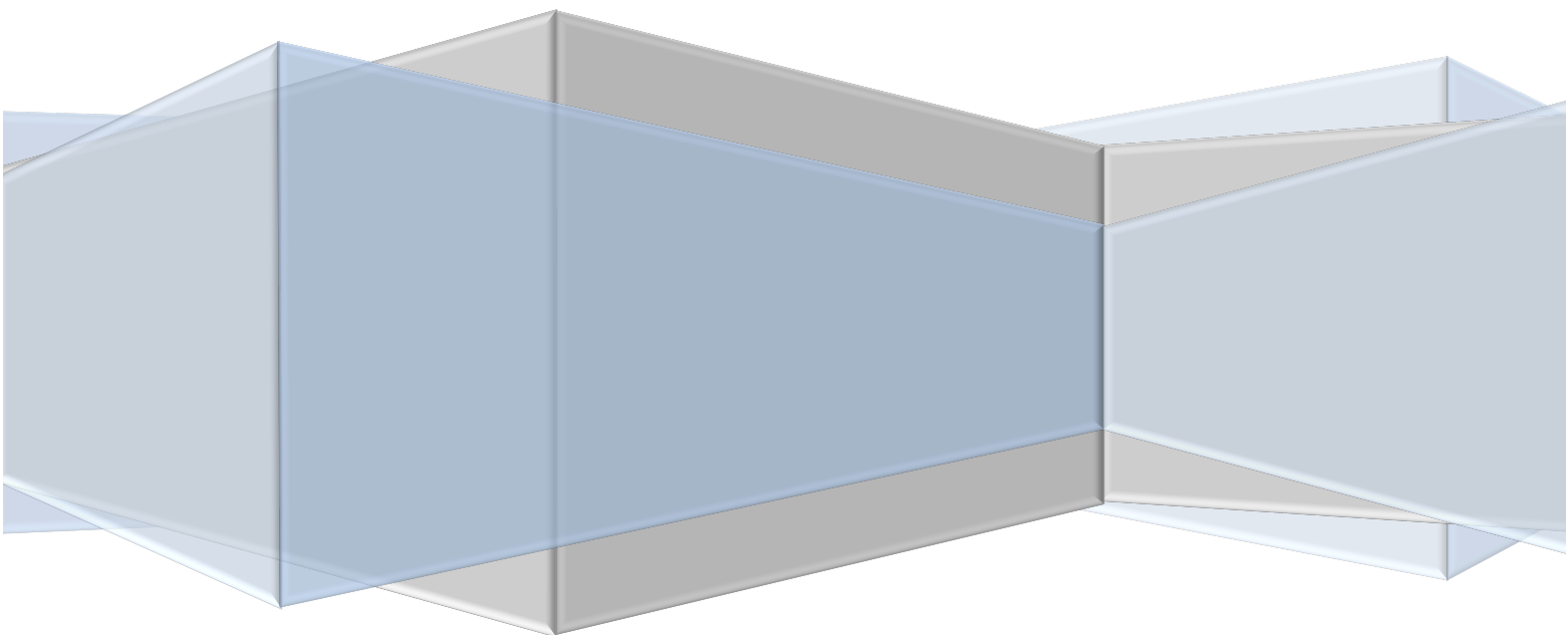


# Justice Innovation and the Culture of Legal Practice

The Dean's Forum on Dispute Resolution  
and Access to Justice

The University of Saskatchewan College of Law

March 13, 2014



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## I. Introduction

Access to justice has been a concern of the legal profession for a long time and has become one of the most important issues requiring action. The Dean's Forum is intended to provide a venue to continue the discussion in the Saskatchewan context and the opportunity to design the direction for the future of the legal profession in Saskatchewan through the lens of access to justice. In order to focus the discussion, this report a) provides an overview of the culture of legal practice as it relates to access to justice, b) summarizes some of the themes emerging from consultations with members of the Saskatchewan bar, c) describes a range of innovative options that have been considered or implemented in other jurisdictions as a starting point for discussing the types of innovations that may materialize in Saskatchewan, and d) poses some questions for reflection for those participating in the Forum. The content of this report was informed by a literature review, the *Cromwell Report*, and consideration of leadership provided by lawyers' organizations (see the appendices for more information).

## II. The Culture of Legal Practice – Defining the Problem

### A. The Traditional Business Model – Collective Inertia and Failure to Imagine Services Delivered Differently

Legal services have traditionally been delivered through a single model: a hierarchical partnership business model where lawyers work on client issues in units of time, tailoring their research and analysis to the circumstances of a particular client. A client's information is confidential and legal advice is protected through the tenet of solicitor-client privilege. Many legal disputes are resolved through the formal court system, which has become highly formalized and technical. While technology has impacted the day-to-day aspects of legal practice, the essential model has remained the same for a very long time. Some would say that there is a collective inertia in the way law has traditionally been practiced. Law firms have been built on this model and the continued success of many in the profession is perceived to be dependent upon the practice of law remaining by and large the same.

However, we have come to understand that some aspects of this business model are ineffective at providing accessible legal services to the broad public. Most middle and low income members of the public are priced out of the current legal market and are forced to either attempt to represent their own interests within a system designed for trained professionals or forgo their legal rights altogether. The lowest income members may find representation through government funded legal aid. It is clear that a large segment of the public is not being served within the current business model. This can be viewed as

a failure of the current model that needs adjustment or overhaul, or it can be perceived as an opportunity to make room for alternative ways of delivering legal services.

## **B. Regulatory and Professional Barriers**

Lawyers enjoy a monopoly on the provision of legal services and are a self-regulating profession. The regulations that we put in place to protect ourselves and our clients reflect the traditional form of legal practice and operate in some cases to prevent some forms of legal innovation. The innovation that is necessary to provide legal services for the vast majority of the public that is not currently able to access legal services must be supported through regulatory reform. Our Law Societies are currently and need to continue to be an active part of the discussion on access to justice and the future of the profession, as through their regulations they hold the key to the implementation of some of the potential solutions.

## **C. Legal Education**

The design for the future of the profession is closely linked with the way current law students are being trained. The traditional approach in law school involves students learning to think like a lawyer through the analysis of case law. There have been many innovations in the teaching methods employed in Canadian law schools focusing on increasing the opportunities for students to learn practical lawyering skills. For example, many Canadian law schools have clinical programs in which students can participate in the provision of legal services to low-income clients under the supervision of a licensed lawyer.

However, less innovative progress has been made on the professional identity aspect of legal education. Most law students leave law school with a very traditional impression of a lawyer as a neutral and impartial advocate within an adversarial system. Despite many changes to the legal system promoting non-adversarial approaches to dispute resolution (such as through collaborative law, mediation, etc.), not all law students are leaving law school with an understanding of such alternative approaches or alternative lawyer roles.<sup>1</sup> The Federation of Law Societies has recently imposed a requirement for students to obtain training in professional ethics and responsibility,<sup>2</sup> which may go a long way to address this traditional deficiency depending on how law schools interpret and implement this requirement.

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<sup>1</sup> The University Of Saskatchewan College Of Law is a leader in this regard with its first year dispute resolution program and upper year course offerings in negotiation, mediation, arbitration, and multi-party dispute resolution.

<sup>2</sup> The Federation of Law Societies of Canada, *National Requirement*, online: <[http://www.flsc.ca/\\_documents/National-Requirement-ENG.pdf](http://www.flsc.ca/_documents/National-Requirement-ENG.pdf)>

Any focus on the future of legal practice and the culture of lawyering must take into account the implications of how current law students are being trained.

#### **D. Lawyer Roles and Lawyer-Client Relationships: Professional Identity**

The legal profession is made up of lawyers who each possess a professional identity. The typical model of a good lawyer is one that is competent and zealously defends, protects, and advocates for client interests. This typical model is developed in law school and continues to foster as lawyers enter the profession. The assumption within that model is that the lawyer is the expert and that justice is a function of process and rights. This model, in turn, impacts upon how lawyers view their professional role, how they conduct themselves in their relationships with clients, and how they seek to serve their client's interests. If the future of law is to see lawyers delivering legal services differently, lawyers will need to adopt a different set of skills and adjust their professional identities.

#### **E. Psychological and Health Dimensions of Lawyering**

The way legal services are typically delivered requires lawyers to put in a significant amount of time in their work, which negatively impacts upon their physical and psychological health as well as their work and life balance. While lawyers are often handsomely remunerated for this effort, and sometimes excessively so, there is an imbalance in the profession that is not sustainable or life supporting. Any discussion on the future of the legal profession should also consider this aspect.

#### **F. Public Perception and Expectation**

Lawyers do not practice law in a vacuum. Part of the culture of legal practice is determined by the expectations of clients and the public in general, who hold a particular image of lawyers and legal practice and are used to engaging with lawyers on traditional terms. While trying to reduce the cost and value for clients may be a catalyst for change, clients may also be a source of pressure for the legal culture to remain the same. Part of the solution is likely to involve re-branding legal services to the public.

### **III. Summary of Consultations – The Saskatchewan Context**

Our working group reached out to some members of the Saskatchewan bar to get a sense of the types of pressures experienced by lawyers in Saskatchewan within the current culture of legal practice in relation to access to justice. The individuals we consulted include the following: Amanda Dodge (CLASSIC Legal Services); Kathryn J. Ford, Q.C; Cara Haaf (Partner at Scharfstein, Gibbings, Walen, Fisher LLP); Kylie Head (CBA Saskatchewan President); Nancy E. Hopkins, Q.C. (Partner at McDougall Gauley LLP); Charmaine Panko (Associate at Miller Thompson Lawyers); Karen Prisciak, Q.C (Partner at A.S.K. Law); Alma Wiebe, Q.C. (A.S.K. Law); Craig Zawada, Q.C., (CEO of WMCZ Lawyers). The following material is a generalized summary of some of the themes that emerged from our discussions.

#### **A. Law School and Ongoing Legal Education**

Those we consulted with saw a need for refocusing current legal education to a greater extent towards practical lawyering skills. Some were critical of the message imparted in law school that emotions are irrelevant or inappropriate in the practice of law and identified that emerging law students needed greater emotional intelligence in order to effectively serve their clients. Some saw potential in a greater connection between the law school and the current bar, whether facilitated through increasing meaningful mentorship opportunities or utilizing practitioners to a greater extent within the law school.

We also heard that there is an important role for continued legal education, particularly on the professionalism aspects of practice. It was identified that there is a small contingent of the bar that is engaged on bigger picture professional issues, such as access to justice, but that the solutions require engagement from the whole bar. The Law Society of Saskatchewan's Continued Professional Development requirement for ethics was identified as a potential venue for generating greater engagement in these discussions from the bar.

#### **B. The Generation Gap**

It was suggested that the practice of law was largely controlled by the older generation, which is accustomed to practicing in traditional ways. There was great hope expressed for the future of legal practice, as it was identified that new lawyers are emerging from law school to a greater extent with an interest and passion for access to justice issues and innovative practices. However, there was concern expressed that during articling and the initial years of practice this passion and engagement is lost due to the demands of practice and there being little room or support for innovation. The first 5 years of practice for new lawyers was identified as a critical time for providing support for innovation and to

maintain engagement if the vision that the new generation will bring change is to materialize. It was identified that there was a need for greater mentorship both within law firms and within the profession.

### **C. Innovation Inhibitors**

When discussing the potential for different types of innovation, a lot of concern was expressed in relation to Law Society regulations and the risks for lawyer liability and discipline. Concerns largely related to the extent of ethical and fiduciary obligations to clients, the protection of solicitor-client privilege, and particular regulations that prevent some forms of innovation.

While market pressures have been a catalyst for innovation in other jurisdictions, it was suggested that Saskatchewan is somewhat isolated from such pressures due to our strong economy. There is currently a lot of work for lawyers in Saskatchewan within the current model and law firms are not motivated to implement change without being required to do so.

### **D. Desire for a Spectrum of Options**

It was identified that part of the problem is the focus and allocation of resources both within the system and within law firms on traditional forms of legal service delivery and dispute resolution. There was desire expressed for a spectrum of options in the way client needs are served and the ability to exercise choice in determining which option is best for individual clients based on their circumstances.

Within this discussion, there was a range of perspectives on mandatory mediation. For some, mediation is seen to have great potential for access to justice and should be used to a greater extent in more areas, such as in residential tenancies disputes, social services appeals, and other administrative matters. Some suggest that mediation has limited potential when both parties don't adequately prepare or commit to the process, which can be connected to an imbalance of power and resources. Some suggest that mediation is inappropriate in some circumstances and should not be mandatory or that there should be greater flexibility in its application.

### **E. Focus on Clients and the Need for Reinforcements**

It was identified that the focus in the practice of law has skewed too far towards the business aspect. Some expressed feeling uncomfortable with the business of law and felt at times to be placed in conflict with the interests of their clients. There was a desire expressed to reorient the focus back on service to client needs. Within that discussion, some lawyers—particularly in the area of family law—expressed feeling ill-equipped to address the multiple layers of issues connected to a client's legal issue, such as mental health problems, the need for emotional counseling, or financial planning guidance. Some

expressed a pressing need for greater support in these areas and saw potential in collaboration with other professions.

## IV. A Starting Point – Innovations Tried Elsewhere

The following material is a description of some innovations that have been tried or considered in other jurisdictions. It is designed to provide a starting point for the discussion of innovations that may work for Saskatchewan. It is not intended to limit the discussion or consideration of other types of innovations.

### A. Limited Scope Retainers – “Unbundling”

**What is it?** The limited scope retainer is a way for a lawyer to provide legal service to a client on a portion of the client’s legal issue. It recognizes the reality that many people who cannot afford the cost of a general service retainer attempt to navigate the legal process by themselves. By unbundling a client’s legal issues and providing assistance at strategic intervals or on particular tasks, a limited scope retainer represents a middle ground between full representation and no representation.

**Considerations:** The concerns with limited scope retainers are largely associated with a lawyer’s ethical and fiduciary responsibilities and the potential for liability. For example, a lawyer should carefully consider whether a limited scope retainer is appropriate for the client’s legal issue and must be careful to ensure the division of tasks between lawyer and client is clearly identified in the retainer agreement.<sup>3</sup> The Law Society of Saskatchewan just approved limited scope retainers in February 2014.<sup>4</sup>

### B. Alternative Business Structures

**What is it?** Alternative Business Structures (ABS) contemplate outside or non-lawyer investments and participation in law practices.

**Considerations:** While many believe infusing law practices with business professionals would likely improve efficiency and profitability and could stimulate innovation, there is no consensus on whether ABS would have a positive impact on the profession and/or on access to justice. Those who oppose ABS

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<sup>3</sup> For a detailed discussion of opportunities, concerns, and best practices for limited scope retainers, see The Canadian Bar Association Alberta Branch, *The Limited Scope Retainer* (2014), online: <[http://www.cba.org/Alberta/main/pdf/limited%20scope%20retainers\\_FINAL.pdf](http://www.cba.org/Alberta/main/pdf/limited%20scope%20retainers_FINAL.pdf)>

<sup>4</sup> See the amended *Code of Professional Conduct* for all the details. Go to <<http://www.lawsociety.sk.ca/lawyer-regulation/code-of-professional-conduct.aspx>> and click on: Amendment – Limited Scope Retainers (February 14, 2014).



suggest self-governance would be threatened as non-lawyer owners would not be subject to the same level of accountability, and ABS could have negative implications for the ethics of practice. Those in support of ABS suggest continued accountability to the Law Society would sufficiently counter any threat to the ethics of the profession.<sup>5</sup>

### **C. Opportunities for Paralegal Services**

**What is it?** It is suggested that some legal services may be provided at a lower cost by paralegals or non-lawyers, subject to the supervision of lawyers.

**Considerations:** Expanding the use of paralegals in the provision of legal services to low and middle income clients requires a change in the Law Society regulations. Concerns relate primarily to consumer protection and regulating the types of services that are appropriate for paralegals to perform.<sup>6</sup>

### **D. Legal Information Services by Lawyers and Qualified Non-lawyers**

**What is it?** Generalized information about legal issues, rights, and how to access legal services that is easy to find and use, including printed legal guides, workshops and legal clinics, legal information hotlines, online resources, information kiosks at courthouses, etc.<sup>7</sup>

**Considerations:** Concerns on this type of service is whether the information is updated and accurate, whether it is provided in a format that is understandable by the client, and whether it is sufficiently detailed to provide meaningful assistance.

### **E. Summary Advice and Referrals**

**What is it?** Rather than providing full representation to a client, lawyers can provide summary advice for little or no cost on the merits of a client's legal claim, the potential for liability, or procedural aspects of

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<sup>5</sup> For a more detailed commentary on ABS, see The Canadian Bar Association Futures Initiative, *Report on the Consultation* (21 February 2014) at 14.

<sup>6</sup> For a description of the steps taken in other Canadian provinces, see Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* (September 2012) at 7-8, online: <[http://www.flsc.ca/\\_documents/Inventory-of-Access-to-Legal-AccessLawSocietiesInitiativesSept2012.pdf](http://www.flsc.ca/_documents/Inventory-of-Access-to-Legal-AccessLawSocietiesInitiativesSept2012.pdf)> [FLSC *Inventory*]. See also the creation of the Limited License Legal Technician by the Washington State Bar, which authorizes non-attorneys who meet certain educational requirements to advise and assist clients in approved practice areas of law, online: <<http://www.wsba.org/llt>>

<sup>7</sup> For a description of legal information services in Saskatchewan and other Canadian provinces, see FLSC *Inventory*, *supra* note 6 at 3-6.

a legal action. Alternatively, a lawyer may refer clients to other services where appropriate.<sup>8</sup> This service is similar to providing legal information but is more tailored to the client's specific circumstances.

**Considerations:** Concerns on this type of practice relate to ensuring the client clearly understands the extent of the lawyer's role.

#### **F. Alternative Billing Models**

**What it is?** Many clients experience difficulty with the uncertainty of the cost of legal services using the billable hour model. Alternative billing models contemplate charging a client for legal services using a method alternative to the billable hour, such as fixed rates, competitive tendering, and commoditizing services.

**Considerations:** The concern of moving away from billable hours is often expressed in terms of the risk assumed by lawyers in properly estimating in advance the complexity of a legal issue and time required to service it.

#### **G. Legal Expense Insurance**

**What is it?** Prepaid legal insurance to cover legal expenses. This is common in European countries, is gaining ground in the United States, and has been promoted in Quebec for a number of years.

**Considerations:** While not strictly a lawyer-led initiative, there may be a role for lawyer associations in facilitating or promoting the use of this type of service.

#### **H. Pro Bono and Low Bono Services**

**What is it?** Lawyers provide legal services for free or at reduced prices to clients who cannot afford their standard rate.

**Considerations:** While pro bono has always been a common practice in the profession, there are concerns that some lawyers do not engage in this aspect of the profession or some law firms do not support their lawyers in this practice, leading to discussions of mandatory pro bono hours imposed by Law Societies. The Law Society may additionally play a role in offering incentives in other ways.

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<sup>8</sup> For a description of summary advice services in Canadian provinces, see *ibid* at 8-10.

## IV. Conclusion

This report is a brief discussion of the issue of access to justice from the lens of the justice innovation and the culture of legal practice. It summarizes some of the elements of the problem, describes some concerns emerging from consultations with practitioners in Saskatchewan, and briefly describes some forms of innovation that have been suggested or tried in other jurisdictions. This report is designed to be a tool to assist the forum members in discussing, assessing, and implementing changes related to justice innovation and the legal culture in the context of Saskatchewan.

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## V. Questions for Reflection

1. From the perspective of your organization or the work you engage in, what sort of pressures do you experience that prevent innovation or engaging with change? How can they be overcome?
2. From the perspective of your organization or the work you engage in, what are your interests and what needs to be considered in the development of change?
3. From the perspective of your organization or the work you engage in, what resources can you offer to assist with innovation?
4. If you could investigate or explore three innovations discussed in this report or elsewhere, what would they be and what resources or supports would you need (internally or from other organizations)? Who could you collaborate with?
5. What opportunities are not being realized and why?
6. How do we ensure that the voice of the public/user is reflected as we change and innovate?
7. What mechanisms exist or can be created to gather input from system users and to reflect back to them how their input or ideas have been used or considered?
8. Can we influence the public's investment in justice issues, in turn generating the political will for change and innovation? How?

## Appendix A: “Culture Shift” in the Cromwell Report

The first meeting of the Dean’s Forum identified that improving access to justice and dispute resolution in Saskatchewan requires “a culture shift and ways to engage practicing lawyers.”<sup>9</sup> Convened by the Chief Justice of Canada, Beverley McLachlin, P.C. and under the leadership of the Honourable Thomas A. Cromwell, a national Action Committee on access to justice arrived at the same goal of the Dean’s Forum: “to identify and promote a new way of thinking—a culture shift—to guide our approach to reform” in the “Access to Civil & Family Justice: A Roadmap For Change” [the *Cromwell Report*].<sup>10</sup>

The *Cromwell Report* identifies that a new way of thinking and an action plan is urgently needed to change old patterns and approaches of the justice system and its stakeholders.<sup>11</sup> Six guiding principles are outlined in the *Cromwell Report* that prompts a culture shift. These principles include:

1. **Put the Public First** – To put the public first means that all reform efforts ought to focus on the people who use system, remembering that the system exists to serve the public.<sup>12</sup>
2. **Collaborate and Coordinate** – To improve access to justice and to avoid reinventing the wheel involves collaborating and coordinating across and within jurisdictions, within all sectors and aspects of the justice system, as well as with social service sectors and providers.<sup>13</sup>
3. **Prevent and Educate** – Efforts need to focus on preventing legal issues before they occur and having resources available to the public for when they do. Since many legal problems transpire outside of formal justice structures, access to justice means more than access to courts and lawyers. Improving access to justice involves rethinking how legal problems are approached and how to maximize early resolution.<sup>14</sup>
4. **Simplify, Make Coherent, Proportional and Sustainable** – This principle builds on the “public first” goal to make legal information easier to understand and legal procedures less complicated for self-represented litigants and other justice system participants.<sup>15</sup>

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<sup>9</sup> “The Dean’s Forum on Dispute Resolution and the Justice System” (Forum at the College of Law, University of Saskatchewan, 20 September 2013). The discussion focused on the implications of and possibilities for improving the justice system.

<sup>10</sup> The Access to Civil and Family Justice Action Committee, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, October 2013) [the *Cromwell Report*].

<sup>11</sup> *Ibid* at 5.

<sup>12</sup> *Ibid* at 7.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*.

<sup>15</sup> *Ibid* at 8.

5. **Take Action** – The result of improving access to justice so far has been modest so urgent action is necessary to move beyond talking to “bridge the ‘implementation gap’.”<sup>16</sup>
6. **Focus on Outcomes** – The focus must shift beyond fair and just processes to achieve fair and just results for those who use the justice system.<sup>17</sup>

The *Cromwell Report* suggests that “[t]aken together, these principles spell out the elements of an overriding culture of reform that is a precondition for developing specific measures of change and implementation.”<sup>18</sup>

The remaining *Cromwell Report* provides a roadmap toward improving access to justice through innovation, institutional and structural, and research and funding goals, which a culture shift pervades. As part of the national initiative, each province is prompted to adopt an “Access to Justice Implementation Commission” that will be a sustainable structure to promote change and meet the region’s specific needs.<sup>19</sup>

In sum, the six guiding principles and overall report fills a need for a coordinated and collaborative national voice, but a grassroots approach involving local justice system stakeholders as change makers is necessary to improve access to justice in Saskatchewan.<sup>20</sup> The *Cromwell Report* is a departure point for the Dean’s Forum members to create a culture shift in our province’s justice system and beyond.

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* at 9.

<sup>18</sup> *Ibid* at iii.

<sup>19</sup> *Ibid* at 20.

<sup>20</sup> *Ibid* at iii.

## Appendix B: Literature Review

1. **Blaikie, David L, Thomas A. Cromwell, & Darrel Pink, eds. *Why Good Lawyers Matter* (Toronto: Irwin Law Inc., 2012).**

This book provides a collection of essays from leading Canadian legal scholars and practitioners about the roles and ideals of lawyers. The discourse emerging from the essays is organized around three central questions: What is a lawyer? What role do lawyers play? What role should lawyers play? Essays on the first question seek to explore the evolution of the lawyer-client relationship into modern practice; examine the impact of settlement on justice; articulate the reasons behind the negative public perception of lawyers; and survey the ways in which lawyers exercise power collectively, individually, and publicly. Essays on the second question seek to unpack why lawyers garner a bad reputation; articulate the importance of a high standard of conduct for lawyers in the administration of justice; critically examine the regulation of lawyers within the context of their public and private roles; and explore the role of public interest litigation in the pursuit of social, political, and moral justice. Essays on the third question take stock of the state of the legal profession and the implications for lawyer satisfaction and the public good; seek to profile the goals, knowledge, capabilities and character traits of a great Canadian lawyer and the ways they can be cultivated; query the role of lawyers in balancing security and rights in a post-9/11 world; and articulate the fundamental guiding ideals of the legal profession in the context of the myriad changes and challenges it faces.

2. **Campbell, Ray Worthy. "Rethinking Regulation and Innovation in the U.S. Legal Services Market" (2012) 9:1 NYU J L & Bus 1.**

Campbell locates the barrier to innovation in legal services in the regulation of legal practice. He draws from business scholarship, particularly Clayton Christensen's disruptive innovation theory, to explain how market changes occur: essentially, new technology or innovation can either sustain or disrupt current markets, which is ultimately determined by the needs of consumers. Typically, market incumbents are unlikely to pursue disruptive innovations due to the limiting inertia of resources, processes, and business models, thereby leaving room for new market entrants capable of innovation. Over time, the new entrants improve the quality of their product and compete directly with the market incumbents, changing the market structure. However, in the legal services market, regulations prescribe a single business model and prevent unauthorized practice of law, thereby excluding new entrants and preventing disruptive innovation from occurring. Campbell suggests a single business model is insufficient to meet the diverse needs of legal consumers, which has the effect of leaving many

consumer's needs unmet altogether. Campbell explores a range of potential disruptive innovations that could better meet the needs of legal consumers and suggests that if we wish to see innovation in legal practice we must re-evaluate how the practice is regulated.

**3. Fox, Lawrence J. *Raise the Bar: Real World Solutions for a Troubled Profession* (Chicago: American Bar Association, 2007).**

Motivated to look for solutions to the exodus of lawyers from the legal profession and the pervasive dissatisfaction of those who remained, the American Bar Association convened a task force to interview a range lawyers about the problems facing the profession. The essays in this book are the result of the messages they heard and offer specific recommendations for reform: eliminate the billable hour in favor of a more nuanced evaluation of lawyer contribution to both the firm and society, increase mentorship opportunities, reflect core professional values in firm policies and practices, attend to work-life balance, increase *pro bono* and trial opportunities, increase diversity in the bar, among others. The overarching message is not one of profound reform of the legal system, nor are the reforms likely to significantly improve access to justice. But within a system that is broken on many fronts, the hope expressed by the authors is that attending to lawyer satisfaction may reinvigorate the drive for service to society that drew lawyers to the practice of law in the first place.

**4. Grosse, April. "The Future of Dispute Resolution: The More Things Change, The More They Really Don't" (2013) 76:2 Sask L Rev 213.**

This brief article offers reflections on the future of dispute resolution from a civil practitioner. Her observations suggest four trends that she believes will influence the future of the practice. First, Grosse suggests that if current trends continue, there will be a convergence of dispute resolution modes, where arbitration looks more like litigation, litigation incorporates features from arbitration and mediation, and mediation develops more formal processes. Grosse recommends maintaining the distinctions between these modes in order to preserve their purpose. Second, Grosse foresees an erosion of commercial jurisprudence due to private settlements and a call for some form of award publication. Third, Grosse observes an increasing ease of access to foreign jurisprudence but a corresponding decline in its use or meaningful incorporation into Canadian jurisprudence. Fourth, Grosse notes the dramatic increase in the volume of potentially producible documents and a corresponding focus through procedural rules and the culture of case management on the materially relevant. Her overarching thesis is a warning that, without deliberate intervention, the more things change the more they tend to stay the same.



**5. Heavin, Heather & Michaela Keet. "Skating to Where the Puck Will Be': Exploring Settlement Counsel and Risk Analysis in the Negotiation of Business Disputes" (2013) 76:2 Sask L Rev 191.**

With an interest in anticipating the future trends in dispute resolution within legal practice, the authors reflect on the dichotomy between interest-based settlement and adversarial litigation that has traditionally characterized the discussion and training of dispute resolution methods as *alternative*. The authors see potential in moving away from this dichotomy towards an approach that tailors dispute resolution processes according to the context of client needs. They look to ways practitioners are experimenting with a settlement counsel model and risk analysis tools in business disputes as two innovative trends that reflect an integration of problem-solving and traditional adversarial methods.

**6. Kowalski, Mitchell. *Avoiding Extinction: Reimagining Legal Services for the 21<sup>st</sup> Century* (Chicago: American Bar Association, 2012)**

This book employs a fictional narrative approach to imagine the potential for reconstructing how legal services are delivered. Through his characters, Kowalski tells a story to demonstrate what a law firm could look like if it recreated itself to provide better, faster, and cheaper legal services. In part I, the characters in Kowalski's story encounter and articulate the frustrations in current legal service options as they consider contracting a new firm. In part II, the function and innovations of the firm are described through the experience of a newly hired lawyer and a member of the firm's board of directors. The innovations embraced by the book include corporate rather than partnership structure, value pricing rather than the billable hour, legal service outsourcing, alternative firm infrastructure, alternative lawyer hiring and evaluation models, among others. The format is entertaining and thought-provoking.

**7. Macfarlane, Julie. *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008).**

In this book, Macfarlane seeks to describe the skills, knowledge, and sensitivities of an emerging new lawyer within a legal system that has been transforming over the course of the past 30 years. She locates the catalyst of transformation in an emphasis on settlement within dispute resolution processes and the diminishing place of the traditional trial. Macfarlane suggests that while the practice of law is evolving, the fundamental norms and values of lawyers are not evolving to the same extent and she suggests that legal culture needs to move away from three key professional beliefs: default to a rights-based dispute resolution paradigm, justice as process, and lawyers in charge. Macfarlane advocates for an alternative model of conflict resolution advocacy (CRA) that focuses on the "best possible negotiated settlement" for the client. Such a model requires a more complex set of skills around negotiation, information and interest gathering and sharing, legal understanding and presentation, and collaborating

in a new lawyer-client partnership dynamic. In applying this new model, Macfarlane suggests that the new lawyer will encounter new forms of ethical challenges as well as adapt the way law is used and legal advice is delivered. In the final chapter, Macfarlane identifies three primary “sites of change” in the evolution of the new lawyer: legal education, the new judge, and inter-professional collaboration.

**8. Susskind, Richard. *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford: Oxford University Press, 2013).**

This is Susskind's latest book following his previous well-known and provocative book *The End of Lawyers? Rethinking the Nature of Legal Services* (New York: Oxford University Press, 2009). In this book, Susskind claims that the next two decades will bring more radical change for the legal profession than was seen during the past two Centuries. The book is intended to serve as a guide to the future for young lawyers or anyone who wants to build a career in a modernized legal system. The book is divided into three parts. The first offers an updated restatement of Susskind's views on the future of legal services, identifies the key drivers of change, and presents strategies for coping with the radical changes in the legal market. In the second part, Susskind sketches out his predictions for the new legal landscape, including the future for law firms, the shifting role of in-house lawyers, and the coming of virtual hearings and online dispute resolution. The final part focuses on the prospects for aspiring lawyers, and equips young lawyers with penetrating questions to put to their current and future employers.

## Appendix C: A snapshot of national debate inside lawyers' organization

*This appendix refers to some developments, with a focus on the Canadian Bar Association's recent work. As a starting point, we recommend an overview prepared for the Law Society of Upper Canada's Access to Justice Symposium, held on October 29, 2013. The summary, called "Quotable Quotes"<sup>21</sup>, synthesizes other reports produced across Ontario and at the national level, and is worth perusing (at the link we have provided). This paper sets out a number of themes which have emerged from the discourse on access to justice issues and invites readers to reflect on the issues it raises.*

*Summaries of some of the Canadian Bar Association's recent reports are found below, along with separate links:*

### **1. Reaching Equal Justice Report: An Invitation to Envision and Act<sup>22</sup>**

The Canadian Bar Association (CBA) launched the "Envisioning Equal Justice Initiative" in August of 2012. The purpose was to examine access to justice issues in the Canadian context and to begin developing solutions. The final report was released in 2013. It describes the state of access to justice in Canada as "abysmal"<sup>23</sup> and provides 31 targets, with milestones and prescriptions for immediate action, which it believes will create significant change.

Underlying these goals are 3 broad strategies: Looking upstream from the court system for ways to prevent and alleviate problems, reforming courts as the central service responsible for adjudicating people's problems and reinventing the delivery of legal services to eliminate assistance gaps. In order to be successful, the report acknowledges the need for 3 foundational supports: Building public engagement by answering "why should I care about equal justice?" is the first of these. Establishing effective collaborative structures across national, provincial, territorial and local levels is a second necessary step. Finally, building up the capacity of justice innovation by improving the collection and transparency of access to justice metrics, developing a national research strategy, increased federal government engagement and funding of legal aid and deeper commitments by the CBA to taking a leadership role in access to justice reform.

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<sup>21</sup> Karen Cohl, *Access to Justice Themes: Quotable Quotes*, Law Society of Upper Canada online: <[http://lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2013/convjan2014\\_treasurersadvisorygroup.pdf](http://lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2013/convjan2014_treasurersadvisorygroup.pdf)> at p.253-268

<sup>22</sup> Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act* online: <[http://www.cba.org/CBA/equaljustice/secure\\_pdf/EqualJusticeFinalReport-eng.pdf](http://www.cba.org/CBA/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf)>.

<sup>23</sup> *Ibid* at p.5

## **2. The Future of Legal Services in Canada: Trends and Issues<sup>24</sup>**

The CBA Legal Futures Initiative is a comprehensive study designed to address the changing environment of legal service delivery. The first stage of this process involved extensive research and analysis of the market and the ways in which it is evolving. This report, released in June of 2013, synthesized the results of this research and organized the data into a few key themes which could be carried forward to the consultation phase.

The legal industry is deeply impacted by globalization and the rapid spread of new technologies. Like in other industries, clients are being presented with more choices and demanding more influence over the work which lawyers do. New methods of service delivery might take advantage of technological advancements in creating virtual firms, leveraging social media, providing online support and even utilizing artificial intelligence to supplement the work of lawyers.

Increased competition, downward pressure on prices for legal services, potential excess capacity and low growth in many practice areas are all economic trends which threaten traditional business structures. Alternative business structures, which involve non-lawyers in the management and ownership of legal service providers, is an option which is being expanded in the United Kingdom, Australia and elsewhere to respond to these issues.

Changing demographics will continue to influence the legal industry in Canada. The number of lawyers is growing faster than the general population while the profession still struggles to create equal opportunities for female practitioners and those from racial minorities. Older lawyers are deferring retirement, setting the stage for inter-generational conflict with younger lawyers who are looking to take on more responsibility within the profession. Many lawyers are actively seeking a better work-life balance through part-time, contract, work-at-home or other alternative employment arrangements.

Legal education – both through law colleges and continuing professional development – must continue to evolve to this new environment. New fields of competency like legal risk management, legal project management, legal process analysis and legal knowledge engineering continue to emerge. At the same time, non-legal skills like social networking, negotiation and inter-disciplinary knowledge are becoming more valuable.

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<sup>24</sup> Canadian Bar Association, *The Future of Legal Services in Canada: Trends and Issues* online: <<http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/trends-issues-eng.pdf?ext=.pdf>>.

### **3. Innovations in Legal Services: 14 Eye-Opening Case Studies<sup>25</sup>**

To support the work of the Legal Futures Initiative, the CBA invited Special Advisor Richard Susskind, author of *"The End of Lawyers?"* and *"Tomorrow's Lawyers"* to provide examples of legal service providers who are changing the way they do business. The 14 businesses featured in the June 2013 report responded quickly to their changing industry and developed innovative solutions to better meet their client's needs. Some of these businesses would be unable to operate in Canada due to current regulatory restrictions. They are nonetheless valuable examples to reflect upon.

Some common themes which emerge from these case studies include: replacing the partnership model with corporate governance and permitting non-lawyers to manage firms, promoting fixed fee service arrangements rather than hourly billing, promoting an equity share structure, increasing the frequency of contract work, outsourcing routine legal work, increasing the availability of online dispute resolution and leveraging social media, cloud computing, online resources and other new technologies.

### **4. Report on the Consultation<sup>26</sup>**

The second phase of Legal Futures Initiative was to seek consultation on the themes emerging from the Trends and Issues report released in June of 2013. The Report on the Consultation was released in February of 2014 and synthesizes the responses of a board group of stakeholders. The responses revealed a schism between those who believe that significant change in the delivery of legal services is imminent and those who doubt transformative change is likely or necessary. Those in the latter group defended the current regulatory structure, claiming that there are significant public policy reasons for maintaining the status quo. In addition, they expressed concerns that deregulation would encourage "Big Law" and compromise lawyers who serve in the public interest or under-served practice areas.

The questions related to legal education gathered a variety of opinions on the length, form and cost of law school education, along with ongoing professional development. Most of this feedback was rooted in the experiences of the respondents. By contrast, innovation within legal practice was an area where contributors more easily identified their vision for the future.

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<sup>25</sup> Canadian Bar Association, *Innovations in Legal Services: 14 Eye-Opening Case Studies* online: <<http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/Innovations-Paper-Summary-Linked-eng.pdf?ext=.pdf>>.

<sup>26</sup> Canadian Bar Association, *Report on the Consultation* online: <<http://www.cbafutures.org/CBA/media/mediafiles/PDF/Reports/CBAConsultationPaper.pdf?ext=.pdf>>.

Many respondents discussed how regulators can support innovation and maintain the professionalism of lawyers as they engage in new types of legal service delivery. Another area of discussion was the composition of the profession: who is in a position to take advantage of innovation and who should bear the burden of reform?

The report concedes that there are no areas where consensus, or even broad agreement, were readily apparent. The value of the consultation was in identifying the experiences, hopes and concerns of various stakeholders. This information is an important component of the initiative and will continue to inform their work going forward.