that I feel are most likely to give rise to an evolution, and perhaps even a revolution, in legal services.

○ 1.1 PRESSURES ON COSTS

Across the legal market, from the largest businesses to individual consumers, there seems to be a rapidly mounting pressure on costs. Grim economic conditions are bringing a level of cost consciousness to large organizations in respect of all expenditure, and so it is not surprising that General Counsel invariably report that they are under pressure to reduce their spend on external law firms and reduce their internal head count. Many suggest that their legal budgets will need to be cut by 30-50% over the next three to five years. At the same time, most will also say that they have more legal and compliance work to undertake than in the past. This gives rise to what I call the 'more-for-less' challenge — a phenomenon that, I believe, will underpin and define the next decade of legal service. How can lawyers and their clients together find ways of providing more legal service at less cost?

Although the legal market is diverse and very often the needs of in-house legal departments bear little resemblance to those of individual consumers, the more-for-less challenge seems to extend evenly across the economy and society; and so, small and medium sized businesses, who cannot afford their own in-house legal capability, frequently report that they are only able to afford external legal advice sparingly. Similarly, very few individual citizens have the wherewithal to instruct external lawyers and only do so in respect of a few critical issues. Given the pressure on public legal funding, this results in considerable unmet legal need.

Since the global economic downturn, the pressure on costs has intensified and it is widely held that a return to prosperous times is unlikely for many years yet. Accordingly, the more-for-less challenge seems to call not for short term tactical fixes but for longer term, sustainable strategies that will enable affordable legal advice to be more widely available.

Two very broad responses to the challenge have emerged. First, there has been a drive in many law firms and legal departments towards far greater *efficiency*, not just in the back office but in the way legal work itself is conducted. Second, and more radically, there is a school of thought which holds that streamlining traditional legal service will not yield sufficient savings and that, in a number of ways, what is needed is new and quite different ways of delivering and receiving legal services.

○ 1.2 COMMODITIZATION

It is often said with great regret by practising lawyers that there is a trend towards the commoditization of legal services. By this, it is often meant that legal work, which used to require hand-crafting by legal specialists, has now, in some way, been standardized or systematized so that the service of the traditional lawyer is scarcely needed. While this broad development is clearly threatening to conventional law firms, the other side of this coin is that some, if not many, areas of legal practice can be routinized and so provided to clients at far lower cost. Complex work that once occupied the time of legal practitioners might be reduced to some kind of reusable commodity.

The general trend towards standardizing and systematizing professional work is not one that is confined to law. We see this also in medicine, audit, teaching, and many other professions. For many commentators, this is the natural evolution in professional services. For many clients, the reason they choose one advisor over another is often precisely because they prefer the provider who has considerable experience and will not need to reinvent the wheel.

There are two over-simplifications often found in discussions about commoditization. The first is that legal work is either 'bespoke' (hand crafted, tailored, and customized for each particular client's problem) or commoditized (available as a non-chargeable commonplace). However, experience from other professions suggests that the standardization or even systematization of legal work does not necessarily render it into a commodity for which no charge can be levied. For example, a law firm that builds up its own body of templates or standard form documents can often use this as a source of competitive advantage without this work product being reduced to a mere commodity. Equally, lawyers who invest in work flow systems for the conduct of high volume, low value work, often inject greater efficiency without devaluing their offerings.

The second mistaken view of commoditization is that this notion applies entirely to some areas of work and not at all to others. More particularly, it is claimed that high volume, low margin work can be commoditized but 'high end' work cannot. It is increasingly recognized that this does not reflect the nature of legal work. On the contrary, for many, if not most, legal matters, whether they are high or low value, there are invariably elements that can indeed be commoditized, while other components do still require to be undertaken in a traditional, bespoke way. There is no simple mapping of commoditization onto low value work; large elements of high value work can also be

routinized. The challenge here, for all kinds of work, is to disentangle those parts of work that are susceptible to commodity treatment and those that genuinely deserve human handcrafting.

○ 1.3 LIBERALIZATION

In some countries, most notably England and Wales, the legal profession is being liberalized. This does not mean that legal services and legal service providers are no longer regulated. Instead, liberalization is intended to allow market forces to flow more freely in the legal marketplace. In England and Wales, for example, the Legal Services Act of 2007 now permits, broadly speaking, non-lawyers to own legal businesses and for external investment to be made in law firms. The Act allows the establishment of 'alternative business structures' which look very different from legal partnerships of yesteryear.

It is much too early to draw definitive conclusions about liberalization in England but it is clear that there is more innovative and entrepreneurial thinking about legal services in the UK than ever before. From private equity firms to supermarkets, there is great interest in capturing new share of the £25 billion legal market; and the differentiation that the new legal businesses tend to offer is less costly and more client friendly legal service than that traditionally offered by law firms. The Co-operative Bank, for instance, has announced its commitment to recruiting three thousand employees to deliver legal services from over 300 High Street branches. The world's first publically quoted law firm, Slater & Gordon, in Australia, has purchased a large English law firm. And the Royal Bank of Scotland has estimated that over £1 billion of private equity is available for investment in the legal market.

These developments might be seen in Canada as being peculiar to England. However, if, as seems likely, this liberalization gives rise to new and improved legal businesses and new ways of offering legal services, then news of these innovations will spread around the legal world and clients in other jurisdictions may not unreasonably ask for similar innovations in their own countries. In other words, liberalization in some jurisdictions will give rise to pressures in others. There will be a ripple effect across the legal world. It may therefore be that those jurisdictions that do not liberalize will be at a disadvantage as compared with those that are able to organize legal services in a more market friendly way. On the other hand, the Canadian legal profession may see advantages in liberalization, not just to keep up with other jurisdictions, but as a catalyst in bringing about modernization or improvement to legal services that are unlikely to be stimulated from within a closed market.

○ 1.4 NEW COMPETITORS

New competitors to traditional law firms are gradually emerging. In liberalized jurisdictions, of course, these new players are appearing more rapidly. But the attraction of the legal market for commercially astute businesses is by no means confined to jurisdictions that allow external investment and alternative business structures.

It is widely expected, for example, that the 'Big Four' accounting firms will greatly increase their presence in the legal marketplace over the next few years. At the same time, large global legal publishers are highly acquisitive and are moving swiftly from the provision of books and online legal databases to other forms of legal solutions. Equally, legal process outsourcers are gaining ground, delivering routine legal services such as document review in litigation

and due diligence work. Also of growing influence are agencies that make experienced lawyers available on a contract basis (and generally at half the price of conventional law firms).

Most of these new competitors, and there are others, are not intending to compete directly with law firms for conventional mainstream legal work. Instead, they have recognized that there are many routine legal tasks that do not require the expertise and expense of conventional firms; tasks such as project management, document review, basic contract drafting, and rudimentary legal research. The new competitors argue to clients that these tasks can be more efficiently undertaken by them — at far lower cost and to a higher quality.

In the past, law firms provided a wide range of services, only some of which required deep legal experience and expertise. New players in the market are challenging the old model, so that work that is more administrative and process-based in nature need no longer be undertaken by conventional law firms in Canada.

○ 1.5 INTERNATIONAL DEVELOPMENTS

Changes in the global legal marketplace and the demands of international clients are of little relevance, of course, to rural firms or sole practitioners.

However, these international developments are of direct impact on Canada's largest law firms (legal businesses whose significance for the legal profession and for Canada's legal reputation globally cannot be overstated).

The essential issue here is whether large Canadian law firms should pursue aggressive international growth strategies, whether by merger or acquisition. This might be driven by two factors. On the one hand, the recent mergers of Norton Rose with Ogilvy Renault and Macleod Dixon has certainly caused great discussion amongst major law firms as to whether they should follow suit, or whether they might be at a disadvantage if they do not do so.

On the other hand, a shift towards internationalization might be driven by clients themselves. This driver should not be over-emphasised, however, because many global businesses, even some of the largest, prefer not to instruct single firms on global deals or disputes. They prefer instead to choose what they perceive to be the best local advisers in individual jurisdictions. Nonetheless, and especially for more routine international work, there are a significant number of global clients who do like their law firms to have presence in the main markets in which they operate.

While there will always be a need for local Canadian law firms to serve domestic needs, it is likely that a number of the country's largest firms will merge and become part of much larger global legal businesses.

2. ACCESS TO JUSTICE

While much of the focus in the first section of this report is on the needs of major clients and the challenges facing large law firms, the demands and pressures on small law firms and individual clients are no less profound. In Canada, as elsewhere, there is considerable concern over what is perceived to be diminishing 'access to justice'. This refers not just to the availability and accessibility of public dispute resolution facilities but also to the extent to which individual citizens are able to understand their entitlements and benefit from the many facilities that the legal system can afford.

○ 2.1 PUBLIC LEGAL AID

The general trend, across the world, is towards a reduction in the amount of public funding available to support people who struggle to afford legal assistance or legal representation. There are strong arguments of social policy and political philosophy that should incline governments in the opposite direction but, in difficult economic times, civil legal aid, in particular, is regarded by most western governments as less of a priority than, say, health or education. The result is that most jurisdictions are wrestling with the challenge of providing consumers with affordable legal guidance and, where necessary, representation in the court system.

There is a growing movement in the global legal community that is calling for radically new solutions to complement traditional public legal aid. The view here is that it may soon not be viable for most law firms to be involved in advising legally aided clients; and that the court system frequently is not the most sensible or proportionate forum for the resolution of disputes.

For some, the answer lies in a stronger voluntary sector or far greater contribution by lawyers on a pro bono basis. For others, the best way forward is said to be an increase in the use of alternative dispute resolution. Still others suggest that the key lies in the use of internet-based facilities and tools. And yet another body of opinion suggests that some form of conditional and contingency fee arrangements or 3rd party litigation funding are the answer.

Although some would argue for the injection of new money, this seems an unlikely scenario in the current economy. More probable are caps on legal aid expenditure, adjustments of the scope of legal aid, restrictions on eligibility, and so the need for more radical solutions.

○ 2.2 VIABILITY OF SMALL LAW FIRMS

In most advanced jurisdictions, more than 40% of law firms are sole practitioners and over 60% of practices have three partners or fewer. Further, in most of these countries, these percentage figures are falling gradually. (The available statistics for 2009 and 2010 at www.flsc.ca seem to suggest the figures would be higher in Canada.)

Many sole practitioners and partners in small firms say that it is becoming increasingly difficult to earn a fair living from conventional legal work. Those who seem to be hit hardest are general legal practitioners, some of whose work is now being done in higher volumes by larger firms; some of which is conducted by the clients themselves with the assistance of online facilities; and some of which has been to a high degree standardized and systematized.

In contrast, small firms with niche specialist practices, and those that offer a highly personalized service that is deemed important by their client base, continue to trade successfully and many indeed are thriving.

Those who have little sympathy with the plight of small law firms will claim that these businesses are old fashioned, that they are part of an outdated cottage industry, that they are not set up to enjoy economies of scale, and that they steadfastly refuse to embrace modern information technology and management techniques. They will go further and say that the market should be left to weed out the weak from the strong and that small firms must either modernize and innovate or suffer inevitable decline.

Those who are more sympathetic counter that it is not easy for businesses under considerable strain to change direction and strategy in midstream. It is hard to change the wheel on a moving car. They will argue that honest, well-intentioned, hard-working lawyers who have for many years fully met clients' needs should now be supported by the legal profession and its professional bodies in helping them make the transition to modern practices that are fit for future purpose.

Some rely on a different argument — that the gradual withering away of small law firms will result in a severe reduction in access to justice for citizens who have historically relied upon, say, modest local law firms to meet their everyday legal needs. These advocates for small law firms are therefore making a policy claim for their continued existence, a position that is only sustainable if access to justice to the alleged deprived cannot be provided in some other way.

In any event, it is clear that the challenges and opportunities that face smaller law firms are radically different from those that are confronting Canada's largest practices. Indeed, although the sole practitioner and the multinational law firm may, on the face of it, belong to the same profession, a business school professor or seasoned business people would find very little in common between the two categories of legal practice.

2.3 DISPUTE AVOIDANCE AND DISPUTE CONTAINMENT

Much discussion about access to justice, in Canada and internationally, focuses on the availability, accessibility, and affordability of the court system, especially to individual citizens or small traders. The court system, it is often argued, is too costly, cumbersome, time-consuming, and forbidding for many consumers and so, in effect, is not a genuinely public resource. In turn, many attempts to increase access to justice have focussed on streamlining the court system, reducing its cost, and ensuring that users are less daunted by it. Moreover, there has been considerable investment and activity in alternative dispute resolution ('ADR'), so that people in conflict can resolve their differences by, say, mediation instead of congregating in a physical courtroom. Proponents of ADR say that this enables quicker, cheaper, and less stressful dispute resolution.

While these attempts to improve the court system and provide sensible alternatives are important, it would also be greatly advantageous if disputes could be avoided in the first place or, if not avoided, then contained to a greater extent.

Just as preventative medicine has enjoyed great success in reducing illness and suffering, then so too dispute avoidance could flow from some kinds of preventative lawyering. In medicine, if precautions are taken, then ill health can be avoided in the first place. Similarly, in law, there are innumerable opportunities for citizens and businesses to embrace sensible working practices that will help them avoid legal pitfalls. It is a rare chief executive or consumer who prefers a very large legal problem well resolved by lawyers to not having one in the first place. In general, most human beings prefer a fence at the top of a cliff to an ambulance at the bottom.

Dispute avoidance and its cousin, legal risk management, are underdeveloped legal fields in Canada and beyond. One challenge for the legal profession, and this is one that has been met in other professions (such as medicine and tax) is to develop a set of tools, techniques, systems, and processes that enable and allow non-lawyers systematically to avoid legal problems (for example, by undertaking and acting upon legal health checks).

If disputes cannot be avoided, this should not mean that parties' differences escalate into major combat. On the contrary, there is surely scope for dispute containment. The aim here is to discourage disagreements from spiralling and mushrooming, unnecessarily and destructively. While sceptics might say that greater litigiousness is an inevitable feature of modern society, and that the discouragement of aggressive conflict would require societal and attitudinal change beyond the gift of the legal profession, there is nonetheless a contribution that lawyers might make here. It cannot be denied — although nor should it be overstated — that lawyers themselves can be the direct cause of the escalation of disputes. This is commonly said, for example, of family disputes, where the financial incentives that drive lawyers do not generally support early and peaceful resolution of domestic conflicts. If lawyers charge by the hour, then it can be in their interests to prolong rather than pre-empt a dispute. Proponents of collaborative lawyering — which might entail, for example, lawyers on both sides withdrawing from involvement in a case at a specified stage if agreement has not been reached — point out that when the incentives are changed, then lawyers can behave differently. There is merit in the view that incentives should be organized to support the containment rather than the prolongation of disputes.

○ 2.4 ONLINE LEGAL HELP

Given that around 8 out of 10 Canadian households have internet access, then the legal profession should give thought to the ways in which legal guidance and help might be offered on an online basis. While this could be in direct competition to traditional lawyers, it might also be complementary and supplementary to conventional legal service, or it could also offer a source of legal assistance where none other might be affordable or available.

Online legal help can be made available in a variety of ways. Two of these — online dispute resolution and the electronic marketplace — are addressed in Section 4 of this report.

Perhaps the most basic form of online legal help is the provision of basic legal information on publicly available websites. Analogous services are now available on health issues and there is no obvious reason why internet users should not be able to gain appreciation of at least some of their legal entitlements and legal obligations by browsing the web. These systems may do little more than provide the text from conventional leaflets on a website, but they can do much more. For example, the legal information can be organized not according to the conventional categories of law libraries or textbooks, but around the 'life events' of likely users — the situations that people might commonly find themselves in; and in association with each there might be other and perhaps quite diverse sources of legal insights.

More advanced systems can be more interactive, requiring users to answer questions, tick boxes, and enter text. These systems can even perform diagnostic functions and offer fairly specific guidance. A related facility is known as online document assembly, whereby users are asked to answer a series of questions, on the basis of which a fairly polished legal document (from a will to a tenancy agreement) can be automatically generated.

It is easy also to imagine, given the great success of social networking, that a community's legal experience will build up online — users will be able to share their own personal insights into legal situations in which they were involved and perhaps help others who face similar legal difficulties. While conventional lawyers may baulk at the very idea, such facilities might well be far more impressive than having no legal guidance at all (which, regrettably, is the position that can result from the unaffordability of legal services). And, in any event, this reflects no more than the online habits of internet users whenever they have problems in life (for instance, when confronted with a problem with their computer systems).

3. ALTERNATIVE SOURCING

One increasingly popular option for reducing the cost of legal service is to find new and different ways of undertaking routine, repetitive, administrative, and process-based work. Conventionally, this work has been undertaken in Canada by junior lawyers in law firms and in in-house legal departments. The philosophy underpinning alternative sourcing is that this routine work should no longer be undertaken by these junior lawyers but delivered from different organizations and sometimes not even by lawyers. Although legal process outsourcing to India is one example of alternative sourcing, there are many others.

A common view, especially in major firms, is that alternative sourcing is best if not exclusively suited to high volume, low margin legal work. Early successes in other jurisdictions and a depth of feeling amongst General Counsel in Canada suggest that this view is mistaken — instead, there is growing recognition that perhaps the greatest scope for alternative sourcing lies in undertaking differently the routine elements of large scale deals and disputes. Even the world's largest and most complex legal matters can be decomposed, broken down, into component tasks, and those that are routine need not be sourced by costly lawyers in traditional businesses.

Conventionally, if a legal problem arose for a client organisation, they faced the choice of undertaking the work themselves or handing the matter to an external law firm (or a mixture of the two). There are now a wider variety of alternatives, each quite different from internal sourcing or instruction of external law firms. In this section four illustrations of alternative sourcing are given.

○ 3.1 LEGAL PROCESS OUTSOURCING ('LPO')

The idea behind LPO is simple — that routine work is handed over to specialist third party service providers, usually located in countries with low labour costs. For example, if a first level review of documents is required on a major piece of litigation, then these can be passed to an LPO in, say, India, and the work can be undertaken at a fraction of the cost. Why should clients pay for expensive young lawyers in expensive buildings in expensive

cities to review documents when this work can be undertaken at one-seventh to one-tenth of the price by a third party specialist?

One immediate response to the LPO proposition is that the quality of document review is lower than that offered by conventional law firms. However, there is little evidence to support this; indeed most in-house lawyers who have engaged experienced LPOs, report informally that the quality of document review is higher than that provided by law firms.

There are practical issues, however, over quality control and supervision and it is generally held that passing work to an LPO works best when high volumes are involved. In smaller matters, the transaction costs of selecting and managing an LPO are often thought to be disproportionate.

Some law firms claim that their clients do not want their documents to be sent to some far-flung location, although few clients actually corroborate this. In any event, most major LPOs have also set up on-shore facilities so that they can offer comfort to clients who want their routine work to be undertaken nearby.

In Canada, the LPO industry is in its infancy. As yet, the demand for this service has been relatively low. But, as clients come under increasing pressure to reduce their costs, they are likely to turn to this form of alternative sourcing just as they have done in other countries.

So far, LPO work has been focussed largely on document review and litigation, due diligence work, routine contract drafting, and rudimentary legal research. An area of considerable debate is the extent to which these LPOs will undertake more sophisticated legal work over time.

○ 3.2 RELOCATING

Another method of alternative sourcing is relocating. This involves undertaking routine legal and related work in far lower cost locations within the same country as the law firm involved. In Canada, where labour costs are far lower in rural areas, there is considerable scope for setting up facilities where the hourly rates of human beings will be lower, as will be, by some measure, the costs of property.

A key difference between relocating and LPO is that with the former (but not the latter) the work remains within the law firm and so, it might be said, within the legal profession. With the latter, the work is transferred out of the conventional legal supply sector and into the businesses of new providers. Some clients may be indifferent to this distinction but those who are keen to preserve an independent legal profession may well prefer to extend the capabilities of law firms rather than cede ground to the new wave of competitors.

A variant of relocating is near-shoring. Examples of this are found in England, where two leading city firms have set up near-shore facilities in Belfast. The basic underlying thinking is the same — to transfer the work to a less costly location which is still within easy physical (and psychological) reach of the law firm involved.

A related phenomenon here is that of sub-contracting. Again in England, some leading firms pass packages of routine work to law firms in New Zealand and South Africa, where the labour costs are significantly lower.

In Canada, according to discussions at conferences for General Counsel, an emerging model is for clients to retain leading law firms in major cities for the complex elements of large deals and disputes, but ask these firms to subcontract the more routine work to rural practices, rather than handing that same work to junior professionals within large firms. Here lies one potential new avenue of service for small law firms in Canada — to link up with larger firms who are being asked by clients to collaborate in this way.

○ 3.3 LEASING

Yet another broad category of alternative sourcing is that of 'leasing' lawyers. On this approach, legal services are provided to clients not by law firms but through agencies that have freelance lawyers on their books.

There are two quite different attractions here. First, this offers a far more flexible career path for lawyers who do not want to be committed throughout the year to employment within firms or departments. Instead, they can make themselves available on a project basis. Second, lawyers provided in this way cost considerably less than lawyers from law firms, not least because they come with far lower overheads and lower expectations of profitability too.

The best known legal leasing firm of this sort is Axiom. In England three major law firms (Freshfields, Eversheds, and Berwin Leighton Paisner) have each set up equivalent services of their own.

Major clients find leasing helpful when they have occasional peaks in demand for legal service (perhaps a major deal or dispute); while smaller organizations, who cannot afford or justify their own internal legal capability, find leasing useful as way of engaging the equivalent of an inhouse counsel on a temporary basis.

This model is challenging the conventional law firms because high quality lawyers can be made available at much lower prices. Some will say that this is a disruptive development. However, while it may be disruptive for law firms, it is quite the opposite for clients.

○ 3.4 DE-LAWYERING

This inelegant term refers to the use of non-legal personnel for the conduct of routine and repetitive law jobs. In particular, there are growing bodies of paralegals around the world who are taking on legal tasks that used to be the province of junior lawyers. The key advantage here for clients is that the rates of paralegals are considerably lower than those of qualified lawyers.

Those who wish to keep legal work in Canada may regard a thriving paralegal capability as a welcome competitor to LPO. Others, however, see the rise of paralegals as destructive of what has been the ideal business model for law firms — a pyramidal structure with an equity partner at the peak and junior lawyers undertaking routine work at the base. If this routine work is instead carried out by paralegals (or indeed by other forms of alternative sourcing), then the conventional business model is challenged.

Paralegals can be engaged in legal work through various business structures. Some law firms see great potential in building their own armies of paralegals; while there are legal departments that consider their routine work would be most efficiently done by paralegals that they employ directly. As an alternative to both, is the establishment of independent third party

businesses of para-professionals. In the United States, this has become a popular option.

Underpinning the idea of using paralegals instead of lawyers, and indeed the use of any form of alternative sourcing, is the notion that law firms are no longer uniquely placed to undertake all the work that used to be their province. If we decompose or disaggregate (to borrow a term from economics) legal work, that is, break it down into component parts, we can expect the market to organize legal work in a way that, consistent with the level of quality required, will distribute it to the lowest cost providers. In times of economic pressure, whether or not supported by liberalization, it seems likely that a great deal of work across Canada will be alternatively sourced as a result.

4. INFORMATION TECHNOLOGY

Traditionally, information technology was used in the back office of law firms and legal departments — applications such as word processing, accounting and billing, and electronic mail. However, technology is now developing at a remarkable rate, such that a wide variety of new IT-based opportunities are arising for the legal profession. Advances in processing power, internet use generally, and social networking are leading to entirely new and different ways of running businesses, engaging with clients, and delivering services. Although lawyers have traditionally been late adopters of technology, it is hard to imagine a Canadian legal profession of the future that has not embraced at least some technological development. In this section, in part by way of illustration and partly for direct consideration, I introduce four sets of technologies that are set to transform the practice of law and the administration of justice in years to come.

○ 4.1 ON-LINE DISPUTE RESOLUTION (ODR)

Conventional wisdom holds that parties must congregate together in some physical space (whether a courtroom or mediation room) for the resolution of their legal disputes. But is court a service or a place? Is it fundamental for the disposal of legal disagreements that human beings gather together in person, or might disputes be resolved virtually? Advocates of ODR argue that many disputes can be resolved more swiftly, at lower cost, and with much less hassle through techniques such as e-negotiation and e-mediation. Strikingly, to give a flavour of the potential here, around 60 million disputes arising out of eBay trading are resolved by ODR each year. Many traditional lawyers react to this statistic by suggesting that online techniques may be suitable for disputes relating to e-business but have far less place off the internet in the regular world. In response, it can be said that although there is a natural fit between ODR and disputes that arise in the online world, there is no reason why these techniques cannot be used elsewhere, especially by those who are looking for an alternative to traditional dispute resolution. At the very least, it can easily be imagined that the internet generation ('digital natives'), may find it more natural to use ODR than people who can remember a pre-internet world ('digital immigrants').

As ever, the technical details are not vital for the discussion of policy and principle. The key issue here is whether the needs of citizens and businesses needs be met in new and different ways, even if these are alien and threatening to lawyers.

There are said to be at least five providers of ODR services in Canada but their impact so far has been limited. In the most definitive global analysis of ODR it was stated that, 'if there was one clear theme running through our interviews with people involved in the ODR field in Canada, it was one of optimism.' (Wahab, Katsh, Rainey (eds.) *Online Dispute Resolution: Theory and Practice*, (2012) p.449.)

○ 4.2 SOCIAL NETWORKING

The internet provides the world with three remarkable facilities. The first is electronic mail. The second is the worldwide web. And the third is online community — with over 2.2 billion users, one of the unintended consequences of the internet is the proliferation of networks of human beings connected to one another in ways that were unimaginable in the past. The statistics are remarkable. By the end of 2012, it is expected that Facebook will have over 1 billion users. Twitter has between 200 and 300 million users. LinkedIn has more than 175 million users. These are not passing fads: these services have provided platforms for new ways of socializing and working, and their effect has been transformational and, it is reasonable to suggest, irreversible.

It is noticeable, however, that the legal profession, in Canada and across the world, has been slow to embrace social networking. Many lawyers regard these systems as sources of entertainment for their children rather than life-changing utilities. While it is true, for example, that applications of Facebook in the law may not be immediately apparent, the same cannot be said of Twitter — law firms should surely take seriously the fact that many General Counsel and in-house lawyers are already tweeting regularly. This means that they are letting their followers know what they are thinking, where they are going, with whom they are meeting, and so forth. It is hard to imagine that any law firm that wants to keep close to its clients should not avail itself of this channel of communication. And, again, even if clients above the age of 30 can see limited scope for social networks in the delivery of legal service, the same cannot be said of younger clients and younger lawyers.

Social networking is not restricted, however, to public systems such as Twitter and Facebook. Under this heading also falls 'closed communities'. For example, in medicine, there is Sermo, a social network used by around 150,000 doctors (no patients or pharmaceutical companies) to share professional insights and experience. The most popular, analogous system in law — Legal OnRamp — has around one sixth of that number of users and has made modest impact in Canada. There may be scope for a social network specifically for Canadian lawyers, for both law firms and law departments. Equally, there is great potential in the idea of setting up a wiki of Canadian law, in the spirit and manner of Wikipedia. This could be a very powerful resource for the legal profession and its clients.

No-one can confidently predict the ongoing impact of social networks on the legal market, but all the trends and experience from other sectors suggest that its use will, in due course, be pervasive.

○ 4.3 INTELLIGENT SYSTEMS

Since the 1950s, research scientists have been working diligently in the field of artificial intelligence (AI), which is broadly devoted to designing computer systems that can exhibit the kind of behaviour that we expect of intelligent human beings. Serious work on the application of AI in the law began in the late 1970s but was generally thought to be of little practical significance at that time. Two recent developments challenge that conclusion.

The first is the progress that has been made in what can be called 'intelligence search'. Published research suggests, for example, that when a large body of documents needs to be reviewed in preparation for litigation, then the latest systems, in terms of both precision and recall, can outperform human beings whose job it is to search and sift through documents. This is to oversimplify the practicalities and underlying technologies but the broad thrust is clear — before long, computer systems will frequently outperform lawyers in managing and controlling large bodies of documentation. And so, while there is understandable interest amongst clients in retaining LPOs to undertake document review exercises, the savings by this form of labour arbitrage will seem modest once 'assisted discovery', as it is more popularly known, becomes full operational.

The second AI-related development of which lawyers should be aware is the development by IBM of its system known as Watson. This is a computer system that was designed to compete on the TV quiz show, *Jeopardy!* In a live show, Watson beat the two best ever human contestants. This was a remarkable feat of natural language processing, information retrieval, knowledge representation, speech simulation, and many other techniques. The central point to note here is that while the remarkable Google retrieves documents that may be relevant for its users, Watson shows that computer systems can draw conclusions, solve problems, and even offer advice. These technologies are unlikely to be operational in law in the next few years but, in the long term, they will redefine the way that lawyers and their clients attend to their legal affairs. The next generation of lawyers must give thought to what value they can bring to the legal marketplace that cannot be replicated or simulated by intelligent information technologies.

○ 4.4 ELECTRONIC LEGAL MARKETPLACE

The internet is also enabling new ways for clients — from major organizations to individuals — to select their lawyers.

Just as there are price comparison websites that allow users to review the relative costs of, say, house insurance and motor cars, then similar facilities are emerging in respect of the legal marketplace. These systems can help clients identify the respective hourly rates or fixed fees of a wide range of firms. This introduces a transparency that was hard to achieve in the past and of itself, it can be expected, will add a new competitive dimension to the levels at which lawyers set their charges.

Another, often related, online service is the reputation system. Internet users are now familiar with systems that provide consumers' views on services that they have received or purchases they have made. It is both easy and useful to find out, for instance, what other holidaymakers felt about a particular hotel. Similarly, in law, a number of systems are emerging that make it easy for clients to find out how satisfactorily lawyers have served other clients in the past.

A third category of system that looks poised to change the purchasing habits of clients is online auctions for legal services. These have not worked well, generally, where the work involved has been complex or required a high degree of personal service; but, for more routine and repetitive work, many major clients are recognizing that it makes sense to be able to grind prices down by inviting law firms and other providers to bid competitively in an online environment. When combined with online reputation systems, clients can be assured not just of competitive prices but that they are securing their services from well regarded lawyers.

Price comparison systems, reputation systems, and online auctions for legal services are likely to play an increasingly significant role in the selection of lawyers. These systems are not without their problems and critics, but there is no reason to think that they will not be used widely in the Canadian legal profession.

5. IN-HOUSE LAWYERS

Although in-house lawyers represent just one community of clients, they are nonetheless of great significance. They have considerable purchasing power, are increasingly demanding and discerning, and may well play a vital role in changing the way in which legal services are procured and delivered across Canada. As noted in Section 1 of this report, these in-house lawyers are under growing cost pressures. Accordingly, they are more interested than ever before in changes to the way in which they work, both internally and with their external firms.

5.1 PRICING

One natural response to the growing pressure on legal costs is for in-house legal departments to ask their external firms either to reduce their rates or propose some more attractive alternative fee arrangement (AFA). Since the start of the global economic downturn, clients of law firms have been in regular discussion about both options. Generally, in Canada and beyond, General Counsel and senior in-house lawyers are dissatisfied with hourly billing and say so publicly. As has often been said, this way of charging runs the risk of penalizing efficient firms and rewarding those who take longer to complete their work. To charge on an hourly billing basis is to be focused on the input rather than the output of law firms and brings far greater uncertainty in costs than most in-house lawyers can currently countenance. This is not to say that in-house lawyers want to reject hourly billing entirely, but there is growing recognition that it is best suited for complex and high end work, while, for more routine and repetitive tasks, alternatives are preferred. In particular, there is a move across advanced jurisdictions towards far greater adoption of fixed fees. This brings the greater certainty that chief finance officers and General Counsel are currently seeking.

There are many different AFAs on offer and under discussion. However, many in-house counsel view their adoption with some scepticism. They point out, with some force, that if law firms propose alternative fee arrangements with no willingness to reduce their profitability or change their ways of working, then the AFAs are often no more than the same pricing proposition in a different package.

In an environment in which many General Counsel are saying they may need to reduce their legal expenditure by 30-50% over the next three to five years, one of the most challenging questions is whether alternative pricing models can secure savings of this magnitude. On one view, pricing differently will not be enough. Law firms (and in-house lawyers) will need to work differently (more specifically, source and resource their work differently) if the demands of Boards are to be met.

○ 5.2 LEGAL RISK MANAGEMENT

Most in-house lawyers say that their prime responsibility is that of legal risk management. Although they will confess to spending much of their time engaged in fire fighting and are often overwhelmed by the daily workload that flows into their departments, most will say that their strategic priority is not to solve legal problems once they have arisen but to help avoid them in the first place. For many years now, General Counsel have insisted that they will want to move from providing a reactive service within their organization to a more proactive one. And they have suggested that law firms follow suit.

In the event, in Canada and elsewhere, the legal profession has been slow to meet the challenge of legal risk management. Very few in-house legal departments or law firms have developed tools, techniques, systems, and processes to help them identify, quantify, monitor, control, and hedge legal risks more effectively. In contrast with other professions, for example in the world of tax, where tax risk management is supported by a sophisticated set of tools, legal risk management is conducted in a rather haphazard and ad hoc fashion.

It may be that the legal profession will choose to continue ignoring the opportunities and threats that arise from the current lack of effective legal risk management. But this could be to the detriment of clients, who might suffer unnecessarily, for example, from involvement in litigation that could have been avoided or from sanctions resulting from failure to comply with regulations; or it may be that other professionals, such as the accounting firms, will fill this space. These firms are already heavily involved with regulatory compliance and in a variety of litigation-related services. From the client's point of view this may not be detrimental. From the legal profession's perspective, this may constitute a threat.

○ 5.3 COMPLIANCE

In most large companies, but perhaps most notably in major financial services institutions, regulatory compliance is an issue of growing and great concern.

General Counsel harbour a range of agitations — it is hard to keep abreast of changing bodies of regulation across many jurisdictions, the practices of regulators vary between countries, it is not at all easy to raise awareness of regulatory issues across an organization of non-lawyers, and it is equally difficult to keep track of errant behaviour across a large workforce.

In small businesses, managers often confess that they have little grasp of the entire range of regulations that affect them. In larger organizations, while there is increasing investment in compliance (new systems and processes, as well as people) there is some considerable cynicism — slavish focus on the rules can, it is said, become unprincipled box ticking.

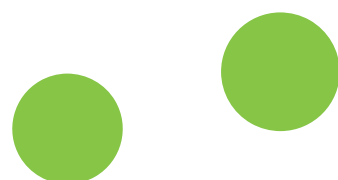
There is a division amongst larger organizations between those that combine their legal and compliance functions and those that keep them separate. Often this is due to the talents and personalities of the individuals employed rather than as a result of strategic choice.

Much compliance work is still conducted in a highly manual, hand-crafted fashion. If compared with, for instance, the manner in which large businesses undertake their corporate tax compliance work, there is little overlap. There has been investment in the latter such that there is now a crowded market of competing tax compliance systems and services, which has brought prices down and raised quality. There are strong arguments in favour of making a start on the industrialization of regulatory compliance.

One option for the Canadian compliance community to consider is that of collaborating on some regulatory compliance work. There is a growing appetite amongst some international banks, for example, to come together and perhaps set up some kind of shared services centre which would carry out the more routine, repetitive, and non-competitive aspects of compliance on a shared cost basis. This could bring dramatic reductions in cost and introduce precisely the kind of industrialization just noted.

There is also considerable scope for the use of information technology to support compliance — for instance through intelligent checklists, automatic document assembly systems, the embedding of good legal practice in organizational systems and processes, and e-learning to raise levels of awareness of regulations, especially across large organizations. Here, as elsewhere, General Counsel and in-house lawyers will increasingly be called upon to re-think the way they work and drive new efficiencies in their departments and organizations. Failure to do so will be a failure to meet the reasonable demands of shareholders.

Achieving superior compliance management, in other words, is one amongst several ways in which General Counsel can and should demonstrate to their wider organizations that lawyers and compliance specialists can and do bring significant value to the organizations of which they are part. In-house lawyers often worry that their value is not recognized, or cannot be quantified. A willingness to change and to embrace technology and modern management techniques will go some considerable way to building confidence in in-house functions.



6. LEGAL EDUCATION

If the general thrust of this report is accepted, it can reasonably be expected that there will be fundamental and irreversible change in the legal profession by 2020 and beyond. While many legal leaders may be relieved that they will be retired before the great transformations, the legal profession of today surely has a responsibility to think deeply about and to nurture its legacy for the next generation of lawyers. These lawyers will be digital natives and not digital immigrants. How, then, in Canada is the profession preparing young and aspiring lawyers for what is likely to be a very different legal future?

6.1 WHAT ARE YOUNG LAWYERS BEING TRAINED TO BECOME?

In many universities, the law is taught in much the same way as it was in the 1970s and 1980s. The same basic approach to education is in place. Of more concern perhaps is that there do not seem to have been changes to the curricula that match the changes in legal work that have been seen in the marketplace in recent years and can reasonably be anticipated for the future. In most law schools, it seems to be assumed that lawyers of the future will continue to be one-to-one, consultative advisory service providers who are skilled crafts-people and compelling advocates. However, in an era of alternative providers, of internet-based guidance, of online dispute resolution, of the disaggregation of legal work, of globalization, of commoditization, and of mounting economic pressure, there is at least a debate to be had as to whether law students are adequately being prepared for times ahead.

Are Canadian law students being trained to be 20th century or 21st century practitioners? There is considerable evidence to suggest that lawyers of tomorrow will need a wider range of skills and competences than those of the past. Emerging fields, such as legal risk management, legal project management, legal process analysis, and legal knowledge engineering, may all sound rather alien to today's Canadian practitioners but the need for sophisticated exponents of these disciplines is becoming clear to market leaders and thought leaders around the world. As a result, there is a small but growing number of law schools who are introducing their students to these new dimensions of legal service.

Law schools in Canada bear an enormous responsibility for the legal profession of the future. If the education of lawyers continues unchanged, it is likely (because of commoditization, technology, and new competition) that the profession will shrink. On the other hand, if law students are equipped with new skills then they can confidently help build a vibrant and sustainable future for the legal profession.

○ 6.2 BECOMING EXPERT

One objection to the alternative sourcing of legal work (as discussed in Section 3) is that this will take away the training ground of lawyers. In other words, if routine and repetitive work is, for example, outsourced or computerized, then junior lawyers will no longer be exposed to the kind of work on which they used to cut their teeth. The worry is that young lawyers will no longer have a clear road to becoming experts.

Clients of law firms, especially non-lawyers, tend to have little sympathy with this concern. With some force, they point out that this, at root, is a training problem that the legal profession must address. Some will go further and say that the real issue here is that, historically, clients have contributed too much to the training costs of young lawyers; but now that times are tougher and clients are questioning the way that routine and repetitive work is undertaken, this practice has become exposed.

One of the issues here, no doubt, is that trainee lawyers and young lawyers, especially in large firms, are paid more than the value they can bring to clients. In the distant past, legal apprentices were not paid at all or they even had to pay for the privilege of working with their masters. The war for talent has resulted in law firms paying significant salaries to inexperienced lawyers and they have sought to recoup this expense by charging them to clients.

If clients are unlikely to tolerate a reluctance to embrace alternative sourcing because it creates training difficulties, the profession will need to find other ways of bringing young lawyers through from novice to expert. This could involve a reversion to greater use of the traditional apprenticeship model; it could involve young lawyers undertaking the work at very low prices (competitive alternate sourcing), or it might require the profession to embrace advanced e-learning and simulated legal practice technologies which show enormous promise for exposing trainee lawyers to a wide range of legal issues.

Just as many practising lawyers are hesitant about the more extensive use of information technology in the delivery of their services, so too would many academics — often without direct experience of these systems — doubt that e-learning methods can substantially complement or improve upon traditional teaching techniques. There is mounting evidence not just in law but in other professions too that e-learning can work very well indeed.

○ 6.3 LEARNING FROM OTHER PROFESSIONS

In considering future ways in which Canadian lawyers might be educated, considerable insight can be gained from looking at the experience of other professions. It is noticeable, however, that in many reviews and reports about the legal profession, the inclination to learn from others is often

confined to the scrutiny of a selection of legal jurisdictions around the world. While there is much to be gained from examining the way in which other legal systems operate, in the field of training and education, in particular, there is perhaps more to be derived from other professions.

The training of doctors is especially instructive. In many major teaching hospitals, there are professors who, in one day and under one roof, undertake clinical work with patients, teach young students, and conduct laboratory research. This integration of teaching and practice, of scholarship and service delivery, is a salutary lesson to the legal world where, all too often, the practising and academic branches of the profession have little in common, and, sadly, have little respect for one another. In medicine, it can also be observed that, after the first two years of more or less constant classroom training for aspiring doctors, the emphasis then shifts, so that medical students spend more of their time with patients than they do in these classrooms.

Beyond medicine, as is so often the case, a glimpse of the future for law firms can be gained by looking at the current state of the major accounting firms. Deloitte, for example, has recently launched Deloitte University, a campus that cost in excess of \$300 million to construct. The training facilities are state of the art and the very existence of the institution reflects how important learning and development are to the firm. The 'Big Four' firms have always spent much more (generally more than double) of their percentage turnover on training than law firms. There are lessons too to be learned from their open plan working environments. Anecdotal evidence, at least, suggests that many of the traditional benefits of the apprenticeship system can be achieved in an open plan environment; and much else besides. Young professionals are able to soak in, from all directions, insights into the way in which more seasoned practitioners and/or clients, collaborate with colleagues, conduct themselves on the phone, and manage their inboxes.

In other professions, there seems to be greater uptake than in law of e-learning technologies and greater use too of mobile devices in the delivery of the content for some training courses. There is much also to be learned from other professions about knowledge management. In some ways, capturing, sharing, and re-using knowledge is closely related to training and learning. On one view, training and education provides 'just-in-case' knowledge (guidance and insight that professionals gain and hold in reserve in the event that at some later stage they might need it) as against 'just-in-time' (tools and facilities which offer substantive guidance on the spot, and usually deliver it through information technology). Many professions have enjoyed greater success with knowledge management than the legal profession. The challenge is to upgrade in law the quality, scope, and impact both of 'just-in-case' and 'just-in-time' knowledge.



7. CONCLUSION

The purpose of this report is to widen horizons and encourage fresh thinking. It is not claimed that the issues raised here are exhaustive of all the challenges that the Canadian legal profession needs to tackle in facing the coming decade. However, the selection of issues discussed do, in combination, present a formidable challenge. Even if only one half of the developments anticipated come to pass, then these of themselves will result in remarkable transformation. For lawyers in Canada and around the world, the future, it appears, will be very different from the past. The perspective urged here is to assess the trends and developments not by reference to the ways of lawyers of the past; but in an open-minded, innovative spirit, that encourages lawyers to embrace and welcome change rather than resist and deny its necessity.

This report does not assume that there is one, single, and inevitable future for the Canadian legal profession. It does not suggest that the job for reformers is to try and determine the nature of that inevitable future. On the contrary, it lays out a whole set of possibilities which leaders in the profession may choose to pursue or reject, as they feel is appropriate.

The most fruitful way to predict the future, as has been said by others, is to invent it.



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