

What a Law Society Should Be

A Response to the Law Society of Upper Canada's Alternative Business Structures Discussion Paper of September 24, 2014

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Abstract -

ABS proposals (alternative business structures proposals) to improve the method of delivering legal services, cannot solve the unaffordable legal services problem and could prevent the Law Society from doing so. This paper expresses the author's opinion by developing the critically important relationships among:

(1) the ABS question (whether relevant legislation and Law Society bylaws should be changed to allow law firms to adopt alternative business structures, such as being owned by non-lawyer investors to obtain needed financing);

(2) the unaffordability of legal services problem that afflicts the majority of Canada's population, and whether it should be solved first; and,

(3) the conception of what a law society should be in order to fulfill its duties under s. 4.2 of the province of Ontario's Law Society Act, which include: (a) "to maintain and advance the cause of justice and the rule of law"; (b) "to act so as to facilitate access to justice"; and, (c) "to protect the public interest." The title of the law society in the province of Ontario is, The Law Society of Upper Canada (LSUC), named while part of the British colony of "Upper Canada" because it is further up the St. Lawrence River than is "Lower Canada," now the province of Quebec. They ceased to be British colonies when Canada became a country on July 1, 1867, which was 70 years after LSUC became a law society in 1797.

A critically important issue of the ABS question is, what is the needed concept of a law society—is it a support-service for the practice of law, and not just a regulator, i.e., to use a sports analogy, a provider of stadiums and arenas for new areas of practice, and a CPD/CLE coach and trainer, and not just a referee, and more often than not, merely a spectator watching part-time from the sidelines? Are its functions as a regulator of the legal profession and as a representative of lawyer-interests, in conflict, like trying to be the referee and the coach at the same time?

And do the ABS investors and their advocates want to be the owners of the team (in fact, all of the teams), and in the game only for the profits, and to gain control of the legal services market by way of enfranchising strings of owned law firms that substitute an entrepreneurial duty to their owners, in place of the fiduciary duty to clients?

Introduction

The ABS issue will determine the future nature of Canada's law societies and their ability to solve the unaffordable legal services problem (hereinafter, "the problem"). ABS proposals² cannot solve the

¹ Ken Chasse J.D., LL.M., member of the Law Society of Upper Canada (Ontario, since 1966), and of the Law Society of British Columbia, Canada (since 1978). I have posted several of my "access to justice" papers on the "open access" Social Science Research Network. See my SSRN author's page at: <http://ssrn.com/author=1398484>.

² See this statement on LSUC's website: "The Law Society released Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper on September 24, 2014, to seek input from lawyers, paralegals, stakeholders and the public about Alternative Business Structures (ABS)." These ABS proposals have three parts: (1) law firms can be invested in (owned—up to 49% or 100%) by non-lawyer people and entities; (2) legal services be enabled to be provided with related non-legal services; and, (3) routine legal services be automated by software

problem, which the in-depth analytical literature defines as, “the majority of the population cannot obtain legal services at reasonable cost” (hereinafter, “the problem”).³ The main cause is the unaffordability of

applications. See the discussion in my *Slaw* blog articles on: December 16, 2014, “[The More that Law Society Committees Change, the More Things Stay the Same.](#)”; (2) November 25, 2014, “[LSUC’s Worrisome ABS Proposals](#)”; and, (3) October 9, 2014, “[Legal Advice Services Cannot Be Automated by Alternative Business Structures](#)”.

³ The following authorities establish such as an accurate definition of the problem:

(1) *Report of the Legal Aid Review 2008*, at 76-77, being the report of University of Toronto, Faculty of Law, law and economics professor, Michael Trebilcock, to the Attorney General of Ontario, on July 25, 2008 (“the Trebilcock report”); online: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf or, <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/>;

(2) Noel Semple, “[Access to Justice through Regulatory Reform](#)” (a paper prepared for the National Family Law Program, July 16, 2012; electronic copy available online at: <http://ssrn.com/abstract=2101831>). Dr. Semple is a postdoctoral research fellow, Centre for the Legal Profession, University of Toronto Faculty of law. At p. 3 he states: “Although comprehensive and reliable data about the cost of Canadian legal services is not available, the information that is available makes it clear that prices are high enough to deter many potential clients. According to the *Canadian Lawyer* 2012 survey of hourly rates, the average for a Canadian lawyer with 10 years’ experience was \$340 per hour. The average legal fee for a contested divorce was \$15,570. Given that the median income for a single Canadian is less than \$30,000 per year, the potential for these legal fees to deter Canadians is obvious.” (Therein text accompanying notes 13 and 14 [quoting from, Robert Todd, “The Going Rate” *Canadian Lawyer* (June, 2012) therein at page 32 at pp. 37 and 34].

(3) Michael Trebilcock, Anthony Duggan, and Lorne Sossin (eds.), *Middle Income Access to Justice* (University of Toronto Press, 2012), the “Introduction” states in part (p. 4): “For our purposes, when we refer to middle income earners, we are contemplating the large group of individuals whose household income is too high to allow them to qualify for legal aid, but too low, in many cases, for them to be in a position to hire legal counsel to represent them in a civil law matter. As a result of this denial of effective access to justice, we are witnessing a staggering number of individuals trying to navigate an increasingly complex civil justice without any or adequate legal assistance and feeling increasingly alienated from the legal system. This is the crisis of access to civil justice that we face. ... One of the findings in this review [the Trebilcock report] was an acute lack of access to civil justice for lower and middle income earners in Ontario, manifesting itself particularly in an increasing number of unrepresented litigants.”

(4) Reports, dated May 2012, of the Action Committee on Access to Justice in Civil and Family Matters, recommending that legal services be provided by non-lawyer professionals who provide related services: *Report of the Access to Legal Services Working Group*; and, *Report of the Court Processes Simplification Working Group*. Available online: <http://www.cfcj-fcjc.org/collaborations>. The Action Committee is part of the Canadian Forum on Civil Justice at York University in Toronto, where it is affiliated with the Osgoode Hall Law School and the York Centre for Public Policy and Law. See the [Canadian Forum on Civil Justice website](#); online at: www.cfcj-fcjc.org/?q=about. But treating the problem of unrepresented litigants and clogged courts by simplifying court processes and procedures is like trying to remedy a cold by blowing your nose to simplify the act of breathing. It’s treating the symptoms and not the cause. However, I’m not saying that blowing your nose should not be done.

(5) Rachel Birnbaum, Nicholas Bala, and Lorne Bertrand, “The Rise of Self-Representation in Canada’s Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants” (2012), 91 *Canadian Bar Review* 67, at 71, 92, and 94.

(6) Canadian Bar Association, *Reaching equal justice: an invitation to envision and act-A summary report by the CBA Access to Justice Committee*, August 2013; online: http://www.cba.org/cba/News/2013_Releases/08-18-accessreport.aspx.

legal advice services. Legal advice cannot be automated.⁴ The cost-saving part of the ABS proposals is the automating of routine legal services, and the regimentation of investor-owned strings of law firms. They cannot solve the problem. The solution requires the legal profession be moved from its “handcraftsman’s method” of delivering legal services to a “support-services method.” This conversion has occurred in all competitive fields of producing goods and services except in the legal profession. For

(7) Gillian K. Hadfield “The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law” *International Review of Law and Economics* (forthcoming); download copy available at: SSRN <http://ssrn.com/abstract=2333990>.

(8) View the video of the University of Toronto, Faculty of Law's Access to Civil Justice Colloquium, on Feb. 10, 2011; online: <<http://hosting.epresence.tv/MUNK/1/watch/219.aspx>>. It provides seeing and hearing the Chief Justice of Canada, Beverley McLachlin, as the keynote speaker (introduced by Ontario's Attorney General, Chris Bentley). She has spoken publicly “off the bench,” several times on this topic--the legal profession has a monopoly over the provision of legal services, therefore it has a duty to make legal services available at reasonable cost.

(9) Beverley McLachlin C.J.C., 21st Century Justice, Remarks to the Probus Club, Vancouver, Feb. 26, 2013, p. 9: “In some courts, up to 40% of the cases involve self-represented litigants.”; citing: Andre Gallant, “The Tax Court’s Informal Procedure and Self-Represented Litigants: Problems and Solutions” (2005), 53 *Canadian Tax Journal* 2; and, Anne-Marie Langan, “Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario” (2005), 30 *Queen’s L.J.* 825, “the author cites data compiled by the Ontario Ministry of the Attorney General, which show that in 2003, 43.2 percent of applicants in the Family Court Division of the Ontario Court of Justice were not represented by counsel when they first filed with the court. The average percentage of unrepresented litigants in Ontario family courts between 1998 and 2003 was 46 percent.” Online at: <<http://probusvancouver.com/2012/12/february-26-2013-at-2pm-the-right-honourable-beverley-mclachlin-p-c-chief-justice-of-canada-presentation/>>.

(10) Osgoode Hall Law School at York University (Toronto) Professor John McCamus, Chair of the Board of Directors of Legal Aid Ontario, stated on July 3, 2013, that he is aware that the majority of Canadians cannot afford a lawyer, and that the income ceiling to qualify for a legal aid certificate in Ontario was \$10,800, and the threshold for a single parent with one child was \$18,000; online: <http://www.thestar.com/opinion/commentary/2013/07/03/legal_aid_ontario_overwhelmed_goar.html>. Professor McCamus is the author of the 1997 Report of the Ontario Legal Aid Review-A Blueprint for Publicly Funded Legal Services, recommendation 79 of which states that, “governance of the legal aid system in Ontario should be transferred from the Law Society to an independent statutory agency.” That recommendation was implemented in the Legal Aid Services Act, S.O. 1998, c. 26, s. 3(1) of which states: “A corporation without share capital is established under the name Legal Aid Ontario in English and Aide juridique Ontario in French.” Professor McCamus, has served as the Chair of Legal Aid Ontario’s (LAO’s) Board of Directors since 2007. See public information statements about LAO, provided by Professor McCamus at (1): <<http://blog.legalaid.on.ca/2013/11/06/why-we-need-to-improve-legal-aid-services-to-ontarios-aboriginal-clients/>>; and, (2) <http://www.lawsocietygazette.ca/treasurers-blog/mccamus-legal-aid/>.

(11) the May 15, 2013, Toronto Star newspaper article about the “broken justice system,” entitled, “Do-it-yourself-law—a trickle becomes a deluge,” dealing with the National Self-Represented Litigants Research Study (2013) conducted by University of Windsor law Professor Julie Macfarlane online: <http://www.thestar.com/opinion/commentary/2013/05/15/doityourselflaw_a_trickle_becomes_a_deluge_goar.html>. And in the LAO blog issue for Jan. 22, 2014, see Dr. MacFarlane’s photo and article, “Fire in the hole: Why every lawyer needs to care about access to Justice.” A much shorter summary version of this article was posted on Slaw on October 24, 2013.

⁴ See my article, Legal Advice Services Cannot Be Automated by Alternative Business Structures, on Slaw October 9, 2014; and on the SSRN: Legal Advice Services Cannot Be Automated by Alternative Business Structures, October 15, 2014.

example, a lawyer's office does all of the work necessary to deliver each legal service to the client. There is no reliance on external support-services. But no doctor's office provides all treatments and remedies for all patients, but rather is merely one part of a vast, mutually interdependent medical infrastructure of support-services, such as specialized doctors, technical tests and technicians, prescription drugs, and hospital services.

Large-scale competitive manufacturing does the same. For example, car manufacturers rely on "special parts companies" that have the high degree of specialization and scaled-up volume of production that maximizes the economies-of-scale that maximize cost-efficiency, thereby enabling the manufacturers' products to improve without having to increase their price. But without comparable support-services, law firms by themselves are too small to develop the necessary degree of specialization and economies-of-scale provided by the large volume production that would enable them to cope with the cost-price conflict, *i.e.*, to be able to maintain the quality of legal services without having to increase their price. They can't, therefore the problem is inevitable.

They can't because of the increased time now needed to deliver legal services. Without a mechanism that is constantly improving cost-efficiency, that increased time must increase the price of legal services. Such mechanism is the foundation of support-services methods of production. But the legal profession's "handcraftsman's method" of production doesn't have one. The increase in time is caused by: (1) the exploding volume of laws; (2) the increasing complexity of laws, *e.g.*, more laws are now based upon technology, and such laws must be as complex as the technology they regulate; (3) there is more technology to be understood; and, (4) electronic records management technology has vastly increased the volume of records that must be considered. Almost all of that record-making is automated. Every interaction, and transmission or manipulation of information now automatically produces a record, and therefore records are now the most frequently used kind of evidence.

The major forces that are increasing the volume of laws are: (1) more laws needed for societies' increasing dependence upon technology; and, (2) demands that the "rule of law"⁵ be brought to bear in many new areas, and expanded in many established areas, *e.g.* laws concerning, the environment, privacy and access to information, electronic commerce, rights and freedoms, taxation, and the Criminal Code. An example is the effect that the Canadian Charter of Rights and Freedoms has had upon the concepts, consequences, scope of application, and case law of rights and freedoms. *Charter* issues crop up now in every area of the practice of law, which wasn't so pre-*Charter*. For example, the law of search and seizure is now into searching intangibles and the effects of electronic technology, and not just searching and

⁵ For the definition and "three principles" of the "rule of law," see: *Christie v. British Columbia (A.G.)* 2007 SCC 21, [2007] 1 S.C.R. 873, paras. 1920.

seizing in physical places and things.⁶ And such major laws cause increases in the volume and complexity of more specialized laws, such as electronic commerce legislation necessitating changes to the document requirements of laws governing real estate transactions, and electronic signatures for agreements of purchase and sale.

The ABS proposals are based upon maintaining the craftsman's method. Therefore they cannot solve the problem. Whatever improvements are made to the profession's craftsman's method of delivering legal services would be like adding a motor to a bicycle when in fact, the speed, capacity, and cost-efficiency of a motor vehicle are needed, and similarly, motor vehicles cannot be made to do what airplanes do. Only a law society can bring about the necessary support-services for the delivery of legal services.⁷ However, could the ABS proposals include an agreement to accept the development of support-services by the law societies? But wouldn't that be inconsistent with the degree of control of law firms that the investors in law firms would want? Particularly so, investors who buy up strings of law firms to franchise them, so as to impose the regimentation that provides the cost-efficiency that franchising can produce.

For example, the Discussion Paper (at p. 9) says that an example of ABS enterprises in other jurisdiction include: ... "law firms operating as franchises so they have centralized access to management systems, technology, marketing and other expertise." Imposing such "enterprises," which is what is done to each franchised outlet, would be inconsistent with law societies' bringing their own improvements, such as developing support services, to methods of delivering legal services. Therefore apparently one of the intentions of these ABS proposals is that the duty to regulate such methods is to be handed over to the investors. That would reduce the responsibilities of law societies, and therefore their powers in fact. The investors owning law firms would control the degree and kind of innovation possible and thus dictate the conception, practice, and policy, and duties of a law society. That would be inconsistent with the duties imposed upon the Law Society by s. 4.2 of the Ontario Law Society Act, which include, (1) "to maintain and advance the cause of justice and the rule of law"; (2) "to act so as to facilitate access to justice"; and,

⁶ For example in R. v. Vu 2013 SCC 60, [2013] 3 S.C.R. 657, 302 C.C.C.(3d) 427, the issue was whether the traditional rule that a search warrant to search a place also authorizes searching containers and receptacles, applies to computers, given that computers often contain private and confidential information about people who are not related to the purposes of the search. Thus, computer searches are very intrusive invasions of privacy that should be considered in themselves to searches of a separate place. Therefore the traditional rule is not adequate for deciding whether a particular computer search is a violation of the s. 8 search and seizure provisions of the Canadian Charter of Rights and Freedoms, and whether the evidence obtained should be excluded under Charter s. 24(2). See also, R. v. Fearon 2014 SCC 77, in regard to the privacy issues concerning police seizures of cell phones ("mobiles" some say).

⁷ As an example of such a support-service, see my article, "Access to Justice – Canada's Unaffordable Legal Services – *CanLII* as the Necessary Support Service." It advocates a much expanded role for *CanLII*, comparable to that provided by LAO LAW at Legal Aid Ontario.

(3) “to protect the public interest”. Law societies would be rendered fixed in what they are now, rather than evolving as the needs and circumstances of society changed.

Therefore the “details” of these investor contracts have to be known in order to have a sufficient opportunity to comment adequately on these ABS proposals—“the devil is in the details.” That is not provided in the Discussion Paper.

But the history of Ontario’s Law Society of Upper Canada’s (LSUC’s) performance in regard to the problem is very contrary to its being so innovative and proactive (instead of passive) as to sponsor and cause the creation of the necessary support-services.⁸ They appear to be therefore, quite willing to turn the problem over to the ABS’s, which in fact cannot solve the problem. This attitude makes possible the opportunism of those benchers who are very enthusiastic about the ABS proposals, because there is a lot of money to be made by those law firms whose clients can still afford legal services. But 70% of the lawyers in private practice work in middle-sized and small law firms. Their interest in ABS proposals is very different than that of the big law firms. The latter have clients who can still afford legal services; the former have many more former clients who can’t afford legal services. The big law firms will benefit, but those law firms whose clients have become former clients won’t. And ABS’s cannot reverse that situation unless the quality of legal advice services is greatly reduced so that a lawyer can service more clients per unit time, and thus legal services will cost less because they are of lower quality. The “profit pressures” created by investor-owners of franchised law firms will bring that about.

But it is the middle-sized and smaller law firms who provide the great majority of legal services in Canada, to the great majority of clients and taxpayers. Therefore they have the reputation of the legal profession in their hands and their performance in delivering legal services. How can ABS’s help them when they cannot solve the problem? It is taxpayers who finance the justice system that gives employment to judges and lawyers. But the great majority of those taxpayers cannot afford legal services for themselves—meaning, legal advice services which ABS’s cannot make less expensive if they are to be kept of necessary quality.

But in fact, the legal profession, with good Law Society leadership, can provide itself with all that ABS proposals could, and more.⁹ There is no need to risk the dangers to the profession’s independence and professionalism inherent in ABS proposals.

⁸ For LSUC’s history to 1997, see this book by Christopher Moore, *The Law Society of Upper Canada and Ontario’s Lawyers 1797-1997* (Toronto: University of Toronto Press, 1997). The inside flap of the dust cover begins: “In July 1797, ten of the fifteen lawyers in Upper Canada gathered at Wilson’s Hotel in Niagara-on-the-Lake to establish the Law Society of Upper Canada. Half of them were under thirty; the youngest was nineteen. The organization they were founding, a professional organization with statutory authority to control its membership and govern its own affairs, had no parallel in the common-law world.” But page 14 states of those very youthful founding fathers: “Yet six of the ten would be dead within a decade of this meeting.”

⁹ See the article cited in note 4 *supra*.

But for the law societies to be willing and able to move the method of delivering legal services to a support-services method, would require the implementing of a different conception of the duties and purpose of a law society than what law societies live by now. That is why the problem has been allowed to develop over decades and remains unsolved and growing worse. No Law Society publication declares that the problem is the Law Society's problem and duty to fix it, let alone acknowledge that its failure to respond to the problem over decades, is its cause. If not, then it doesn't have a cause, which is a proposition unacceptable in a democracy based upon the rule of law and the ability to effectively enforce one's constitutional rights and freedoms, and protect one's property and privacy.

Because of the exploding volumes of laws, their complexity, and relevant electronic records, people have never needed lawyers more. If legal services were affordable, lawyers would have more work than they could handle. But the ABS proposals don't talk of developing support-services. Instead, their deceptively simplistic "quickie fix" for the problem, requires a degree of control of law firms, and prohibitively "occupying the field of reform,"¹⁰ that will foreclose the ability of law societies to ever make legal services affordable again. ABS promoters are playing on the fact that many firms are very worried about their loss of clients, and like a drowning man, will reach out for any stick or plank to stay afloat. But to see how the ABS proposals are going to improve this situation of financial distress, we have to know what are the terms of these investor contracts that own and franchise strings of law firms. So again, "The devil is in the details." That information isn't provided in the Discussion Paper.

Therefore, ABS proposals cannot satisfy the duties imposed on the Law Society by s. 4.2 of Ontario's Law Society Act: (1) to maintain and advance the cause of justice and the rule of law; (2) to act so as to facilitate access to justice for the people of Ontario; (3) to protect the public interest; and, (4) to act in a timely, open and efficient manner.

There is also an argument that the ABS proposals are unconstitutional. They greatly threaten to exert too much control that will jeopardize the independence of the legal profession, which is essential to the independence of the judiciary, which in turn is essential to the efficacy of our democratic form of government, and of the rule of law, and therefore, of the efficacy of the rights and freedoms of our constitution. Judges can decide only what lawyers give them, who are professionally bound to give them all that is possible so as to help judges reach the right decision, so as to make the rule of law adequately available to the clients. And such control will prevent the principle of the independence of the legal profession from becoming a constitutional principle itself and not just a necessary adjunct of judicial independence.

¹⁰ "Occupying field of reform," meaning the "one-way entrenched and potentially damaging nature of ABS proposals," see the Part B list in my *Slaw* blog post of November 25, 2014, "LSUC's Worrisome ABS Proposals."

Secondly, there will be an increased probability of a greatly lessened ability of law societies to innovate because investor-owned law offices will have to approve such changes to their property rights. And will thus again be perceived as having “occupied the field” of reform such as to foreclose reform and innovation as to the delivery of legal services by any other agency including law societies. Such innovation is essential to maintaining the health of the legal profession and the delivery of legal services—health as to maintaining competence, ethics, and preventing the fiduciary duty to one’s client becoming instead, a buyer-seller relationship. For example, no ABS would have created CanLII,¹¹ or the centralized legal research unit, LAO LAW¹² at Legal Aid Ontario (LAO),¹³ which was created when the Law Society managed LAO LAW. It is the best legal research unit used by lawyers in private practice in Canada (see the LAO LAW section 5 below at p. 25).

And thirdly, ABS’s will bring an increased “profits pressure” that could lower the quality of legal advice services by adopting a “volume strategy” of processing more clients per unit time by spending less time preparing and giving the legal advice, which is the only way the cost of legal advice can be lowered using the craftsman’s method of delivering legal services. Which is exactly the strategy in the fast food industry; customers will give-way somewhat on quality if they can get better price and convenience. But that “fast food” industry strategy is not appropriate for a profession that is the foundation of judicial independence,¹⁴ and the quality of whose work-product has a substantial impact upon the quality of

¹¹ CanLII is the Canadian Legal Information Institute. CanLII’s website states: “CanLII is a non-profit organization managed by the Federation of Law Societies of Canada (the FLSC). CanLII’s goal is to make Canadian law accessible for free on the Internet. This website provides access to court judgments, tribunal decisions, statutes and regulations from all Canadian jurisdictions.” See online: <<http://www.canlii.org/>>. The FLSC’s website is online at: <<http://www.flsc.ca/>>.

¹² LAO LAW is a centralized legal research unit within Legal Aid Ontario (LAO) that provides legal research services as a free-of-charge support-service to lawyers representing legally aided clients. The clients are poor people who qualify under LAO’s very stringent income limits for free legal services. (a single person with no dependents, to qualify for legal aid, cannot have an annual income greater than \$11,600.) The lawyer are paid by LAO in accordance with a reduced tariff of fees. It is a variety of the “judicare” model of providing legal services. It is a very sophisticated support-service providing legal research services to lawyers in private practice who do legal aid cases. By its ninth year of development, it was producing 5,000 legal opinions per year, which proves its popularity with lawyers in private practice. Its use of the support-service strategy has made it the best legal research unit in Canada, created in the poorest resourced place in the legal profession. Why wasn’t it created in the best resourced law offices? See the Appendix as to the specific services provided by LAO LAW.

¹³ This is an example of the “judicare” model of providing legal services. It is a variety of socialized law in that government finances the provision of legal services, and controls the procedures by which it is obtained and the tariff of fees by which lawyers are paid. Therefore it is an exception to the legal profession’s monopoly over the provisions of legal services, and an exception to the principle of the profession’s independence from government intervention. But it is strongly supported by the legal profession because such poor people would never be lawyers’ clients anyway.

¹⁴ As to the important role that lawyers play in ensuring access to justice and upholding the rule of law, see: *Christie v. British Columbia (A.G.)* 2007 SCC 21, [2007] 1 S.C.R. 873, para 22.

decisions made by judges, and therefore upon the rule of law, which is essential to the proper functioning of a democracy.¹⁵

I know well the differences between the craftsman's and support-services methods of delivering legal services because I created LAO LAW, which is the only such support-service in Canada. It now has 35 years experience of successful innovation that has saved LAO millions of dollars. It has solved a smaller version of the very same problem that is the unaffordable legal services problem. Other lawyers don't have that knowledge because they haven't had that experience, including those benchers who support ABS proposals. And their dedication to the ABS proposal implies that they don't really want to learn because it's not relevant to buying-up law firms to make franchises of them, meaning their ABS proposals are based upon preserving the craftsman's method of production. There is a lot of money to be made by their law firms from enabling ABS proposals to franchise strings of law firms, as they are, unaided by support services such as LAO LAW, which can produce legal opinions and other legal research services far more cost-efficiently than can any law firm. Support services are not something the investors buying-up law firms control nor create. Therefore these ABS proposals will never involve this needed transition of the production of legal services from the present craftsman's method to a support-services method. That means that ABS's will never solve the unaffordable legal services problem. But that isn't necessary to these ABS proposals either. Their chief innovation is to automate routine legal services. They will profess to automate services such as real estate work (conveyancing), writing simple wills, and incorporating simple companies.

The support-services strategy doesn't work only in relation to providing legal research services. It applies to any type of work that producers of goods and services are not able to do cost-efficiently and make render a profit. That difficult work is studied and made a specialized service, such as are the special parts companies for the motor vehicle manufacturers. As a result, support-services exist in every field of the production of goods and services where there is sufficient pressure to make them happen. They don't exist in the legal profession because there hasn't been sufficient pressure to make them happen. LAO LAW happened because of government pressure on LAO to make it happen. The Ontario government insisted that the Law Society reduce the "unaffordable" amounts of money being paid out on lawyers' accounts for legal research hours claimed. Therefore, early in 1979 the Law Society reluctantly advertised for a "Director of Research." On July 3, 1979, I started work as Legal Aid Ontario's first Director of Research. It happened in the poorest-funded and resourced part of the legal profession, and the least attractive place to work for aggressive, career-oriented lawyers, which proves that the problem exists

¹⁵ See also this statement: "Lawyers are duty-bound to protect the administration of justice and enhance its reputation within their community." *R. v. Rosenfeld* 2009 ONCA 307, (2009), 94 O.R.(3d) 641 (Ont. C.A.), para. 40; *fld. in, R. v. McLellan* 2012 ONCA 717, [2012] O.J. No. 5028, 293 C.C.C. (3d) 326, para. 28.

because there hasn't been enough pressure upon law societies and accountability required of them to make it happen.¹⁶

So, there are a lot of issues to be decided, few of which are dealt with in the discussion paper circulated by LSUC.¹⁷ Therefore it invites comments without making the membership adequately aware of the important issues and facts they should be commenting on. That is because: (1) it does not discuss whether the ABS proposals are compatible or incompatible with the necessary "support-services solution" to the problem, nor does it deal with the fact that support-services are used in all other sufficiently competitive areas of the delivery of good and services; (2) it shows no understanding of the cause of the problem; and, (3) it is not a neutral, balanced text that presents all issues and arguments on both sides, as to whether the ABS proposals should be accepted. It reflects the bias of LSUC's ABS Committee in favour of adopting the ABS proposals. ABS committee members wrote the discussion paper.

Therefore, are the changes in the law necessary to implement ABS proposals, changes made by the Ontario legislation, or also changes to the regulations made by the Law Society? If there is bias operative, what declaration should be made as to its sources, and the limits of its power and scope?

And therefore, ABS proposals involve substantive issues as to the availability and quality of legal services that deserve public and political debate. ABS proposal are not merely dissertations on procedural issues concerning the method of delivering legal services that can be left to law societies to decide alone—its benchers alone. Given the money to be made, and the financial stress of the profession, this is a situation for opportunism that is dangerous to what a legal profession and a law society should be, and what true professionalism and dedication to one's clients should require.

The ABS advocates will say, "but there has been no such trouble in Australia and England and Wales whereat ABS's have been operation." We don't know that. The resulting corrupting of professionalism and the operation of the fiduciary duty to clients won't declare itself in the news media, and it will be very hard to ferret out because neither its perpetrators or lawyer-victims will want it revealed.

¹⁶ In 1979, I was just such an aggressive and career-oriented criminal lawyer, in my 13th year of practice, but took the job because I had to solve a family problem by getting back to Toronto, ASAP, from Vancouver where I had been working, arguing criminal appeals for the Crown before the BCCA. Ironically, although working at LAO I initially thought to be a negative career choice, now, my years creating LAO LAW are the ones of my career of which I am most proud because I solved the problem by creating the first support-service that can reduce the cost of legal advice services, and the best legal research unit in Canada, and it still is, 35 years after I started, and 26 years after I left.

¹⁷ See this [statement on LSUC's website](#): "The Law Society released *Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper* on September 24, 2014, to seek input from lawyers, paralegals, stakeholders and the public about Alternative Business Structures (ABS)." Comments and requests to attend meetings may be sent to, abs.discussion@lsuc.on.ca by December 31, 2014. [This discussion paper reads more like a promotional text than a neutral text providing a balanced presentation.] And see also LSUC's Alternative Business Structures Working Group [Report to Convocation](#) (at Tab 4) of the Professional Regulation Committee Report, February 27, 2014.

ABS's will further weaken the ability of law societies to cope with demands for government intervention to establish a different agency to regulate the legal profession in Ontario so as to solve the problem. A different concept of what a law society should be is needed; not the use of ABS's that will fix law societies as being only what they are now, and therefore more vulnerable to government intervention because ABS's cannot solve the problem of unaffordable legal services.

LSUC's election of benchers on April 30, 2015,¹⁸ should make these issues their most important issues. The most serious and threatening law society problem is the fact that Canada's legal profession has priced itself beyond the ability of the majority of the population to pay for lawyer-provided legal services. Therefore, Benchers' Convocations should not be having votes on the ABS proposals before the election, which votes would pre-empt their being the election's most important issues. Such bencher elections provide the only possibility of bringing about the necessary change in the concept as to what a law society should be and do. Otherwise, Canada's legal profession will continue to shrink, and become a profession of employees and tightly investor-owned and controlled law firms. That will greatly reduce its prestige, influence, and its prominent professional and social welfare position in society, and lawyers' incomes.

¹⁸ The third paragraph of the [bencher election announcement](#) on LSUC's website, states: "As members of Convocation, benchers deal with matters related to the governance of the Law Society and the regulation of Ontario's lawyers and paralegals. Benchers dedicate an average of 31 days a year to Law Society business. This includes sitting on hearings as an appointee to the Law Society Tribunal, attending monthly committee and Convocation meetings and attending calls to the bar. Benchers are remunerated for some of their services and are reimbursed for expenses." The conception of a bencher is therefore that of a part-time and unpaid contributor to law society affairs. This is charity, which greatly influences the foundation concepts as to what a bencher is, and what are the purposes and duties of a law society. The main interest and time of benchers has to be devoted to their law practices. Can this historically-based and unchanged concept of a bencher continue to provide a management structure capable of fulfilling law society duties and functions, for a social welfare function as important as the availability of legal services, and solving problems as complex as the unaffordability of legal services problem? Or, for example, has the problem remained unsolved because that management structure is now outmoded? Historically cherished management structures cannot deal with 21st century problems in making adequately accessible, legal services that are, competently and ethically provided, and affordable. It is management by part-time amateurs. "Amateurs" because benchers do not have the technical skills required by all of the issues the committees the benchers are divided into, deal with. For example, the problem of unaffordable legal services is not a legal problem. It requires the advice of experts in the cost-efficiency of the production of professional services. But instead, the authors of all of the writing on the problem are lawyers. That is why their recommendations are all improvements to the existing method of delivering legal services, but without questioning or justifying that method, which assumes that there couldn't be any other method. This is the approach of amateurs, lacking essential expertise in regard to the law societies' greatest problem in the whole history of Canada's law societies.

And where in law society management are: (1) the experts who examine the production processes of all legal services to determine whether support-services are needed as exist in all of large scale competitive production of goods and services; (2) the flexible, proactive systems of innovation that develop new types of specialization as there are in the medical profession, *e.g.*, the records management lawyer specialized in the problems, *inter alia*, of the high cost of electronic discovery; (3) the experts in cost-efficiency

1. The Aggressive Social Welfare-Dedicated Law Society, or The Law Society Managed by Part-time Amateurs

The third paragraph of the bencher election announcement for the April 30, 2015 election on LSUC's website, states:

As members of Convocation, benchers deal with matters related to the governance of the Law Society and the regulation of Ontario's lawyers and paralegals. Benchers dedicate an average of 31 days a year to Law Society business. This includes sitting on hearings as an appointee to the Law Society Tribunal, attending monthly committee and Convocation meetings and attending calls to the bar. Benchers are remunerated for some of their services and are reimbursed for expenses.

The conception of a bencher is therefore that of a part-time and unpaid contributor to Law Society and public affairs. This is charity, and indeed highly commendable charity. To devote 31 days, largely unpaid days, while under the pressures of private and institutional practice, particularly clients' unceasing demands, must be very taxing. But it is a structure that greatly influences the foundation concepts as to what a bencher is, and what are the purposes and duties of a law society. The main interest and time of benchers has to be devoted to their law practices and employers. Can this historically-based and unchanged concept of a bencher continue to provide a management structure capable of fulfilling Law Society duties and functions, for a social welfare function as important as the availability of legal services, and solving problems as complex as the unaffordability of legal services? Has that problem remained unsolved because that management structure is now outmoded? Historically cherished management structures cannot deal with 21st century problems in making adequately accessible, legal services that are competently and ethically provided, and affordable.

It is management by part-time amateurs. "Amateurs" because benchers do not have the technical skills required by all of the issues that the committees the benchers are divided into, deal with. For example, the problem of unaffordable legal services is not a legal problem. It requires the advice of experts in the cost-efficiency of the production of professional services. But instead, the authors of all of the writing on the problem are lawyers. That is why their recommendations are all improvements to the existing method of delivering legal services, but without questioning or justifying that method, which assumes that there couldn't be any other method. In none of it is there a reference to the support-services method, without which the problem cannot be solved. And then they don't have the opportunity to put their recommendations into effect to see the consequences, and engage in the tough and often discouraging process of voluminous trial-and-error, which is where the real and essential learning process begins. "The only things we really know are those that we have experienced." Therefore, this is the approach of amateurs, lacking essential expertise in regard to the law societies' greatest problem in the whole history of Canada's law societies.

I too was just such an “amateur” in regard to the problem of generating a sufficiently large cost-saving for legal aid so that I wouldn’t lose my job. I had been a criminal lawyer for 13 years. But I had what other writers about the problem have not had—a sufficiently long period of trial-and-error, plus enough pressure on me to make success happen. By the ninth year of its development, what is now called LAO LAW, was producing 5,000 legal opinions per year. That meant 5,000 clients being served by a support service, for legal aid lawyers,¹⁹ that had made legal research services more cost-efficiently done than anywhere else in the legal profession.

The result is, the Law Society must become a support-service to the practice of law, and to use a sports analogy, not just a regulator, but also a provider of stadiums and arenas as new areas for the “practice of law” game, and coach and a trainer, and not just a referee, and more often merely a spectator watching part-time from the sidelines. The ABS advocates want to be the owners of the teams, all of the teams, and be in the game only for the profits, and who will provide coaching and equipment, only if it’s sufficiently profitable. Therefore, a critically important issue of the ABS question is, what is the now-needed concept of a law society?

The present management structure and concept of a law society is vulnerable to the opportunism of benchers serving the interests of their law firms to the detriment of the legal profession, and to the need of the public for adequately available legal services. A decision on an issue as important as to whether ABS’s should be allowed should not be vulnerable to an unacceptably high probability of control by self-interest, in place of performing the duties as to facilitating access to justice and the rule of law, imposed by s. 4.2 of the Law Society Act. It tempts government intervention into Law Society management. Change the management structure by removing the regulatory function of a law society from its representative function in representing the interests of its lawyer-members. That will remove the most serious conflicts because an independent regulator of the legal profession would not allow them; for example, not allow ABS proposals to be entertained in ways that don’t prevent the inherent conflicts of interest involved, and access to justice issues to be ignored.

Is socialized law necessary? Not because legal services are inherently unaffordable for the majority of population and socialized law is the only way to make them affordable (which is the justification for socialized medicine in Canada). But rather because socialized law may be the only way to get a

¹⁹ Legal Aid lawyers in Ontario are those in private practice who provide legal services to clients who have obtained Legal Aid certificates. In Ontario, a single person with no dependents, to qualify for legal aid, cannot have an annual income greater than \$11,600. This is an example of the “judicare” model of providing legal services. It is a variety of socialized law in that government finances the provision of legal services, and controls the procedures by which it is obtained and the tariff of fees by which lawyers are paid. Therefore it is an exception to the legal profession’s monopoly over the provisions of legal services, and an exception to the principle of the profession’s independence from government intervention. But it is strongly supported by the legal profession because such poor people would never be lawyers’ clients anyway.

management structure that is sufficiently skilled and dedicated to making them affordable. The fact that the problem exists proves that the present management structure and concept of what a law society should be is not adequate. And the way the ABS issue is being presented by the Law Society shows that it is not adequate, for at least these facts:

- (1) LSUC has not presented the issues in an unbiased way—its Discussion Paper is a promotional text; professional advertising in the guise of an expertly written report.
- (2) It hasn't declared the timetable and defined the steps on the way to rendering a final decision, and implementing ABS's if that decision approves them.
- (3) The much more important issue of unaffordable legal services is ignored, but instead the much more recently important but very much less important issue of ABS's has a Discussion Paper circulated, and very committed big law firm advocate benchers serving as high-pressure lobbyists to get the changes to legislation concerning the law society and practice of law, and presumably a timetable for bringing ABS proposals into operation that has not yet been revealed; and,
- (4) It has not raised the very important ethical question as to whether the unaffordable legal services problem should be solved first before indulging the commercial interests of ABS investors and their big law firm "rain makers."²⁰

This is contrary to the democracy that should allow the Law Society's members to have sufficient control of the process by which a final decision is reached. And it is contrary to the public and the political process being sufficiently part of the decision-making on the issue as to whether ABS's will be allowed. A Law Society decision that ABS's should be allowed, no matter how that decision is obtained, will be used to bring about the necessary change in the law. All of which again proves that the availability of legal services is too important to be left to the management of part-time amateurs.

But the benchers will ask, "who is going to pay for all of this expertise that you say is missing?" If it were done nationally, as was CanLII, for the benefit of all of Canada's lawyers, it could be made to pay for itself. Similarly, a one-time \$200 addition to annual fees, would produce about \$20 million dollars with which to obtain the software for automating routine legal services. No matter how big the increase in fees has to be, it would produce a better result than selling out the independence of the legal profession by surrendering total ownership of its law firms to market-controlling motivated investors. And the bargaining power of the Federation of Law Societies of Canada, on behalf of every lawyer would be far more powerful than the bargaining power of individual law firms negotiating with large, profits-fixated investors, particularly so the many law firms now desperate for clients.

The legal profession can do for itself everything and more than what ABS's can provide, and do it without having to surrender its professionalism and independence to commercial ownership. The professional and fiduciary duty model of delivering legal services is where the dignity and social position

²⁰ As to the possibility of such being a criminal breach of trust by a self-interest promoting bencher, see note 46 *infra* and accompanying text.

of a lawyer lies, not the entrepreneurial, commercial model. We don't need ABS's; and, they are a dangerous threat to the independence of the legal profession and that of the judiciary. The solution to the problem is to create the necessary support services for all major areas of the practice. It can be done nationally, again by the FLSC sponsoring the necessary single unit of experts to serve the country.

But the great weakness of my argument, which ABS promoters are exploiting, is the history of Law Society performance and the management structure that has produced it. It will remain, until candidates and voters at bench elections remove it. Otherwise, governments will.

2. Law Societies can Automate Routine Legal Services Much Better than ABS's can

Instead of ABS's, Canada's law societies could be bargaining as a combined single entity on behalf of all lawyers, for the automation of routine legal services. That, along with maintenance fees, would make a very attractive contract for suppliers of the necessary software. And it would create for all law societies on behalf of all lawyers, a very powerful bargaining position. Much more powerful it would be than each separate law firm bargaining with powerful investors as to surrendering its ownership in exchange for automating routine legal services. But once law firms are owned by investors, such joint action by law societies will not be possible. Impossible it would be for the Federation of Law Societies of Canada to get the agreement of the complex investment structure that will own law firms, to do anything on behalf of all lawyers of Canada. CanLII was possible because the FLSC could be freely and independently used jointly by all of Canada's law societies to create it. That kind of act of creation on behalf of all lawyers will never be possible again if many law firms are franchised outlets of ABS investors. Law firms will be bought up to become strings of franchised law firms. Franchises do as they are told, including who to buy from and what to support.

Why not require that all investors owning any portion of a law firm, sign an agreement that they will never interfere with any joint or single action of any law society or the FLSC? Of course they won't be willing to do that. And the benchers who support ABS's will make sure that, that will never be required. And it's impossible to do effectively anyway, because there will be investors who own investors and holding companies, and all of the other complexities of the investment market brought to bear upon the ownership of law firms. Therefore it also is simplistic and unrealistic to think that the independence of the profession, and the fiduciary duty being the foundation of the solicitor-client relationship, could be adequately protected against such complex ownership.

And most important of all, is the fact that legal advice services cannot be automated. That is the basis of the unaffordable legal services problem. It is not caused by routine legal services. And legal advice services are so closely intertwined with routine legal services that the automating of routine services will

never solve the problem, and doubtfully will have any significant impact. There's nothing in the analytical literature that says that it can have any.

When a law firm is owned by an investor, it has another mouth to feed. The increased "profits pressure" will require owned law firms to stop doing pro bono work, and lawyers to give their paralegals more "lawyer" work to do. And it will force lawyers to strictly restrict the amount the time they spend with each client. All of that will mean a lowering of the quality of legal services. In result, owned law firms will move from the professional model of providing legal services to the entrepreneurial, buyer-seller model.

The cause of the unaffordable legal services problem is the continued use of the handcraftsman's method by which legal services are provided, which lacks the necessary cost-efficiency, specialization, and economies-of-scale provided by the support-services method. The difference is explained in the next section. ABS proposals are based on preserving the handcraftsman method of providing legal services. They can never have a significant impact upon the unaffordable legal services problem without drastically reducing the quality of legal services provided. And if they don't cause such reduction, the unaffordable legal services problem will remain. There is nothing in the analytical literature concerning ABS that says that they can solve the unaffordable legal services problem. And as stated above, because ABS's are based upon the handcraftsman's model, and will prevent any other method from being adopted, law societies will never be able to solve the problem.

3. The Support Services Method of Delivering Goods and Services

The present method of legal services delivery is the "handcraftsman's" method, *i.e.*, the same lawyer or group of lawyers performs all stages of the work necessary to delivering the finished legal service to the client. That method is slow, inefficient, and therefore has a poor cost-efficiency. Like using a horse and wagon or a bicycle. No matter how hard one work's with it and improves it, it can't be made to provide the speed, carrying capacity, and cost-efficiency of a motor vehicle, nor a motor vehicle be made to perform like an airplane. As a result, legal fees have to be too high, *i.e.*, continue to increase the gap between what lawyers need to operate their law offices, and what people can afford to pay for legal services. And, legal fees will have to continue to increase in response to an ever-increasing volume of complex laws and technology to cope with, in delivering all legal services.

The handcraftsman's method was given up more than 100 years ago by the medical profession, and by all of large-scale manufacturing. Instead, they rely on the following strategy for coping with their "costs of services delivery and manufacturing" problems:

- (1) the use of specialization of staff, materials, equipment, and methods as an on-going evolving process, in response to new knowledge, complexity, and technology;

- (2) scaling-up the volume of work done by each specialist, thereby taking advantage of economies of scale that enable each product or service produced to bear an ever-diminishing portion of over-all costs; and,
- (3) an intense application of technology, particularly now electronic technology, in the work done by each specialist.

As a result, types of work that are not able to be done sufficiently profitably by the general practitioner or manufacturer, are made a specialty. This strategy results in a "support-services method" of services delivery, in place of the handcraftsman's method, which doesn't use support services. Four very essential benefits are obtained from this support-services method:

- (1) the competence with which the work is done is substantially increased;
- (2) costs are substantially reduced;
- (3) response time is greatly reduced; and most important of all,
- (4) the probability of making an error that hurts the patient, customer, or client is reduced to a minimum.

As a result, the same doctor does not perform all parts of the treatment of patients. Nor does the same surgeon do every kind of surgery. The specialty that was surgery, has been divided up into several different kinds of surgery and surgeon, in response to constantly increasing medical knowledge and technology. And similarly, car manufacturers contract-out the more difficult and complex parts of manufacturing motor vehicles to "special-parts companies" that specialize in making those parts. As a result, both the car manufacturer and the special-parts companies make a profit. Similarly, the specialist surgeon functions as a support service for the family doctor, as does all other parts of the medical services infrastructure. The legal profession has no counterpart. Therefore, the problem is inevitable.

The opposite results are obtained by using the handcraftsman's method of services delivery. For example, because legal research is considered to be too time-consuming to produce adequate revenue for the time it takes, most legal research is done by law students and young lawyers because they work by a lower hourly rate fee structure. As a result:

- (1) the competence with which the research work is done is greatly reduced;
- (2) in comparison, only very limited cost-savings are obtained; but,
- (3) the response time is greatly increased; and worst of all,
- (4) the probability of making an error that hurts the client is substantially increased.

But legal research is the foundation of all other legal services. Therefore it should not be given to the legal profession's least experienced people. Good legal research is as much the product of one's experience as a lawyer, as it is of one's training and talent, if not more so.

In the support-services method, legal research is given to lawyers who are specialists in doing legal research, accompanied by sophisticated in-house databases by which all of the office's work-product is

captured for use in future research projects. And those databases are maintained by expertise in database management so as to maximize the many benefits obtained from them. There are several other support services that can be developed from such databases. As a result, such a database becomes more important and valuable than any lawyer in the office. And, it makes untrue the belief that all law offices are only as good as the lawyers in them. With proper database management, every retiring or otherwise-exiting lawyer leaves behind in the office database, her/his expertise and special knowledge and insights, which are thus available to all remaining lawyers, and to every newly recruited lawyer, which drastically reduces their training time. Such structured procedures can bring about greater cost-efficiency than can be provided by any ABS proposal. I know that because I did it because I had to do it.

In legal research support services, each legal research specialist has detailed, finger-tip and quickly used knowledge of the materials in the office database related to his/her specialty, and of all of the legal literature related to that specialty. In this way, in such specialized legal research support services, specialization in both personnel and legal materials used is employed in an on-going process. And as a result, those four benefits, essential to high quality legal services, are obtained and maximized as greater levels of specialization are enabled by constantly scaling-up the volume of work done by each specialist. That's why successful businesses get bigger so as to maximize the benefits of their success. "Nothing cuts costs like scaling-up," is a basic principle of all engineering. And, "if you want to sell cars at a lower price, make more of them"--Henry Ford.

With good Law Society leadership, there are many other support-services that could be created for lawyers using the same support-services strategy, as detailed below. But that won't happen when ABS investors set the routine by which law firms will work, applying the allegedly more cost-efficient practices of the commercial market.

But most telling of the profession's knowledge, including that of ABS advocates, in none of the authoritative reports and discussions carried out in relation to this most damaging and serious of the legal profession's problems, *i.e.*, the "legal services available only at *unreasonable* cost" problem, is this issue as to the method of delivering legal services even mentioned, let alone analyzed. Their recommendations deal with improvements to the present system of services-delivery, without questioning the worth of the system itself. That is what ABS proposals will do. And that is why there has been no solution to this problem, even though a solution has been most compellingly needed for decades. As a result, all of the authoritative and prominent lawyers who have dealt with this problem are like experts trying to improve a horse-powered transportation system so that it will have the capacity, speed, and cost-efficiency of a motor vehicle powered transportation system. It cannot be done, no matter how much it is improved. Similarly, the handcraftsman's method of legal services delivery cannot be made to solve the problem, no matter how much it is improved. But law societies and legal experts continue to try, again and again, as

shown by each new report, institutional “initiative,” and other published proposals. But they are lawyers, trying to solve the problem with only a lawyer’s skill and experience, instead of getting the assistance of experts in developing information systems as a service. And ABS advocates do no better. But there is money to be made and but an unknowledgeable and desperate audience to be convinced.

Therefore, the problem and its long history of failure, requires government intervention because law societies, being the regulators of the legal profession in Canada, do not realize that they do not understand the true nature of the problem, and won’t accept the fact that they and all other such institutions within the legal profession, do not have the expertise necessary to solve the problem. If left to carry on as they have been, the problem will never be solved, and the damage, injury, and distress that it is causing will continue to increase.

So, we must get ready for those predictions to come true that say that the middle-sized and small law offices will disappear over the next ten years.²¹ And also get ready for government intervention that rolls back law societies’ regulatory power and monopoly over the provision of legal services, and the legal profession’s independence from government interference.²² That intervention might well take the form of

²¹ See this example: referring to the next decade, a recent Canadian Bar Association report forecasts that the middle-sized law firm will very likely disappear: *The Future of Legal Services in Canada: Trends and Issues* (Canadian Bar Association, June 2013), released June 12th; at p. 31 online: <<http://www.cbafutures.org/trends>>.

²² See the following in-depth studies as to the loss of self-regulatory power by law societies in other jurisdictions during the law ten years; See these articles and reports concerning the loss of self-regulation by the legal profession:

(1) Paul D. Paton, “Between a Rock and a Hard Place: The Future of Self-Regulation—Canada between the United States and English/Australian Experience,” 2008 *Journal of the Professional Lawyer* 87 (an ABA publication); electronic copy available online at: <<http://ssrn.com/abstract=1226802>>.

(2) Noel Semple, “Access to Justice through Regulatory Reform” (a paper prepared for the National Family Law Program, July 16, 2012; electronic copy available online at: <<http://ssrn.com/abstract=2101831>>. Dr. Semple is a postdoctoral research fellow, Centre for the Legal Profession, University of Toronto Faculty of law. See also *supra* note 3 item (2).

(3) Gillian K. Hadfield, “The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law” *International Review of Law and Economics* (forthcoming); download copy available at, SSRN: <http://ssrn.com/abstract=2333990>.

(4) Edward Iacobucci, Michael Trebilcock, (2008) “Self-Regulation and Competition in Ontario’s Legal Services Sector: An Evaluation of the Competition Bureau’s Report on Competition and Self-Regulation in Canadian Professions,” a publication of the Faculty of Law, University of Toronto, Sept. 15, 2008. Available for download from the FLSC’s website; online: <<http://www.flsc.ca/en/federation-news/2008/academics-review-the-competition-bureau-study-of-the-professions-november-20-2008-/>>. Also published as, “The Competition Bureau’s Report on Competition and Self-Regulation in the Canadian Legal Profession: A Critical Evaluation,” (with Edward Iacobucci), (2009) *Canadian Competition Record* 92. Also listed in the publications of the profile of Michael Trebilcock, in the Faculty of Law, of the University of Toronto’s website; online: <<http://www.law.utoronto.ca/faculty-staff/full-time-faculty/michael-trebilcock>>.

(5) Richard F. Devlin, Porter Heffernan, “The End(s) of Self-Regulation” (2008), 45:5 *Alberta Law Review* 169. Also reproduced in, Alice Woolley, Richard Devlin, Brent Cotter & John M. Law, eds., *Lawyers’ Ethics and Professional Regulation* (LexisNexis Canada Inc., 2008) at 574-598.

variations on the theme of governments using an expansion of legal aid organizations, such as Legal Aid Ontario (LAO), as the basic infrastructure by which to introduce programs of socialized law. In Ontario, LAO's 77 legal clinics could be converted and expanded to provide legal services in the major areas of legal practice. And, governments could heavily sponsor the use of legal services insurance. Similar recommendations were put forward in the *Trebilcock Report* of 2008.²³ I would add the services of LAO LAW so that such clinics will be able to out-perform the offices of private practitioners as to the costs and price of legal services. And further apply that strategy to produce several other support services.

Therefore ABS advocates, particularly bench-advocates, will imply that they can save the profession from government intervention. To an audience and power structure, including government and political power structures, that are not knowledgeable as to the various methods of producing goods and services, the illusion of doing something about the problem is as good as doing something about the problem.

It has to be that way because so large is the damage the problem has inflicted and continues to inflict upon the population, and upon our courts, clogged by unrepresented litigants, that we are in danger of becoming a legally dysfunctional society. In particular, it is the middle class that is being hurt, and they pay most of the taxes that support the justice system wherein lawyers and judges are provided a living, but they can't make effective use of any of it because of the unavailability of legal services at reasonable cost. Particularly important, they cannot make effective use of the rule of law and the rights and freedoms protected by the Canadian Charter of Rights and Freedoms. For them, the Charter is a paper tiger. Therefore, why should they continue to respect the justice system, or the constitution, or any of the people that, that system and our constitution employ, including lawyers? Constitutions cannot work effectively without the respect of the populations for which they are enacted. Therefore, if governments want to stay in power, they cannot allow this situation to continue.

(6) *Self-regulated professions—Balancing competition and regulation* 2007, (Canadian) Competition Bureau, "Lawyers" at 71-79; online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02523.html>>.

(7) Paul Douglas Paton, "In the Public Interest?: Threats to Self-Regulation of the Legal Profession in Ontario, 1998-2006" ("A dissertation submitted to the school of law and the Committee on Graduate Studies of Stanford University, in partial fulfillment of the requirements for a degree of Doctor of the Science of Law," February, 2008).

(8) Adam M. Dodek, "Regulating Law Firms in Canada," (2011), 90 Canadian Bar Review 381 at 403. Adam Dodek is an Associate Professor, Faculty of Law, Common Law Section, University of Ottawa.

(9) Harry Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995), 33 Alta. Law Rev. 800.

²³ *Report of the Legal Aid Review 2008*, being the report of University of Toronto, Faculty of Law, law and economics professor, Michael Trebilcock, to the Attorney General of Ontario, on July 25, 2008 ("the Trebilcock report"); online:

<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf> or, <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/>>.

4. Support services are necessary as are the following innovations

Therefore, the necessary solution to the unaffordable legal services problem is for the law societies to create the necessary support services that will again make legal services affordable. The underlying strategy is not simply one of creating legal research and related support services. Rather, it is necessary to isolate those parts of the work involved in providing each legal service that are inefficiently done by law firms, so as to create a specialized support service for each of them. Thereby many different kinds of support services can be created for all parts of legal services work that law firms find difficult to make profitable. For those types of work, the necessary specialists and scaled-up volume of production are created so as to render them more cost-efficiently provided, and at a lower cost than can be achieved by any law firm. That is the strategy that created LAO LAW and made and kept it successful.²⁴

Because the middle-sized and smaller law firms provide the great majority of legal services to the great majority of clients in Canada, they should not have to change in order to convert the legal profession from a handcraftsman's method to a support-services method of delivering legal services. Their performance determines the reputation and financial welfare of the legal profession as a whole. Other solutions require the imposition of various forms of self-improvement. They could improve cost-efficiency. But their cumulative impact upon the problem would be like adding a motor to a bicycle, when the capacity, speed, and cost-efficiency of a motor vehicle is needed. It is impossible to improve the existing handcraftsman's method of delivering legal services sufficiently. The method itself must be replaced by conversion to reliance upon specialized support-services, as has happened everywhere else where the pressure of competition compels innovation or failure, dissolution, and bankruptcy.

Two reasons make that necessary—to enable the lawyers in that majority of law firms to keep up with developments of law and technology, as well as to make legal services affordable again. Every legal service must take increasingly longer to provide because: (1) the rapidly increasing volume of laws; (2) and their complexity; (3) the increasing volume of laws based upon technology that lawyers must have some knowledge of; and, (4) the greater volume of electronic records that electronic records management technology makes possible—every act of a formal or commercial nature, and every communication and presentation produces a record, almost all of which is due to automation. The two major forces causing these increases are: (1) our increasing dependence upon technology that generates new laws and related forms of legal infrastructure for enforcement, legal services, and adjudication; and, (2) demands that the rule of law be made to apply in new areas and in established areas with greater scope and sophistication (*e.g.*, new laws concerning privacy, the environment, electronic commerce, rights and freedoms, crime and regulatory offences, and taxation).

²⁴ See my paper: "[The Technology of Centralized Legal Research Can Solve the Unaffordable Legal Services Problem.](#)"

As a result, lawyers are needed more than ever before because such increases in volume and complexity make increasingly impossible the ability of people to use the law effectively without the help of lawyers. In turn, that means that if legal services were affordable, lawyers would have more work than they could handle, and be asking the law schools to expand their enrolments. Instead, the opposite is happening. That is the fault of law societies. They have yet to accept the “unaffordable legal services problem” as their problem, and their duty to solve it.²⁵

Thus is created the legal services version of the need to be constantly improving one’s product—the need to cope with more and more while maintaining the high quality of legal services. Specialized support services are needed to keep lawyers informed of the various developments in a rapidly expanding volume and complexity of laws. That is what LAO LAW does for Ontario’s legal aid lawyers. The development of such support services nationally is what is needed.

The strategy is to take those parts of any legal service that law firms find that they can’t do cost-efficiently so as to generate sufficient income, and create a support service that will do them much more cost-efficiently than can any law firm. It does that by developing the necessary specialized staff, materials, equipment, and methods of production. Such support services can be developed for all problem areas of cost and efficiency, such as the need for experts in electronic discovery, particularly its “review” stage.²⁶ They are then made available at cost—a cost that will be significantly lower than that of any law firm because of the much higher degree of specialization and scaled-up of volume of production possible. Therefore law societies should develop the expertise necessary to detect those parts of legal services work in each traditional area of legal services that do need to be provided by a specialized support service. Unfortunately, law society management in Canada shows an unwillingness to innovate.²⁷

²⁵ See: Ken Chasse, “The failure of law societies to accept their duty in law to solve the unaffordable legal services problem” (August 11, 2014, on the SSRN), and on the Access to Justice in Canada blog on August 12, 2014 (Part 1); and August 14, 2014 (Part 2); and excerpted on *Slaw* on September 11, 2014.

²⁶ The larger law firms have begun to develop their own e-discovery specialists; for example, this announcement: “BLG hires Canada’s leading electronic discovery lawyer to lead e-discovery for the Firm. **Toronto (August 6, 2013)** — Borden Ladner Gervais LLP (BLG) is pleased to announce that renowned electronic discovery lawyer, Martin Felsky, will be joining BLG as National E-Discovery Counsel, effective August 12, 2013, to lead the Firm’s e-discovery and litigation support services. Martin is highly regarded for providing his legal and business expertise to large corporations, the judiciary and government organizations across Canada on matters of information governance, litigation preparedness, and electronic discovery. In this new role, Martin will be responsible for advising the Firm and its clients on e-discovery and litigation readiness planning to ensure that the Firm’s clients receive the highest quality and most efficient litigation support services. ... Borden Ladner Gervais LLP (BLG) is a pre-eminent full-service, national law firm focusing on business law, commercial litigation and intellectual property solutions for our clients. With more than 750 lawyers, intellectual property agents and other professionals in six Canadian cities, BLG assists clients with their legal needs, from major litigation to financing and patent registration.” See online: <http://www.blg.com/en/newsandpublications/news_1439#>.

²⁷ The Benchers who manage Canada’s law societies themselves lack the necessary expertise to render legal services affordable, nor have they employed that expertise. And they contribute, according to a published statement of the Law Society of Upper Canada (its LSUC 2015 Bencher Election announcement), on average, only 31 days per year

For the following reasons, all law firms need the higher degree of specialization, scaling-up of production, and resulting higher level of cost-efficiency that only support services can bring to the practice of law:

- (1) to provide the cost-efficiency that will again make legal services affordable to the majority of the population, and enable legal services to remain affordable and of high quality even though lawyers must cope with more laws, complexity in those laws, the increasing interaction between technology and laws, and the continuing rapid expansion of records generated by electronic records technology;
- (2) to minimize the probability that caselaw will be inadequate and unfair, because lawyers in litigation have an inadequate knowledge of the interaction between law and technology, and new laws in new areas subject to the rule of law;²⁸
- (3) to enable lawyers to be sufficiently knowledgeable of the technology that underlies more and more of our laws—case law as well as statutory laws;
- (4) to challenge technology and its legislated infrastructure; and,
- (5) because the high degree of specialization and volume of production inherent within such a support service, make other innovations readily apparent and achievable.

Other types of support services and innovations that will assist in bringing down the price of legal services are:²⁹

(1) The family doctor strategy: the family doctor screens patients to various specialist doctors, technicians, drugs, and the rest of the medical infrastructure. The legal profession needs a counterpart so

to law society matters. It is a nineteenth century management structure. But today, it is part-time management by amateurs, which stands in unfavourable contrast to the necessary skills required to make legal services adequately available to the population. Were it otherwise, the problem of unaffordable legal services would not exist. That problem is, the majority of the population cannot obtain legal services at reasonable cost (*supra* note 3 and accompanying text). See note 65 and accompanying text *infra*, and also notes 38 and 66 *infra* and accompanying text *infra*, in relation to the statutory duties placed upon the Law Society of Upper Canada For more in-depth analysis, see my “access to justice” articles posted on my (Social Science Research Network) SSRN author’s page, at: <http://ssrn.com/author=1398484>.

²⁸ An example of the ignorance of technology that is diminishing the quality of justice is the text, *The Sedona Canada Principles—Addressing Electronic Discovery* (January 2008). It is the predominate authority for conducting electronic discovery proceedings in Canada (and its part of the *Rules of Civil Procedure* in Ontario (Rule 29.1.03(4)), although it shows no understanding of electronic records management technology. See this analysis by Ken Chasse, “The Sedona Canada Principles is Very Inadequate on Records Management and for Electronic Discovery.” The *Sedona Canada Principles* text is very similar to the American, *The Sedona Principles, 2nd Edition* (June 2007). A draft of the 2nd edition of the Sedona Canada Principles will soon be made available on the Sedona and Ontario Bar Association websites.

²⁹ See also my article, “The “Records Management Lawyer”—a Specialist in a Necessary Major Field of the Practice of Law,” section 6, “The divisions of work of the records management lawyer (p. 21).

as to be able to capture the 85% of legal problems that go unserved, by lawyers.³⁰ For example, projects that help self-represented litigant (SRL's) should evolve to provide for the legal profession, a service comparable to that provided by the family doctor for the medical profession.

(2) The percentages of self-represented litigants: they are a publically observable failure of the law societies to enable the legal profession to serve its very necessary purposes; therefore such percentages should be published within Law Society publications and the first to receive pro bono assistance, and the National Self-Represented Litigants Project should become the equivalent of the family doctor, providing that essential screening function that channels patients to the right treatments, services, and drugs, that the medical infrastructure of interdependent support services provides. Such projects should work towards the problem's end, instead of needing the problem's continuance to sustain their purpose, prominence, and importance.

(3) Court procedures simplification projects should become duty counsel projects for civil litigation courts, instead of depending for their continued existence upon the continuation of the problem of unaffordable legal services.

(4) Solving the high cost of the "review" process of electronic discovery: make the preparation work of a lawyer making production comparable to that of an accountant. The client doesn't give the accountant 100,000+ records and say, "here, you make up our financial records and then do the audit." The litigation lawyer should be able to work the same way, by combining the searching and reviewing into one act of precise electronic searching of the client's index of its database, an integral part of its electronic records management system.³¹ In this way the same advantages of legal research can be used: (1) highly indexed, headnoted, summarized, and abstracted materials; (2) the searching is done by experts in legal research (lawyers and law students); and, (3) the searching is done electronically. So, show the client how to make a comparable index of the client's own records database, which will give the client as much useful information for doing business daily, as do its financial records, as well as provide

³⁰ See: (1) *Slaw* blog post, Feb. 26, 2014, by Malcolm Mercer, "Being in Favour of Reform, Just Not Change," online: <http://www.blg.com/en/ourpeople/search?k=&sn=F>; (2) Gillian K. Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans" (2009), 37 *Fordham Urban Law Journal* 127 at 134-142; and, (3) Rebecca L. Sandefur, "Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services," in Michael Trebilcock, Anthony Duggan, & Lorne Sossin, eds. *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2013), 222 at 226.

³¹ Such indexing requirements are set out in the National Standard of Canada, *Electronic Records as Documentary Evidence* CAN/CGSB-72.34-2005 ("72.34", section 6.5 at p. 23), published in December 2005. This standard was developed by the CGSB (Canadian General Standards Board), which is a standards-writing agency within Public Works and Government Services Canada (a department of the federal government). It is accredited by the Standards Council of Canada as a standards development agency. The process by which such national standards are created and maintained in Canada is described within the standards themselves (reverse side of the front cover), and on the CGSB's website (see, "Standards Development"), from which website these standards may be obtained; online: < <http://www.tpsgc-pwgsc.gc.ca/ongc-cgsb/index-eng.html> >. And see also, Ken Chasse, Indexing (available for free download from the SSRN).

continuous preparation for discovery and trial. Then the high cost of the “review” stage of e-discovery will disappear. The lawyer would use the client’s index of records to prepare to make production by electronically searching an index, instead of reading each record for relevance and privilege, or using a TAR device (technology assisted review device, such as those based upon “predictive coding”).³² Such technology is based upon a faulty concept of review, and is still without a history of proven reliability. It is still doubtful that it can adequately reduce the cost of electronic discovery for the great majority of litigation that is not the litigation of large organizations and hundreds of thousands of records to be sorted. A “front-end sort” by way detailed indexing at the time when records are created or received, produces a far more useful and precise tool for searching, than does a “back-end reading,” regardless whether the reading is done by people or electronic devices.³³

(5) The electronic discovery lawyer: this specialist would be available to all law firms; the larger firms are now appointing their own electronic discovery” specialist.³⁴ Such specialists are but a necessary first step to recognizing “records management law” as an established field of practice.³⁵ That will be necessary because: (a) electronic records are the most frequently used type of evidence in litigation; (b) many major pieces of legislation are dependent upon electronic records; (c) solving the high cost of the “review” process of electronic discovery will need such specialists; and, (d) the technology of electronic records and electronic records management systems is the foundation of all of commerce, communication,

³² “Predictive coding” is a document review technology that allows computers to predict particular document classifications (such as “responsive” or “privileged”) based upon coding decisions made by those knowledgeable as to the subject matter. In the context of electronic discovery, this technology can find key documents faster and with fewer human reviewers, thereby saving much time to conduct document review for finding relevant and potentially privileged documents. A detailed description of the use of predictive coding devices is found in, *Dynamo Holdings Ltd. Partnership v. Commissioner of Internal Revenue* (U.S. Tax Court, Nos. 2685-11, 8393-12, Sept. 17, 2014); online: <<http://goo.gl/NiY7XY>> (click “available here” at bottom of the page). And it is mentioned in, *L’Abbé v. Allen-Vanguard Corp.* 2011 ONSC 7575, [2011] O.J. No. 5982, at para. 23: “Various electronic discovery solutions are available including software solutions such as predictive coding and auditing procedures such as sampling.” But whether predictive coding can make such litigation affordable to a majority of the population is yet to be decided. And given the substantial criticism of keyword searching is predictive coding’s efficacy undermined by relying upon keyword searching strategies?

Instead, a different strategy is needed because, accessing, sorting, and reviewing records is far more cost-efficiently done by way of a “front end” indexing of records than by a “back end” reading of records; *infra* note 34 and accompanying text. In contrast there are large error rates in relying on keyword searching of texts themselves, instead of relying upon well composed indexes to search; see: Victoria L. Lemieux and Jason R. Baron, “Overcoming the Digital Tsunami in e-Discovery: is Visual Analysis the Answer?” (2012), 9 Canadian Journal of Law and Technology 33 at 35.

³³ Which makes very important the need for indexing of client databases in order to the solve the high cost of the “review” state of electronic discovery. See the reference to the national standard “72.34” in note 31 *supra*.

³⁴ See for example, (note 26 *supra*) this announcement: “BLG hires Canada’s leading electronic discovery lawyer”; online at: http://www.blg.com/en/newsandpublications/news_1439.

³⁵ See: Ken Chasse, “The ‘Records Management Lawyer’—A Specialist in a Necessary Major Field of the Practice of Law” (Sept. 7, 2014), online on Social Science Research Network: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492724>.

and of all legal processes; and, (e) aiding clients to maintain their electronic records management systems in compliance with Canada's national standards for electronic records management, or with the standards of the International Organization for Standardization (the ISO in Geneva Switzerland).

(6) Creating new types of specialist lawyers: As in the medical profession, the on-going specialization of doctors enables a great scaling-up of the work done by each specialist. That provides an on-going increase in the competence with which it is done, and a great reduction in cost because of the scaling-up, and a great reduction in response time because specialization brings greater competence and cost-efficiency, and fourthly, a great reduction in the probability of making an error that damages the client's legal position. Law schools should therefore develop the counterpart of medical school's fourth year—a year in which law students develop an area of specialization.

(7) Monitoring and advising proper levels of legal fees: during spot audits of trust accounts and other law office financial records, which are now a routine part of Law Society regulation, legal fees should be checked and the information thus obtained, used as part of a continuing surveying process. The results should be published to the profession. And the Rules of Professional Conduct should be more precise, helpful, and compelling as to what are "fair and reasonable" fees. In support, parts of Continuing Professional Development programs should deal with legal fees as a function of affordability, not lawyers' need for revenue. The setting of legal fees should be subject to economic analysis of such factors as: the population's income levels; whether the growth in fees outpaces the consumer price index; the "economic health" of each of Canada's provinces and territories; and, variations in the gross domestic product. And research should be conducted as to the effect on legal fees of alternative business structures (ABS's) in those countries that have allowed ABS's such as, law firms being owned by non-lawyers, and commercial organizations providing legal services to their customers and clients by way of their employee lawyers.

(8) A mentoring service: similar to that provided by LAO LAW (see the Appendix); it should enable inexperienced lawyers to obtain advice from lawyers experienced in each of the major fields of practice, and which in turn will increase the sharing of resources among law firms.

(9) Websites being more helpful to the public on legal fees: law society website pages dealing with legal fees should be amended to reflect these innovations. Therefore they would not deny being responsible for the affordability of legal fees. And they would assert a proactive enforcement of rules and use of complaints procedures.

(10) Legal services insurance: Working with government and insurance companies, such insurance should be promoted by law societies. Insurance spreads the cost of legal services over a wider population than those needing legal services at any single point in time, and enables government agencies and insurance companies to assist in lowering the cost of legal services.

(11) Innovations promotion: the Federation of Law Societies of Canada should monitor and provide advice to law societies as to such innovations. Such work should be coordinated with the uses of CanLII, when improved to be a support service as well developed as is LAO LAW now, having 35 years of success at bringing about such innovation and know-how.

(12) Law society publications: those publications of law societies that are sent to their members several times each year should be made to serve the above purposes. They should be as proactive in bringing about affordable legal services as they are in publicizing to the profession the outcome of law society prosecutions and disciplining procedures. There are regular features of such publications that no longer have sufficient importance, occupying pages better devoted to major problems, policies, and practices.

(13) Law society management must become much more sophisticated and proactive. Now, it is passive, waiting for problems that are not deemed to be sufficiently under pressure to become crises. The medical profession doesn't wait to be pushed to employ new life-saving and health-improving technology. It would be immoral to do so. The legal profession must push its law society benchers to a comparable level of efficacious performance and accountability.

(14) The FLSC (Federation of Law Societies of Canada) could represent all lawyers by negotiating on behalf of all law societies, with companies that can automate the provision of routine legal services. The alternative should be unacceptable to Benchers' of good faith and conscience, *i.e.*, law firms left to bargain individually with big commercial investment organizations for the investment money with which to obtain such automation, with the consequence of each becoming a franchised law firm in a string of so-exactly franchised law firms.³⁶ That will not provide the best "access to justice." It threatens the overpowering of professional fiduciary duty to clients, by the entrepreneurial duty to profits. And the many complex and powerful financial arrangements it will bring, will put the independence of the legal profession at great risk, which independence is essential to the independence of the judiciary, and therefore potentially unconstitutional.³⁷

³⁶ LSUC's ABS "Discussion Paper" (notes 17 and 65 and accompanying text *infra*) states: (at page 9): "Some examples of ABS enterprises in other jurisdictions include: ... law firms operating as franchises so they have centralized access to management systems, technology, marketing and other expertise"; and (at p. 13) "Lawyers in jurisdictions that permit ABS have used technology in some of the following ways: Establishing franchises that provide centralized infrastructure and assistance with marketing and branding strategies, buying power and practice support."

³⁷ The independence of the judiciary is a constitutional principle arising from the separation of power doctrine as to the separation of the three traditional divisions of government powers into the legislative, executive, and judicial powers. Although the concept of responsible government has allowed the executive branch of government in Canada to exercise what would be thought of as unconstitutionally delegated legislative powers under an American form of government, the separation of judicial powers from legislative and executive powers has been rigorously maintained by the courts. Non-lawyer organizations owning law firms are not government agencies, nor do they exercise government powers. But it is the self-interest of the source of such control that is the threat to judicial

None of these innovations requires any law society to intervene directly into the setting of fees for purposes of ending the unaffordability of legal services problem. Similarly, competent and ethical practice doesn't require law societies to be closely monitoring the delivery of every legal service so as to ensure that all legal services are provided competently and ethically. But they do require a goal-oriented proactive attack upon the problem, equal in diligence and dedication to those aimed at eliminating incompetently and unethically provided legal services. The varieties of support services that can be developed are only as limited as one's imagination and motivation. And as LAO LAW's development of multiple support services has shown, the ability to innovate is greatly aided by an excellent centralized legal research unit (see the detailed list of LAO LAW's services in the Appendix). The law societies must be so engaged in order to comply with their duty to "facilitate access to justice."³⁸ To enforce performance of that duty, court decisions that require the law societies to provide lawyers at law society expense, to people unable to afford lawyers, can be argued to be justified.

5. LAO LAW at Legal Aid Ontario (see also the Appendix)

LAO LAW shows what a support service can do that an ABS can't. LAO LAW is a centralized legal research unit within Legal Aid Ontario (LAO) that provides legal research services as a free-of-charge support service to Ontario lawyers in private practice who provide legal services to LAO-approved clients. The clients are poor people who qualify under LAO's stringent income limits for free legal services. The lawyers are paid by LAO in accordance with a reduced tariff of fees. It is a variety of the "judicare" model of providing legal services.

LAO LAW was created to reduce the amount of money paid out on lawyers' accounts for legal research hours claimed. It is the best legal research unit in the legal profession in Canada. As its first Director of Research, beginning on July 3, 1979, I devised its technology of centralized legal research. In

independence, which threat is not the exclusive preserve of control by governments. Therefore, although a provincial government may purport to alter the law to allow ABS-type ownership of law firms, such would not impair the ability of the courts to decide if such were a threat to the separation of judicial powers from executive and legislative powers, and whether it should be a federally-appointed s. 96 court (of the Constitution Act, 1867), that decides such issues. Therefore, legislation allowing undue ABS-initiated potential investment control of the legal profession, could be declared to be unconstitutional, as being a threat undermining judicial independence.

Note also the LSUC publication, *In The Public Interest*, being the 2007 report of LSUC's Task Force on the Rule of Law and the Independence of the Bar. In states at p. 6: "Thus, this Task Force adopts these four fundamental principles: 1. the independence of the Bar is an essential element of a free and democratic society; 2. the independence of the Bar is a right of those who need legal assistance; 3. the independence of the Bar is constitutionally recognized as a necessary condition of an independent judiciary and of the rule of law; and 4. the independence of the Bar is both consistent with and necessary for the pursuit of legitimate public policy goals, such as defending national security." At pp. 8-9, the report deals with independence of lawyers from client control.

³⁸ As is required by the duties expressly imposed by Ontario's Law Society Act s. 4.2, set out in notes 47 and 65 *infra* and note 27 *supra* accompanying texts.

its ninth year of development, 1988, it was producing more than 5,000 legal opinions per year for use by legal aid lawyers.³⁹ No law firm in Canada produces 5,000 per year of any legal service requiring legal advice.⁴⁰ They lack the necessary volume of production and degree of specialization. The practice groups within large law firms are little law firms. Therefore the handcraftsman's method that law firms use, without the aid of support services, makes the problem inevitable. But the recommended improvements will not solve the problem.

Because of a faulty conceptualization of the problem, all of the other published solutions won't work. But my recommendations are based upon having gone through the necessary lengthy, and difficult, trial-and-error process to achieve success. That is how the necessary knowledge of the true nature of the problem and its cause and solution are obtained. Failure is necessary for success, if one learns from one's failures. All other writers have had to stop with making recommendations—recommendations made without an opportunity to put them into effect so as to learn from the consequences. Therefore their recommendations are improvements to the existing method of delivering legal services. The cause of the problem is not the absence of the right improvements, but rather the method itself—the “handcraftsman's method” of delivering legal services. It was long ago abandoned everywhere in favour of a “support-services method,” except by the legal profession. It lacks two essential features: (1) the necessary degree of specialization; and, (2) the economies-of-scale obtained by scaling-up the volumes of goods or services produced. That combination enables a product or service to improve without having to increase its price. The support-services method uses those two factors to produce the cost-efficiency that provides a way of coping with that cost-price conflict. If a product or service is improved, its price must increase unless innovation provides a constantly improving cost-efficiency that eliminates the need to increase its price.

³⁹ Legal Aid lawyers in Ontario are those in private practice who provide legal services to clients who have obtained Legal Aid certificates. In Ontario, a single person with no dependents, to qualify for legal aid, cannot have an annual income greater than \$11,600. This “judicare” model of providing legal services, is a variety of socialized law in that government finances the provision of legal services, and controls the procedures by which it is obtained and the tariff of fees by which lawyers are paid. Therefore it is an exception to the legal profession's monopoly over the provision of legal services, and an exception to the principle of the profession's independence from government intervention. But it is strongly supported by the legal profession because such poor people would never be lawyers' clients anyway.

⁴⁰ LAO has suffered a number of funding cuts during the last 25 years and therefore so as LAO LAW. Therefore its present staff is smaller than was mine, and so its strategy of service has to be different. I had my staff produce complete legal opinions because that is the most effective way of reducing the legal research costs paid out by LAO to legal aid lawyers for servicing legal aid clients. Now, LAO LAW emphasizes more its substantial databases of specific memoranda and pleadings, which can be downloaded freely by legal aid lawyers, and its several related services. (The Appendix provides a detailed description.) However, it still does provide legal opinions in response to specific fact patterns provided by lawyers requesting them. And the support-services strategy of production is still the concept upon which it operates. Also limiting, is LAO LAW's existence in a government-funded social welfare agency, and not in a commercial organization able to reap the rewards of being successful in a competitive marketplace. No matter how successful and useful it is to private practitioners, its yearly funding varies with that of LAO.

Canada's law societies have not brought about such innovation, therefore its legal profession has no means of preventing the price of legal services from increasing. Therefore the problem is inevitable.

For example, the support-services method of production is what is used by: (1) the medical profession; (2) all of large-scale competitive manufacturing; and, (3) LAO LAW at Legal Aid Ontario (LAO).⁴¹ Each is a long-standing, very successful example of the support-services method of production. It facilitates constant innovation that enables improvement of products and services without price increases. The medical profession has a very flexible system of creating new specialists, in response to new medical technology. The "surgeon" is now several highly specialized surgeons and related specialties. All parts, services, and treatments provided by the medical infrastructure of support services are interdependent. No part of it provides all treatments for all patients. In contrast, law firms do all the work themselves for each client, without relying on support services. And as an example of the support services used in manufacturing, motor vehicle manufacturers use "special parts companies," that also use a high degree of specialization in conjunction with large volumes of production to obtain the economies of scale that support-serviced production provides. That is the principle upon which LAO LAW is based, and the craftsman's method is not based. Therefore it can never solve the problem. And therefore, never can ABS's, because they are based upon perpetuating the craftsman's method, *i.e.*, no reliance upon external support services.

6. The Law Society must first solve the Problem of Unaffordable Legal Services before Considering ABS Proposals

Therefore, because ABS's can't solve the law societies' most important and threatening problem, in good conscience and responsibility to its statutory duties, shouldn't the Law Society first solve the problem, before it indulges the promoters of ABS's? How can the Law Society explain such priority of place given to ABS Discussion Papers and projects to: (1) the thousands of people whose lives have been severely damaged for lack of legal service; (2) to the high percentages of self-represented litigants whose slow moving cases are bringing our courts to a halt—clogged courts greatly delay the progress and therefore the expense of everybody's litigation; (3) to the legal profession itself, under very negative

⁴¹ LAO LAW is a centralized legal research service within LAO (Legal Aid Ontario), providing fact-specific legal opinions and other related support services to legal aid lawyers. See LAO LAW's website; online: <<http://www.legalaid.on.ca/en/info/laolaw.asp>>. As to the support services it provides, see the Appendix at the end of this paper. The Ontario Legal Aid Plan (OLAP), the predecessor of LAO, was managed by the Legal Aid Committee of the Law Society of Upper Canada (LSUC). OLAP's first day of operation was Wednesday, March 29, 1967. I was an assistant Crown Attorney of one year's experience that day in Toronto, so I saw the most experienced defence counsel in Toronto act as Duty Counsel in the criminal courts of the Old City Hall, including the great Arthur Maloney. The next day, the Duty Counsel were of substantially lesser experience. LSUC's management of OLAP ended with the passing of the Ontario Legal Aid Services Act 1998, S.O. 1998, c. 26, which ended OLAP and created Legal Aid Ontario (LAO), as "a corporation without share capital" (s. 3).

economic forecasts because the problem remains unsolved; and, (4) to Legal Aid Ontario, because funding it adequately with more taxpayer money is very politically unwise while the majority of taxpayers cannot afford legal services for themselves?

Thus the support-services method is badly needed; not ABS's. Support-services use three economic factors that are not possible using the handcraftsman's method: (1) costs are spread over the very large volumes produced, as was the result of LAO LAW's producing 5,000 legal opinions per year; (2) constant innovation produces further cost-savings to each unit produced, that are magnified by the volumes produced; and (3) the "fixed costs factor," whereby certain costs do not vary in proportion with the volume produced, works more powerfully the greater are the volumes produced. For example, whether a law office has 10 lawyers or 50 lawyers, its library costs don't vary proportionately with the volume of legal services produced. Bigger is better. As a result, such higher degrees of specialization, combined with vastly scaled-up volumes produced and specialization, creates a much higher degree of cost-efficiency than is possible in law firms. That enables a product or service to improve without having to increase its price. The legal profession has no similar mechanism. Therefore the prices of legal services must increase.

The support-services method produces: (1) a very high degree of competence by means of constant innovation; (2) a great cost-saving; (3) a minimization of response time; and most important of all, (4) a reduction to a minimum of the probability of making an error that hurts the client, patient, or customer. Compare that with the "cutting costs by cutting competence" strategies of law firms by giving more work, particularly legal research work, to law students and paralegals. The exact opposite results are obtained. The three factors that determine the quality of what is produced are, talent, training, and experience. Experience being usually, the most important of the three. The "cutting costs by cutting competence" strategy means using people of lesser training and experience. The support-services method uses people of greater training and experience. Therefore it can produce greater competence, quality, and quantity

7. ABS's Are Not Needed, Nor Desirable

(1) Conflicting interests of big versus smaller law firms in ABS proposals

The big law firms, and all such law firms whose clients can still afford legal services, will see their needed solution to "the unaffordable legal services problem," as being different from what other law firms need. They still have sufficient clients; the middle-sized and smaller law firms don't. Therefore, the solutions put forward are different. As a result, the "ABS proposals" are structured to benefit the bigger law firms considerably, and all other law firms, very little. That is caused by the difference between being a franchisor of law firms, instead of being a franchised law firm. The following two paragraphs from a

recent American Bar Association publication summarizes the approach of bigger law firms to the problem (being an analysis arising from the ABA's "law firms in transition survey"):⁴²

Now in its sixth year, the survey has largely achieved its original mission. Looking at six years of trend data, certain developments could not be clearer. The combined forces of intense competition, technological advances, commoditization of services, flat demand and more demanding buyers have created a legal marketplace that few law firm leaders now expect to return to the good old days of 6 to 8 percent annual rate increases, ever-rising law firm profitability and plenty of work for everybody. Those days have passed.

Rather, today's leaders recognize that the legal economy will continue to be characterized by pervasive price competition, more commoditized legal work, technology replacing human resources, competition from non-traditional providers and more nonhourly billing, resulting in smaller annual billing rate increases, fewer equity partners, increased lateral movement, more contract lawyers, more part-time lawyers, reduced leverage, smaller first-year classes, fewer support staff, slower growth in profits per partner and a clear need for improved practice efficiency.

Alternative business structures (ABS's) that propose ownership of law firms by non-lawyer organizations to any extent, are not necessary and can be harmful to the practice of law. They will put the professional concept of duty to serve the best interests of one's clients, at substantial risk of being dominated by the entrepreneurial business model for maximizing profits. An investment owner of a law firm is another mouth to feed. And whatever benefits they propose to bring can be achieved by the legal profession itself. Other than the District of Columbia, American jurisdictions prohibit the division of fees with non-lawyers, and therefore non-lawyer ownership of law firms.⁴³

Currently an the ABS proposal put out for comment by LSUC's Alternative Business Structures Committee has three components, having four variations: (1) law firms can be owned up to either 49% or 100% by non-lawyer persons or organizations; (2) related non-legal services can be provided by law firms in conjunction with legal services; and, (3) routine legal services be automated. Proponents argue that (2) and (3) are dependent upon allowing (1), *i.e.*, automating routine legal services requires the investment money that makes non-lawyer ownership necessary. That is not true.

(2) Reasons for rejecting ABS proposals

These are the reasons for rejecting such ABS proposals that allow ownership of law firms by non-lawyers:⁴⁴

⁴² "2014: Law Firms in Transition," by Eric A. Seeger, vol. 40 no. 5 (Sept.-Oct. 2014) *Law Practice Magazine* 48.

⁴³ See: (1) the ABA Formal Opinion 464, "Division of Legal Fees With Other Lawyers Who May Lawfully Share Fees With Nonlawyers," August 19, 2013, of the Standing Committee on Ethics and Professional Responsibility; and, (2) the State Bar of Texas, Ethics Opinion 642, Nonlawyer Officers Prohibited in Law Firms, May, 2014.

⁴⁴ See also my *Slaw* blog posts of this subject of ABS's and "the problem": "LSUC's Worrisome ABS Proposals" (November 25, 2014);

(1) ABS proposals cannot solve the unaffordable legal services problem, as might be implied or alleged, because they cannot reduce the cost of legal *advice* services.

(2) Legal advice services cannot be automated, just as the decisions of judges cannot be automated.

(3) Investors will buy-up groups of law firms, enfranchise them, with the result that the entrepreneurial model of doing business will force out the professional model of practicing law, because of the increased pressure to produce profits. Such pressure can make necessary “power volume practice” strategies aimed at maximizing the clients serviced per unit time, the withdrawing of pro bono work because it produces no income, and having paralegal workers and law students do the work of lawyers because their cost is lower. It will produce a “cult of efficiency,” that will come to value the cost-efficiency of what is produced more than the quality of what is produced. Such is very prevalent in the provision of public goods and services by governments.⁴⁵ That is very inappropriate for a profession that

“Legal Advice Services Cannot Be Automated by Alternative Business Structures” (October 9, 2014); “The failure of law societies to accept their duty in law to solve the unaffordable legal services problem” (September 11, 2014), and on the SSRN, August 10, 2014, and on the Access to Justice in Canada blog on August 12, 2014 (Part 1); and August 14, 2014 (Part 2);

CanLII as the Solution to the Unaffordable Legal Services Problem (Oct. 24, 2013);

Government Intervention to Solve the “Access to Justice” Problem is Inevitable (August 9, 2013);

The End of the Monopoly Over the Provision of Legal Services and Prosecutions for the “Unauthorized Practice of Law”, Parts 1 & 2 (February 5 & 12, 2013).

And see also my more in-depth treatment of this “access to justice subject of unaffordable legal services,” in the articles (for free download) listed on my SSRN author’s page, at: <http://ssrn.com/author=1398484>.

⁴⁵ The phrase, “cult of efficiency,” comes from the book of that title by Professor Janice Gross Stein of the University of Toronto: *The Cult of Efficiency*, rev. ed., (Toronto: House of Anansi Press, 2002). The theme of Professor Stein’s book is that when efficiency in a government’s provision of public goods and services, such as health care, education, roads, and police services, to citizens in a democratic society, is taken to mean exclusively “cost containment,” to the exclusion of all other values such as the effectiveness and quality of those public goods and services, efficiency has become a cult. Such a narrow interpretation of efficiency takes no account of other causes and effects such as the needs of an aging society, and of ever-changing and improving technology. Such application of efficiency to mean “cost containment” only, excludes any possibility of effective reform of the health care system, or of any other system providing public goods or services. Efficiency alone is not enough to give us what we think we want. Schools are closed, hospitals are reorganized in the name of efficiency, but the results are far from what citizens desire. Professor Stein argues that the public good demands that we go beyond the cult of efficiency to talk about accountability and choice. As examples she examines public education and universal health care in Canada, arguing that the future depends on whether citizens can establish new standards of accountability and choice for public services. She argues that a new culture of choice must become the axis around which public debate about public goods and services will take place. She states (at page 6):

Efficiency is only part of a much larger public discussion between citizens and their governments. Efficiency is not an end, but a means to achieve valued ends. It is not a goal, but an instrument to achieve other goals. It is not a value, but a way to achieve other values. It is part of the story but never the whole. When it is used as an end in itself, as a value in its own right, and as the overriding goal of public life, it becomes a cult. ... At times, however, even the mention of effectiveness is absent, and the conversation slides over to focus only on costs. And when the public discussion of efficiency focuses only on costs, the cult becomes even stronger.

Her thesis can and should be applied to both the criminal and civil justice system in Canada. Professor Stein is the Harrowston Professor of Conflict Management, Department of Political Science at the University of Toronto, and the Director of the Munk Centre for International Studies, also at the University of Toronto.

provides the foundation upon which judicial independence and the efficacy of the “rule of law” rest. Law society enforcement of the requirements of those principles will have to be restrained by the fact that the financial welfare of law firms will be dependent upon what conditions owner-investors have imposed in exchange for their investment money.

(4) Individual law firms have very little bargaining power when negotiating with commercial investors, especially because such investors will want a lot of control in compensation for the risk they will be taking in investing in law firms in financial distress due to their shortage of clients due to the unaffordable legal services problem.

(5) Instead, law societies, together as a unit, bargaining on behalf of the whole of Canada’s legal profession will have much better bargaining power in obtaining the necessary automation expertise, and lowest maintenance fees arrangements. A one-time increase in annual fees of \$200 will produce about \$20 million for purposes of such negotiating and buying such services. The investment money of ABS proposals is not needed, nor the worries and threats to the integrity of the legal profession that it will bring.

(6) ABS’s are not subject to the established methods of prevention and discipline, *i.e.*, by: (a) legislation; (b) the regulator (the Law Society is not going to prosecute and punish itself or Convocation); (c) by the insurer, *e.g.*, LAWPRO’s terms of insurance, compensation, and recovery; (d) by law suit by a client, private person, or other lawyer or official; nor by (e) discrete internal settlement (a “payoff” by a law firm to get an injured or scandalized client to keep its mouth shut).

(7) The automation of routine legal services is being held out as a substantial improvement for all law firms, when in fact it can bring only a very limited improvement to the over-all cost of legal services, and legal advice and routine legal services are so intertwined as to make the cost-saving illusory and potentially contrived to fulfill pre-established goals of cost-saving.

(8) Such ABS proposals can be of significant benefit only to those law firms whose clients can still afford legal advice services, and as a result, take advantage of the related the non-legal services that would be allowed. What control will the investor-enfranchisers have over the choice and use of such non-legal services? The benchers of such law firms can use their positions to promote personal interests as “rainmakers” for their firms.”⁴⁶

(9) The problem of “unaffordable legal services” should be solved first, before favouring, by way of ABS’s, those people who can still afford legal services. The very long existence of this problem shows that: (a) the public has insufficient impact upon the formation of Law Society policy and practice; and, (b)

⁴⁶ Would such be a breach of trust? Section 122 of Canada’s Criminal Code establishes the offence of, “breach of trust by public officer.” Benchers would come within the relevant definition of “official” in s. 118. See the broad definition given this offence by the Supreme Court of Canada in, R. v. Boulanger 2006 SCC 32, [2006] S.C.J. No. 32, [2006] 2 S.C.R. 49, 210 C.C.C. (3d) 1.

if the law societies had been sufficiently responsive to the population's need for legal services, the problem would not exist.⁴⁷ The unaffordable legal services problem is ignored, but ABS proposals, which are only recently topical, already have a Discussion Paper that LSUC has published for comment, which has been written entirely by the proponents of ABS's, and has presumably, a timetable for approval by Convocation, and then a request to have the legislation changed so that ABS proposals can be implemented.⁴⁸

(10) ABS proposals might be presented as being necessary because LSUC has nothing else to point to as a response to “the problem,” particularly so in response to the need to forestall government intervention.⁴⁹ And ABS proposals should not be used as a reason for LSUC continuing not to try to solve the unaffordable legal services problem, which failure should be considered to be a failure to perform the duties imposed by s. 4.2 of the Law Society Act.

(11) The inappropriate “partiality” presented by the ABS Discussion Paper released on September 24th, as a LSUC publication, because it is a promotional text as to its ABS proposals, rather than being a neutral text, providing a “balanced presentation” of opposing views and factors.⁵⁰

⁴⁷ That appears to be contrary to s. 4.2 of the Ontario Law Society Act, because it requires LSUC, in carrying out its functions, duties and powers under the Act, to have regard to a duty to: (1) maintain and advance the cause of justice and the rule of law; (2) act so as to facilitate access to justice for the people of Ontario; (3) protect the public interest; and, (4) act in a timely, open and efficient manner. See also notes 38 *supra* and note 65 *infra* and accompanying text.

⁴⁸ See note 17 *supra* and accompanying text, as to LSUC's publication of the Discussion Paper.

⁴⁹ As to such need, the, Report of the Treasurer's Advisory Group on Access to Justice Working Group at pages 4-5 (being pages 235-236 of LSUC's Report to Convocation of January 23, 2014), states in paragraph 6: “This report from the Treasurer's Advisory Group on Access to Justice (TAG) Working Group proposes a framework for change which would see the Law Society lead and innovate on these important issues, rather than have change imposed upon it.” And paragraph 9 states: “Despite significant individual and organizational efforts, including those of the Law Societies, the ‘crisis’ only seems to be growing, highlighted perhaps most starkly by the numbers of self-represented litigants appearing in courts across the country. As a result, the attention being focussed on the need to address the obvious and growing imperative to provide more effective and meaningful access to justice in the last few years has been unprecedented.”

I suggested just such a program what would provide the law societies with just such a reason that would show that they are in fact being proactive in trying to solve the problem. See my paper, “Access to Justice—Canada's Unaffordable Legal Services—CanLII as the Necessary Support Service,” available for free .pdf download on the SSRN. It recommends that *CanLII* be enabled to provide the sophisticated support-services that LAO LAW provides, but make them available, at cost, to every lawyer and judge in Canada. More than a year ago, I sent this paper to *CanLII*'s Board of Directors, and to every LSUC bencher for whom I could find an email address, but it has been ignored. I posted a summary of the paper on the blog, *Slaw*, dated October 24, 2013.

⁵⁰ 16 *supra* and accompanying text. See this statement on LSUC's website: “The Law Society released Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper on September 24, 2014, to seek input from lawyers, paralegals, stakeholders and the public about Alternative Business Structures (ABS).” Comments and requests to attend meetings may be sent to, abs.discussion@lsuc.on.ca by December 31, 2014. (This discussion paper reads more like a promotional text than a neutral text providing a balanced presentation.). And see also LSUC's Alternative Business Structures Working Group Report to Convocation (at Tab 4) of the Professional Regulation Committee Report, February 27, 2014.

(12) The appearance of such proposals is that of a solution to all parts of the problem, when in fact it can have no effect upon the cost of legal *advice* services, which is the major part of the problem, and not the cost of routine legal services.⁵¹

(13) The “one-way entrenched and potentially damaging nature” of such proposals, in that allowing them is a “one-way process”—because of the numerous investment and other business relationships that ABS’s permit and promote, they will be very difficult to untangle and remove if they prove to be a mistake or no longer desirable.

(14) As long as they are beneficial to law firms sufficiently represented by benchers, without challenging them by analytical opposition, there will be no effective movement to change them.

(15) They prevent other ways of coping with the problem because they will be seen as “occupying the field” with a “sufficient degree of reform, and be incompatible with the many complex and irreversible investment and other business relationships they will create.”⁵²

(16) As the ABS’s propose,⁵³ clients who can still afford legal services of all types, will expect to be able to receive related non-legal services with their legal services. But those who cannot afford legal advice services will not be able to expect either.

(17) LSUC’s Bencher election on April 30, 2015, will be a lost opportunity to hold this proposal “to account” and prevent its entrenchment, if the candidates are not challenged to respond adequately to its dangers and weaknesses by LSUC’s membership.⁵⁴ Note that the election announcement states that benchers contribute on average, only 31 days per year to Law Society business.⁵⁵

(18) ABS proposals are potentially unconstitutional because the control they allow to non-lawyer investment organizations over the legal profession, is a threat to judicial independence which is dependent

⁵¹ See section 8 below.

⁵² *Supra* note 49, 2nd paragraph, and accompanying text which provides an example of an alternate reform, see my solution for “the unaffordable legal services problem” by way of enabling [CanLII](#) to provide the legal opinion and other support services long provided by the LAO LAW division of Legal Aid Ontario: [CanLII as the Solution to the Unaffordable Legal Services Problem](#), posted on the *Slaw* blog, Oct. 24, 2013. A longer, more in-depth version is available for free .pdf download from the SSRN: “[Access to Justice – Canada’s Unaffordable Legal Services – CanLII as the Necessary Support Service](#).”

⁵³ *Infra* note 64.

⁵⁴ See this [Bencher election announcement](#) on LSUC’s website, dated October 27, 2014.

⁵⁵ *Ibid.* Paragraph 3 states: “As members of Convocation, benchers deal with matters related to the governance of the Law Society and the regulation of Ontario’s lawyers and paralegals. Benchers dedicate an average of 31 days a year to Law Society business. This includes sitting on hearings as an appointee to the Law Society Tribunal, attending monthly committee and Convocation meetings and attending calls to the bar. Benchers are remunerated for some of their services and are reimbursed for expenses.” Therefore LSUC’s Benchers are very much part-time amateurs—amateurs because the problem of unaffordable legal services is not one that lawyers have the necessary expertise to solve, *i.e.*, it is not a legal problem.

upon the profession's independence. Judges' decisions are totally dependent upon what lawyers give them by way of evidence and argument.

(3) *Report of the Professional Organizations Committee of 1980—Legal Services*

Very relevant are the first four of the issues for review, identified by the terms of reference of *The Report of the Professional Organizations Committee of April 1980*. They state:

By letter of April 6, 1976 to the Ontario Law Reform Commission, the Attorney General Ontario requested a review of statutes governing the professions of public accounting, architecture, engineering, and law 'with a view to making recommendations to the Government for comprehensive legislation setting the legal framework within which these professions are to operate.' The issues for review were: (1) the appropriate of the division of functions and jurisdiction of such professional groups; (2) the possible creation of new professional groups within professions; (3) the need for the recognition and definition of the roles of paraprofessionals, such as law clerks and engineering technologists, and the appropriateness of the creation of new governing bodies for these groups; (4) the amount of control these professional groups should have over the training and certification of their members; (5) the appropriateness of incorporation such new professions; and, (6) the appropriateness of the requirement of Canadian citizenship or British subject status as a condition of membership in a professional body

Chapter 3 concerns, "Legal Services and the Licensed Practice of Law." Pages 72 to 74 deal with "Routine Services," which begin:

The argument is sometimes made that within the functions customarily performed by lawyers, there are subsets of routine services that can adequately performed by persons other than lawyers at a lower cost. Examples commonly cited are residential conveyancing, uncontested divorces, the preparation of wills, and simple incorporations.

. . .

With the information at our disposal, we are not inclined to recommend that conveyancing, or any other class of so-called "routine" services, should be "carved out" of the existing licensure regime in law and opened up to other service providers. We take this view for a number of reasons:

Five of the six reasons have a counterpart to the proposed automating of "routine legal services" in the ABS proposals.

The first reason would be the need to create new occupations to provide these services, and the necessary licensure regimes. They would require government involvement of education and training programs, and regulatory structures. There would have to be very compelling need and benefits to justify such an undertaking.

The counterpart to this reason would be the ensuring the quality of the software used to automate such routine legal services. There is no regulatory regime controlling the quality of software. As a result software errors and vulnerabilities are very prevalent and costly. In addition to the prevalence of such serious records management errors, which our litigation procedural laws ignore, are the serious errors in the software that all ERMS's depend upon. In 2002, a study commissioned by the U.S. Department of

Commerce's National Institute of Standards and Technology (NIST) concluded that, "software errors cost the U.S. economy \$59.5 billion annually." Their report states in part:

"The impact of software errors is enormous because virtually every business in the United States now depends on software for the development, production, distribution, and after-sales support of products and services," said NIST Director Arden Bement. "Innovations in fields ranging from robotic manufacturing to nanotechnology and human genetics research have been enabled by low-cost computational and control capabilities supplied by computers and software."

In 2000, total sales of software reached approximately \$180 billion, supported by a large workforce encompassing 697,000 software engineers and 585,000 computer programmers.

Software is error-ridden in part because of its growing complexity. The size of software products is no longer measured in thousands of lines of code, but in millions. Software developers already spend approximately 80 percent of development costs on identifying and correcting defects, and yet few products of any type other than software are shipped with such high levels of errors. Other factors contributing to quality problems include marketing strategies, limited liability by software vendors, and decreasing returns on testing and debugging, according to the study. At the core of these issues is difficulty in defining and measuring software quality.

The increasing complexity of software, along with a decreasing average product life expectancy, has increased the economic costs of errors. The catastrophic impacts of some failures are well-known. For example, a software failure interrupted the New York Mercantile Exchange and telephone service to several East Coast cities in February 1998. But high-profile incidents are only the tip of a pervasive pattern that software developers and users agree is causing substantial economic losses.

Therefore, the untested "assumption of reliability and regularity" that the legal community applies to the use of devices dependent upon software is unjustified and dangerous. All devices, electronic or otherwise, must be assumed to be sufficiently prone to error such that the evidence they provide should not be considered to be reliable unless there is expert opinion evidence, or other forms of authoritative certification, as to their reliability. An example of unexpected unreliability in a much used and "faithful" electronic device is provided in this recent news story: "Xerox scanners/photocopiers randomly alter numbers in scanned documents."⁵⁶ Also of concern is the current frequency of "hacking" into everything electronic, for example, this article: "Why Apple's Recent Security Flaw is Scary."

And the software in breathalyzer machines, which one would assume would have to be more reliable than that in most other electronic devices so as to minimize wrongful convictions and acquittals,

⁵⁶ Text of this article is somewhat informal in places but nonetheless persuasive. The title is hyperlinked, being online at: < http://www.dkriesel.com/en/blog/2013/0802_xerox-workcentres_are_switching_written_numbers_when_scanning>.

nonetheless has a significant error rate. The following quotation uses the term “source code,”⁵⁷ in reference to the software in a particular make and model of breathalyzer machine:⁵⁸

... . On average, 25 software defects exist for every 1,000 lines of code.

If the number of lines of code in the source code can be ascertained, the industry averages can be applied to estimate the number of defects. The estimated number of defects is calculated by multiplying the number of lines of code by 25, and dividing that product by 1,000.

The number of lines in the source code has been disclosed in testimony for the Draeger 7110 device, which has 53,774 lines of code that print out on 896 pages. Applying the formula that utilizes the industry average, it is reasonable to expect 1,344 defects in the software for the Draeger 7110, if it conforms to the industry norms and is “average”.

Also, the ability to detect defects and the implanting of malicious software is very poor. The following quotation is from an article dealing with the, “Trojan horse defence,” *i.e.*, defences against accusations of illegal materials found stored in a computer that assert that a malicious program, secretly contained within an obtained acceptable program was the cause of the implanting:⁵⁹

Daniel Bilar explains how antivirus programs work, and points out that a lot of malicious codes are not recognized by antivirus software that is not updated regularly. Between 26 and 31 per cent of malicious software is not detected on antivirus programs that are not up-dated for a week (this percentage is only valid for better antivirus programs – poor quality antivirus programs can miss up to 80 per cent of malicious codes). It is clear that it is reasonably probable, and not only a hypothetical exception, that a computer can be infected with a Trojan horse. It is important to be aware that although people might have a basic understanding of technology (for instance, the majority will not necessarily open strange files received by e-mail), very few are aware of the fact that they can download various forms of malicious code (such as Trojan horses) simply by launching an URL site, opening a PDF document or browsing internet pages. Up-dated antivirus software, firewalls, and caution on the internet help reduce the risk, but cannot completely eliminate it.

. . .

Testing of malware developed for the purposes of stealing personal information and account credentials has revealed that, on average, 60% are not detectable by anti-virus software at the time they are discovered in the wild. Therefore, client computers with the most “up to date” anti-virus software signatures are likely to be vulnerable to such attacks about 60% of the time. [footnotes omitted]

⁵⁷ “Source code” contains programming techniques and is essential documentation in the development of software. It is a record of that development. Therefore, to evaluate software, one needs production of its source code. For a further explanation see Wikipedia online: http://en.wikipedia.org/wiki/Source_code.

⁵⁸ This quotation comes from page 14 of the following article, dealing with the considerable volume of litigation challenging the source code of Intoxilyzer, Breathalyzer, and Alcotest machines and their operation: William C. Head and Thomas E. Workman Jr., “An Analysis of ‘Source Code’ in the United States: What Challenges Have Been Asserted, and Where is this Litigation Heading Analysis of ‘Source Code’?” presented at the *International Council on Alcohol, Drugs and Traffic Safety*, Seattle Washington, August 30, 2007. See also, Charles Short, “Note: Guilty by Machine: The Problem of Source Code Discovery in Florida DUI Prosecutions,” 61 Fla. L. Rev. 177 (January 2009). DUI = driving under the influence (of alcohol or drugs).

⁵⁹ Miha Sepec, “The Trojan Horse Defence-A Modern Problem of Digital Evidence” (2012), 9 Digital Evidence and Electronic Signature Law Review 58, at 61. A free download is available at: <<http://journals.sas.ac.uk/deeslr/article/view/1990>>.

Therefore, what protection will there be to ensure the quality of the software programs used to automate “routine legal services”? There is no certification program, and no formal process of warranting the quality to the client receiving such automated routine legal services. The software used will not have been authoritatively certified as being reliable and producing accurate results.⁶⁰ Would there be a mandatory requirement that the client be able to receive a formal certification of software quality? For example, attacking the operation of, and the results provided by a breathalyzer-type instrument is provided for by s. 258(1)(c) of the Criminal Code. Paralegals are tested and are subject to a regulatory regime, but software isn’t. The documents produced by the automating of routine legal services might be used as evidence in legal proceedings.

The second and third reasons are, “the demarcation disputes among licensed professions or occupations that have plagued other professions,” and the difficulty of identifying exactly which services are “routine.” The ABS counterpart to that would be disputes between lawyers and franchisers as to what should be automated as a “routine legal service,” and what exactly is a “routine legal service.” What is emphasized by the Discussion Paper is that (p. 9), the “expanded range of products and services, such as do-it-yourself automated legal forms, as well as more advanced applications of technology and business processes,” and, “law firms operating as franchises so they have centralized access to management systems, technology, marketing and other expertise.” Perhaps there won’t be serious disputes between the franchiser and the lawyer as to what should be an automated legal service because the franchised lawyer will be under such increased “profits pressure” that there will be a very strong bias toward the cost-efficiency of automation instead of upon the quality of the legal services rendered. Would there be rules of professional conduct establishing principles or guidelines as to which services should be automated? If so, how would their application be enforced? The Discussion Paper provides no information from other jurisdictions. If such automation were obtained by profession directly itself as suggested above, enforcement of quality would be in the hands of the law society instead of whatever the franchiser considered to be necessary, i.e., discipline dedicated to the public interest, rather than practices of cost-efficiency dedicated to profits.

The fourth reason is that the volumes of new lawyers licensed annually, “alleviates concerns over undue restrictions on the supply of legal services.” Such reason would similarly reduce the need for automating legal services, particularly given that they cannot solve the problem, and routine legal services are most frequently closely intertwined with non-routine legal services.

⁶⁰ For example, breathalyzer-type instruments used in relation to impaired driving (DUI) prosecutions under Canada’s Criminal Code, are officially approved for use, by way of the Approved Breath Analysis Instruments Order, SI/85-201.

The fifth reason is that loosening the restrictions on price advertising would help to lower the cost of legal services. However, any resulting increased competition would not make necessary the automating of routine legal services. There is a large number of law firms short of clients that don't need to automate routine legal services.

The sixth reason is that the consent of the Attorney General should be required for prosecutions for the unauthorized practice law in relation to the activities of non-lawyer providers functioning in the legal services market. The same issue would apply to the functionaries of enfranchising investors directing the methods of providing legal services of any kind, perhaps in reverse in that prosecutions would not occur that should. Rule 7.6-1 of the Rules of Professional Conduct states: "A lawyer shall assist in preventing the authorized practice of law and the unauthorized provision of legal services." And Rule 7.1-3 requires a lawyer to report criminal activity related to a lawyer's practice (pp. 99-100)

(4) Law Society programs are inadequate substitutes for a solution to the problem

For people who cannot afford legal advice services, the substitute programs the law societies are now providing or supporting, might, by reason of "long usage," become permanent.⁶¹ None is said to be only temporary. They are inadequate because they don't attack the problem head-on so as to again make all legal services affordable. The purpose of a law society is not to support substitutes in place of legal services provided by lawyers. Without more effective alternatives, such programs will become permanent. ABS's will serve only those clients who can still afford legal advice. Other people will have to use these much poorer "cutting costs by cutting competence" alternatives outlined in the "Federation of Law Societies of Canada's "Inventory of Initiatives" text."⁶² Such dumping of problems upon inadequate alternatives is compatible with law societies managed by benchers who are just part-time amateurs.⁶³ Traditional management structures of law societies, such as when LSUC was formed in July 1797 by way of a meeting of ten practitioners, including the Attorney General of Upper Canada, in the beautiful little tourist town of Niagara-on-the Lake (pop. 15,000), cannot provide the resources or mentality necessary for coping with 21st century problems of accessing affordable legal services. In 1832, LSUC moved into

⁶¹ See section 8 below.

⁶² *Ibid.*

⁶³ Law society management is that of part-time amateurs. The Benchers who manage Canada's law societies themselves lack the necessary expertise to render legal services affordable, nor have they employed that expertise. And they contribute, according to a published statement of the Law Society of Upper Canada (its LSUC 2015 Bencher Election announcement), on average, only 31 days per year to law society matters. It is a nineteenth century management structure that is no longer capable of making legal services adequately available to the residents of Canada. Were it otherwise, the problem of unaffordable legal services would not exist. That problem is, the majority of the population cannot obtain legal services at reasonable cost (*supra* note 3 and accompanying text). For more in-depth analysis, see my "access to justice" articles posted on my SSRN author's page, at: <http://ssrn.com/author=1398484>.

Osgoode Hall, in downtown Toronto, which is where Osgoode Hall Law School was (but is now located uptown at York University) when I was a law student (1961-1964; tuition fees being \$650 per year—that part of LSUC’s management was very good). A proactive law society would have converted Osgoode Hall into a beautiful museum by now, and changed its name to the “Law Society of Ontario, formerly the Law Society of Upper Canada.” Half the people living in Toronto were not born in Canada.⁶⁴ Wouldn’t “Upper Canada” to them mean a law society for lawyers whose offices are up there in Canada’s Territories, above the 60th parallel of north latitude?

The practice of law is not a business, and business is not the only agency that can make the practice of law as cost-efficient, and legal services as affordable as necessary. Canada’s legal profession itself can finance the acquisition of the necessary automating of routine legal services. The Federation of Law Societies, representing all law societies and lawyers in Canada, would have much more bargaining strength, and as a result, could offer a much more attractive contract for purchasing automation and continuing support thereafter, than can individual law firms bargaining with large commercial investors represented by and associated with the big law firms.

8. ABS’s are Contrary to the Law Society’s Duties under the Law Society Act—the 5 propositions law societies must accept to have credibility on solving the problem of unaffordable legal services⁶⁵

Because ABS proposals cannot solve the problem of unaffordable legal services, adopting them is contrary to the duties imposed by the Ontario Law Society Act. ABS proposals cannot satisfy the five propositions that Canada’s law societies must accept if their statements as to what they refer to as their “concern about the access to justice problem” are to have credibility:

1. The precise statement of the nature and extent of the problem of unaffordable legal services is: “the majority of the population cannot obtain legal services at reasonable cost.”
2. The duty to make affordable legal services available to the population arises from the law that requires the law societies to regulate the legal profession and the monopoly it has over the provision of legal services. For example, in the province of Ontario, that duty of the Law Society of Upper Canada is made express and precise by the statutory duties created by the Law Society Act, s. 4.2 of which states:
 - 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
 - (1). The Society has a duty to maintain and advance the cause of justice and the rule of law.
 - (2). The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
 - (3). The Society has a duty to protect the public interest.

⁶⁴ See the website “Toronto Facts,” which provides a .pdf text that states that a 2011 household survey showed that: “49% of those living in Toronto were immigrants,” and, “33% of immigrants living in Toronto arrived between 2001 and 2011.”

⁶⁵ See my article, [The failure of law societies to accept their duty in law to solve the unaffordable legal services problem](#). It is posted on the Social Science Research Network (the SSRN).

- (4). The Society has a duty to act in a timely, open and efficient manner.
 - (5). Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s.7.
3. Therefore, if the problem of unaffordable legal services exists, it is the law societies' fault that it exists. If the law societies had been sufficiently responsive to the population's need for legal services, the problem would not exist.
 4. Therefore, it is the exclusive duty of the law societies to solve the problem of unaffordable legal services.
 5. If the law societies cannot make legal services available to the population, they have no purpose. Therefore a different management structure has to be put in place that can regulate the legal profession so as to make affordable legal services available.

Note that s. 4.2 of Ontario's Law Society Act provides no exceptions to the Law Society's duties in regard to: (1) the rule of law; (2) access to justice; and, (3) acting in a timely, open and efficient manner. It cannot be said, as the Law Society of Upper Canada's history of failing to act would imply, that the unaffordable legal services problem is an exception to such duties. And dare Canada's other law societies reject such duties because their law society legislation is less explicit as to their duties?

But as though to deny such duties, Canada's law societies have allowed the problem to develop over decades without doing anything. That is because they do not accept the principle that the duty to solve the problem arises from their duty in law to regulate the legal profession. For example, there is a webpage within the Law Society of Upper Canada's website entitled, "Your Legal Bill – Too High?" It begins: "The Law Society does not set fees for legal services and cannot reduce a lawyer's or paralegal's bill that you think is too high." And it concludes, "If you have a complaint about your lawyer or paralegal that does not involve the amount of the bill, see the Law Society's page on Complaining about a lawyer or paralegal." Nowhere does either webpage say, "however, these are the proactive steps that we are taking to make legal services affordable," followed by a list of such "steps" in proof of being sufficiently proactive. There are no such "proactive steps." But if it is argued that in fact they do exist, then why for decades has the problem continued to grow worse?

If it is not the law societies' duty to solve the problem, it is nobody's duty. It cannot be government's duty to deal with unaffordable legal services because such government intervention into lawyers' fees would violate the principle of the independence of the legal profession from government intervention. If it is nobody's duty, then that majority of the population that cannot afford legal services must accept as a perpetual reality, that they must deal with their legal problems without the help of lawyers. That is the conclusion one must draw from the Federation of Law Societies of Canada's 2012 published text, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* (click on the highlighted word "inventory" in the last sentence). Those "initiatives," are existing, operative programs. They are of three types: (1) self-help programs; (2) "cutting costs by cutting competence" programs, by way of greater

use of, students, paralegals, and “unbundled” legal services, wherein the client does more with the intended result that the cost will be lower because the lawyer does less; and, (3) *pro bono* charity, which, albeit commendable, is too small to have any significant impact upon the volume of legal services needed. Nor will it service those long and difficult cases that spend a year or two in the courts, requiring multiple proceedings, meetings, and the drafting of many documents; they being cases generated by all income levels of society. Accordingly, the first paragraph of this “*Inventory of Initiatives*” text defines the problem as being merely, “gaps in access to legal services.” The fact that the majority of the population cannot obtain legal services at reasonable cost is hardly a “gap” in the availability of legal services. It appears that the definition of the problem has been crafted to suit these operative programs, rather than an accurate definition of the problem used to determine the programs needed. If the answer to be accepted is that this “*Initiatives*” text was not intended to deal with the unaffordable legal services problem, then what published Law Society text describing operative programs does? There is none.

No democracy need accept the proposition that it must do without affordable legal services because the unaffordability of legal services is inevitable, and like the weather and uncontrollable economic forces, it cannot be changed. Nor accept that we are no longer a constitutional democracy. That majority needs a lawyer in order to make effective use of the Constitution, particularly so the Canadian Charter of Rights and Freedoms. Democracy needs the rule of law, which needs the advice of lawyers to effectively enforce it. For that reason the legal profession has traditionally been referred to as, “the gatekeepers of the constitution.” Now unaffordable legal services have cast us as the obstructers of the constitution. This situation violates the duties imposed upon the Law Society of Upper Canada by s. 4.2 of Ontario’s Law Society Act, to maintain and advance the cause of justice and the rule of law, and to act so as to facilitate access to justice for the people of Ontario.

Meanwhile, these four types of damage caused by the problem are getting worse: (1) to the population in that there are many thousands of people whose lives have been damaged for lack of legal services; (2) to the courts in that they are being clogged, as judges have warned, by high percentages of self-represented litigants, because their cases move much more slowly than those that have lawyers; (3) to the legal profession in that it is shrinking and is predicted to have a very negative future of contracting and of law firms failing; and, (4) to legal aid organizations because it is politically very unwise for governments to fund them better with taxpayers’ money, to enable them to provide free legal services to more poor people, while the majority of the taxpayers cannot obtain legal services for themselves at reasonable cost. The problem must be causing more damage in one day than have all of the incompetent and unethically practising lawyers in the whole history of Canada. But the law societies have failed to be proactive about unaffordable legal services, but they are in regard to the much less serious problems of incompetent and unethical lawyers. Conclusion: the law societies do not accept the proposition that the

law imposes upon them a duty to do all that it is possible for them to do, to bring about affordable legal services. The problem is their problem, and the law imposed a duty upon them to solve it.

Innovation that moves the legal profession from its present “handcraftsman’s method” of delivering legal services to a “support services method” will solve the problem of unaffordable legal services, or go a substantial way to making legal services again affordable. And the underlying concept, that any type of work that can’t be cost-efficiently done by a law firm can be made to generate a profit by making a support-services specialty of it. Now, because there is no reliance on specialized support services, no law firm has available to it the required degree of specialization, combined with the sufficiently scaled-up volume of production, that enables a product or service to improve without having to increase its price. Without a method that constantly increases cost-efficiency, that cost-price conflict cannot be resolved. The price must increase. The legal profession must be constantly improving its services, in the form of maintaining their high quality in a situation wherein there is a need to devote increasingly more time delivering each service—more time because of: (1) the rapidly increasing volume of laws; (2) their greater complexity due *inter alia*, to the complexity of the technology upon which they are based and impacted; (3) the greater volume of technology to be understood; and, (4) the much greater volume of relevant electronic records to be coped with. Therefore the problem of unaffordable legal services is inevitable.

Because ABS proposals have no ability to solve the problem, adopting them instead of attacking the problem with methods that can, will be strong evidence that the Law Society is not fulfilling its duties under the Law Society Act. Adopting ABS proposals will be considered to be an inadequate response to the problem that, the majority of the population cannot obtain legal services at reasonable cost.⁶⁶

9. Law Society Conflicts of Interest and Dealing with the ABS Proposals

There are three types of conflict inherent within law society management:-

1. conflicts between the law society’s regulatory functions and its representative functions in serving the interests of its lawyer-members
2. using the position of a bencher of the law society to serve self-interest, in conflict with a bencher’s public duties, such as acting in conformity with the duties imposed upon the LSUC by s. 4.2 of Ontario’s Law Society Act—duties as to (1) advancing the cause of justice and the rule of law; (2) facilitating access to justice for the people of Ontario; (3) protecting the public interest; and, (4) acting in a timely and efficient manner.
3. time conflicts between time needed to serve clients and the unexpected demands of private practice, make necessary a bencher’s keeping law society duties simple and predictable as to time and trouble, *i.e.*, such are strong disincentives to innovation and

⁶⁶ *Supra* note 3 and accompanying text.

change, because they often require extra time and effort because of the uncertainties inherent in their development.

Law societies being insufficiently accountable for their exercise, or failure to exercise their powers to regulate the legal profession, these conflicts must be considered to be inevitable. Therefore the failure of all law societies in Canada to deal with the problem of unaffordable legal services is inevitable, otherwise the problem would not exist. Therefore a different management structure is needed.

The Clementi Report in 2004, in the U.K.,⁶⁷ recommended that the regulatory and representative functions of law societies should be clearly split because they are in conflict. As the Report states, the regulatory function serves the public interest, which should take primacy. The latter serves the interests of the lawyers. It is very difficult for a body combining both roles to deal with competition issues, particularly so to the satisfaction of public perception.

As to applying these recommendations to the ABS debate, to alter the present method of delivering legal services, brings forth the following mixture of Law Society regulatory functions that are in conflict with its representative functions for lawyers' interests.

1. Time given to the ABS proposals **V.** time that should be given to the unaffordable legal services problem. Being a much more serious problem, the latter should be solved first before considering the former.
2. Law firms interest in ABS proposals **V.** the public interest.
3. The interest of the big law firms **v.** the interest of smaller law firms.
4. Benchers serving the public interest **V.** serving their self-interest, *i.e.*, the interest of big law firm benchers **v.** that of smaller law firm benchers.
5. Benchers' duty and time needed to serve clients **V.** time needed for law society duties serving the public interest, *i.e.*, the Law Society not performing its duties under s. 4.2 of Ontario's Law Society Act.
6. ABS's investors owning law firms **V.** maintaining the fiduciary duty of lawyers to their clients and their professionalism
7. ABS potential threat to the independence of the legal profession, which independence is essential to the independence of the judiciary (because judges' judgments depend upon the evidence and arguments provided by lawyers), and therefore to the "separation of powers doctrine" of the constitution. The threat arises from the investor ownership of a law firm that represents clients, in cases in which the firms' investors have an interest, which threatens the integrity of the evidence and argument presented by the firms' lawyers which can threaten the integrity of the judgements rendered in such cases.
8. The legal profession doing for itself **V.** whatever the ABS's propose to do for them.
9. ABS control of enfranchised law firms **V.** law society control of the regulation of lawyers and law firms.

⁶⁷ Sir David Clementi's report is entitled, Review of the Regulatory Framework for Legal Services in England and Wales.

10. Whether the ABS proposals can have any significant effect upon the unaffordable legal services problem?
11. Potentially, the Law Society's vulnerability to criticism for not engaging the unaffordable legal services problem being answered by its adopting the ABS proposals, which cannot have any significant impact upon the problem.

Such conflicts of interest can be prevented only by separating the regulatory functions of a law society from its representative functions for its lawyer members. LSUC's regulatory and representative functions should be managed by separate institutions. That was the conclusion of the Clementi Report of 2004 in the U.K. And, it is the necessary conclusion needed to enable LSUC to be law society for the 21st century.

10. ABS Proposals Maintain the Handcraftsman's Method of Delivering Legal Services Instead of a Support Services Method

The ABS proposals are based upon maintaining the handcraftsman's method because: (1) that is how law firms will remain desperately short of clients; (2) have very little bargaining power as individual negotiators; and therefore, (3) are easily bought-up to create strings of enfranchised law firms; with which, (4) to gain a dominate position in the legal services market for controlling the price of legal services. Therefore they cannot solve the problem. Whatever improvements are made to the profession's handcraftsman's method of delivering legal services will have an effect no greater than adding a motor to a bicycle when in fact, the speed, capacity, and cost-efficiency of a motor vehicle are needed to solve the problem. The problem is not caused by the lack of the right improvements to the present method of delivering legal services, as all other writers assume, but rather by the method itself, the handcraftsman's method.

But only law society benchers can bring about the necessary support-services for the delivery of legal services.⁶⁸ However, could the ABS proposals include an agreement to accept the development of support-services by the law societies? But wouldn't that be inconsistent with the degree of control of law firms that the investors in law firms would want?—particularly so, investors who buy up strings of law firms to enfranchise them, so as to impose the close and detailed regimentation that provides the alleged cost-efficiency that enfranchising can produce.

For example, LSUC's ABS Discussion Paper states (at p. 9), that an example of ABS enterprises in other jurisdiction include: ... "law firms operating as franchises so they have centralized access to

⁶⁸ As an example of such a support-service, see my article, "Access to Justice – Canada's Unaffordable Legal Services – *CanLII* as the Necessary Support Service." It advocates a much expanded role for *CanLII* (*supra* note 5), by providing nationally, at cost, the extensive legal research services, including legal opinion services, provided by LAO LAW, which is the legal research unit at Legal Aid Ontario (LAO). Those services are available to Ontario lawyers in private practice who provide legal services to the poor people approved by LAO to receive such services; *i.e.*, LAO is a "judicare" model of legal support service.

management systems, technology, marketing and other expertise.” Imposing such “enterprises,” which is what is done to each franchised outlet, would be inconsistent with law societies’ bringing about their own improvements, such as developing support-services, to methods of delivering legal services. Therefore apparently one of the intentions of these ABS proposals is that the duty to regulate such methods is to be handed over to the investors’ franchise managers. That would reduce the responsibilities of law societies, and therefore their powers and duties in fact (but not in law). The investors owning law firms would control the degree and kind of innovation possible and thus dictate the conception, practice, and policy, and duties of a law society. That would be inconsistent with the duties imposed upon LSUC by s. 4.2 of the Ontario Law Society Act.⁶⁹ Law societies would be rendered fixed in what they are now, rather than evolving as the needs and circumstances of society changed. Therefore the “details” of these investor contracts have to be known in order to have a sufficient opportunity to comment adequately on these ABS proposals—“the devil is in the details.” But they are not provided in the Discussion Paper.

11. Determining the Conception of a Law Society Necessary for the 21st Century

That is how the ABS issue will determine the future nature of Canada’s law societies and their ability to solve the unaffordable legal services problem. But one could argue that the history of LSUC’s performance proves that they are already fixed as to what they are and will be—they will have “part-time amateurs” as managers now and until the damage caused by the problem to society, the courts, and to the legal profession itself, finally compels government intervention. To create support-services is to innovate, which always carries some risk of failure and more time, work, and worry away from clients’ needs, and maybe hurting one’s reputation. Is that compatible with the reasons for becoming a bencher, and being re-elected, and tending to one’s law practice?⁷⁰ So the institutional culture and wisdom of law societies would come to dictate the commanding rule be that, “if it’s not broken, don’t fix it.” And “it” is never broken until there is sufficient pressure that says that “it” is broken, which there never is. So the problem remains. That could in time prove embarrassing, which makes likely that the problem will be handed over to what might be implied to be an ABS solution, which in fact is no solution. And therefore, there is no real issue as to ABS management conflicting with Law Society management. For example, LSUC has failed to perform its duties under s. 4.2 of Law Society Act, and its history of performance strongly indicates that it will continue to do so. Had those duties been performed, the problem of unaffordable legal services, now suffered by the majority of society, would not exist.

⁶⁹ Which duties include, (1) “to maintain and advance the cause of justice and the rule of law”; (2) “act so as to facilitate access to justice”; and, (3) “to protect the public interest”.

⁷⁰ Far better to keep simple one’s law society work and simplify its problems so as to be free as possible to cope with the always varying and unexpected needs of clients and the administration of one’s practice and expectations of one’s partners and family.

Or, perhaps the view of the benchers is that the affordability of legal services is not a duty clearly and without question imposed upon the Law Society. But it can't be the Ontario government's duty because that would require government intervention into legal fees, and into the cost-efficiency of the methods of delivering legal services, which would be a violation of the principle of the independence of the legal profession from government intervention.⁷¹

Then it's nobody's duty. But the taxpayer pays for the whole of the justice system which provides a place of employment for lawyers and judges, but the majority of taxpayers cannot afford legal services for themselves. That means that legally, we are a dysfunctional society, because the law is now too complex to be able to make effective use of it without the help of a lawyer, particularly so constitutional rights and freedoms. That is why it is said that "lawyers are the gatekeepers of the constitution." But if lawyers are unaffordable to the majority, then we are no longer a constitutional democracy ("constitutional monarchy" some say). Therefore politicians and governments should stop believing that we have a justice system that's the envy of many countries in the world. So can that interpretation of law societies' duties be an answer that the residents of Canada should accept, and be tolerated in a democracy? If not, should they continue to accept the concept and practice of a law society that is made necessary by the management of part-time amateurs?

The availability of legal services, being the most important of professional services to the public after medical services, is dependent upon the management provided by the part-time amateurs who are the benchers of our law societies. Without the safeguard of adequate accountability for the exercise of bencher powers under the law, theirs is a management structure having, what should be considered to be, an unacceptably high probability of being used for self-interest rather than in the public interest—public interest as defined by duties in legislation such as s.4.2 of Ontario's Law Society Act. The election of benchers cannot provide sufficient accountability. Absent from such elections are the necessary supporting structures of a party system and opposition parties, daily question periods, televised proceedings, public and published speeches and writings by experts providing detailed analysis of issues and government performance, and news media analysis, and sophisticated pressure groups. As a result, a system as big as that which benchers administer cannot have the reality or appearance of being disciplined

⁷¹ Law societies have advocated that the principle of the independence of the legal profession be made a constitutional principle, and not merely an adjunct principle necessary to the constitutional principle of judicial independence, which is a necessary part of the "separation of powers" doctrine of a constitutional democracy. See: LSUC's publication, *In the Public Interest* (Irwin Law, 2007), being a collection of essays by constitutional law experts, supporting the evolution of the "independence of the legal profession" to become a constitutional principle in its own right. But if law societies refuse to engage the "unaffordable legal services problem," it would be contrary to the "rule of law" as it should apply to law societies, to so insulate them from government intervention by way of a constitutional principle. Particularly so if LSUC's recent and quick publication of its, *Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper*, means that it will use them to provide an apparent solution to the problem, which in fact they cannot solve, nor are intended to.

by sufficient accountability. The profession and its market are now too big and its problems too complex and now damaging, for its present management structure to be adequate. Were it adequate, the problem would not exist.

It is in this context that decisions on the two most important issues ever to be dealt with by law societies will be decided: (1) whether to allow the use of ABS's that allow investors to have an ownership share of law firms; and, (2) whether solving the unaffordability of legal services problem is a duty generated by the legislation that gives the law society the powers to regulate the legal profession, and if so, how to perform that duty. What mechanisms of effective accountability are there that dissuade benchers from using their votes on these issues to serve the interests of their law firms instead of the public interest? Public need makes the second issue far more important than the first, but it stands where it has been for several years, with no progress made. It is the ABS issue, of only recent importance, that has generated a Discussion Paper and a process for decision by the benchers of LSUC. There's more money to be made and more quickly to be made by the law firms of investors, from the successful promotion of their ABS's, than from rendering legal services affordable, particularly so because law societies haven't tried to learn how to make them affordable. Law societies are very proactive in ensuring that lawyers are competent and ethical. But the unaffordability of legal services problem causes more damage in one day than have all of the incompetent and unethical lawyers in the whole history of Canada. Franchised strings of investor-owned law firms can be used to gain a dominate, price-controlling position in the legal services market. But given the great damage being done daily to the population, to the courts, and to the legal profession itself, by the unaffordability of legal services problem, how can this ordering of priorities be explained otherwise than as the serving of self-interest?

This would not happen if LSUC's regulatory functions were given to an authority, independent of its representative functions of serving the interests of its member lawyers. The regulator would have intervened long before such conflict could develop, by requiring that the unaffordable legal services problem be dealt with—to be required by way of a published statement, if private counsel were ignored. LSUC's history would not be the same.

12. The Discussion Paper—the “Devil is in the Details”

LSUC's ABS Discussion Paper implies that it can have a significant impact upon the following unaffordable legal services problems, but in fact it can't; for example:

Under the heading, “Access considerations,” on page 11, the Discussion Paper refers to the following statistics and facts, for most of which, the ABS proposals cannot change because they need legal advice services because they are not routine legal problems:

- In Canada and elsewhere, in family law, most litigants do not use lawyers - recent studies show 70% are unrepresented;

- In 2009, the federal Department of Justice published *The Legal Problems of Everyday Life* showing that legal advice was sought for less than 15% of justiciable problems in Canada;
- People with legal problems commonly seek assistance from non-lawyers. The above-noted Department of Justice study (of almost 7,000 adults) found that 42.2% of respondents who experienced a personal injury problem consulted an unregulated source of assistance. Employment (35.8%) and housing (33.7%) were the next highest areas in which respondents resorted to non-legal sources of assistance.
- In 2009, the Ontario Civil Legal Needs Project found that one-third of low- and middle-income Ontarians did not seek legal assistance for what they regarded as legal problems.
- A recent study of 259 self-represented litigants in family and civil law matters in Ontario, British Columbia and Alberta reported that the most consistently cited reason for self-representation was the inability to afford to retain, or continue to retain, a lawyer.⁷²

This research highlights the fact that there are gaps in legal services for many Ontarians. Even middle-income individuals are in many cases not obtaining, or cannot afford, the services of a lawyer or paralegal.

There are two situations in which people tend to seek legal services. They are either looking for help with important but routine issues, such as the purchase of a house or the creation of a will or power of attorney, or they are facing a serious legal problem, such as a personal injury, a criminal charge, or a marriage breakdown.

People are always sensitive to cost. And the more serious the problem, the more legal services are likely to cost. In fact, serious legal problems often cost more than the average person can afford.

And there are several matters the Discussion Paper does not deal with such as, the effect upon the probability of claims against professional insurance, and possible new ethical considerations. And there should be information provided as to the benchers' views as to what are the issues, before the membership is asked for its views. The Discussion Paper does not invite comments on these matters, therefore there can be no certainty that the membership is aware that these matters are relevant. And what does a typical investor contract look like? It's details may activate the principles that, "the devil is in the details." What are the terms and conditions? And what is the timetable for voting on, or deciding whether to approve or reject the ABS proposals? Will there be such votes before the bencher election of April 30, 2015, which would pre-empt it as a campaign issue, which would raise suspicions as to the efficacy of the democratic process available to the membership.

In addition, there are several other failings of the Discussion Paper referred to above and in the following sections of this paper.

⁷² Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs Of Self-Represented Litigants", p. 8.

13. Constitutional Law Considerations

Firstly, adopting ABS proposals is contrary to the principle of the independence of legal profession being made a constitutional principle, which has long been desired and campaigned for by law societies.⁷³ To allow ownership of a law firm and the enfranchising of groups of law firms is to surrender the independence of the lawyers in those law firms, or at least the appearance of independence. The more law firms an investor owns and enfranchises, the greater is the possibility that the investor will have an interest in the outcome of a case in which one or more of the lawyers in those law firms is representing one or more of the parties. The power of control, and the appearance of the possibility of adverse control, conflicts with what a true independence concept needs.

There is also the matter of poor law society performance of its duties, such as those under s. 4.2 of Ontario's Law Society Act, making government intervention necessary so as to restore adequate access to legal services. That would be made much more difficult if the independence of the bar were to be given the protection of constitutional status. And there is also a "performance" issue created by the procedures used to prevent benchers using their positions improperly to serve personal interests. For example, will those benchers whose law firms or law practices will gain substantially if the ABS proposals are adopted by the law society, be excluded from the voting on such issues, or at least required to provide affidavits as to having no conflict of interest? The protection of the constitution should not be given to a failure to institute such measures of accounting adequately for the law society's use of its powers.

The independence of the legal profession has two branches—independence from government interference, and from control by clients. The implementing of ABS proposals would necessitate a third branch. Control by the investor-owner-enfranchiser of one's law firm brings a much greater probability of adverse control, and a much more difficult type of control to investigate, reveal, and therefore to discipline and prevent.

Secondly, such ownership by investors would endanger the efficacy of the constitutional principle of the independence of the judiciary. A proposal that governments be able to invest to own law firms clearly raises an important issue as to violating the constitutional principle of the independence of the judiciary from the other branches of government, particularly the executive branch (as guaranteed for example, by Canadian Charter of Rights and Freedoms s. 11(d) (a "fair and public hearing by an independent and impartial tribunal"), and ss. 96-100 of the Constitution Act, 1867. Given that judges are dependent upon lawyers for the evidence and arguments upon which they base their decisions, judicial independence is limited to the extent that the legal profession is independent from such intervention.⁷⁴ And the "rule of

⁷³ Infra note 75 in regard to the article by Professor Monahan.

⁷⁴ Therefore some would argue that the independence of the legal profession should be recognized as being in itself a constitutional principle, at least as an unwritten one, as are such important principles as, democracy, federalism,

law,” as guaranteed by the Charter’s opening line, cannot “rule” with the required integrity without a truly independent judiciary.⁷⁵

It should be accepted therefore that judicial independence applies to all similarly threatening forms of control of the judiciary and its dependence upon the independence of the legal profession. “Alternative business structures” (ABS’s) proposals are by nature, that threatening because they propose ownership of law firms by the investment market. Law firms should not become commodities to be manipulated on various investment markets, with the lawyers in those law firms taken on a commercial ride they know not where. In fact, the intended end of that ride is control of the legal services market by such enfranchisers so as to control the price of legal services.

ABS’s are being promoted by a Committee of the Law Society of Upper Canada (LSUC) as a means of lowering the cost of legal services.⁷⁶ Such proposals have three parts: (1) law firms can be investment properties (owned—up to 49% or 100%) by non-lawyer people and entities; (2) legal services be enabled to be provided with related non-legal services; and, (3) routine legal services be automated by software applications. The theme of these ABS proposals is that in order to have (2) and (3), the legal profession must accept (1). However, as I argued in, “Legal Advice Services Cannot Be Automated By Alternative Business Structures,” (posted on the *Slaw* blog, October 10, 2014), “it ain’t necessarily so.” And, what is not dealt with in these proposals is how they are going to make legal advice services affordable. The “unaffordable legal services problem” afflicts both kinds of legal services: (1) legal advice services; and, (2) routine legal services that don’t require legal advice. The considerable volume of in-depth writing available defines that problem as being, “the majority of the population cannot obtain legal services at reasonable cost.”⁷⁷

constitutionalism, and the protection of minorities—Peter W. Hogg (Professor Emeritus Osgoode Hall School, York University, Toronto), *Constitutional Law of Canada* 5th ed. (Thomson Carswell, 2007), vol. 1, at 479; and, Professor Patrick J. Monahan, Osgoode Hall Law School, *Constitutional Law* 3rd ed. (Irwin Law, 2006, 133-137. And more specifically as to the “independence of the Bar,” see, Patrick J. Monahan, “The Independence of the Bar as a Constitutional Principle in Canada,” in, *In the Public Interest: the Report and Research Papers of the Law Society of Upper Canada’s Task Force on the Rule of Law and the Independence of the Bar* (Law Society of Upper Canada & Irwin Law Inc., 2007), at 144 and 146.

⁷⁵ A definition of the “rule of law” is provided in note 5 *supra*.

⁷⁶ Alternative Business Structures Working Group Report to Convocation (at Tab 4) of the Professional Regulation Committee Report, February 27, 2014 (Co-Chairs, Malcolm Mercer & Susan McGrath). And see also this statement on LSUC’s website: “The Law Society released Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper on September 24, 2014, to seek input from lawyers, paralegals, stakeholders and the public about Alternative Business Structures (ABS).” Comments and requests to attend meetings may be sent to, abs.discussion@lsuc.on.ca by December 31, 2014. (This discussion paper reads more like a promotional text than a neutral text providing a balanced presentation.)

⁷⁷ Note 3 and accompanying text *supra*.

In response, the proponents of ABS's will argue that the need of the population for affordable legal services must be held to override such alleged minor conflict with the need for judicial independence, assuming only for the sake of argument that such very unlikely probability could ever exist. And because ABS's are proposals to make legal services again affordable, they are not subject to the independence of the judiciary principle.

But in fact the constitutional principle of "judicial independence" is essential to the "separation of powers" doctrine, such that conflicts with the independence of the judiciary can never be taken as "minor," particularly so those arising from interference with the independence of the legal profession. And, as I explained in my earlier article, legal services can be made affordable by the legal profession itself without the need to incur the dangers of law firms being owned by the investment market. Those dangers are that: (1) lawyers' fiduciary duty to their clients will be compromised by the resulting increased "profits duty" that replaces the professional devotion to one's client with the profits-minded retention of one's customers; (2) the independence of lawyers in advising and representing their clients may come into conflict with the interests of their investment owners; (3) the efficacy of Law Society powers of regulation and discipline will be reduced by the control over law firms and lawyers that such investors will demand, given that, because of its state of economic distress, the legal profession is now an unattractive investment, which will likely be compensated by greater control; and, (4) therefore lawyers and law firms being "owned" would be a continuing threat to the independence of the judiciary.

The following potential forms of adverse control by investors are set out in the Law Society's ABS Discussion Paper as being instead, opportunities to gain otherwise unavailable resources (at p. 11):

- law firms operating as franchises so they have centralized access to management systems, technology, marketing and other expertise; and,
- law firms using equity financing to invest heavily in technology so they can offer new and innovative forms of delivering legal services.

The first statement, as to making available, "management systems, technology, marketing and other expertise," to law firm procedures is what is done to make fast-food outlets more profitable. It is inappropriate for the rendering of legal services. Would such investors in a similar way make heart and brain surgery, and cancer treatments more cost-efficient? Are they going to tell criminal lawyers how to defend murder cases more cost-efficiently, or how to be more cost-efficient in preparing a patent application, or how to conduct a complex child custody case in a more *pro forma*, by recipe way? That is where the great bulk of time in providing legal services is taken up. The ABS promoters are right, the legal profession doesn't presently have such "management systems" skills, nor should it want them. The Discussion Paper is full of such vague phrases and commitments, leaving readers inadequately informed for opinions and judgments. There is insufficient information provided as to how an enfranchised law firm would be rendered more cost-efficient and able to feed the investors with sufficient profits.

Nonetheless, the opportunity for the membership to provide comments thereupon was open to December 31, 2014, which the ABS Committee and Convocation will take into consideration,

And such detailed and complete control of law firms would greatly reduce the power of law society to regulate the legal profession.

Only the use of specialized support services can make legal services affordable. Investors bringing what they have done to other forms of commercialism cannot. The Discussion Paper doesn't deal with the distinction between the economics of the craftsman's methods and support-services methods of producing goods and services. Therefore clearly, they don't understand the cause of the problem, which to them, is not relevant, because they are going to do only what they know how to do to make what they own render profits. To them, a law firm's provision of services is no different than any other source of services.

The control of a franchised outlet is inconsistent with the professionalism required of a law firm. Large-scale investment organizations owning strings of franchised law firms will enable them to have lawyers financed by the same investor to be representing opposing clients. And, although law firms will know their immediate investor, they won't know who controls the investor and the complex chain of ownership and influence beyond that. And a lawyer representing a client connected to an investor who owns an interest in that lawyer's law firm, will bring a conflict of interest before the court comparable to a lawyer representing a very close relative. And lawyers themselves can be financially associated with investors owning other law firms. Judges will not be able to assume that the lawyers appearing before them are serving the party they represent with complete independence to serve the purpose of aiding the court to reach the right decision, or subject to the interests of the investors in their law firms, or the franchising organization that sets the procedures by which its franchised law firms are to operate. The potential webs of intersecting investment ownership structures will undermine the credibility of any principle of independence while subject to such structures. And such equity financing to purchase technology with which to automate routine legal services, may control the source of the purchase, such that the investor would dictate the technology the law firms could obtain and its price.

The ABS proposals will enable lawyers to themselves earn money from being investors by: (1) owning law firms including their own; (2) owning related non-legal services provided with legal services; (3) owning an interest in the organizations that supply the software programs for automating the provision of routine legal services; and, (4) being retained by their investors and employees. And investors might control which related legal services and automating software is to be used. The potential conflicts appear endless. Lawyers themselves won't know what degree of ownership and control their law firms are subject to, and by whom their investor is controlled, unless they are the ones who negotiated the investing, and even that might not bring knowledge of what happens thereafter to that ownership share. And

therefore judges will no longer be able to assume the necessary degree of independence from the potential conflicts of interest of the lawyers appearing before them.

The ABS proponents will argue that such adverse forms of control of lawyers have not happened in countries such as Australia and England where ABS's are allowed. But how can they know that? What competent investigation has been carried out to determine whether or not they do exist? Such forms of corrupting control and conflicts of interest do not proclaim their existence but instead keep themselves well hidden and protected with threats of "consequences" should they be revealed. Therefore, the onus of proof should be placed upon those who have the power to prove the propriety of their use of power, rather than upon those who might complain about the methods and consequences of its application. But given the complexities of intertwining investment structures and sources, many lawyers will not know to whom their individual law firms' senior partners have made them beholden. Judgments and proceedings may be subject to post-facto attack when such conflicts of interest and compromised independence become known. Against the sophistication and complexity of the investment market, law society powers of regulation will be illusory.

The proponents of ABS's will argue that the principle as to the independence of the legal profession is applicable only to government control, not other forms of control. But, the independence of the legal profession has never been threatened before by the ownership of law firms and control of the lawyers who work in them, nor by any other source of control. The great complexities and intricacies and convoluted forms of ownership and influence used by sophisticated investors will make them a greater, more frequent, and better hidden threat to lawyer and judicial independence than the prospect of government control and interference.

But the following "list of considerations" described in the discussion paper (p. 12), in regard to which the LSUC wishes "input," concern only the effect upon lawyers:

- i. access considerations;
- ii. technological considerations;
- iii. economic considerations;
- iv. professional and ethical considerations;
- v. implementation considerations.

These factors don't direct attention to the Law Society's position. They do not include constitutional law considerations, nor proof of the Law Society's ability to maintain adequate authority to regulate and discipline the legal profession, nor the history of Law Society performance as it reflects upon its ability to maintain the independence of the legal profession.

All of the above factors should be considered in light of Law Society passive performance in relation to the unaffordable legal services problem. It has been developing for decades but law societies have

stood on the sidelines and watched its damaging effects become observable to all, but they have done nothing. There is no program in effect that directly attacks the problem. The Chief Justice of Canada, Beverley McLachlin, from at least as far back as 2007 has bravely come off the Bench to make several speeches to authoritative groups about the problem, but no progress has been made.⁷⁸ The problem's damage caused to: (1) society; (2) the courts; (3) the legal profession; and, (4) legal aid organizations, continues to grow worse. (it is very politically unwise for governments to improve the funding of legal aid organizations so as to be better able to provide free legal services to poor people while the majority of taxpayers cannot afford any lawyer-services for themselves).

This history of poor Law Society performance should be brought to bear upon the issue of the constitutionality of ABS proposals. That history makes strong the argument that the Law Society will not provide adequate protection against such improper control of lawyers and the rendering of their legal services. Particularly so will those benchers who are closely involved with the investors not want the Law Society to take effective action. It makes more likely the loss of the legal profession's independence, so essential to judicial independence, to commercial forces wishing to make "justice" better serve their profit-minded interests and shareholders.

There cannot be a judiciary free and independent of investor control if there isn't a legal profession independent from investor control. Both the federal and provincial governments should be alerted about the possible approval of these ABS proposals. Because they could have substantial impact upon the independence of the judiciary, they should be discussed in Parliament and the Legislatures. It is no answer to say other professions or trades have allowed investor ownership. Ours is a unique profession in that the independence of one of the three branches of government, the judiciary, is dependent upon our independence. Judges' decisions and judgments are completely dependent upon the evidence and arguments presented by lawyers. The Discussion Paper does not adequately deal with this matter. Its presentation is superficial and therefore must be considered biased.

Section 12 of the Ontario Law Society Act, make the Attorney General of Ontario, the Federal Minister of Justice, and the Solicitor General for Canada, benchers. Have they or their representatives mentioned these matters? What part will they play? Will they bring the ABS proposals to the attention of Parliament and the Legislatures? The Discussion Paper does not deal with such important interests.

⁷⁸ See for example: (1) the video of the University of Toronto, Faculty of Law's *Access to Civil Justice Colloquium*, on Feb. 10, 2011, after introduction by former Attorney General of Ontario Chris. Bentley; online: < <https://hosting2.desire2learncapture.com/MUNK/1/Watch/219.aspx.>>; (2) "21st Century Justice"—Remarks to the Probus Club, February 26, 2013, Vancouver, B.C. (at p. 9); (3) "The price of justice should not be so dear"—stated in an address to the Council of the Canadian Bar Association, on August 11, 2007; (4) "The Challenges We Face—Remarks of the Right Honourable Beverley McLachlin, P.C. Presented at the Empire Club of Canada, Toronto, March 8, 2007"; (5) Remarks to the annual Canadian Bar Association conference, August 13, 2011, in Halifax (a Toronto Globe & Mail news story, no longer available online).

What if the firms representing plaintiff and defendant are owned by the same investor, who has an interest in which party wins? The Discussion Paper refers to strings of investor-controlled franchised law firms. The investment market is a complex one, with investors owning investment organizations and companies, plus the complexities of holding companies whose purpose is to own shares of other companies to form a corporate group, such that it will be difficult to know who really controls such franchised law firms. Therefore this statement in the Discussion Paper (at page 22), reduces this “conflicts of interest” problem to an unrealistic simplicity, to wit: “On the other hand, it could be argued that this position is too broad and that focused conflicts rules and fiduciary law can effectively address these issues.”

The case law on independence of judges and lawyers deals only with issues as to government interference and control. That is because there hasn’t been any comparable threat. But because of the complexities of the investment market, investor control can create an even greater threat to the independence of the profession and therefore of the judiciary required by the constitution, because detection will be far more difficult than detecting interference by governments.

It is not a sufficient answer to say, “well, there haven’t been any reported occurrences of such actual tampering with the independence of lawyers and law firms by investors in other jurisdictions that have allowed ABS’s.” Such damaging and unethical control by investors cannot be adequately detected. Therefore, the issue cannot be settled by the frequency of detection, but rather by assessing the probability of its happening. History teaches without exception that power always corrupts those who are not sufficiently accountable for their exercise of power. Longterm neglect of duty is a variety of institutional corruption. The unaffordable legal services problem would not exist, nor would our courts be clogged by self-represented litigants if there had been adequate response during the decades these problems have been developing.

It’s a situation comparable to wrongful convictions—wrongful due to hidden weaknesses of the evidence that is the basis of the convictions. They are very infrequently detected, and detected only in very unusual circumstances that most often occur long after the conviction, and the sentence has been served.⁷⁹ If in criminal proceedings, the burden of proof of, “proof beyond a reasonable doubt,” were lowered to the civil burden of “proof on a balance of probabilities,” the trial and the evidence would look no different. The ability to detect wrongful convictions would be no greater. But we would all agree that such altering of the burden of proof could not do “justice.” Similarly, if expert opinion evidence were received without evidence presented of, and cross-examination of the qualifications of the experts, there would be no greater ability to detect wrongful decisions. But we would all agree that the probability of

⁷⁹ See for example, the decision in *R. v. Hanemaayer* 2008 ONCA 580, 234 C.C.C.(3d) 3 (Ont. C.A.), and my article, “Plea Bargaining is Sentencing” (2009), 14 Canadian Criminal Law Review 55.

wrongful decisions would be much increased to an intolerable level, which probability would justify a finding of negligent practice, without the need to prove that the resulting decisions were in fact thus rendered faulty or need to prove their damaging consequences to the parties.⁸⁰

14. ABS's Will Reduce the Law Society's ability to Resist Demands for Government Intervention

There are eight factors that threaten a substantial reduction of the present self-regulation of Canada's legal profession—therefore, ABS proposals should not be allowed to add to them, being factors that the Discussion Paper does not discuss. ABS proposals should be considered in the context of the probabilities that they create, *i.e.*, that ABS ownership and enfranchising will in effect diminish the Law Society's power and willingness to deal with the problem of unaffordable legal services:

- (1) the consequences suffered by the majority of the population who cannot obtain legal services at reasonable cost, but law societies can show no progress or efforts made towards a solution—a situation that has been developing for decades;
- (2) the power and speed of communication provided by the internet, the social media, along with the news media, and skilled pressure groups, to make those consequences into a powerful and compelling public issue and then a major political issue demanding government intervention that will reduce law society powers and prominence, and therefore its ability to enforce the provision of competently and ethically provided legal services;
- (3) the well developed progress for more than ten years, of the loss of self-regulation by law societies in several other countries;⁸¹

⁸⁰ In fact, the present use of electronic records as evidence in e-discovery and admissibility of evidence proceedings, without examining or allowing issues as to the state of records management to be considered, is exactly the same as using expert opinion evidence without examining the qualifications of the experts that provide the opinions. And in spite of the requirement of proof of the integrity of the records management system the records come from; e.g. s. 31.2(1)(a) of the Canada Evidence Act, & s. 34.1(5),(5.1) of the Ontario Evidence Act. See for example the decision in, *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, 2012 ONSC 7243, [2012] O.J. No. 6082, at para. 8.

⁸¹ See these articles and reports concerning the loss of self-regulation by the legal profession:

(1) Paul D. Paton, "Between a Rock and a Hard Place: The Future of Self-Regulation—Canada between the United States and English/Australian Experience," 2008 *Journal of the Professional Lawyer* 87 (an ABA publication); electronic copy available online at: <<http://ssrn.com/abstract=1226802>>.

(2) Noel Semple, "Access to Justice through Regulatory Reform" (a paper prepared for the National Family Law Program, July 16, 2012; electronic copy available online at: <<http://ssrn.com/abstract=2101831>>. Dr. Semple is a postdoctoral research fellow, Centre for the Legal Profession, University of Toronto Faculty of law. See also *supra* note 3 item (2).

(3) Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law" *International Review of Law and Economics* (forthcoming); download copy available at, SSRN: <http://ssrn.com/abstract=2333990>.

- (4) the fact that the consequences of the unavailability of legal services at reasonable cost will motivate the many non-lawyer legal service providers to press government to change the law so that they can fill the market that lawyers have out-priced themselves from—the collapsed and down-sized law firms will make available the necessary lawyers to become employees of such service providers;
- (5) the possibility of regulation of non-lawyer providers of legal services by official agencies other than law societies;⁸² and,⁸³
- (6) governments are increasingly unwise to improve the very poor funding that legal aid organizations suffer, until law societies innovate to make legal services affordable again—taxpayers who cannot afford legal services for themselves, should not be

(4) Edward Iacobucci, Michael Trebilcock, (2008) “Self-Regulation and Competition in Ontario’s Legal Services Sector: An Evaluation of the Competition Bureau’s Report on Competition and Self-Regulation in Canadian Professions,” a publication of the Faculty of Law, University of Toronto, Sept. 15, 2008. Available for download from the FLSC’s website; online: <<http://www.flsc.ca/en/federation-news/2008/academics-review-the-competition-bureau-study-of-the-professions-november-20-2008/>>. Also published as, “The Competition Bureau’s Report on Competition and Self-Regulation in the Canadian Legal Profession: A Critical Evaluation,” (with Edward Iacobucci), (2009) Canadian Competition Record 92. Also listed in the publications of the profile of Michael Trebilcock, in the Faculty of Law, of the University of Toronto’s website; online: <<http://www.law.utoronto.ca/faculty-staff/full-time-faculty/michael-trebilcock>>.

(5) Richard F. Devlin, Porter Heffernan, “The End(s) of Self-Regulation” (2008), 45:5 Alberta Law Review 169. Also reproduced in, Alice Woolley, Richard Devlin, Brent Cotter & John M. Law, eds., *Lawyers’ Ethics and Professional Regulation* (LexisNexis Canada Inc., 2008) at 574-598.

(6) Self-regulated professions—Balancing competition and regulation 2007, (Canadian) Competition Bureau, “Lawyers” at 71-79; online: <<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02523.html>>.

(7) Paul Douglas Paton, “‘In the Public Interest’: Threats to Self-Regulation of the Legal Profession in Ontario, 1998-2006” (“A dissertation submitted to the school of law and the Committee on Graduate Studies of Stanford University, in partial fulfillment of the requirements for a degree of Doctor of the Science of Law,” February, 2008).

(8) Adam M. Dodek, “Regulating Law Firms in Canada,” (2011), 90 Canadian Bar Review 381 at 403. Adam Dodek is an Associate Professor, Faculty of Law, Common Law Section, University of Ottawa.

(9) Harry Arthurs, “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?” (1995), 33 Alta. Law Rev. 800.

⁸² See the, Final Report of the Legal Services Providers Task Force to the Benchers of the Law Society of British Columbia (December 6, 2013). It deals with these issues: (1) should there be a regulator of other legal services providers; and, (2) should the law society be that regulator? Recommendation 3 of the Report states: “That the Law Society develop a regulatory framework by which other existing providers of legal services, or new stand-alone groups who are neither lawyers nor notaries, could provide credentialed and regulated legal services in the public interest.” At the Law Society’s Bencher meeting of April 11, 2014, “the Legal Services Regulatory Framework Task Force was created to develop a regulatory framework by which other existing providers of legal services, or new stand-alone groups who are neither lawyers nor notaries, could provide credentialed and regulated legal services.” See online: http://www.lawsociety.bc.ca/apps/broadcast/ntp.cfm?msg_id=859&capvalue=srmrc.

⁸³ Alternative Business Structures (ABS) proposals to allow law firms to be owned by investors may make law societies poor alternatives for regulating other professions or preventing non-lawyer legal services providers from employing lawyers to provide the full range of legal services to their customers, clients, and patients. See LSUC’s ABS “Discussion Paper” referred to in note 77 and accompanying text *supra*.

required to give more of their tax money to legal aid organizations to provide poor people with free legal services, *i.e.*, such poor funding is the fault of law societies, not governments nor unwilling taxpayers. Such poor people are a comparatively small portion of the population; the majority that cannot afford lawyer services is not small.

Together, these six reasons create two more reasons for government intervention that are the most powerful in a democracy:

- (7) without legal services available to the majority of the population, the rule of law cannot be effectively enforced, with the result that Canada has fallen back from being a constitutional democracy (monarchy) to a parliamentary democracy, and the *Canadian Charter of Rights and Freedoms* is but a “paper tiger” for that majority, and therefore,
- (8) obviously, the public has very inadequate means of influencing the policies and practices of Canada’s law societies, (were it otherwise, the problem would not exist) which means a very different management structure is needed so as to command sufficient accountability from the agency that regulates the legal profession.

These factors, if left without a persuasive answer, will coalesce into a powerful demand for government intervention to make legal services affordable again, so that the rule of law may be enforced, and Canada can again be a constitutional democracy in more than name only. ABS’s will further weaken the ability of law societies to cope with demands for government intervention to establish a different agency to regulate the legal profession in Ontario. A different concept of what a law society should be is needed; not the use of ABS’s that will fix law societies as being only what they are now in concept, policy and practice, and motivation, and therefore more vulnerable to government intervention because ABS’s cannot solve the problem of unaffordable legal services.

15. Conclusion

The Law Society is not trying to solve the unaffordable legal services problem. That should be its main goal if it is to justify its monopoly over the provision of legal services. A law society that cannot make legal services adequately accessible, that are competently and ethically provided and affordable, has no purpose. These ABS proposals are a deviation and a diversion from that duty, being the Law Society’s first duty.

ABS proposals will not solve the unaffordable legal services problem. But I don’t think that is the goal of their promoters. The purpose is to make money for the investors and the lawyers from the big law firms who will represent them, and themselves become investors. It will mean the commercializing of the

legal profession. And, with their tight control of the law firms they could end the independence of the legal profession. Their presence will fix law societies into their present form, conceptual foundation, and status. There will be no evolution of the Law Society to meet the changing needs of society for legal services. That will have been given over to the commercial world, whose interest is not in serving the public interest, but rather to make money for its owners. A law society that wants to “go commercial” and abandon its duty to the public invites and deserves government intervention.

What has caused the unaffordable legal services problem is that the legal profession has continued to use an outmoded method of delivering legal services. The craftsman’s method has been abandoned everywhere in favour of a support-services method, wherever there was sufficient pressure to make it happen. Law societies have not evolved so as to be able to adequately serve the population’s need for legal services because there hasn’t been enough pressure on them to do so. Benchers have been left to satisfy their private reasons for being benchers, including the promotion of ABS proposals. They are based upon preserving the craftsman’s method, therefore they cannot solve the problem. But that is not the purpose of their promoters.

The legal profession is the lynch pin among all of the interdependent parts and concepts that support the justice system. If the law societies cannot bring affordable legal services to the population, what purpose do they have? And the justice system will become very inadequate, being a system providing employment for lawyers and judges, but one paid for by taxpayers, the majority of whom cannot afford legal services provided by lawyers.

Legal services now take more time to provide because of the rapid expansion of laws, their complexity, and the automation of records-making and management, which in turn is due to society’s increasing dependence upon technology and demands that the rule of law be made to apply in new areas of human activity. Therefore there is an ever-increasing development of legal infrastructure. Lawyers should therefore have more than enough work. But the legal profession is contracting at a time when it should be expanding, and worse is predicted.⁸⁴

In contrast, the statements in LSUC’s webpage entitled, “Your Legal Bill – Too High?,” tell the public that the high cost of legal services is not the Law Society’s problem.

⁸⁴ See for example: (1) The Canadian Bar Association’s text, *The Future of Legal Services in Canada: Trends and Issues* (released June 12, 2013), forecasts (p. 31), that over the next decade, the middle-sized law firm may disappear. If so, smaller firms will go first; (2) the *Lawyers Weekly* article of June 21, 2013, by Cristin Schmitz, “CBA report says get ready for big change,” which begins, “Lawyers’ earnings will flatten or fall”; and, (3) the writings of Jordan Furlong, a consultant and legal industry analyst, such as, The agile lawyer will rise as permanent, full-time, salaried employment vanishes.” This “agile lawyer” will be independent of steady employment; instead be available to aid law firms with peak period work problems. In present times of firms being short of clients, such “agility” would mean a professional life of poorly paid, hand-to-mouth piece work.

The FLSC's *Inventory of Initiatives* text⁸⁵ strongly implies that the majority of the people in Canada had better get used to dealing with their legal problems without lawyers. It is a confession of an inability to deal with the problem, and an acceptance of the present cost of legal services as a fact that cannot be changed. Therefore it fails to deal with the symptoms of the problem, unaffordable legal services, let alone the cause, the cause being the preservation of the "handcraftsman's" method of delivering legal services instead of moving to a "support-services" method. The "medicine" that it prescribes has dangerous side-effects such as "cutting costs by cutting competence," and inviting self-medication by way of "self-help." Those side-effects greatly increase the probability of error that severely injures the "patient"—the former client of licensed, competent lawyers.

The law societies' regulation of the monopoly over the provision of legal services generates a third duty (in addition to being proactive in ensuring the competent and ethical practice of law by all lawyers). The law societies have not accepted the duty to maintain affordable legal services.⁸⁶ The monopoly needs a different management structure than is provided by the elected benchers of Canada's law societies.

But ironically, the solution to the problem of "legal services unavailable at reasonable cost," is in the hands of the law societies themselves. Their federation, the Federation of Law Societies of Canada (the FLSC), is the sponsor, and therefore the controller of CanLII, the Canadian Legal Information Institute. At present, CanLII provides free online access to court and tribunal decisions and to the statutes and regulations created in all jurisdictions of Canada. It is an excellent service. But because the materials it provides are limited to case law, statutes, and regulations, it serves to preserve the handcraftsman's method of delivering legal services. Therefore it cannot have any impact upon the problem. To give it that impact, CanLII should be enabled to provide the same support services that LAO LAW (a division of Legal Aid Ontario) provides to Ontario's lawyers for their legal aid cases. But unlike the limited lawyer population who do legal aid cases in Ontario, and the limited areas of law for which LAO LAW provides its support services, CanLII could provide all of them at cost to all lawyers in Canada, and in all major fields of the practice of law. That is how the problem will be solved, just as it has been solved for LAO by LAO LAW continuously for 35 years.⁸⁷ The underlying concept and strategy of support-services economies-of-scale can lower the cost of any legal service.

⁸⁵ See the text accompanying note 62 *supra*, and section 8 above.

⁸⁶ See: The failure of law societies to accept their duty in law to solve the unaffordable legal services problem," on the SSRN, August 10, 2014, and on the Access to Justice in Canada blog on August 12, 2014 (Part 1); and August 14, 2014 (Part 2), and excerpted on *Slaw*, (September 11, 2014). And see also the other "access to justice" articles listed on my SSRN author's page.

⁸⁷ In all of the literature dealing with the future of Legal Aid Ontario (LAO), there is no analysis of LAO LAW, its methods, its market, its popularity, its history of success, or of the great cost-saving that it has provided to LAO. Similarly, after establishing LAO LAW as a very successful support service, I asked to be allowed to provide similar service to lawyers for their paying clients (their non-legal aid clients). The resulting expansion would have made

Secondly, the FLSC should represent all law societies in negotiating on behalf of all lawyers in private practice, for services that would automate the provision of routine legal services.

In conclusion Law Society management of the problem has been non-existent. As its consequences become more threatening to law society independence, the temptation to throw the problem and the future welfare of the profession to the consequences of allowing the use of ABS investors, whatever they may be. They cannot solve the problem. The situation is ripe for opportunism by ABS investors and their advocates. That will render a disservice to the profession and undermine professionalism. The answer to the problem is a different conception of what a law society should be and do, and its necessary qualities of leadership and sponsoring necessary innovations, so as to comply with the law that gives it the powers of regulating the legal profession in Ontario and Canada as a whole. The problem of unaffordable legal services afflicts the majority of the residents of Canada. Therefore these issues should be made patent to the membership of law societies and to the candidates for the next bench elections throughout Canada.

The conflicts of interest revealed by the ABS issue, provide strong evidence that the Law Society's regulatory functions, (to regulate the legal profession in the public interest and in accordance with its duties under s. 4.2 of Ontario's Law Society Act), are now in serious conflict with its representative functions serving the interests of its member lawyers. The Clementi Report of 2004, concerning the delivery of legal services in England and Wales,⁸⁸ recommended that the regulatory and representative functions of their law societies should be clearly split because they were in conflict. As the Report states, the regulatory function serves the public interest, therefore it should take primacy and be given priority over the representative function. LSUC's performance shows that its present management structure is not capable of performing both functions to the satisfaction of the public interest and the public perception. In preference to remedies such as the alternative business structures proposals, the best solution to present "unaffordable legal services" problems is a law society solution, but it requires a law society whose performance is not so damaged by conflicts of interest.

LAO a lot of money (like now, LAO LAW had no competitors), and, because of the even greater cost-efficiencies and expansion of our database that would be obtained from the resulting increase in size (because "bigger is better"), the service to legal aid lawyers would have been further improved. That proposal was refused, with no explanation as to why. The Law Society of Upper Canada (LSUC) was the manager of LAO at that time. The "McCamus Report" of 1997 (see note 3, item (10) *supra*), recommended (at p. 12) that LSUC be removed as the manager of LAO. That was accomplished by the Legal Aid Services Act, 1998. For similar reasons, Professors Zemans and Monahan, also of Osgoode Hall Law School at York University, in their study for the York University Centre for Public Law and Public Policy, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (Toronto, 1997), also recommended that LSUC should be removed as the manager of LAO, because of its refusal to innovation for the best future of LAO (at pages 2-3, and 65-66). And the "Trebilcock Report," Report of the Legal Aid Review 2008, note 3, item (1), adopted all of the recommendations of Professor McCamus.

⁸⁸ Note 67 *supra* and accompanying text.

APPENDIX

LAO LAW's Support Services for Ontario's Legal Aid Lawyers

LAO LAW is a specialized support service at Legal Aid Ontario. Its legal research services are provided to Ontario's lawyers in private practice who provide legal services to legally-aided clients. It is based upon three types of specialization taken to a higher degree than exists in private practice: (1) of the research staff of lawyers; (2) of the materials used, and of the re-use of previously created work product; and, (3) of the principles of database management. The database is the most important piece of infrastructure for the production of LAO LAW's materials and services. It is more important than any of its lawyers.

Consider this more detailed description of the materials now provided by LAO LAW. To view the following materials and their herein footnoted websites, a LSUC solicitor number and LAO solicitor number are needed. In addition to full legal opinions provided in response to fact-specific requests for legal research, the following services are provided to Ontario lawyers who do legal aid cases:

Criminal law⁸⁹: factums and precedents prepared by LAO LAW staff lawyers and experienced counsel in private practice (approximately 414 factums available); general and specific issue memoranda (close to 1,000 memoranda available); sentencing quantum charts; *LAW@LAO*--which is LAO LAW's magazine of recent developments in criminal law; related websites of particular interest to criminal law practitioners; secondary materials—a wide range of criminal law resources; and, *The Bottom Line*—"Brief weekly summaries of breaking case law and legislative developments in criminal law, with hyperlinks to decisions and legislation."

Family law⁹⁰: factums prepared by LAO LAW staff lawyers and private counsel; general and specific issue memoranda (374 memoranda available); *LAW@LAO*--LAO LAW's magazine of recent developments in family law; related websites—links to sites of particular interest to family law practitioners; secondary materials—a wide range of family law resources; *The Bottom Line*—"brief weekly summaries of breaking case law in family law."

Immigration and Refugee law⁹¹: memoranda of argument prepared by private counsel and LAO LAW staff; general and specific issue memoranda; *LAW@LAO*--"LAO LAW's magazine of recent developments; related websites—links to sites of particular interest to refugee practitioners; secondary materials prepared by others, such as the Refugee Law Office and the Immigration and Refugee

⁸⁹ Online: <<https://www.research.legalaid.on.ca/cgi/site4/CriminalMain.htm>>.

⁹⁰ Online: <<https://www.research.legalaid.on.ca/cgi/site4/FamilyMain.htm>>.

⁹¹ Online: <<https://www.research.legalaid.on.ca/cgi/site4/RefugeeMain.htm>>.

Board; *The Bottom Line*—“brief weekly summaries of breaking case law in refugee law, with hyperlinks to decisions.”

Aboriginal Legal Issues⁹²: general and specific issue memoranda—areas covered include, residential school damages, matrimonial property, CFSA matters, sentencing alternatives and prisoner's rights, and Ontario Resources for Aboriginal Offenders (directs counsel to community resources that can be utilized in the preparation of an alternative sentencing plan for Aboriginal offenders); related websites—a comprehensive set of links to sites of particular interest to practitioners representing Aboriginal clients.

Mental Health Law⁹³: consent and capacity board decisions-text of decisions of the Ontario Consent and Capacity Board (CCB); general and specific memoranda-memos addressing issues arising in both the criminal law and civil law contexts; related websites—links to sites of particular interest to practitioners representing clients with mental health problems; secondary materials—a collection of papers about Consent and Capacity Board hearings, and of forms used by duty counsel and court staff by duty counsel and court staff in mental health court in relation to Part XX.1 of the Criminal Code.

Correctional Law⁹⁴: general memoranda—“These memos address issues touching upon the rights of prisoners and the statutory authority of officials in administering sentences. Memos address two principal themes: (1) inmate grievances, such as involuntary transfer and disciplinary hearings; and (2) conditional release, including accelerated parole review, day and full parole, and statutory release and detention.” “Related websites—links to sites of particular interest to practitioners dealing with correctional law issues”; “What’s Pending—proposed amendments to the Corrections and Conditional Release Act (CCRA)/Criminal Code.”

Other Resources⁹⁵: the Forensic Science Resource Database—“This is an ongoing project to compile and organize introductory resources in commonly arising areas of forensic science to assist defence counsel in acquiring an overview of the relevant forensic issues. The information is hyperlinked where copyright allows. ... Whenever possible, the lists have been reviewed by qualified experts to ensure that the material is relevant and accurate.”

Mentoring-LAO LAW Online mentoring⁹⁶: “Mentoring is the generosity of lawyers to fellow lawyers: the ultimate gift of time, skill and care given from one professional to another.”

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⁹² Online: <<https://www.research.legalaid.on.ca/cgi/site4/AboriginalMain.htm>>.

⁹³ Online: <<https://www.research.legalaid.on.ca/cgi/site4/MentalHealthMain.htm>>.

⁹⁴ Online: <<https://www.research.legalaid.on.ca/cgi/site4/CorrectionalMain.htm>>.

⁹⁵ Online: <<https://www.research.legalaid.on.ca/cgi/site4/forenmain.htm>>.

⁹⁶ Online: <https://www.research.legalaid.on.ca/cgi/site4/OLMS_main.htm>.