



TAB 5

Report to Convocation September 28, 2017

Professional Regulation Committee

Committee Members

William C. McDowell (Chair)
Malcolm Mercer (Vice-Chair)
Jonathan Rosenthal (Vice-Chair)
Fred Bickford
John Callaghan
Gisèle Chrétien
Suzanne Clément
David Howell
Seymour Epstein
Carol Hartman
Michael Lerner
Brian Lawrie
Virginia MacLean
Susan Richer
Raj Sharda
Jerry Udell

Purpose of Report: Decision and Information

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COMMITTEE PROCESS

1. The Professional Regulation Committee (“the Committee”) met on September 14, 2017. In attendance were William C. McDowell (Chair), Malcolm Mercer (Vice-Chair), Jonathan Rosenthal (Vice-Chair), Fred Bickford, Gisèle Chrétien, Seymour Epstein, David Howell, Michael Lerner, Brian Lawrie, Virginia MacLean, Susan Richer, and Jerry Udell (by telephone).
2. Law Society staff members Karen Manarin, Terry Knott, Eric Smith, Juda Strawczynski, and Margaret Drent also attended the meeting.

FOR DECISION

**PROPOSED AMENDMENTS TO THE RULES OF
PROFESSIONAL CONDUCT REGARDING COMPETENCE
AND THE PROVISION OF LEGAL OPINIONS**

MOTION

3. That Convocation approve the amendments to paragraphs [8] and [9] of the Commentary to Rule of Professional Conduct 3.1-2 (Competence) as set out at [Tab 5.1.1 \(English\)](#) and [French \(Tab 5.1.2\)](#).

Nature of the Issue

4. These amendments are intended to provide additional guidance to lawyers about the provision of legal opinions, and would reflect changes to the Model Code of Professional Conduct of the Federation of Law Societies of Canada approved by Federation Council in March 2017.
5. In 2016, the Committee reviewed a consultation report describing these and other proposed Model Code amendments and provided feedback to the FLSC. A notice was also sent to legal organizations and an e-bulletin was circulated to all lawyers and paralegals advising them of proposed Model Code changes and inviting them to provide comments directly to the Federation.
6. According to the FLSC consultation report, the impetus for this proposed amendment regarding the provision of legal opinions is a recommendation of the Canadian Bar Association (CBA) Legal Futures Initiative (“Futures”). The “Futures” Report emphasized the importance of lawyer independence and raised the possibility of undue influence being exercised by powerful clients over lawyers’ legal opinions.
7. The proposed amendment to the Commentary would, if approved by Convocation, also provide greater guidance on the issue of a lawyer making unreasonable assurances to a client.
8. The Committee is proposing some modifications to the Model Code wording. The Model Code provides “a lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer”. The Committee proposes to add the phrase “to a client” to emphasize that the guidance applies in the advisory, rather than the advocacy, context. The Committee also proposes the phrase “the legal opinion that the lawyer holds” rather than “genuinely held”.

Tab 5.1.1

REDLINE SHOWING AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT ARISING FROM MODEL CODE AMENDMENTS

September 6, 2017

Competence

3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

[2] Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

[3] In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include

- (a) the complexity and specialized nature of the matter;
- (b) the lawyer's general experience;
- (c) the lawyer's training and experience in the field;
- (d) the preparation and study the lawyer is able to give the matter; and
- (e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.

[4] In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

[6] A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should

- (a) decline to act;
- (b) obtain the client's instructions to retain, consult, or collaborate with a licensee who is competent for that task; or
- (c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

[7] The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-1A to 3.2-1A.2.

[8] A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. A lawyer should only provide his or her legal opinion to a client when it is the legal opinion that the lawyer holds and it is provided to the standard of a competent lawyer.

[8.1] What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

[9] A lawyer should be wary of ~~bold providing~~ and unreasonable or over-confident assurances to the client, especially when the lawyer's employment or retainer may depend upon advising in a particular way.

[10] In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy, or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-licensure. Advice or services from non-licensure members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices.

[12] The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed, so that the client can make an informed choice about their options, such as whether to retain new counsel.

[13] The lawyer should refrain from conduct that may interfere with or compromise their capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

[15] **Incompetence, Negligence and Mistakes** – This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described in the rule. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

[15.1] The *Law Society Act* provides that a lawyer fails to meet standards of professional competence if there are deficiencies in

- (a) the lawyer's knowledge, skill, or judgment,
- (b) the lawyer's attention to the interests of clients,
- (c) the records, systems, or procedures of the lawyer's professional business, or
- (d) other aspects of the lawyer's professional business,

and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

[Amended – June 2009, October 2014]

Onglet 5.1.2

VERSION CORRIGÉE DE MODIFICATIONS PROPOSÉES AU CODE DE DÉONTOLOGIE ÉMANANT DU CODE TYPE

6 septembre 2017

Compétence

3.1-2 Un avocat doit fournir tous les services juridiques entrepris au nom d'un client conformément à la norme de compétence exigée d'un avocat.

Commentaire

[1] À titre de membre de la profession juridique, l'avocat est censé avoir les connaissances, l'expérience et les aptitudes requises pour exercer le droit. Ses clients sont donc en droit de croire qu'il a les aptitudes et qualités requises pour traiter convenablement toutes les affaires juridiques dont ils le saisissent.

[2] La compétence est fondée sur des principes déontologiques et juridiques. La présente règle traite des principes déontologiques. La compétence est plus qu'une affaire de compréhension des principes du droit ; il s'agit de comprendre adéquatement la pratique et les procédures selon lesquelles ces principes peuvent s'appliquer de manière efficace. Pour ce faire, l'avocat doit se tenir au courant des faits nouveaux dans tous les domaines du droit relevant de ses compétences.

[3] En décidant si l'avocat a fait appel aux connaissances et habiletés requises dans un dossier particulier, les facteurs dont il faudra tenir compte comprennent :

- a) la complexité et la nature spécialisée du dossier ;
- b) l'expérience générale de l'avocat ;
- c) la formation et l'expérience de l'avocat dans le domaine ;
- d) le temps de préparation et d'étude que l'avocat est en mesure d'accorder au dossier ;
- e) s'il est approprié et faisable de renvoyer le dossier à un titulaire de permis dont les compétences sont reconnues dans le domaine en question, de s'associer avec ce dernier ou de le consulter.

[4] Dans certaines circonstances, une expertise dans un domaine du droit particulier pourrait être requise ; dans bien des cas, le niveau de compétence nécessaire sera celui du généraliste.

[5] L'avocat ne devrait donc pas accepter une affaire s'il n'est pas honnêtement convaincu de posséder la compétence nécessaire pour la traiter ou de pouvoir l'acquérir sans délai, sans frais et sans risques excessifs pour son client. Il s'agit là d'une considération d'ordre éthique, distincte des normes de diligence que pourrait invoquer un tribunal pour conclure à la négligence professionnelle.

[6] L'avocat doit reconnaître son manque de compétence pour une affaire déterminée et que s'il s'en chargeait, il desservirait les intérêts de son client. Si son client le consulte au sujet d'une telle affaire, l'avocat doit :

a) refuser le mandat ;

b) obtenir les directives du client pour engager un titulaire de permis ayant les compétences pour prendre en charge cette affaire ou consulter ou collaborer avec un tel titulaire de permis ;

c) obtenir le consentement du client afin d'acquérir les compétences sans délai, sans risques et sans frais pour le client.

[7] L'avocat devrait également reconnaître que, pour avoir les compétences nécessaires à une tâche en particulier, il devra peut-être demander conseil à des experts dans le domaine scientifique, comptable ou autre domaine non juridique, ou collaborer avec de tels experts. De plus, il ne doit pas hésiter à demander au client la permission de consulter des experts lorsque cela est approprié.

[7A] Lorsqu'un avocat envisage la possibilité de fournir des services juridiques en vertu d'un mandat à portée limitée, il doit évaluer soigneusement pour chaque cas si, dans les circonstances, il est possible de rendre ces services de manière compétente. Une entente visant à fournir ce type de service n'exonère pas un avocat de son obligation de représenter un client avec compétence. Comme dans tout mandat, l'avocat devrait tenir compte des connaissances juridiques, des aptitudes, de la rigueur et de la préparation raisonnablement nécessaires pour assurer une représentation compétente. L'avocat devrait veiller à ce que le client comprenne complètement et clairement la nature de l'entente et la portée des services, y compris les limites. Voir aussi les règles 3.2-1A à 3.2-1A.2.

[8] L'avocat devrait préciser clairement les faits, les circonstances et les hypothèses sur lesquels une opinion est fondée, particulièrement lorsque les circonstances ne justifient pas une enquête exhaustive ainsi que les dépenses qui en résultent et qui seraient imputées au client. Toutefois, à moins d'indication contraire de la part du client, l'avocat devrait mener une enquête suffisamment détaillée afin d'être en mesure de donner une opinion, plutôt que de faire de simples commentaires assortis de nombreuses réserves. L'avocat ne devrait donner d'autre opinion juridique à un client que celle qui est la sienne et qui satisfait à la norme de l'avocat compétent.

[8.1] Ce qui est considéré comme une communication efficace avec le client variera selon la nature du mandat, les besoins et les connaissances du client ainsi que la nécessité pour le client de prendre des décisions bien éclairées et de fournir des directives.

[9] L'avocat devrait faire attention de ne pas faire de promesses présomptueuses ou déraisonnables au client, surtout lorsque l'emploi ou le mandat de l'avocat peut en dépendre.

[10] En plus de demander à l'avocat de donner son avis sur des questions de droit, on pourrait lui demander de donner son avis sur des questions de nature non juridique – comme les complications commerciales, économiques, politiques ou sociales que pourrait comporter l'affaire – ou sur le plan d'action que devrait choisir le client, ou s'attendre à ce qu'il donne son avis sur de telles questions. Dans bien des cas, l'expérience de l'avocat sera telle que le client pourra tirer profit de ses opinions sur des questions non juridiques. L'avocat qui exprime ses opinions sur de telles questions devrait, s'il y a lieu et dans la mesure nécessaire, signaler tout manque d'expérience ou de compétence dans le domaine particulier et devrait faire nettement la distinction entre un avis juridique ou un avis autre que juridique.

[11] Dans le cas d'un cabinet multidisciplinaire, l'avocat doit veiller à ce que le client sache que l'avis ou les services d'un non-titulaire de permis pourraient s'ajouter à l'avis juridique donné par l'avocat. Un avis ou les services de membres non avocats du cabinet qui n'ont aucun lien avec le mandat des services juridiques doivent être fournis à l'extérieur du cadre du mandat des services juridiques et à partir d'un endroit distinct des lieux du cabinet multidisciplinaire. La prestation d'avis ou de services non juridiques qui n'ont aucun lien avec le mandat de services juridiques sera également assujettie aux contraintes énoncées dans les règlements administratifs et les règlements régissant les cabinets multidisciplinaires.

[12] En exigeant un service consciencieux, appliqué et efficace, on demande que l'avocat fasse tout effort possible pour servir le client en temps opportun. Si l'avocat peut raisonnablement prévoir un retard dans l'exécution de ses tâches, il devrait en aviser le client de sorte que ce dernier puisse faire un choix éclairé quant à ses options, comme la possibilité de retenir les services d'un autre avocat.

[13] L'avocat devrait s'abstenir de toute conduite qui pourrait gêner ou compromettre sa capacité ou son empressement à fournir des services juridiques satisfaisants au client et devrait être conscient de tout facteur ou de toute circonstance pouvant avoir cet effet.

[14] L'avocat incompetent nuit à ses clients, déshonore sa profession et risque de jeter le discrédit sur l'administration de la justice. En plus de compromettre sa réputation et sa carrière, il peut aussi causer du tort à ses associés et aux professionnels salariés de son cabinet.

[15] Incompétence, négligence et erreurs – La présente règle ne vise pas la perfection. Une erreur ou une omission, bien qu'elle puisse donner lieu à une action en dommages-intérêts pour cause de négligence ou de rupture de contrat, ne constituera pas forcément un manquement à la norme de compétence professionnelle décrite dans la règle. Bien que des dommages-intérêts puissent être accordés pour cause de négligence, l'incompétence peut aussi entraîner une sanction disciplinaire.

[15.1] La Loi sur le Barreau prévoit qu'un avocat ne respecte pas les normes de compétence de la profession s'il existe des lacunes sur l'un ou l'autre des plans suivants :

- a) ses connaissances, ses habiletés ou son jugement ;
- b) l'attention qu'il porte aux intérêts de ses clients ;
- c) les dossiers, les systèmes ou les méthodes qu'il utilise pour ses activités professionnelles ;
- d) d'autres aspects de ses activités professionnelles,

et que ces lacunes soulèvent des craintes raisonnables quant à la qualité du service qu'il offre à ses clients.

[Modifié – juin 2009, octobre 2014]

FOR DECISION

**PROPOSED AMENDMENTS TO THE RULES OF
PROFESSIONAL CONDUCT ARISING FROM THE MODEL
CODE OF THE FEDERATION OF LAW SOCIETIES OF
CANADA - DISHONESTY, FRAUD BY CLIENT OR OTHERS**

MOTION

9. That Convocation approve amendments to Rule 3.2-7 (Dishonesty, Fraud etc. by Client or Others) as set out at [Tab 5.2.1 \(English\)](#) and [Tab 5.2.2 \(French\)](#).

Nature of the Issue

10. The amendments are intended to further clarify the wording of Rule 3.2-7, and would reflect changes to the Model Code of Professional Conduct of the Federation of Law Societies of Canada in March 2017.
11. Prior to the March 2017 Model Code amendment, Model Code Rule 3.2-7 was solely concerned with dishonest and criminal conduct in the context of a lawyer-client relationship. Materials provided by the Standing Committee on the Model Code of the Federation of Law Societies of Canada acknowledge that some jurisdictions, including the Law Society of Upper Canada, had already expanded the rule to expand the scope of the provision beyond the lawyer-client context.
12. In April, 2012, Convocation accepted the Committee's recommendation that the Rules of Professional Conduct (then Rule 2.02(5)) should address the situation in which the person orchestrating the fraud is not the client, and this is reflected in the Law Society's current Rule.
13. In 2016, the Committee reviewed a consultation report describing these and other proposed Model Code amendments and provided feedback to the FLSC. A notice was sent to legal organizations and an e-bulletin was circulated to all lawyers and paralegals advising them of proposed Model Code change and inviting them to provide comments directly to the Federation.
14. During the winter of 2016, the Law Society notified the professions about the proposed Model Code changes and invited them to submit comments directly to the FLSC.
15. The Committee is proposing to retain the guidance in the Law Society's Rules regarding "red flags" in real estate transactions, since this guidance does not appear in

the Model Code (see paragraphs 3.1, 4.1 and 4.2 of the Commentary to the Law Society's Rules).

16. The Committee also proposes to retain the Law Society's Commentary reminding lawyers that a client or other person may use a lawyer's trust account for an improper purpose, including hiding funds, money laundering, or tax sheltering. The attached redlines at [Tab 5.2.1](#) and [Tab 5.2.2](#) assume that Rules 3.2-7.2 and 3.2-7.3 and Commentary would be retained if the proposed Model Code amendments to Rule 3.2-7 were to be adopted.
17. To more accurately reflect the nature of the lawyer-client relationship, the Committee proposes to replace the word "advise" with "instruct" in Rule 3.2-7(c).

TAB 5.2.1 – Redline Showing Proposed Amendments to the Rules of Professional Conduct – Proposed Model Code Amendments (as approved by FLSC Council March 2017)

September 15, 2017

Dishonesty, Fraud, etc. by Client or Others

3.2-7 A lawyer shall not

- a. knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct;
- b. ~~do or omit to do anything that the lawyer ought to know assists in, encourages or facilitates any dishonesty, fraud, crime, or illegal conduct by a client or any other person~~
- c. ~~or instruct~~ advise a client or any other person on how to violate the law and avoid punishment.

[Amended – October 2014]

~~**3.2-7.1** A lawyer shall not act or do anything or omit to do anything in circumstances where he or she ought to know that, by acting, doing the thing or omitting to do the thing, he or she is being used by a client, by a person associated with a client or by any other person to facilitate dishonesty, fraud, crime or illegal conduct.~~

[New – April 2012]

3.2-7.2 When retained by a client, a lawyer shall make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation.

3.2-7.3 A lawyer shall not use their trust account for purposes not related to the provision of legal services.

[Amended – April 2011]

Commentary

[1] Rule 3.2-7 which states that a lawyer must not knowingly assist in or encourage dishonesty, fraud, crime or illegal conduct, applies whether the lawyer’s knowledge is actual or in the form of wilful blindness or recklessness. A lawyer should also be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client or any other person. Rules 3.2-7.1 to 3.2-7.3 speak to these issues.

[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client or any other person who is engaged in criminal activity such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers commonly provide services such as

- (a) establishing, purchasing or selling business entities;
- (b) arranging financing for the purchase or sale or operation of business entities;
- (c) arranging financing for the purchase or sale of business assets; and
- (d) purchasing and selling real estate.

[3] To obtain information about the client and about the subject matter and objectives of the retainer, the lawyer may, for example, need to verify who are the legal or beneficial owners of property and business entities, verify who has the control of business entities, and clarify the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries. It is especially important to obtain this information where a lawyer has suspicions or doubts about whether he or she might be assisting a client or any other person in dishonesty, fraud, crime or illegal conduct.

[3.1] Lawyers should be vigilant in identifying the presence of “red flags” in their areas of practice and make inquiries to determine whether a proposed retainer relates to a *bona fide* transaction. Information on “Red Flags in Real Estate Transactions” appears below.

[3.2] A client or another person may attempt to use a lawyer’s trust account for improper purposes, such as hiding funds, money laundering or tax sheltering. These situations highlight the fact that when handling trust funds, it is important for a lawyer to be aware of their obligations under these rules and the Law Society’s by-laws that regulate the handling of trust funds.

[4] A *bona fide* test case is not necessarily precluded by rule 3.2-7 and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

[Amended – October 2014]

Red Flags in Real Estate Transactions

[4.1] A lawyer representing any party in a real estate transaction should be vigilant in identifying the presence of “red flags” and make inquiries to determine whether it is a *bona fide* transaction. Red flags include such things as

- (a) purchase price manipulations (revealed by, for example, deposits purportedly paid directly to the vendor, price escalations and “flips” in which a property is sold and re-sold within a short period of time for a substantially higher price, reductions in the balance due on closing in consideration of extra credits or deposits not required by the purchase agreement, amendments to the purchase price not disclosed to the mortgage lender, the acceptance on closing of an amount less than the balance due, a mortgage advance which approximates or exceeds the balance due resulting in surplus mortgage proceeds, and so on);
- (b) a nominal role for one or more parties (fraud is sometimes effected through the use of “straw people”, who may not exist or whose identities have either been purchased or stolen, as well as through the suspicious use of powers of attorney);

- (c) the purchaser contributes no funds or only a nominal amount towards the purchase price or the balance due on closing;
- (d) signs that the parties are concealing a non-arm's length relationship or are colluding with respect to the purchase price;
- (e) suspicious or repeated third-party involvement (for example, giving instructions, supplying client directions or identification, and providing or receiving funds on closing); and
- (f) the proceeds of sale are disbursed or directed to be paid to parties who are unrelated to the transaction.

[4.2] The red flags listed above are not an exhaustive list. Further information regarding red flags is available from many sources, including the "Fighting Real Estate Fraud" page within the "Practice Resources" section of the website of the Law Society. Fraudulent real estate schemes and the red flags associated with such schemes are numerous and evolving. Lawyers who practise real estate law have a professional obligation therefore to educate themselves on an ongoing basis regarding the red flags of real estate fraud.

[New – October 2012]

Onglet 5.2.2

**Version corrigée de modifications proposées au Code de déontologie émanant du code type
(approuvées par le Conseil de la FOPJC en mars 2017)**

15 septembre 2017

Malhonnêteté ou fraude du client ou d'autres personnes

3.2-7 L'avocat ne doit ~~jamais~~ pas :

- a) favoriser ou encourager sciemment la fraude, la malhonnêteté, le crime ou une conduite illégale ;
- b) accomplir ou omettre d'accomplir quelque chose lorsqu'il devrait savoir qu'en accomplissant ou en omettant d'accomplir cette chose, il facilite, encourage ou aide à la malhonnêteté, la fraude, le crime ou une conduite illégale d'un client ou d'une autre personne ;
- c) informer ~~ou instruire~~ le client ou une autre personne des moyens de violer la loi et d'éviter une sanction.

[Modifié – octobre 2014]

3.2-7.1 Un avocat refuse d'agir ou d'accomplir ou d'omettre d'accomplir quelque chose lorsqu'il devrait savoir qu'en agissant, en accomplissant ou en omettant d'accomplir cette chose, il est manipulé par un client, par une personne associée à un client ou par une autre personne afin de faciliter la malhonnêteté, la fraude, le crime ou l'illégalité.

[Nouveau – avril 2012]

3.2-7.2 Lorsque ses services sont retenus par un client, un avocat fait tous les efforts raisonnables pour vérifier le but et les objectifs du mandat et pour obtenir les renseignements nécessaires sur le client pour remplir cette obligation.

3.2-7.3 Un avocat n'utilise pas son compte en fiducie à des fins qui ne sont pas liées à la prestation de services juridiques.

[Modifié – avril 2011]

Commentaire

[1] La règle 3.2-7 qui prévoit qu'un avocat ne doit pas encourager ni faciliter sciemment la fraude, la malhonnêteté, le crime ou l'illégalité, s'applique et ce, que l'avocat en soit réellement conscient ou démontre de l'aveuglement volontaire ou de l'imprudence. L'avocat se garde de devenir l'instrument

de clients sans scrupules ou de leur entourage ou de toute autre personne. Les règles 3.2-7.1 à 3.2-7.3 traitent de cette question.

[2] Un avocat devrait être vigilant et éviter de s'engager involontairement avec un client ou toute autre personne qui mène une activité criminelle telle que la fraude immobilière ou le blanchiment d'argent. La vigilance est de mise parce que les moyens frauduleux pour ces activités et pour d'autres activités criminelles peuvent être des opérations pour lesquelles les avocats fournissent fréquemment des services comme

- a) la création, l'achat ou la vente d'entreprises ;
- b) l'organisation du financement pour l'achat, la vente ou l'exploitation d'entreprises ;
- c) l'organisation du financement pour l'achat ou la vente d'actifs commerciaux ;
- d) l'achat et la vente d'immobilier.

[3] Pour obtenir des renseignements sur le client et sur le sujet et les objectifs du mandat, il est possible que l'avocat doive, par exemple, vérifier qui sont les propriétaires légaux ou les bénéficiaires de la propriété et des entreprises, vérifier qui contrôle les entreprises et clarifier la nature et le but d'une opération complexe ou inhabituelle lorsque le but n'est pas clair. L'avocat devrait consigner les résultats de ses recherches. Il est particulièrement important d'obtenir ces renseignements lorsqu'un avocat a des doutes ou des soupçons sur le fait qu'il est peut-être en train de faciliter l'activité malhonnête, frauduleuse, criminelle ou illégale d'un client ou de toute autre personne.

[3.1] Un avocat devrait savoir reconnaître la présence d'indices de fraude dans son domaine de pratique et poser les questions pertinentes pour s'assurer que le mandat proposé porte sur une opération véritable. Des renseignements sur les indices de fraude dans les opérations immobilières apparaissent ci-dessous.

[3.2] Un client ou une autre personne peut tenter d'utiliser le compte en fiducie d'un avocat à des fins illégitimes, comme pour cacher ou blanchir des fonds, ou encore comme abri fiscal. Ces situations soulignent le fait que lorsqu'un avocat gère des fonds en fiducie, il doit être conscient de ses obligations en vertu des présentes règles et des règlements administratifs du Barreau qui portent sur la gestion des fonds en fiducie.

[4] La règle 3.2-7 n'a pas nécessairement pour effet d'interdire la pratique des causes types motivées par la bonne foi. Lorsque le préjudice personnel et la violence ne sont pas à redouter, on conçoit que l'avocat puisse accepter de conseiller et de représenter le client qui, de bonne foi et pour des motifs suffisants, veut mettre une loi à l'épreuve, la façon la plus efficace de procéder étant de commettre techniquement une infraction donnant lieu à une cause type. Dans tous les cas, l'avocat devrait s'assurer que le client est conscient des conséquences que pourrait avoir l'introduction d'une cause type.

[Modifié – octobre 2014]

Indices de fraude dans les opérations immobilières

[4.1] Un avocat qui agit pour une partie dans une opération immobilière devrait savoir reconnaître la présence d'indices de fraude dans son domaine de pratique et poser les questions pertinentes pour s'assurer que le mandat proposé porte sur une opération véritable. Les indices de fraude immobilière comprennent notamment :

- a) des manipulations du prix d'achat (révélé par exemple, par des dépôts soi-disant payés directement au vendeur, valeur gonflée et vente frauduleuse (flip) par laquelle une propriété est vendue et revendue sur une courte période pour un prix substantiellement plus élevé, réductions dans le solde dû à la clôture en contrepartie de crédits supplémentaires ou dépôts non requis dans la convention

d'achat, modifications au prix d'achat non divulguées au prêteur hypothécaire, acceptation à la clôture d'un montant moindre que le solde dû, acompte hypothécaire qui atteint ou dépasse le solde dû entraînant un solde du produit de la vente, etc.) ;

b) un rôle symbolique d'au moins une partie (la fraude est parfois accomplie par le recours à des personnes qui sont fictives ou dont l'identité a peut-être été volée ou achetée, ou par l'utilisation suspecte de procurations) ;

c) l'acheteur fait des paiements minimes, ou ne fait aucun paiement, au prix d'achat ou au solde dû à la clôture ;

d) des indications que les parties dissimulent un lien de dépendance ou sont de connivence à l'égard du prix d'achat ;

e) un engagement suspect ou répété d'un tiers (par exemple, un tiers donne des instructions, fournit des instructions au client ou son identification, fournit ou reçoit des fonds à la clôture) ;

f) le produit de la vente est acheminé à des parties qui n'ont pas de lien apparent avec l'opération.

[4.2] La liste des indices de fraude immobilière énumérés ci-dessus n'est pas exhaustive. De nombreuses sources offrent d'autres renseignements sur les indices de fraude immobilière, y compris la page « Lutter contre la fraude immobilière » dans la section des ressources sur la pratique du site Web du Barreau. Les combines de fraude hypothécaire et les indices de fraude connexes sont nombreux et continuent d'évoluer. Les avocats qui exercent le droit immobilier ont donc une obligation professionnelle de se renseigner de façon continue à cet égard.

[Nouveau – octobre 2012]

FOR DECISION

**REPORT OF THE ALTERNATIVE BUSINESS
STRUCTURES WORKING GROUP**

MOTION

18. That Convocation approve that licensees may deliver legal services through civil society organizations, such as charities and not for profit organizations, to clients of such organizations in order to facilitate access to justice, provided that:
- a. Civil society organizations that are funded by Legal Aid Ontario, including clinics as defined under the *Legal Aid Services Act, 1998*, are to be expressly excluded from Law Society regulation of the legal services described in paragraph 18;
 - b. Existing permitted provision of legal services, legal information and support services are not to be affected by Law Society regulation of the legal services described in paragraph 18;
 - c. Legal services as described in paragraph 18 are to be provided at no cost to the client by way of fee for service, membership fee or otherwise; and
 - d. Civil society organizations that are subject to Law Society regulation of the legal services described in paragraph 18 may not refer clients to lawyers or paralegals in exchange for donations, payments or other consideration; and
19. That Convocation approve the development of specific regulation of legal services through civil society organizations as described above for Convocation's consideration and approval.

SUMMARY OF ISSUE UNDER CONSIDERATION

20. In June 2017, the ABS Working Group¹ delivered an interim report to Convocation (the "June 2017 Report") whereby it requested "That Convocation approve that licensees may deliver legal services through civil society organizations, such as charities, not for profit organizations and trade unions, to clients of such

¹ The Working Group is chaired by Malcolm Mercer and Susan McGrath. Current members are Fred Bickford, Marion Boyd, Suzanne Clément, Cathy Corsetti, Janis P. Criger, Carol Hartman, Brian Lawrie, Jeffrey Lem, and Anne Vespry.

organizations in order to facilitate access to justice.”² The report was tabled to provide more time for legal organizations and the public to consider the report.

21. The Working Group has since heard from a range of stakeholders regarding the opportunities and risks which could arise from permitting the delivery of legal services through civil society organizations.
22. Based on the further feedback it has received, the Working Group has amended its initial proposal. It reports through the Professional Regulation Committee with the concurrence of the Paralegal Standing Committee and the Access to Justice Committee.
23. The Committees recommend that Convocation approve that licensees may deliver legal services through civil society organizations, such as charities and not for profit organizations to clients of such organizations in order to facilitate access to justice in accordance with the following principles:
 - a. Civil society organizations that are funded by Legal Aid Ontario, including clinics as defined under the *Legal Aid Services Act*, 1998, will expressly excluded from Law Society regulation of legal services through civil society organizations;
 - b. Existing permitted provision of legal services, legal information and support services will not be affected by Law Society regulation of legal services through civil society organizations;
 - c. Legal services through civil society organizations to be regulated by the Law Society are to be provided at no cost to the client by way of fee for service, membership fee or otherwise;
 - d. Civil society organizations to be regulated by the Law Society may not refer clients to lawyers or paralegals in exchange for donations, payments or other consideration.
24. The Committees are providing this report to supplement the June 2017 Report, which should be read with this report.
25. In particular, as set out in the June Report, the Committees propose that if the motion is approved, the Law Society amend its By-Laws to permit civil society organizations (CSOs) to register with the Law Society. Before finalizing By-Law changes, the Law Society will discuss the language of the By-Law changes with interested stakeholders.

² June 2017 Report, PRC Report to Convocation at para 27. The report may be found at <http://www.lsuc.on.ca/uploadedFiles/Convocation-June2017-Professional-Regulation-Committee-Report-2%20-%20Tab%204.4.pdf>.

26. It is proposed that lawyers and paralegals would be permitted to provide legal services directly to clients through the registered CSOs. CSOs would register with the Law Society if the circumstances under which legal services would be provided to CSO clients (by “embedded” lawyers and paralegals) meet the requirements prescribed by new by-laws to be adopted by Convocation. The requirements will focus, among other things, on ensuring that:
 - a. licensee have control over their delivery of legal services;
 - b. solicitor-client privilege will be protected; and
 - c. the fundamentals of professionalism, including independence, competence, integrity, confidentiality, candour, avoidance of conflicts of interest, and service to the public good through client relationships and responsibilities to the administration of justice will be safeguarded.
27. A registered CSO would be de-registered if the prescribed circumstances under which legal services may be provided to CSO clients by “embedded” licensees were no longer present.
28. Lawyers and paralegals providing legal services through registered CSOs would continue to be fully regulated by the Law Society.

BACKGROUND

The June 2017 Report

29. The June 2017 Report recommended that Convocation approve the policy decision to enable the direct delivery of legal services to clients of civil society organizations by lawyers and paralegals providing services through such organizations. The report provided a non-exhaustive list of examples of different civil society ABS structures which have already emerged in Ontario and in other jurisdictions, including:
 - a. Lawyers (from Legal Aid Ontario) ‘embedded’ within civil society organizations;
 - b. Medical-legal partnerships;
 - c. Licensee owned not for profit law firms;
 - d. Law firms owned by trade unions and associations;
 - e. Aspire Law LLP, a joint venture between a charity and a law firm; and
 - f. The Salvation Army Australia model premised on a for-profit firm cross subsidizing pro bono services (the “Salvos Model”).

Feedback Received Regarding the June 2017 Report

30. The Law Society invited comments through its ABS webpage by September 1st. It received formal submissions from two individuals, lawyers Ken Chasse (two submissions, attached as [Tabs 5.3.1](#) and [5.3.2](#)) and Mitch Kowalski (attached as

Tab 5.3.3), a submission from the Ontario Trial Lawyers Association (attached as **Tab 5.3.4**) and a submission from the Law Foundation of Ontario (attached as **Tab 5.3.5**).

31. The ABS Working Group also heard informally from various legal organizations and social service agencies.
32. The main issues raised in the formal submissions and meetings are described and considered further below.

DISCUSSION

(i) The “Slippery Slope” Argument: Civil Society as a Gateway to all ABS

33. Concerns were raised that the current civil society initiative may be a “slippery slope” effort to usher in all forms of alternative business structures. For example, the Ken Chasse submissions claim that approval of this proposal will lead to legalizing all ABS initiatives. Similarly, OTLA warns that:

Within the private bar generally, there is the concern that permitting CSOs to provide services through embedded licensees is an indirect way of moving towards non-licensee owned for-profit law firms in Ontario – a “slippery slope.” Debates over non-licensee ownership have already occurred. A decision not to pursue this form of ABS structure was made, and it should not be revisited under the guise of CSO structures.³

Discussion

34. In September 2015 the Working Group clearly indicated that it is no longer considering majority non-licensee ownership at this time.⁴ It is not revisiting this decision. It has clearly communicated which areas it continues to explore, none of which contemplate majority non-licensee ownership of traditional law firms. Any policy recommendations related to the remaining areas under consideration would be brought forward to Convocation for separate consideration in due course.

³ OTLA Submission at page 5.

⁴ See Alternative Business Structures Working Group Report, in Professional Regulation Committee Report to Convocation, September 24, 2015, online at www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-september-2015-prc.pdf.

(ii) Impacts on Community Legal Clinics and Legal Clinic Partners

35. At Convocation and through feedback received over the summer, the Working Group heard that Legal Aid Ontario and legal aid clinics noted the following concerns:
1. Community legal clinics are not for profit agencies, and are already regulated pursuant to the *Legal Aid Services Act, 1998*. They should not be subject to further regulation under the Working Group's proposal.
 2. The purposes of this initiative must be clearly communicated to clinics and partner agencies so that there is no "chill" in service delivery which may arise from a perception that the Law Society will be regulating the work of "trusted intermediaries" who provide legal information and related support services.
 3. The purpose of this initiative must be to create new pathways to legal services and increase access to justice resources for Ontarians. It should supplement existing services. This model should not be used to pit legal aid funded clinics against third party service agencies to provide Legal Aid funded services.
 4. The Law Society should continue to consider other means of using its regulatory powers to facilitate access to justice to vulnerable groups.

Comment

36. The Working Group agrees with each of the concerns noted above. This proposal was never intended to, and will not include Legal Aid funded initiatives, including community legal clinics in any new proposed regulatory framework.
37. Indeed, the Working Group proposal is intended only to permit new provision of legal services and not to change the regulatory requirements for currently permitted services.
38. The proposal is rooted in a commitment to making it easier for individuals to access legal services. It is premised on greater interdisciplinary collaboration where possible, using social service workers and other trusted intermediaries to help connect clients of civil society organizations to legal services. The Working Group is committed to ensuring that regulation does not create a chilling effect on the legal information services and support services provided by trusted intermediaries.

(ii) Civil Society Organization Fee for Legal Services Models

39. The June 2017 Report considered civil society delivery models which could require the client to pay for legal services. Since June 2017, the Working Group has heard

arguments for and against such models.

40. Several stakeholders expressed concerns about models where a client (or certain clients in a cross-subsidizing model) would pay a fee for legal services. Those concerned noted that if the policy rationale for CSO delivery of legal services is to facilitate access to justice for vulnerable populations, then such services should not be or run on a for-profit basis.

(i) *Associations delivering legal services for a fee*

41. Since its June 2017 Report, the Working Group has heard concerns regarding the appropriateness of permitting the delivery of legal services (“Member Services”) to members of trade unions and other associations (“associations”), including the following:
 - a. Providing legal services to members of associations through employed lawyers and paralegals is quite different than addressing unmet legal needs or access to justice issues in the same way as the Social MDP model.
 - b. Associations can, and in certain cases already do, provide their members with access to legal expense insurance options and/or prepaid legal services plans, whereby legal services are provided as needed by the private bar. It is therefore unclear there is significant advantage in permitting employed lawyers and paralegals to serve members of associations.
 - c. Association models developed to date in other jurisdictions focus on providing traditional legal services directly to members. These models, such as the British Medical Association model, appear to be operating as non-licensee owned, for-profit firms. Non-lawyer equity in for-profit firms should not be permitted simply because the owner is an association or a union rather than a corporation.

Comment

42. As the June 2017 Report notes, there are different ways whereby civil society organizations could (and in jurisdictions where permitted have) been involved in delivering legal services. Member Services models have to date addressed different access to justice issues, in a different manner from what may be described as Social MDP models.
43. The Working Group notes that key characteristics in Social MDP models include the following:
 - i. Clients receive other social, health or other services which are complemented by the provision of legal services;

- ii. Legal services are delivered in a multi-disciplinary practice setting, with 'embedded' lawyers and paralegals to facilitate the delivery of legal services and other services;
 - iii. Clients frequently are vulnerable and have interrelated problems, including one or more legal issues, which, if unaddressed may have cascading effects; and
 - iv. Clients are both unable to pay for legal services, and either may not otherwise receive legal services or would face significant barriers to accessing legal services but for the presence of 'embedded' counsel.
44. In contrast, key characteristics to date of Member Services models include the following:
- i. The association has provided services to association members as a membership benefit and/or or a fee (and there do not appear to be multidisciplinary approaches).
 - ii. Clients may not be particularly vulnerable, and in the case of members of the British Medical Association, can be fairly sophisticated clients. While some members of unions or associations may have multiple legal and other problems, which if unaddressed may have cascading effects, this is unlikely to be the norm.
 - iii. Clients may be able to pay for services. Both the Unionline trade union ABS and the British Medical Association model described in the June 2017 Report intend to make a profit, to be returned to the union / association generally.
45. The Working Group is of the view that there may be access to justice benefits from Member Services and other association models. There may be opportunities to develop greater multidisciplinary approaches. "Push marketing" efforts might help members better understand their unmet legal needs and how they can readily access legal services. Economies of scale and using staff lawyers and paralegals might lower the cost of legal services delivery. Other access to justice innovations might emerge. In theory the delivery of legal services through associations could be provided to members as a membership benefit at no cost, at a reduced cost, or at particular agreed upon costs. The legal services could operate on a for profit basis.
46. However, the Working Group acknowledges that there are different rationales, and different potential outcomes from permitting associations to have employed licensees deliver legal services to their members using employed lawyers and paralegals for a fee (including as a benefit from a general membership fee).
47. The Working Group has reflected on this model further. It notes that, as described above, associations are already able to help their members access private practice

legal services. There is not the same need in Member Services models as there is in Social MDP Models for embedded legal service provision. Private practice lawyers and paralegals can practically be contracted by an association to provide services to its members. While there may be unmet legal needs among association members, there are access to justice options available to serve these populations. In short, association and trade union legal service delivery models are premised on a different design, and address different access to justice concerns than the Social MDP model, where legal services are one of several interconnected issues facing a client, where there are clear unmet legal needs, where the client may not otherwise have access to legal services, and likely would not be able to afford to pay for legal services.

48. The Working Group carefully considered the different rationales for Member Services models and Social MDP models. It ultimately has concluded that Member Services models should not form part of the recommendation contained in this report to Convocation. The Working Group recognizes that there is a less pressing need for Member Services models as compared to Social MDP models. Moreover, depending on the structure, an association or trade union operating under the Member Services model might in essence become the owner of a traditional law firm which is not the intent of its recommendation.

a. Cross Subsidizing Models

49. Charities and not-for-profit organizations by definition do not earn profits; however, if permitted, they could enter into cross subsidizing models where fee based services subsidize the cost of no fee services.
50. In his submission, Mitch Kowalski strongly supports the model developed by the Australian Salvation Army (the “Salvos Model”), through which it operates one law firm that serves paying clients, and which cross subsidizes the operation of its separate humanitarian law firm. He notes that there is a current shift, embraced by millennials, towards “mission-driven companies” which “seek to harness the energy and passion of employees to not only improve the bottom line but also to provide social benefit.”⁵ He suggests that this “represents the most significant generational shift in thinking about what a career in legal services is – and can be, and has resulted in a creative way to address access to justice.”⁶ He notes that the Salvos Model and its predecessor, “have completed over 19,000 pro bono cases, all without any government funding”, have received numerous awards, have systems in place to manage confidential and privileged information, and do not appear to have been subject to law society action.⁷ He maintains that unless there

⁵ Kowalski Submission, at page 1.

⁶ *Ibid.* at page 2.

⁷ *Ibid.* at page 3.

is data showing that such levels of pro bono service are being delivered by Ontario firms at present time, or that there is “demonstrable evidence of ethical violations by the Salvos entities,” Convocation should adopt the June 2017 motion as it was presented.

51. However, as noted above, the Working Group also heard concerns that civil society organizations should not be permitted to deliver legal services for a fee. OTLA’s position exemplifies the concerns. Its position is as follows:

OTLA supports the approval of this policy decision to permit the direct delivery of legal services to clients of CSOs provided that steps are taken to ensure that:

- a. the licensee has control over the delivery of their professional services;
- b. solicitor-client privilege will be protected;
- c. the fundamentals of professionalism, including independence, competence, integrity, and service to the public good through client relationships and responsibilities to the administration of justice will be safeguarded; and
- d. the CSO cannot directly or indirectly charge any fee to clients in respect of any legal service provided by the CSO to them through its embedded licensees, nor can the CSO take any fee or receive any donation directly or indirectly for referring any matter to a licensee not employed by the CSO.

It should be noted that OTLA proposes the addition of this fourth principle to the three criteria outlined in paragraph 33 of the June, 2017 interim report. The addition of this fourth principle is required for OTLA’s support of this policy decision.⁸

52. OTLA further states that “While it may be that CSOs should be allowed to charge below-market rate fees to serve those who cannot afford the rates of the private bar and who do not qualify for Legal Aid, the question of whether CSOs should be able to charge for legal services is outside the scope of this submission.”⁹

⁸ OTLA Submission at page 1.

⁹ *Ibid.* at page 6.

Discussion

53. The Working Group considered two types of cross subsidy models. The first, exemplified by the Salvos Model, involves paid legal services from clients who have the ability to pay market rates, with profits from paying clients subsidizing free legal services to those who are unable to pay for legal services.
54. A second model, alluded to by OTLA's submission can be described as a "low bono" services delivery model. There may be clients who are ineligible for Legal Aid, but who cannot afford to pay market rate for legal services either. These clients could pay a "low bono" amount, that is, a rate that is below market rate. The proceeds from "low bono" paying clients could help subsidize the costs of providing "pro bono" services to those who cannot pay.
55. The Working Group struggled with what would be appropriate with respect to cross subsidizing models, given that both depend on charging a fee for legal services to certain clients.
56. This is a controversial area. The Working Group's primary consideration leading to the consideration of civil society delivery of legal services has been the concern of unmet legal needs. However, it is considering how to address such unmet legal needs in the context where the Working Group has already decided that it would not consider non-licensee majority ownership of traditional law firms.
57. A cross subsidizing model, such as the Salvos Model, clearly meets unmet legal needs, at no public expense. It is a creative model that serves a social purpose. However, there is a legitimate concern that were a civil society organisation permitted to provide conventional legal services on a for profit basis to clients, then it would effectively be operating as a traditional law firm. While the civil society organization's mandate may be laudable, its delivery of for-profit legal services would be no different than the for-profit legal services currently available through traditional law firms.
58. Given the Working Group's September 2015 statement that it no longer intended to consider a "more fundamental structural shift" to permitting majority non-licensee ownership or control of traditional law firms at that time¹⁰, it is of the view that a cross-subsidizing model based on clients paying market rates should not proceed.

¹⁰ Alternative Business Structures Working Group Report, in Professional Regulation Committee Report to Convocation, September 24, 2015, at para. 128.

59. This was not an easy decision for the Working Group, but ultimately it is concerned that this model too closely resembles that which it has already determined would not be recommended at this time.
60. The Working Group also considered permitting “low bono” delivery of legal services. There is merit to “low bono” programs, which would provide more affordable justice to those who are unable to pay for legal services at market rates but can afford to contribute something. Proceeds from “low bono” payments could support the delivery of legal services to those who cannot afford to pay at all.
61. The Working Group recognizes the potential benefits of a “low bono” regime, but also recognized that there are additional regulatory issues, such as how client monies would be handled and reported, and appropriate accounting mechanisms, which would have to be addressed. Further, designing a regulatory framework that permitted charging below market rates, but not market rates, would be challenging. While these are issues that likely could be addressed in due course, the Working Group does not wish to delay the civil society model further. The Working Group ultimately is of the view that it is better to proceed on the basis of a model whereby licensees may deliver legal services through civil society organizations where there is no fee for services.
62. The Working Group believes that it is important to engage in this regulatory initiative, monitor its impact, and consider refinements as it progresses. It may be that in the future there is some evolution regarding cross-subsidizing legal services delivered by licensees through civil society organizations. However, the Working Group is not recommending their inclusion in the proposal going forward in this report.

b. Law Firm / Civil Society Partnerships and Brokerage Concerns

63. Concern has been expressed by OTLA with the Aspire model, in which a UK charity has effectively partnered with a personal injury law firm. OTLA submits that:

Under the guise of a CSO structure, it appears that a charity is able to profit within a space in the legal market where the private bar is already able to meet the needs of the market. The personal injury bar is concerned with the idea that a private actor in the for-profit market can gain an advantage, to the detriment of the client, by partnering with a charity.¹¹

¹¹ *Ibid.*

64. Ultimately OTLA submits that this form of CSO structure should not be permitted in Ontario.¹²
65. Significant concern has been expressed by OTLA that referrals to for-profit firms on the basis of their relationships with charities and not-for-profits, including donations, raise many of the same concerns that are the basis for the prohibition against paying referral fees to non-licensees and may compromise appropriate referrals.¹³
66. The Working Group agrees with the general principle that civil society organizations should not be paid referrals for legal work, either directly or indirectly. Licensees currently may not pay non-licensees for referrals. The Working Group agrees that a civil society organization operating under the Social MDP Model should not be permitted to make referrals in exchange for donations, payments or other consideration.¹⁴

Principles for Developing Civil Society Delivery of Legal Services

67. Given the above discussion, the Working Group maintains that Convocation should approve that licensees may deliver legal services through civil society organizations in order to facilitate access to justice, subject to principles to guide implementation of this policy direction.
68. In September 2015, the ABS Working Group confirmed that it will consider potential models with regard to the following criteria:
 - a. Access to justice: Any structural and related regulatory changes concerning alternative business structures should be reviewed to determine their effect on access to justice. Solutions that provide potential improvements for access to justice should be given more weight on that basis.
 - b. Responsive to the public: In promoting access, the new structures and processes should be responsive to the needs of the public for legal services including greater flexibility in cost, location and availability of legal and other services with appropriate quality and adequate financial assurance of legal services.

¹² *Ibid.*

¹³ *Ibid.* at page 7.

¹⁴ See generally the referral fee rules at Rules 3.6-5 to 3.6-8 of the Rules of Professional Conduct and Rule 5.01 of the Paralegal Rules of Conduct and Guideline 13 of the Paralegal Guidelines. For a review of recent changes to referral fee regulations, please see www.lsuc.on.ca/advertising-fee-arrangements/.

- c. Professionalism: The fundamentals of professionalism, including independence, competence, integrity, confidentiality, candour, avoidance of conflicts of interest, and service to the public good through client relationships and responsibilities to the administration of justice should be safeguarded in any move to liberalize ownership and structure.
 - d. Protection of Solicitor-Client Privilege: Any change proposed to implement alternative business structures must not jeopardize the protection of solicitor-client privilege.
 - e. Promote Innovation: New business structures and processes should be designed to promote innovation which may include, among other things, the adoption of technology and/or other business processes that will enable them to adapt to the legal services marketplace and to better serve the public.
 - f. Orderly transition: The preferred alternative business structures or related solutions options should be amenable to an orderly and thoughtful transition to new regulatory models. Any plan for new structures or service models should be inclusive, responsible, and mindful of any necessary disruptions that may be occasioned.
 - g. Efficient and Proportionate Regulation: Any changes should improve the Law Society's ability to effectively protect and promote the public interest in competent and ethical practices, including appropriate responses to client complaints. Restrictions on who may provide legal services should be proportionate to the significance of the regulatory objectives.
69. In addition to the above criteria, the Working Group concludes that implementation of this report's policy recommendation should also be based on the following principles:
- a. Civil society organizations that are funded by Legal Aid Ontario, including clinics as defined under the *Legal Aid Services Act*, 1998, will be expressly excluded from this regulation;
 - b. Existing permitted provision of legal services, legal information and support services will not be affected by this regulation;
 - c. Legal services permitted by this regulation are to be provided at no cost to the client by way of fee for service, membership fee or otherwise;
 - d. Civil society organizations registered under this regulation may not refer clients to lawyers or paralegals in exchange for donations, payments or other consideration.

NEXT STEPS

70. If approved, the Committee would return with recommended By-Law changes.
71. The Working Group recognizes that the implementation of this proposal will require careful consideration. It is committed to providing meaningful opportunity to Legal Aid Ontario, legal clinics, social service and community agencies, legal organizations, licensees, stakeholders and the general public to provide their input before any proposed model of implementation would be developed and presented to Convocation.
72. In addition, the Working Group is continuing to consider minority ownership by non-licensees and franchise models, and new forms of legal service delivery in areas not currently well served by traditional practices. It will report further with respect to these issues in due course.

Access to Justice—Unaffordable Legal Services’ Concepts and Solutions

Ken Chasse¹

August 28, 2017

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¹ Ken Chasse (“Chase”), J.D., LL.M., member, Law Society of Upper Canada (Ontario), and of the Law Society of British Columbia, Canada. For further in-depth analysis, see my other “access to justice” articles listed on my [SSRN author’s page](#); and, shorter posts listed on my [Slaw author’s page](#) (a blog; “Canada’s online legal magazine”). The “SSRN” is the [Social Science Research Network](#).

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Word count: 75,334.

Introduction

The legal profession has priced itself beyond the majority of the population. But there is no law society program the purpose of which is to solve the unaffordable legal services problem. That is because no longer is it possible to be both a good lawyer and a good bencher. (The benchers are the lawyers elected by the other members of the law society for a term, to be the managers of the law society.)

The major problems of law societies are not legal problems. They require kinds of expertise that lawyers don't have. They will be national problems that will be frequent and multiple, and require national solutions. Law societies need a civil service facility that performs a function comparable to that of a civil service—one such civil service for all of Canada's law societies. Now, they are like an elected government without a civil service—it cannot govern. As a result, law societies cannot cope with the unaffordable legal services problem. The basic infrastructure for rendering such a facility operative and funding it already exists. With good sponsorship by the Federation of Law Societies of Canada, it will succeed.

Civil services have these features that law societies and benchers don't have:

1. they are permanent institutions—they don't change with each election of benchers;
2. they are institutions of continuous development of expertise as to the functions and needs of an elected government—benchers are not;
3. they are charged with a duty of constant vigilance as to public need and how to satisfy it—benchers don't have the skill or the resources;
4. because they are permanent, they can carry out programs requiring long-term development; development that is not interrupted or disrupted by elections—benchers aren't capable of long-term development—they focus on the next election, but the most important services provided by governments are the products of programs requiring long-term development.

Now, our law societies are managed by part-time amateurs—amateurs because they don't have the expertise necessary to deal with the more important law society problems, and they don't go out and get it. And because they are under no pressure to do otherwise, they can give top priority to the only effective source of pressure upon them—their law practices and employers, *i.e.*, where they earn their living. That leaves only a very small portion of their time for their bench work, a doubtful willingness to establish any program that might interfere with that top priority.² The cause is the obsolescence of law society

² “Benchers” are the lawyer-members of a law society elected by its lawyer-members to be the law society’s managers for a fixed term, plus a small number of lay benchers who are to represent the public interest. In Ontario, the Law Society of Upper Canada (LSUC) holds a bench election every four years. The last one was on April 30, 2015; see: “Bench Election 2015”. The announcement for that bench election stated (3rd paragraph): “Benchers dedicate an average of 31 days a year to Law Society business.” Christopher Moore’s book concerning the law society in the province of Ontario, *infra* note 4, provides this further definition: “**Benchers** Sometimes ‘Masters of the Bench’ or collectively ‘the Bench,’ this term for members of the society’s governing body was borrowed in 1797 from the English Inns of Court, which once reserved benches in their dinning-halls for their governing members.” (Appendix 1, p. 343.)

management structure. It is that of the nineteenth century when law societies were created. It is under no pressure to change, therefore there has been no innovation as to its structure. It does only that which benchers have always done—“affordability” has not been one of them. Therefore law societies don’t sponsor the changes to the method of producing legal services that would keep legal services affordable. Nineteenth century law societies facing complex 21st century problems, such as the unaffordable legal service problem are like an elected government without a civil service. If their unwillingness to change remains, they should be abolished.

The solution to the problem of unaffordable legal services exists all around the legal profession—everywhere there is the pressure that forces innovation. No pressure; no innovation. And so the way by which the work to provide legal services is done, is the same as it has always been, *i.e.*, there is no reliance upon external, highly specialized support services. Law societies have failed to sponsor them into existence. As a result, the unaffordable legal services problem is inevitable.

This article provides a solution to the unaffordable legal services problem in Canada, which afflicts the majority of its population (“the problem”), so as to: (1) provide a law society management structure that is capable of solving such problems; (2) have law societies that fulfill their duties in law to make legal services adequately available; and thus, (3) avoid being abolished or the removal of their regulatory functions to more effective agencies. The problem concerns legal advice services, and routine legal services to a much smaller extent. It is the unaffordability of legal advice services that need a law society solution.

The law society texts and other materials that I refer to are those of the law society in Ontario, the Law Society of Upper Canada (LSUC), because I know it best (having been a member since March, 1966). But to no lesser extent does every part below apply to all of Canada’s law societies. And it is relevant to every jurisdiction having the same problem of unaffordable legal services that brings the adequacy of law societies into question.

The duties of law societies applicable to the problem are well stated in the Ontario Law Society Act in section 4.2, concerning LSUC, which is the law society in the province of Ontario, Canada:³

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.

³ Section 4.2 was added to the Law Society Act in 2006 (2006, s. 21, Sched. C, s. 7). See the references to s. 4.2 in notes 28, 37, 45, 55, and 123 and accompanying texts *infra*.

4. The Society has a duty to act in a timely, open and efficient manner.

However, law society benchers—being lawyers elected by its lawyer-members to be its managers—do not try to solve the problem of unaffordable legal services. That would require benchers to donate an unknown amount of time to projects involving trial-and-error learning of an unknown amount, and therefore accepting the risk of failed innovations—accepting the risk of failed expense and damage to one’s reputation and popularity. That is not only incompatible with the work-situation of a practicing lawyer. It is also contrary to fulfilling the motivations that cause a lawyer to become a bencher. Being good lawyers, they will not do anything that could put a risk their not having sufficient time to service their clients and employers. But they do nothing to resolve that conflict of interest, *i.e.*, being good lawyers makes them incapable of being good benchers.

Contrary to what is stated above in s. 4.2, bencher tradition and current practice strongly suggest this belief is held by benchers:

With the personal and professional resources that we have we shall always do all that we can to serve the public, but if we don’t have such resources as might be needed in any particular situation, we cannot do it, and the traditions and history of the law society strongly support our view that we needn’t try to do it. The “affordability of legal services” has not previously been a matter of the law society’s responsibility.

Proof of its existence is found in this statement concerning the attitudes of some LSUC’s benchers that its purpose should be to “serve and protect lawyers”:⁴

One litmus test of bencher candidates’ frustration was the mission statement of 1994. The traditional declaration that the Law Society existed to govern the profession in the public interest, for instance, seemed merely to acknowledge that the public and the legislature would never delegate self-governing authority to the profession on any other understanding.

That was not the reaction of the profession. Circulated to members in the spring of 1994, the mission statement provoked a third of respondents to deny that the society should subordinate the interests of the profession to those of the public. Almost half could not accept that the society did not exist to advance members’ interests. In the election a year later, the mission statement continued to provoke many bencher candidates. “‘To Serve and Protect Lawyers’ should be the motto of the society,” declared one. ‘It is time to put the needs of the profession to the forefront,’ proclaimed another.

The persistence of such obsolete bencher attitudes provides an explanation as to why LSUC has made no attempt to solve the unaffordable legal services problem, *i.e.*, the affordability of legal services is not the

⁴ Christopher Moore, *The Law Society of Upper Canada and Ontario’s Lawyers 1797-1997* (University of Toronto Press, 1997) 337, referring to LSUC archives, “Minutes of Convocation, vol. 104, Feb. 1994 (approved of draft mission statement), and vol. 106, Apr. 1994 (tabulation of responses).” See also notes 42 and 149 *ibid.*, and accompanying texts. “Upper Canada” was the British Colony that became the province of Ontario on July 1, 1867, which is Canada’s birthday.

law society's responsibility. That is at best, a 19th century attitude carried forward into the 21st century in justification of benchers' self-interest, and not fulfilling their duty in law to regulate the legal profession so as to make legal services adequately available. And so, a contradicting irony operates in that the problem is now such that the majority of law firms are suffering a shortage of clients because the majority of the population cannot afford legal services. By neglecting its public duty, the law society has intentionally failed to serve and protect its members. The results now are:

- (1) The alternatives that law societies put forward for the public are intended to help the population learn to live with the problem, but not to solve the problem, which in effect means that law societies are telling the residents of Canada that never again will they have a lawyer of their own, in a fiduciary relationship,⁵ who will do all of the work related to a client's legal problems, and do it affordably—such is an implied public declaration that those days are permanently gone, and, it is also a confession of an intentional incompetence to solve the problem.
- (2) Law societies' major answer to the problem is to promote “alternative legal services,” instead of trying to solve the problem.⁶ Such alternatives do not provide lawyers in a fiduciary relationship with their clients, doing all of the work required by each client's legal problems, and doing it affordably; (lawyers' pro bono free legal services is but a very tiny exception in comparison with what the problem requires and cannot be made available for long and complex cases).
- (3) In practice, contrary to law, benchers' needs to serve their clients and employers are given priority over the needs of the public for affordable legal services. The former is what a lawyer needs to do, but it is the latter that is the greater need of the

⁵ A fiduciary duty is a unilateral undertaking wherein one party is in a position of trust to act for the benefit of another, with the power to act in accordance with a discretion granted by the other party, and to act on behalf of that party where necessary. A lawyer is a fiduciary for his or her client.

⁶ Alternative legal services (ALSs) are, for example: clinics of various types, self-help webpages, phone-in services, paralegal and law student programs, family mediation services, and court procedures simplification projects, public legal education information services, programs for targeted (unbundled) limited retainer legal services (as distinguished from a full retainer to provide the whole legal service), pro bono (free) legal services, and the National Self-Represented Litigants Project, the purpose of which is to help self-represented litigants to be better litigants without lawyers. ALSs can provide only simple services and they are charity, and as such do not provide a traditional solicitor-client relationship, that provides a fiduciary duty that requires the lawyer to act in the best interests of the client (pro bono services being but a very small exception in that they can be available only for short and simple cases, and the extent of fiduciary duty for targeted services is uncertain). “Alternative legal services” are dealt with in section 4 below (p. 21): “Alternative legal services: the Federation of Law Societies of Canada's ‘Inventory of Initiatives’ text advocates cutting costs by cutting competence.”

population and of the justice system. “The benchers” as presently constituted, cannot reverse that priority without being at risk of inadequately serving clients or employer.

- (4) As a result, benchers’ needs are being given priority over fulfilling a law society’s duties in law, (such as those set out in Ontario’s Law Society Act, s. 4.2), and superior to fulfilling the purpose of a law society. Specifically, benchers’ failure to try to solve the problem implies a view that they will determine the proper interpretation of the law in accordance with what the practice of benchers has always been; the addition of s. 4.2 to the Law Society Act notwithstanding.
- (5) Law societies are the “lynch pin” of the justice system. When they fail, it fails. They have the duty in law to make legal services adequately available. Therefore, if they don’t solve the problem, they cannot justify their control of the monopoly over the provision of legal services that democracy-based society has granted them, and therefore their powers to regulate the legal profession should be removed to another agency that is more responsive to public need, and to the democratic process. “Affordability” is part of that legal duty. If law societies reject that, then the great damage being caused by the problem justifies government intervention. It cannot be allowed to remain unsolved. It is causing too much damage to the population, the justice system, and to the legal profession itself, which a democracy should not allow to be inflicted and endured by the populations those law societies are required to serve. Government intervention will bring the beginning of socialized law.
- (6) If law societies don’t solve the problem, the efforts of all other “access to justice” agencies can do no better than to help them to provide such “alternative legal services.” That is far less than what the Canadian Charter of Rights and Freedoms requires of the justice system that the population is paying for, should provide, and specifically, far less than what “fundamental justice,” and adequate “access to justice” and, “the rule of law” require.⁷

⁷ In Canada, the prohibition against lawyers being employed to provide services to the customers of their employers (e.g., Ontario’s Law Society Act, s. 26.1 (non-licensure practicing law or providing legal services); s. 26.2 (punishment, *etc.*, for contravening s. 26.1); and, s. 21.3 (order prohibiting contravention)), can be overcome by a Canadian Charter of Rights and Freedoms “public freedom for access to the courts” argument based upon s. 2(b)’s, “freedom of opinion and expression”; see: Re Southam Inc. and The Queen (No. 1), 1983 CanLII 1707 (ONCA), 41 O.R. (2d) 113; plus an extended use of, Endean v. British Columbia, 2016 SCC 42. Such would be aided by the equality rights argument as to, “equal protection and equal benefit of the law,” that law societies’ refusal to try to solve the problem has created a permanent class much disadvantaged of legal services and equality. As a result, for that majority, Canada’s claim to be a constitutional democracy is but an illusion and pretence. To use the wording of the essential s. 15 test: being middle class, or of “middle income,” and unable to obtain a lawyer’s advice at a

- (7) In spite of common provincial legislation such as Ontario's Law Society Act s. 4.2, there is no public declaration by a law society that states: "this problem is our problem, and it is our duty in law to solve this problem."
- (8) Law society benchers do not understand the true cause of the problem because they do not try to solve the problem.
- (9) For example, Canada's law societies do not do such obvious things to cope with this national problem, as joining together in a common effort to solve the problem instead of merely helping the population to learn to live with the problem.
- (10) Law societies appear to expect taxpayers to continue to pay for the justice system, whereat all lawyers work, directly or indirectly, to earn a far better income than do the great majority of those taxpayers. But the law societies do not try to provide those taxpayers with affordable lawyers.
- (11) In effect, law societies are refusing to solve a problem as is required by their duty in law to regulate the legal profession so as to make legal services adequately available.
- (12) Law society management structures and resources are incompatible with serving the needs of the public for legal services. In regard to complex problems such as unaffordable legal services, management by part-time amateurs is not enough. Such problems require expertise that benchers do not have. For that reason they are "amateurs."
- (13) Therefore as part of their management structure, law societies need a permanent institute that provides the expertise, continuous vigilance as to public need, and able to conduct programs requiring long-term development, comparable to that which a civil service provides to an elected government. Without it, they will never have the expertise and resources necessary to solve such problems. When the politically elected heads of government departments first take office, they too are amateurs, but they have a civil service to advise them; benchers don't. And, their approach to the problem strongly implies that they don't want one, *i.e.*, they have too strong an interest in what is, instead of what should be.

reasonable cost is "immutable, or changeable only at unacceptable cost to personal identity," and to one's ability to invoke constitutional rights and freedoms and the rule of law. However, s. 15 equality rights are limited to grounds of discrimination analogous to the grounds enumerated in s. 15(1). However, it is time to free s. 15 from that now unneeded restriction of Parliamentary intent. See also notes 7 and 55 *infra*.

- (14) All of this is happening because law societies are unaccountable to the political process and therefore unaccountable to the democratic process—such accountability exists in law, but not in fact.⁸
- (15) As a result, the major victims of the problem—the population, the courts and the justice system, and the profession itself, continue to grow in size and number because no effort is being made to solve the problem.
- (16) The problem is increasing the probability of wrongful convictions due to an increasing number of accused persons appearing in the courts without counsel to represent them.
- (17) All forms of communication of law societies with the public and their member-lawyers should include the facts and issues in this list. Otherwise, there is unacceptable censorship, the effect of which is to: (1) obscure law societies' conflict of interest between serving the personal needs of their benchers and serving the needs of the public for affordable legal services; (2) avoid public discussion of law societies' duty and failure to try to solve the problem; and, (3) avoid discussion of the great damage being caused by that failure, to society, the justice system, and to the legal profession itself.
- (18) The unaffordable legal services problem is a law society-caused problem, capable of a law society-caused solution. The creation of CanLII and the national mobility agreement, (which allows lawyers to work up to 100 days a year in other participating provinces, without becoming licensed to practice in those provinces), are impressive law society accomplishments. They show that the law societies acting together can solve the problem of unaffordable legal services if they would take the problem as seriously as they claim. (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.")

⁸ It doesn't exist in fact because governments do not hold law societies accountable for their use of the monopoly over the provision of legal services which they have been granted. There are no votes in improving the justice system, so it is believed. See: Ken Chasse, "No Votes in Justice Means More Wrongful Convictions," (pdf., SSRN June 10, 2016).

Consider this example of censorship: the issues and subject matter of this paper—law societies’ failure to try to solve the problem of unaffordable legal services and its solution--do not fit within the mandatory, limited topics specified in the Call for Proposals for an “access to justice” conference held in Toronto on October 20-21, 2016, by “TAG,” which is, The Action Group on Access to Justice. It is a law society action group, that of LSUC.⁹ The webpage stated: “Call for Proposals: Connect, Create, Communicate – Public Legal Education and the Access to Justice Movement.” ... All proposals must align with the following core themes of the conference:” [under the headings of], “Connecting, Creating, and Communicating.”

None of the items listed as “core themes” included anything to do with solving the problem, or the consequences of not solving or trying to solve the problem, particularly not law society efforts of that nature. And none dealt with the dire consequences of not solving the problem. All related to helping participants and the public get used to living with the problem. But surely solving the problem is a far more important topic in fact, and one demanded in law—the Law Society Act, s. 4.2. But there are no law society-supported conferences dealing with solving the problem—nothing concerning LSUC’s efforts to do so. The same limitations as to content appear to have been imposed upon Access to Justice Week, October 17-21, 2016. That would be a “strategic censorship”; *i.e.*, attract those active in regard to the “access to justice” problem, then control what they discuss.

To have benchers accept and implement what I recommend below requires an updated conception of what a bencher is and what a law society should do. Such revision is at least 50 years overdue—when the problem was small and easily solved. It should be seen as the required interpretation and application of s. 4.2 of Ontario’s Law Society Act. But it won’t be accepted until benchers are made to fear the imminent abolition of their law societies or an organized and formal demand from their membership. There are no signs of either yet. But the necessary conditions are in place and getting worse.

Because law societies fail to exercise control, the field of legal services is being divided up among: (1) lawyers; (2) alternative legal services; (3) other professionals such as notaries and independent paralegals; (4) commercially provided legal services such as, LegalX, LegalZoom, and Rocket Lawyer; and (5) alternative business structures (see section 11, pp. 81-124). Commercially provided legal services could eliminate the general practitioner.¹⁰ Being by far the most numerous members of law societies, their

⁹ TAG’s “About” webpage states: “The Action Group on Access to Justice (TAG) is catalyzing solutions to Ontario’s access to justice challenges by facilitating collaboration with institutional, political and community stakeholders. TAG is guided by a group of senior thought leaders from across the justice system. It is funded by the Law Foundation of Ontario with support from the Law Society of Upper Canada.” TAG’s address is that of The Law Society of Upper Canada in Toronto, Ontario.

¹⁰ See: Jordan Furlong, “The Decline and Renewal of the “General Practice, Solo and Small Firm” Lawyer,” Lawyerist.com, November 1, 2016.

disappearance would cause a great reduction in the importance of the legal profession for the general public and with it a great reduction in the purpose, power, and prestige of law societies.

1. Law society management structures in Canada are incompatible with solving the unaffordable legal services problem

The unaffordable legal services problem is inevitable because of the failure of law societies to bring about the necessary “support services” method of producing legal services. That is an essential part of their duty in law to regulate the legal profession so as to make legal services adequately available—competent, ethically provided, and affordable legal services. But they show no signs of having accepted “affordability” as part of that duty. They provide CPD/CLE courses and prosecute lawyers for incompetence and unethical practice but do nothing about affordability. There is nothing being done to help lawyers provide their legal services affordably—particularly so legal advice services.

The price of legal services must increase because the innovation necessary to generate the cost-efficiency that enables a product or service to improve without its price having to increase doesn't happen. That is how producing an improved product or service copes with that cost-price conflict, by innovation. Because of the rapid increase in the volume and complexity of laws, caused by more technology and the rule of law affecting more aspects of our lives, legal services require more work and time to provide them. A lawyer's time has to be paid for (regardless the method of billing). As a result, the price of legal services must increase faster than the incomes of the majority of the population. The problem is inevitable.

In contrast, competitive manufacturing and the medical profession cope with the cost-price conflict by way of the continuous innovation that improves cost-efficiency, which the support-services method of producing goods and services makes possible. The legal profession's method of producing legal services does not. Marketplace manufacturers and medical professionals are forced to do so, and accept the risks of failed innovations. Benches are not and do not.

True support services use a high degree of specialization, so as to achieve a large volume of production, to take advantage of the basic engineering principle that states, “nothing cuts costs as effectively as scaling-up the volume of production,” *i.e.*, “bigger is better.” Thus goods and services can improve, and methods of production can change without having to increase the price of those goods and services.

But the lawyers in each law firm do all of the work necessary without using independent, highly specialized, high volume support services. None is available. So it is that no law firm is able to develop the necessary degree of specialization of all factors of production, nor the scaled-up volume of production of legal services necessary to achieve the cost-efficiency essential for keeping legal services affordable—affordable and changing to match public need, including flexibility in coping with the economic “ups and

downs” that the population must endure. Therefore the legal profession cannot cope with its cost-price conflict. That is to say, it cannot match needed changes in the type and methods of producing legal services without increasing their price.

In contrast, no doctor’s office provides all treatments and remedies for all patients the way a lawyer’s office does for all clients. Every part of the medical infrastructure is made up of mutually interdependent, highly specialized support services. All parts of the medical services infrastructure are highly specialized, even the family doctor is a specialist. There are no “generalists.” It is made up of specialized doctors, technicians, technical tests, drugs, and hospital services. The legal profession has nothing comparable. Law firms share nothing. They are highly “silo-ed,” independent production units. None has the necessary high degree of specialization or the economies-of-scale that large-scale volumes of production provide. And there are no specialized support services available. Therefore, the problem is inevitable.

Because law society management is without the necessary expertise to solve the problem, Canada’s law societies have failed to provide the innovation that would move the legal profession to a support-services method of providing legal services. Until that happens, the problem of unaffordable legal services will not be solved.

Law societies cannot remain satisfied to provide only “alternative legal services” as their answer to the problem of unaffordable legal services—they being services such as, self-help services, targeted (limited retainer) legal services, public legal education and information, and advice from non-lawyers, paralegals, and law students. Therefore this article presents the necessary “support services” solution and innovations, for what is the most serious “access to justice” problem Canada has ever faced. And therefore, proposed “alternative business structures” are not needed or desirable.¹¹

The great damage caused by the problem of unaffordable legal services to, Canada’s population, its courts, and to its lawyers, shows how very essential law societies are to the proper functioning of the justice system as a whole. The price of legal services is increasing faster than the incomes of the majority of taxpayers who pay for the justice system whereat lawyers earn a better living than do those taxpayers.

¹¹ See section 11 below (p. 70). For alternative legal services, see note 6 *supra*. Alternative business structures (ABS) propose ownership by investors of law firms. They would provide the funds for the automation of routine legal services, and enable related non-legal services to accompany the provision of legal services. Because they would not change the method whereby legal services are produced, such proposals have no capacity to solve or reduce the problem of unaffordable legal services, *i.e.*, for that majority of the population that cannot now afford legal advice services, ABS would not make them affordable. See LSUC’s ABS Discussion Paper of September 24, 2014. On September 27, 2012, LSUC’s Working Group on Alternative Business Structures reported its Terms of Reference to Convocation. The latest report of substantive content is that of September, 2015 (pdf.): “Alternative Business Structures Working Group Report – Next Steps”: (at Tab 2.5 (pp. 110-132) of the Reports to Convocation of the Professional Regulation Committee, September 24, 2015, and the Report of June 29, 2017). For earlier reports and a summary of activities, see LSUC’s “Alternative Business Structures” webpage. See also notes 94, 95, 123, 134, and 146, and accompanying texts *infra*.

But law societies do not use their powers of, and perform their legal duties as to, regulating the legal profession so as to provide those taxpayers with affordable lawyers. Why should taxpayers respect a justice system that they cannot make effective use of but must pay for? They cannot make effective use of the rights, freedoms, and rule of law proclaimed by the constitution's most important text—the Canadian Charter of Rights and Freedoms. Its analytical legal literature is much too voluminous and complex for most lawyers to keep up with, CPD/CLE programs notwithstanding. That is the state of the majority of Canada's population. So, how can we continue to consider ourselves to be a constitutional democracy? Law societies have made necessary their own abolition.

And the power of communication provided to everyone by the social media, news media, the many sophisticated pressure groups, and opposition political parties, will bring it on sooner than expected. Public questions and accusations from these sources can force change. All the necessary conditions now exist.¹²

As lawyers we must decide which concept of a law society we want our benchers to live by: (1) a law society that strives to make a community's legal health as important to it as its medical health, and its lawyers as important to it as its doctors; or, (2) that of a worn out aristocracy that has long outlived its worth, and is now trying to make up for the great damage it has done and is doing to society, by handing out charity in the form of alternative legal services.

Making available to people "their own lawyer," providing affordable legal advice services, is the necessary solution to the problem. Otherwise the justice system won't work. See this article in the Lawyerist.com (November 14, 2016): "I Don't Want a Free Lawyer, I Want a Real Lawyer." That title succinctly states the insult. In reply, our law societies state in effect, "we're giving you alternative legal services that are not costing you anything, so you shouldn't complain."

But they are in fact, simplistic services, provided without the solicitor-client relationship (except for the short and simple cases provided *pro bono*, or by way of "targeted, limited retainer" legal services.

If the legal profession cares for its future, it cannot turn its back on society by collectively saying:

If you are not rich, you had better get used to living with the problem of unaffordable legal services. We are not going to change our methods to make legal services more

¹² And what of using an Ombudsman Act to activate an Attorney General to hold a provincial law society to account for its inactivity in the face of the massive misery and damage it is causing to our court system and democracy, and accountable to the legislated duty to solve it? The Ontario's Ombudsman Act states, s. 14, "Function of Ombudsman: "(1)The function of the Ombudsman is to investigate any decision or recommendation made or any act done or omitted in the course of the administration of a public sector body and affecting any person or body of persons in his, her or its personal capacity. R.S.O. 1990, c. O.6, s. 14 (1); 2014, c. 13, Sched. 9, s. 6 (1). "Investigation on complaint "(2) The Ombudsman may make any such investigation on a complaint made to him or her by any person affected or by any member of the Assembly to whom a complaint is made by any person affected, or of the Ombudsman's own motion."

affordable. If you cannot afford our services, sell your house, or take on another mortgage, or go beg a loan somewhere. The problem is yours, not ours.

The response to the profession that society will require of its governments will be, “because our law societies have made no effort to solve the problem, you had better get used to having very different law societies, that is to say, organizations that are much more responsive to public need and accountable to the democratic process.”

2. The solution to the unaffordable legal services problem

“The problem”: The majority of population cannot obtain legal services at reasonable cost.¹³

¹³ The following authorities establish that for many years, that has been an accurate definition and extent of the access to justice 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, J.D., Ph.D., “Access to Justice through Regulatory Reform” (a paper prepared for the National Family Law Program, July 16, 2012. At that time Dr. Semple was a postdoctoral research fellow, Centre for the Legal Profession, University of Toronto Faculty of law. He is now an Assistant Professor at the Faculty of Law, University of Windsor. 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 the text accompanying notes 18 and 19.)

(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>.

(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.

All of the current alternatives won't work. In contrast, what I recommend is based upon having gone through the necessary trial-and-error learning process, beginning in July, 1979, to solve a smaller version of the very same problem, which problem is still operative in very much the same form, except that the

(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>.

(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* USC Law School and Department of Economics (Oct. 30, 2013); pdf copy available at: SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=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 (LAO), 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>.

(In regard to LAO's income ceilings in June, 2016, see notes 20 and 21 and accompanying text *supra*.)

Professor McManus 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, served as the Chair of Legal Aid Ontario's (LAO's) Board of Directors from 2007 to July 2016. See public information statements about LAO, provided by Professor McCamus at (1): "Why we need to improve legal aid services to Ontario's Aboriginal clients"; at:

<<http://blog.legalaid.on.ca/2013/11/06/why-we-need-to-improve-legal-aid-services-to-ontarios-aboriginal-clients/>>;

and, (2) "A major access to justice issue" <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."

(12) Malcolm Mercer, "Being in Favour of Reform, Just Not Change," (*Slaw*, February 26, 2014); and, Colin Lachance, "Law's Reverse Musical Chair Challenge" (*Slaw*, June 16, 2016).

victims are much greater in size and number. Other writers and committees may make recommendations without an opportunity to put them into effect so as to learn from their consequences, except for the consequences of alternative legal services. They have no experience successfully trying to solve the problem. Such recommendations are like adding a motor to a bicycle when the solution needs at the least a motor vehicle, *i.e.*, such recommendations remain as improvements to the existing method of providing legal services.

The cause of the problem is not the absence of the right improvements to the method, but rather the method itself. Production without specialized support services was long ago abandoned everywhere that market or comparable pressures required it—abandoned everywhere in favour of a “support-services method.” But not by the legal profession because the necessary pressure has not yet been imposed to make such innovations happen. Governments in Canada are failing to hold law societies to account for the management of the monopolies over the provision of legal services in their respective jurisdictions.

The legal profession’s method of producing legal services lacks two essential, interdependent features: (1) the necessary degree of specialization; and, (2) the scaling-up of production volumes that provide the revenue for specializing every factor of production, including the competence of lawyers. Together they maximize the economies-of-scale obtainable. That combination enables a product or service to improve without having to increase its price. That is why the support-services method has been successful and is used everywhere in the production of all goods and services. It uses those two factors to produce the cost-efficiency that provides a way of coping with that cost-price conflict. Its strategy is to cut costs by increasing competence.

But to its detriment, the legal profession attempts to cut costs by reducing competence, *e.g.*, giving the bulk of a law firm’s legal research work to law students, paralegals, and inexperienced lawyers; and similarly, courts using “clerking” by law students and law school graduates. Legal research-lawyer specialists are needed. In addition to being career-dedicated legal researchers, they will be expected to have the knowledge to provide other lawyers with the means of challenging the technology that now produces most of the evidence used in legal proceedings and for legal services. The law is now vast, rapidly increasing and changing, complex, and related to, and dependent upon complex technology that lawyers do not understand.

Legal research done by formally designated legal research lawyers who do know the technology that produces the most frequently used kinds of evidence, (such as, electronically-produced records, breathalyzer/intoxilyzer readings, and mobile phone tracking evidence) is now necessary. That is cutting costs by increasing competence. But that requires a civil service-type agency that is constantly vigilant as to the needs of lawyers and can provide the necessary education and advice as to the need for new kinds of specialized lawyers and provide the support services to make their specialized knowledge available to

all lawyers, especially the general practitioner, the legal profession's most numerous kind of lawyer by far. But benchers, and CPD/CLE programs don't have the ability to do that. They need a civil service-type agency to advise them of such needs, and to provide the expertise and supervision to make the solutions operative.

Such need for improvement to stay competitive and competent can be of two kinds: (1) constant pressure to improve the product or service itself without having to increase its price; or, (2) maintaining its quality and marketability in spite of increasing difficulty to produce it, also without having to increase its price. Competitive manufacturing markets give rise to the first kind of pressure. Production of legal services must cope with the second kind. They take more time to produce due to the increased time needed to cope with: (1) very rapidly increasing volumes of laws; (2) their complexity; (3) their increasing dependence upon technology that must be learned; and, (4) volumes of records produced by electronic automation (to such great extent that electronic discovery and civil trials are unconscionably and intolerably expensive). There are also complaints about the procedures of courts' administration. They lack the expert advice that would make them more cost-efficient and easier to use.

If a product or service is improved, the cost of producing it must increase if there is no method to prevent such increased production costs. Its price must increase unless innovation provides a constantly improving cost-efficiency that eliminates the need to increase its price. Canada's law societies have not sponsored such innovations as the law requires of them to maintain legal services as adequately available. That is so because they have not been made subject to the necessary pressure to do so. Therefore the legal profession has no means of preventing the price of legal services from increasing. Its method of producing legal services is obsolete. The problem is therefore 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) the centralized legal research methods created at LAO LAW at Legal Aid Ontario (LAO).¹⁴ Each is a successful example of the support-services method of production. It facilitates constant innovation that enables the improvement of products and services without price increases. The medical profession has a very flexible system of creating new specialists, in

¹⁴ LAO LAW is a centralized legal research support service within LAO (Legal Aid Ontario), providing fact-specific legal opinions and other related support services to all 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 section 8 below (p. 38). However, mainly because reductions in funding, LAO LAW has different priorities now. My references to LAO LAW are to the technology of centralized legal research as used during its first nine years (1979-1988), when I was its Director of Research, and not to how it is used now. See section 3 below, "LAO LAW—the legal profession's only true support service" (p. 20).

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). LSUC's management of OLAP ended with the passing of the *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, which ended OLAP and created Legal Aid Ontario (LAO), "a corporation without share capital" (s. 3). LSUC was removed because of its conflict of interest and refusal to innovate in its management of legal aid.

response to new medical technology—specialized doctors, technicians, technical tests, drugs, and hospital services. The innovation never stops.

In the legal profession, it never started. The necessary degree of specialization of all factors of production does not exist. Legal services are produced in the same way that they have always been produced. In contrast, the “surgeon” of the early nineteenth century is now several highly specialized types of surgeons and related specialties. All services and treatments provided by the medical infrastructure are highly specialized and mutually interdependent support services—no part of it is a “generalist.” Highly specialized to the degree that no single part of that medical infrastructure, and no doctor provides all treatments and remedies for all patients the way a law firm does for all clients. The necessary close relationship between doctor and patient has not been disturbed, nor need that between lawyer and client be disturbed if a support services method of producing legal services were used.

And so, the problem of unaffordable legal services is inevitable, lawyers being one of its major victims—apparently passive victims in that they impose no pressure upon their law societies to solve the problem. The result will be, living out their careers in a financially depressed profession at a time when people have never needed lawyers more. If legal services were affordable, lawyers would be overwhelmed with work, have a bright financial future, and begging their law schools to increase their enrolments. Instead, the opposites prevail because 19th century law society management can’t cope in a 21st century world. It is no longer possible to be both a good lawyer and a good bench.

In contrast to doctors, law firms do all the work themselves for each client, each firm relying upon only its own internal resources. There are no external support services used (except for the support service that is the publishers of law books and related electronic research services). As an example of the support services method, automobile manufacturers use the “special parts companies” of the massive “parts industry.” Each combines a high degree of specialization of every factor of production in conjunction with very high volumes of production of each special part they make so as to maximize competence and the economies-of-scale obtainable. The greater the volume of production, the more powerfully can the “fixed costs factor” reduce the costs of production because not all costs vary proportionately with the volume of production. “Bigger is better.” Those volumes produce the large revenues that enable those companies to be constantly innovating so as to maintain a high degree of specialization of every factor of production: staff; materials; equipment; and methods of manufacturing goods and services. But without the pressure of competition, it wouldn’t happen. But there are other sources of equally effective pressure.

As in the medical profession, the innovation never stops. But as is shown by the persistence and steady growth of the problem of unaffordable legal services, in the legal profession it never started. The medical profession is under constant pressure to make our doctors and hospitals constantly available, using the best that medical science can provide. There has been no comparable pressure applied to the legal

profession. As a result, the method of producing legal services has never changed, because law society management structures and views as to their responsibility for affordability have never changed.

Doctors may complain about the tariffs of fees provided by Canada's provincial and territorial socialized medical services programs. But none of them is short of patients as are the majority of law firms short of clients. And the majority of Canada's residents appear to be very satisfied with their government-provided medical services.

The support services method of high volume, highly specialized production provides the highest degree of competence to be combined with the greatest economies-of-scale. Law firms cannot achieve the low costs necessary because their production volumes are too small, and their lawyers insufficiently specialized. Therefore the unaffordable legal services problem is inevitable. But law societies in Canada have not yet attempted to solve the problem. They have provided the population with nothing more than ways to live with the problem—like providing palliative care instead of trying to cure the life-threatening disease. Instead, create of support services to help provide those legal services that are hard to make profitable, such as legal research, would make legal services affordable.

There are specialized practitioners within the legal profession. But they are not available at an affordable cost to the majority of society. And, their primary purpose is not greater cost-efficiency, but rather to deal with legal problems of greater complexity. As in the medical profession, all factors of production have to be sufficiently specialized. Being a specialist in a particular area of law is not enough specialization, unless all other factors of producing legal services are adequately specialized, including the materials used and the principles of database management that maximize the re-use of previously created work-product. That is most powerful factor in cutting costs. The bigger the volume of producing each legal service, the greater the cost-efficiency, therefore the lower the cost of legal services. Because of their high volume of production of each service, support services reap the lowest costs of production. That low cost can be passed on to all law firms that use the support service. But they don't exist, because law societies have not sponsored their existence. As a result, the most specialized of lawyers cannot produce enough legal services to create any significant economies-of-scale. And the specialist lawyers are formally created at their instance and to serve their interests, and not that of the population.

For example, our Courts of Appeal and the Supreme Court of Canada use students and law school graduates, unspecialized lawyers to do or aid with their legal research as "clerks." Being a judge's "clerk" publically warrants one's high degree of scholastic competence. But such "clerking" requires inexperience continue to be venerated by force of a misplaced time and convention. Instead, courts should be using specialized, career-oriented and experienced legal research lawyers, using methods of centralized legal research. The method by which most lawyers and judges get their legal research work done should

now be considered obsolete.¹⁵ The existence of “clerking” today is a clear example of the cause of the problem—the obsolescence of the method of producing legal services.

The support-services method of producing goods and services uses three economic factors that are not possible in the current production of legal services: (1) costs are spread over very large production volumes; (2) constant innovation produces further cost-savings that are magnified by the volumes produced; and (3) the “fixed costs factor,” *i.e.*, many production costs do not vary in proportion with the volume produced. The greater the volume produced, the greater is the cost-efficiency and cost savings—“nothing is as effective at cutting costs as scaling-up the volume of production.” As a result, such higher degrees of specialization, combined with vastly scaled-up volumes of production, provide a much higher degree of cost-efficiency and specialization than is possible in law firms, particularly so in the law firms of general practitioners, they being the ones needing support services most. It is a degree of cost-efficiency 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 beyond what the majority of society can afford. And so the legal profession has priced itself beyond what the majority of the population can afford.

And the vacuum thereby created is being rapidly filled by commercial alternatives (such as, LegalX, LegalZoom,¹⁶ LegalZoom (Canada), Axiom, Rocket Lawyer, and, Neota Logic). They will gradually diminish the need for lawyers in private practice, particularly the general practitioner. Private practice is diminishing—diminishing at a time when it should be expanding to meet an ever-increasing need for lawyers’ legal advice services.¹⁷ And, that reduction is being accelerated by the commercialized automation of legal services.¹⁸ Automating routine legal services: yes, of course, but under the supervision of lawyers in private practice. Such automation can be carried out by the profession itself. It doesn’t need the investors’ money of “alternative business structures.” (See section 11 below, p. 81.)

Access to justice committees do not consider such comparisons among professions and manufacturers, even though they have existed for several years, all the while their victims becoming larger and more numerous. Being trained only to deal with legal problems, such analysis is absent from their publications. The unaffordable legal services problem is not a legal problem. Lawyers do not have the necessary

¹⁵ See: Ken Chasse, “The SCC and Lawyers Need Better Researchers Than ‘Clerking’ and Law Students.” (*Slaw*, Feb. 1, 2016).

¹⁶ For the impressive accomplishments of LegalZoom in marketing and avoiding being convicted for “the unauthorized practice of law” (UPL) see: Benjamin H. Barton, *Glass Half Full—The Decline and Rebirth of the Legal Profession*, chapter 5, “LegalZoom and Death from Below,” (pp. 85-105), (Oxford University Press, 2015).

¹⁷ See: Colin Lachance, “Law’s Reverse Musical Chair Challenge.” *Slaw*, June 16, 2016. The relevant part of this article is quoted below in section 6, “Private Practice is Shrinking” (p. 26).

¹⁸ As to fears that automated legal services will threaten private practice, see: John Gillies, “Law Firms [Slowly] in Transition.” *Slaw*, December 1, 2015. And see also note 125 and accompanying text *infra*.

expertise to solve the problem, and our law societies do not go out and get it. But an agency that serves the purpose of a civil service for all law societies in Canada will have it. Creating that agency and how to fund it is described below.

The lawyer-members of law societies themselves do not understand the true cause of the problem. That is shown by their failure to pressure the benchers whom they themselves elected, to improve the profession's economic situation. So, they continue to be major but passively willing victims of such law society neglect of legally-imposed duties. If matters remain as they are in relation to the problem, most lawyers will go through the rest of their careers in a severely economically-depressed profession. And this is happening at a time when the population has never needed lawyers more. There is too much law and its complexity for people to effectively deal with their legal problems without the help of a lawyer's advice. That means, if legal services were affordable, lawyers would be overwhelmed with the volume of work available. The profession would have a very bright economic future and would be expanding. And it would be urging the law schools to increase their enrollments because more newly-called-to-the-bar lawyers would be needed to help do all the legal work clients were asking for. Instead, the opposites are happening.

Only a law society can bring about the necessary innovations that will transfer the profession to a support services method of production. No law firm can do it by itself. Its degree of specialization and production volumes are too low—too low to be able to finance the required highly specialized and scaled-up production volume support services. That requires the whole profession acting together. Therefore that requires the legal profession's law societies to sponsor such innovation. That is a necessary part of serving their purpose. Also, it is only the profession's law societies that have the power and duty in law to make legal services adequately available.

The transition to a support services method would involve no unwanted disruption. No law firm would be required to use the support services created. They could carry on the way they always have. But I know from my experience in developing LAO LAW that they will all use them because such support services will help them make money and serve their clients better. That is because the support services will be far more cost-efficient at what each does than can any law firm.

That is why the medical profession and all of competitive manufacturing of goods and services have moved to a support services method of production so as to obtain the highest degree of competence combined with the highest cost-efficiency—a law firm can have the competence that comes with specialization, but not the cost-efficiency. But law firm specialization is not motivated by cost-efficiency but by making known that specialists can deal with more complex legal problems more effectively. Greater specialization is needed to increase cost-efficiency. A surgeon is a specialist doctor. But only by having several different kinds of surgeons can cost-efficiency, as well as competence, be maximized.

No single automobile manufacturer could have created such a parts industry by itself. Nor could any doctor's office or hospital have sponsored the very large and complex infrastructure of mutually interdependent support services that constitute the whole of that infrastructure.

But the necessary pressure has to be applied to the whole industry or profession to make such innovations happen. Otherwise nothing happens. Each law society acting alone, cannot cope with the unaffordable legal services problem.

Such organizations do not change until the fear of the consequences of not changing is greater than the fear of the consequences of changing, (such as the fear of a failed innovation or program and loss of popularity).

The power of communication available should now be making them fear the consequences of not being able to show the public and governments that they are making a sincere attempt to solve the problem. They have nothing by which to prove that—no program, or strategy, or public declaration of a duty and intention to solve the problem. Therefore they are very vulnerable to demands that they be abolished and replaced with institutions more responsive to public need and accountable to the democratic process.

The problem now afflicts the majority of Canada's population—many millions of people. Available are the detailed descriptions of the online results of the surveys carried out by the National Self-Represented Litigants Project, and in the Canadian Forum on Civil Justice's (CFCJ's) Everyday Legal Problems and the Cost of Justice in Canada: Overview Report (2016). It states (p. 6):

This survey confirms the growing sense that we are experiencing an access to justice crises in Canada. Within a three-year period, 48.4% of the adult population – or approximately 11.4 million adult Canadians – will experience at least one everyday legal problem that they consider to be serious and difficult to resolve. Further, many people will experience multiple problems. Of those we surveyed, 30% experienced two or more legal problems. This means that within any given three-year period, adult Canadians experience approximately 35,745,000 separate everyday legal problems. This suggests that the formal justice system – as it exists today – would be overwhelmed if it were expected to help resolve all of the everyday legal problems experienced by the public. Further, we know from other studies and reports that people generally cannot afford to access the legal system, nor do they generally understand or feel welcome by it. [footnotes omitted]

Therefore, if legal advice services, provided by lawyers were affordable, lawyers would be overwhelmed with work.

To determine which support services are needed and to establish and make them operative, a permanent agency that performs a civil service function for all law societies will be necessary. The difficult and major law society problems such as the unaffordable legal services problem, will require national solutions, and require expertise that lawyers don't have.

3. LAO LAW—the legal profession's only true support service

My experience in creating and managing LAO LAW taught me to analyze the problem in terms of degrees of specialization and economies-of-scale obtainable from scaled-up volumes of production. It is an unique experience among lawyers. If other lawyers had had the same 9-year experience, they would analyze the problem as I do.

In response to substantial government pressure, LAO LAW was created in July, 1979, to reduce the amount of taxpayers' money being paid out on lawyers' accounts for legal research hours claimed. It is a division of Legal Aid Ontario (LAO), which is a very poorly funded government social welfare program for very poor people.¹⁹ As its first Director of Research, beginning on July 3, 1979, I devised LAO LAW's technology of centralized legal research. In its ninth year of development, 1988, it was producing legal opinions at the rate of 5,000 per year for use by legal aid lawyers—Ontario lawyers in private practice that provide legal services for very poor people, in those areas of law for which LAO grants certificates for legal services.²⁰ That volume of production is due to the high degree of specialization of the major factors of production, which factors are: (1) research staff; (2) in-house materials used; (3)

¹⁹ See: R. v. Moodie, 2016 ONSC 3469. A Toronto Star news item on June 3, 2016, states: "A Toronto judge has criticized the income cutoff for legal aid funding in Ontario as 'not realistic' given the face of poverty in Canada. Superior Court Justice Ian Nordheimer was presiding over the case of Tyrell Moodie, charged with a number of drug offences, who was denied funding by Legal Aid Ontario because he made more than the organization's threshold income level for a single person — about \$12,000. Moodie, 23, works part time and earned about \$16,000 in 2015. Nordheimer put a halt to the charges until the government picks up the tab for his lawyer, which court heard could cost a minimum of \$11,000. 'It should be obvious to any outside observer that the income thresholds being used by Legal Aid Ontario do not bear any reasonable relationship to what constitutes poverty in this country,' Justice Ian Nordheimer wrote in a ruling last week. Nordheimer cited a Statistics Canada report from 2015 that 'calculated the low-income cut-off, before tax, for a single person living in a metropolitan area for 2014 at \$24,328, or more than twice the figure that Legal Aid Ontario uses.'" In R. v. Moodie, 2016 ONSC 3469 (para. 10), Nordheimer J. stated: "With those realities identified and largely acknowledged, this case falls within that category of cases that warrants a *Rowbotham* order, as described in *R. v. Rushlow* (2009), 2009 ONCA 461 (CanLII), 96 O.R. (3d) 302 (C.A.), at paras. 24-25. See also note 20 and accompanying text *infra*."

²⁰ 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 \$12,000. 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. See also note 19 and accompanying text *supra*.

principles of database management; and, (4) methods of producing legal opinions for requesting lawyers. It was achieved because it helped lawyers make money and serve their clients better. There was no rule requiring lawyers to use the service. It proves that lawyers in private practice will use such support services.

However, I'm referring to what the technology of centralized legal research (CLR) is capable of producing as I devised it at LAO LAW. It is a different organization now due to a succession of cuts in its funding. It still uses CLR technology but provides legal opinions in a much smaller volume.

Law students' and inexperienced, young lawyers' legal research does not use such methods. They are still the method by which most of the profession's legal research work is done. No external support services are used. It is an example of what makes the problem inevitable. It is an egregious example of law societies' failure to sponsor the innovations that would keep legal services affordable. LAO LAW is an innovation that happened in the poorest place for it to happen. And it happened only because of government pressure to make it happen. No pressure; no innovation.

Without the use of such support services, law societies can do no better than to promote ways for Canada's population to learn to live with the problem and its very damaging consequences, instead of trying to solve the problem. There is however, a way of preserving that present management structure if a support services method of providing legal services is created. But instead, the following law society reports promote the use of "alternative legal services."

4. Alternative legal services: the Federation of Law Societies of Canada's "Inventory of Initiatives" text advocates cutting costs by cutting competence

The Federation of Law Societies of Canada (the FLSC) published its, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* text dated, September 29, 2014.²¹ This *Inventory text* states its purpose as being to satisfy a need for, "... a variety of approaches to address gaps in access to legal services is needed."²² Gaps! The fact that the majority of the population cannot obtain legal services at a reasonable cost is hardly, mere "gaps" in the availability of legal services. Nor is the clogging of the courts by reason of the high percentages of self-represented litigants merely a "gap," or temporary.²³ The

²¹ This "Inventory text" can be accessed online: <<http://www.flsc.ca/en/access-to-legal-services/>>. Click on the highlighted word "inventory," in the last line at this site.

²² Inventory text, *ibid.*, at p. 2, paragraph 1.

²³ As proof of the clogging of the courts by self-represented litigants for several years now, see:

(1) *The Lawyers Weekly* article, "National pro bono network being weighed," of March 1, 2013, p. 1, states that Federal Court Chief Justice Paul Crampton estimated that 20 to 25 per cent of Federal Court litigants do not have a lawyer; online at: <<http://www.lawyersweekly.ca/index.php?section=article&volume=32&number=40&article=2>>.

numbers of people needing non-litigation legal services is much higher. Self-represented litigants are an excellent self-selected and concentrated source for compelling research and journalism about one of the problem's most seriously damaged and desperate victims. They are the subject of a national research project.²⁴ Mere "gaps in access to legal services," would not justify such a national project.

Instead, the FLSC's proposed solution is the following "inventory of initiatives".²⁵

This inventory outlines the activities that law societies across the country have underway or are contemplating to improve access to legal services for the Canadian public. The inventory is organized into the following categories: [Added are the numbering of the items in the following list, and page numbers within the Inventory text.]

1. Access to Justice Stakeholder Committees (p. 2)
2. Self-help services (p. 6)
3. Public legal education and information (p. 7)
4. Advice from non-lawyers (p. 11)

And the same statistic is cited in an article on March 1, 2013, in *The Court*, a blog of Osgoode Hall Law School at York University, Toronto; online at: <<http://www.thecourt.ca/2013/03/01/amici-curiae-virtual-courts-opposition-to-manitobas-bill-18-and-a-national-pro-bono-duty-counsel-program/>>.

(2) 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 and 91: "... over half of the family cases in Canada's courts now have one or both parties without a lawyer; ... An inability to afford a lawyer is a major factor in the lack of representation," And see similar statements at pages 91 and 92. See also the references cited in the article in note 13(2) *supra*, by Noel Semple, "Access to Justice Through Regulatory Reform," July 16, 2012.

(3) The national self-represented litigants project of Professor Julie Macfarlane of the Faculty of Law of the University of Windsor; see note 24 *infra*; and,

(4) 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/>>. And see also the Chief Justice's videotaped address at the Faculty of Law, University of Toronto, Feb. 10, 2010, cited in notes 13(8) and 13(9) *supra*.

²⁴ See the work of Dr. Julie Macfarlane, Professor at the Faculty of Law of the University of Windsor, and Project Director, The National Self-Represented Litigants Project (NSRLP); online: <<http://drjuliemacfarlane.wordpress.com/about/>>. The project builds on the National Self-Represented Litigants' Research Study conducted by Dr. Macfarlane from 2011-2013: *NSRLP: Identifying and Meeting the Needs of Self-Represented Litigants*, Final Report May 2013, and takes its mandate from the recommendations of the Research Study; online: <<http://www.representing-yourself.com/>>. The experiences and views of self-represented litigants as to the unavailability of legal services at reasonable cost should be a cause of concern.

²⁵ *Inventory of Initiatives* text, *supra* note 21 at p. 2, paragraph 3, and accompanying text.

5. “Summary advice, brief services and referrals by paralegals and lawyers that fall short of full representation are another way to facilitate the delivery of legal information and advice at little or no cost to the client.” (p. 13)
6. Assessing legal needs involves gathering data from the public (p. 15)
7. Economic initiatives (p. 17),
 8. Limited scope retainer/Unbundled legal services (p. 17) [also referred to as “targeted legal services”]
 9. Prepaid legal insurance plans (p. 18)
 10. Legal Aid (p. 18)
 11. Reduced fees (Pro Bono and Low Bono) (p. 19)
 12. Alternative billing models (p. 21)
13. Supply side issues ([helping-supplying law students, *etc.*] small and sole practitioners, rural and remote areas, cultural and linguistic barriers) (p. 21)
14. Alternative business structures for legal service delivery. (p. 24).²⁶

Are such alternative legal services going to teach their users how to raise a Canadian Charter of Rights and Freedoms argument based on an analysis of the case law and accompanying legal literature? Most of the evidence used for legal proceedings and services is now produced by electronic technology of one kind or another. All of expert opinion evidence is based upon the use of electronic technology to produce the data upon which such expert opinions are formulated. How to prepare users of such alternative legal services to challenge such sources of evidence?

The *Inventory text* does not say that this “list of initiatives” is but a temporary solution. Instead, by these “alternative legal services” the members of the FLSC will attempt to lessen the damage caused by the problem instead of attacking its cause.²⁷ They do not provide people with an affordable lawyer of their own, in a fiduciary relationship, who will do all of the work arising from their legal problems. Only the rich and the very poor will have lawyers. Will that survive a constitutional law attack by way of the *Canadian Charter of Rights and Freedoms*?²⁸

²⁶ Alternative business structures (ABS) are defined in note 11 and accompanying text *supra*.

²⁷ See: Ken Chasse, “A2J: ‘Let Them Eat Cake.’ So, Let Them Use Alternative Legal Services” (posted on the blog, *Slaw*, November 26, 2015).

²⁸ Canadian Charter of Rights and Freedoms, being Part 1 of the Constitution Act, 1982, enacted by the *Canada Act 1982* (U.K.) c. 11; proclaimed in force April 17, 1982; providing these arguments:

(1) a s. 15 *Charter* “equality rights” argument recognizing “legal services at reasonable cost” as a constitutional right. Based *inter alia*, upon the concept that being middle class, or of “middle income,” and unable to obtain legal services at reasonable cost, is a state of one’s condition that is “immutable, or changeable only at unacceptable cost to personal identity,” and to one’s ability to invoke constitutional rights and freedoms, and the rule of law; see: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; 1999 CanLII 687 (SCC); *Law v. Canada (Minister of Employment and Immigration)* 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497). Such a right would provide a legal platform from which law society neglect of the problem and its failure to perform its duties,

The above list of programs and services does not provide a reason for not continuing to look for a solution to the problem. For example, they should not be referred to, as does the Inventory text, as being “legal services,” (p. 2). Most of them involve providing legal information and “self-help,” not legal services, and not legal services within the context of a solicitor-client relationship that carries a fiduciary duty to do all of the work required by a client’s legal problems.²⁹

Such surrender of the problem to “alternative legal services” ignores the inevitable and growing volume and complexity of laws, technology-dependent laws, and the explosion of electronic records that electronic records technology has made available to everyone.³⁰ The law is moving toward ever increasing complexity, but alternative legal services take legal services towards simplicity.

The legal profession is contracting and lawyers will serve out the rest of their careers in a seriously economically depressed profession—new lawyers in a financial hand-to-mouth existence; see: Jordan Furlong, (January 30, 2014), “The agile lawyer will rise as permanent, full-time, salaried employment vanishes.”³¹

The strategy is to cut the cost of legal services by cutting the competence of the people who will provide such services by using someone other than a lawyer. Four of those alternative services are mechanisms to “do it yourself” after receiving advice (self-help). As to legal aid, given its very limited

such as those stated by s. 4.2 of Ontario’s Law Society Act, could be attacked. See also note 7 *supra*, and note 55 *infra*, and accompanying texts; and,

(2) right to counsel as per, *British Columbia (A.G.) v. Christie*, [2007] S.C.C. No. 21, [2007] 1 S.C.R. 873, at paras. 19-27. Paragraph 22 states in part: “The role that lawyers play in this regard is so important that the right to counsel in some situations has been given constitutional status.” And paragraph 27: “We conclude that the text of the Constitution, the jurisprudence and the historical understanding of the rule of law do not foreclose the possibility that a right to counsel may be recognized in specific and varied situations. . . .” If the current problem of unaffordable legal services, which makes the rule of law ineffectively available to the majority of the population, is not one of those “specific and varied situations,” then nothing is. Therefore the *Canadian Charter of Rights and Freedoms* can be argued to require that the agency responsible for this unavailability of the rule of law, law societies, be required to take effective action and be held responsible for the current situation and its consequences, and that the government be required to ensure that it happens. See also note 19 and accompanying text *supra*, as to staying criminal proceedings until a lawyer is provided.

²⁹ The fiduciary duty is defined in note 5 *supra*. In sharp contrast to the fiduciary relationship, in a commercial relationship each party serves its own self-interest.

³⁰ The great volume of records created by electronic records management technology has made electronic discovery and litigation in general unaffordable for the majority of the population See (pdf): Ken Chasse, (1) “Solving the High Cost of the ‘Review’ Stage of Electronic Discovery” (SSRN, June 30, 2015); (2) “Admissibility of Electronic Records Requires Proof of Records Management System Integrity” (SSRN, Dec. 7, 2015); (3) “Records Management Law – A Necessary Major Field of the Practice of Law” (SSRN, Jan. 27, 2016); and, “Electronic Records as Evidence.” (SSRN, 2014).

³¹ Jordan Furlong is a leading analyst of the global legal market and forecaster of its future development. See also note 139 and accompanying text *infra*. And see also: (1) Section 6 below (p. 26), “Private Practice is Shrinking”; and, (2) as to the commercialization of legal services, notes 115 and 116, and accompanying text *infra*.

availability, the probability of wrongful convictions will be greatly increased.³² One of the above categories, “reduced fees,” involves not paying or under-paying a lawyer, *i.e.*, “pro bono or low bono.” Such charity, albeit commendable and to be encouraged, won’t provide legal services for long, difficult cases involving multiple proceedings, meetings, and drafted documents. That is too much unpaid time, and time away from paying clients’ needs. But such long and difficult cases are generated by all income levels of society.

In sum, the FLSC’s *Inventory text* advocates these four types of alternatives to the use of lawyers in a solicitor-client relationship: (1) self-help, which is no help or very little help; (2) the use of workers far less trained and experienced than lawyers, which, in comparison, is incompetent help; (3) public legal education; and, (4) legal services provided pro bono or low bono, for simple, short cases. And in comparison to the size of “lawyer labour” needed to solve the problem, pro bono and low bono labour, albeit commendable charity, will be comparatively very minor help in solving the problem.

Therefore:

- (1) the exact cause of the problem remains not understood by the law societies, because they don’t try to learn its cause;
- (2) the legal profession in Canada will remain at risk of: (a) government intervention by way of socialized law, or, (b) “alternative business structures” that allow non-lawyer ownership of law firms by large investment organizations³³; or, (c) commercialized law, which will make lawyers, formerly in private practice, employees of legal service providers in shopping malls and other high volume commercial outlets,³⁴ and,
- (3) this is not the type of innovation that stops the reduction of the number of lawyers in private practice, nor serves the future of the legal profession (see section 6 below (p. 33): “Private Practice is Shrinking”).

Alternative legal services should be provided, but in law and in response to public need, they cannot be the law societies’ sole answer to the problem of unaffordable legal services. That is the consequence of

³² See notes 19 and 20 and accompanying texts *supra*.

³³ See notes 11 and 26, *supra*, and notes 95, 101, 114, 119, 124, 125, 129, 131, 133, and 139, *infra*, and accompanying texts. The prospect of law firms becoming properties for ownership by non-lawyers is discussed in the Canadian Bar Association’s *Futures Initiative* publication, *The Future of Legal Services in Canada: Trends and Issues* (June, 2013), at pp. 17 and 30.

³⁴ See: Richard Susskind, *Tomorrow’s Lawyers* (Oxford University Press, 2013); Raymond H. Bescia, “*Uber for Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services*” (2016), 64 *Buffalo Law Review* (forthcoming)”; at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2754470>; and see, Ken Chasse, “*Counsel, I demand Justice! – Most definitely! How much ‘Justice’ can you afford?*” (*Slaw*, April 10, 2017), and the authorities cited therein. And see the authorities cited in note 36 *infra*.

laws that require law societies to maintain the affordability of legal services. If they cannot, they have no right or reason to exist.

The number of people involved in providing alternative legal services and other forms of palliative care such as helping self-represented litigants, is growing, increasing the probability that such services will permanently be used to justify law societies' not trying to solve the problem of unaffordable legal services. While they serve such palliative care, it is not within the interest of such lawyers, law students, and trained volunteers that the problem be solved. If the problem diminishes so does the purpose and prominence of their providing such commendable service. But now, they increasingly serve to make stronger the law societies' pretence and false appearance that the law societies are doing all that can be required of them in answer to the problem. But palliative care is not trying to cure the disease and prevent its becoming a permanent plague upon the profession. Those lawyers and law students who so help the law societies, make certain that they themselves will go through the rest of their careers in a severely financially depressed profession, with most of those who remain in private practice as general practitioners living a hand-to-mouth existence.

And, if law societies do not challenge the progress and expansion of the commercial producers of legal services, such as, LegalZoom, Legal X, and, Rocket Lawyer, there will be no general practitioners left.

5. The Law Society of Upper Canada's Treasurer's Advisory Group on Access to Justice Working Group Report

A relatively recent law society publicly expressed view of the problem is LSUC's Treasurer's Advisory Group (TAG) on Access to Justice Working Group's *Report to Convocation*, delivered on January 23, 2014. On February 27, 2014, it was considered for "Debate and Decision" in Convocation (LSUC's governing body).

This report³⁵ expresses concern and urgency in regard to the problem, which stands in substantial contrast to the *Federation of Law Societies of Canada's Inventory of Initiatives* text. It doesn't reduce the problem to being merely one of, "gaps in access to legal services." Instead, there is a recognition that change is urgently needed. Being a report to Convocation, it begins by presenting this Motion (pp. 2-3):

1. That Convocation approve the creation of a framework to facilitate the reinforcement and integration of access to justice objectives into the core business, functions and operational planning of the Law Society, the key components of which are as follows, and as further described in this report:
 - a. An internal focus on access to justice as a strategic objective underpinning all of the Law Society's work, which will include:

³⁵ See the list of "Reports" on the right hand side of that hyperlinked "report" page. A pdf. copy can be produced by clicking on, *Treasurer's Advisory Group on Access to Justice (TAG) Working Group Report*.

- i. designating appropriate resources to enhance the Law Society's approach to developing access to justice objectives integrated across program areas;
 - ii. strategically reviewing, reconsidering and, where appropriate, amending the Law Society's rules, regulations, policies and practices to foster change and innovation and achieve the Law Society's access to justice objectives; and
 - iii. developing metrics to measure the effectiveness of actions taken.
- b. An external focus through which the Law Society will provide facilitation of a standing forum for collaboration on access to justice by:
 - i. Reconstituting the Treasurer's Advisory Group on Access to Justice as a standing forum called the Treasurer's Action Group on Access to Justice; and
 - ii. Providing administrative and other resources necessary to convene and support the ongoing functioning of the standing forum.
2. That Convocation approve the following changes to the Law Society's committee structure to support the development and implementation of the new framework:
 - a. Merger of the Access to Justice Committee and the Equity and Aboriginal Issues Committee to become the Access, Equity and Aboriginal Issues Committee;
 - b. Appointment of members of the Access, Equity and Aboriginal Issues Committee to serve as one of the vice chairs of each of the Professional Development and Competence, Professional Regulation and Paralegal Standing Committees; and
 - c. Creation of a new Access to Justice Coordinating Committee.

It proposes, "... integrating access to justice issues into the Law Society's core business and operational planning" (p. 13). And it states, "Not least of the challenges facing the profession is access to justice and a perception that the legal profession is out of touch and itself creates barriers to low and middle income Ontarians accessing legal services and justice" (p. 3).

The fear of government intervention is implied by this statement (p. 4):

6. This report from the Treasurer' 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.

It expresses concern and urgency by using words such as "crisis" (p. 5):

9. 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.

But there is no statement that the Law Society will be proactive in bringing about affordable legal services so people can have "their own lawyer" for legal advice, and not just the pro bono, or alternative

legal services’ “targeted legal services” lawyer of limited retainer and fiduciary duty and help. Instead, it cites (pp. 8-9) reports that recommend:

“Specific innovations and improvements that should be considered and potentially developed [which] include:

- Limited scope retainers – ‘unbundling’ (“targeted legal services”);
- Alternative business and delivery models;
- Increased opportunities for paralegal services;
- Increased legal information services by lawyers and qualified non-lawyers;
- Appropriate outsourcing of legal services³⁶;
- Summary advice and referrals;
- Alternative billing models;
- Legal expense insurance and broad-based legal care;
- Pro bono and low bono services;
- Creative partnerships initiatives designed to encourage expanding access to legal services – particularly to low income clients;
- Programs to promote justice services to rural and remote communities as well as marginalized and equity seeking communities; and
- Programs that match unmet legal needs with unmet legal markets.”

None of these involves lawyers relying upon true, highly specialized support services, as distinguished sending work out to other lawyers or law firms. And none shows recognition of the need to change the present method of doing the work to deliver legal services. They do not analyze nor question its efficacy. Instead they are aimed at improving the existing method. Therefore, putting this list of “innovations and

³⁶ The definition of “outsourcing” provided (at page 33, note 92, of the *Report*) states: “Outsourcing involves a number of initiatives including subcontracting legal work to other domestic or offshore lawyers and other service providers (often under the supervision of a lawyer). For a discussion of various outsourcing trends, see *e.g.* Michael D. Greenberg and Geoffrey McGovern, *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?* (Santa Monica, CA: RAND Corporation, 2012) at 35-36.” See further the four books by Richard Susskind and Daniel Susskind: (1) *The Future of the Professions-How Technology will Transform the Work of Human Experts* (Oxford University Press, 2015); (2) *Tomorrow’s Lawyers-An Introduction to Your Future* (Oxford University Press, 2013); (3) *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2008); and, (4) *Transforming The Law-Essays on Technology, Justice and the Legal Marketplace* (Oxford University Press, 2000).

Richard Susskind’s second book states (section 2.5, p. 48): “A fifth possibility is the *outsourcing* of legal work to specialist support companies, usually in low cost locations. This is giving rise to a rapidly growing field known as ‘legal process outsourcing’ (LPO. On this mode, law firms pass work packages (such as document review in litigation or due diligence for corporate work) to independent companies that are not themselves strictly, law firms; even though they may employ legally qualified individuals and paralegals. Generally, these LPO providers keep their overheads low (by operating in places with low incomes and inexpensive property) and rely on well-developed standards, guidelines, methods, tools, and systems which may even be developed in conjunction with the firms outsourcing to them. Most of these companies simultaneously provide their services to a variety of law firms.” [footnotes omitted]

improvements” into operation will not cause the reduction in costs that will make legal services affordable again. Such is the result of lawyers themselves dealing with a problem that is not a legal problem, *i.e.*, a problem for which they lack the necessary expertise.

This Access to Justice Working Group Report is the closest public statement by a law society that the problem is a law society problem, generated by the law society’s duty “to facilitate access to justice for the people of Ontario.”³⁷ But it does not contain:

- (1) a clear statement that the law that gives the law society the powers to regulate the legal profession creates duties to make available to the people of Ontario legal advice services provided by lawyers that are: (a) competently provided; (b) ethically provided; and, (c) affordable;
- (2) a statement that the “access to justice problem” is the unaffordability of legal services problem;
- (3) a statement as to what is the cause of the unaffordability of legal services; and,
- (4) a statement that the unaffordable legal services problem is the law society’s problem in law to solve.

Contradicting the interpretation that the problem of unaffordable legal services is accepted as a law society problem is LSUC’s webpage entitled, “Your Legal Bill – Too High?,” which states:

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. However, there are certain steps that you can take to address any concerns you may have about your legal bill.

Then follows a list of such steps, none of which involves the Law Society’s taking action in regard to legal fees. The last paragraph of the list states: “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.”³⁸ Neither webpage contains a statement as to the proactive steps that LSUC is taking to make legal services affordable. Such webpages tell the public that problems with legal fees are not the Law Society’s problem. The public is thus made to feel defenceless. It has law societies that warn, in effect, “use lawyers at your own risk.” By default, LegalZoom *etc.*, has much more marketing skill.

And given the way that LSUC’s, The Action Group on Access to Justice (TAG), limited the topics for discussion at, “Connect, Create, Communicate – Public Legal Education and the Access to Justice Movement” conference on October 20-21, 2016, to topics that do not include anything concerning solving the problem (above: Introduction, page 6), it appears that LSUC does not intend to try to solve the problem, and TAG is not to deal with the consequences of not solving the problem.

³⁷ See the Ontario Law Society Act s. 4.2, reproduced in the Introduction above at p. 3.

³⁸ However, if the law societies were sufficiently proactive in maintaining legal services as affordable to the majority of the population, a webpage such as LSUC’s “Your legal bill - Too high?,” would explain in detail how very proactive LSUC is in bringing about and maintaining affordable legal fees.

And again, is such TAG “Public Legal Education” conference going to teach the public how to raise a Canadian Charter of Rights and Freedoms argument based on an analysis of the case law and accompanying legal literature, and the rules of evidence and court procedure? And now the most frequently used kind of evidence is records. They come from very complex electronic records management systems. Many of them have very poor records management that is not in compliance with Canada’s National Standards of Canada for electronic records management. And they are based upon software that contains tens of millions of lines of software code that has a high error rate. Most of the evidence used for legal proceedings and services is now produced by electronic technology of one kind or another. All of expert opinion evidence is based upon the use of electronic technology. Will this “Public Legal Education” teach the public how to challenge such sources of evidence?³⁹

And the problem has greatly increased the probability of wrongful convictions because accused persons don’t have lawyers who will raise such issues and defences. Will such “public legal education” somehow deal with that greatly increased probability?⁴⁰

And neither can “alternative legal services” provide such complex legal advice. All of which means that the problem has to be solved. If law societies won’t try to solve it, their regulatory functions should be moved to an agency that will try—see the Clementi Report (U.K., 2004).⁴¹

6. Private Practice is Shrinking

The law societies’ approach to the problem will speed the reduction of the numbers of lawyers in private practice per capita. A summary of this statistical decline is provided in a recent article (*Slaw*, June 16, 2016), by CanLII’s former President, Colin Lachance, “Law’s Reverse Musical Chair Challenge”:

Estimates and sources vary, but we routinely hear numbers in the range of 70-85% when people discuss the prevalence of legal or justiciable issues that could be but aren’t addressed by a lawyer. That’s a lot of empty chairs!!!

Our lives aren’t getting any less complicated, and the need for guidance on legal matters will not only remain significant but will surely grow. So if the same or even an increasing number of “chairs” are being added, who will step up to fill them?

³⁹ See the references to Canada’s national standards for electronic records management in notes 61, 74, 91, 104, and 105, *infra*, and the published articles as to the quality of records management and its software, listed in notes 61 and 78, *infra* and accompanying texts.

⁴⁰ See: Ken Chasse, “No Votes in Justice Means More Wrongful Convictions,” June 10, 2016, on the SSRN.

⁴¹ The report of Sir David Clementi, (2004) Report of the Review of the Regulatory Framework for Legal Services in England and Wales, recommends that the regulatory function and the representative functions of law societies be performed by different institutions. The regulatory function serves the public interest, which should take primacy. The latter serves the interests of the lawyers. They are in conflict. See, section 1 above (p. 6): “Law society management structures are incompatible with solving the unaffordable legal services problem.” See also notes 95(2), 120, 136, and 141(1),(2) and accompanying texts *supra*.

With the exception of a closing thought at the end, I'll refrain in this post from getting into the protectionist regulatory environments through which lawyers limit the opportunity for others to step in and serve the public need and the public interest. Instead, I'll focus on the trends showing that fewer lawyers are seeking careers where we serve the public directly.

17% decline in total number of solo practitioners and 10% decline among total number of licensees working in Ontario law firms

In the 2013 Annual Report of the Law Society of Upper Canada [in the province of Ontario] we learn that 9,072 *lawyer* licensees declared their primary business activity as operating their one-person law firm. In the 2015 report that number was down dramatically to 7,577.

Those same reports tell us that in 2013, there were 26,731 lawyers and licensed paralegals working in Ontario law firms. In 2015 we saw a surprising drop down to 23,938 licensees.

These numbers are all the more shocking considering that during this two-year period, Ontario admitted 4,200 new lawyers and 2,500 new paralegals. Even accounting for offsetting departures from both streams of the Ontario legal profession, the province still saw a net **increase** of 3,000 lawyers and 1,700 paralegals to the rolls of the Law Society.

When we note further that the population of Ontario increased by 241,000 people during this same period, it's hard to avoid concluding that the chairs of legal need keep appearing, but our fellow licensees are not rushing to fill them.

Barely half of Ontario's lawyers are even insured to serve the public.

The law in Ontario provides that any lawyer who practices law must have malpractice insurance, yet there are many categories for which the lawyer is exempt from the obligation. These include categories for non-practicing lawyers as well as for lawyers whose practice is strictly limited to serving their employer – be it corporate, government, or other. LawPRO, the malpractice insurer for Ontario lawyers, reports that it provided Errors and Omissions insurance to 25,500 lawyers in 2015. Relative to the 49,040 Ontario lawyers on the rolls, that means just 52% of us are choosing to keep the door open to serving the public.

In terms of “full-time-equivalent” lawyers, serving the public, the number is certainly below 50% since within the insured cohort, a little over 7% are insured for part-time practice only. “Part-time” lawyers declare that they intend to allocate less than 20 hours a week to the practice of law. How many of those, like me, practice for well below the 20 hour limit is unknown.

Now, Ontario isn't necessarily representative of the rest of Canada – or of the United States or any other jurisdiction struggling with access to justice challenges and an underserved population. But neither is Quebec, where we learn from the Barreau du Quebec that at the end of 2014, only 39.8% of lawyers are in private practice. Representative or not, it is remarkable that across Canada's two largest provinces – which account for nearly 75% of the Canadian legal profession – the majority of lawyers do not serve the public directly.

When we see more and more people wanting to be lawyers, and most of them are choosing careers where they do not serve the public directly, is this the tipping point we needed to invite others into law's game of reverse musical chairs? If not, what other

signs could we possibly be waiting for to definitively conclude that the public's need for legal assistance will not be addressed by lawyers alone?

And the problem of “lawyer-shrinkage” is not new. The Law Society of Upper Canada’s “Final Report of the Sole Practitioner and Small Firm Task Force,” pages 50-54 (paragraphs 117-130) (March 24, 2005; reviewed in Convocation, April 28, 2005) noted the diminishing number of lawyers entering sole practice. And that shrinkage was recognized as far back as 1981; see, Christopher Moore, *The Law Society of Upper Canada and Ontario’s Lawyers 1797-1997* (University of Toronto Press Inc., 1997), which refers to a report to LSUC by University of Toronto economist David Stager (p. 308), which stated that the number of lawyers in private practice had decreased from 88 percent in 1973, to 71 percent in 1982 (the report was originally delivered in 1981, and summarized in 1983—see footnote 44).

Such decline in the numbers of private practising lawyers is being facilitated by law societies’ failure to try to solve the unaffordable legal services problem. Instead, they promote alternatives that encourage Canada’s residents to deal with their legal problems without lawyers, or by using alternatives that minimize the use of lawyers—a “cutting costs by cutting competence solution.” Such a strategy is like attempting to deal with society’s medical problems without doctors, or with as few doctors as possible.

Deciding on the use of alternatives to doctors’ services is done under the supervision of doctors. And so should decisions on the use of alternative legal services be made within the context of law offices. In regard to legal problems, decisions that a lawyer is not necessary should not be made by people who are not lawyers.

However, section 10 below, “Support services and a civil service for law societies (p. 46, provides the innovations whereby legal services can be made affordable and law society management structures preserved.

7. Why Law Societies and Access to Justice Committees Fail to Solve the Problem

The major problems of law societies will need solutions that require the kind of long-term development that only a civil service-type institution can provide; see section 10 below.

The root cause of the problem is that law society management structures have not changed since they were created early in the nineteenth century. (LSUC was created on July 17, 1797, at Niagara-on-the-Lake, and didn’t move into Osgoode Hall in downtown Toronto until 1832.⁴²). “Not changed” in the sense

⁴² See: Christopher Moore, *The Law Society of Upper Canada and Ontario’s Lawyers 1797-1997* (University of Toronto Press, 1997). “Upper Canada” is the province of Ontario’s British colonial name, being further up the St. Lawrence River than “Lower Canada,” the province of Quebec, rivers and lakes being the main form of transportation then. Canada peacefully became a country on July 1, 1867. But now half of the people living in the Greater Toronto Area (the GTA) were not born in Canada (see: “GTA” & “Toronto Facts-Demographics”). What does “Upper Canada” mean to them—is the Law Society of Upper Canada a law society for lawyers whose law

that they do not rely on any continuous source of expertise as does a government rely on its civil service. As a result they are not capable of dealing with problems such as the problem of unaffordable legal services. Their major defects of that management structure are:⁴³

(1) “The bencher,” is a public officer function whose expected performance and available time are incompatible with bringing about the necessary innovations that can solve the problem; because: (a) they are free to make their first concern their law practices or institutional employers; and, (b) the reasons for becoming benchers are incompatible with taking the risk of being associated with a failed innovation that might take a large and unknown amount of time, and make them unpopular, and perhaps cost a lot of money. And so, being a bencher is an act of charity. As a result, benchers are “part time amateurs”—amateurs because they don’t have the expertise to solve problems such as unaffordable legal services, which is not a legal problem.⁴⁴

Our law societies do not yet fear the consequences of not changing. Therefore nothing changes, neither law society management structures to cope with society’s changing needs for legal services, nor the method of doing the work to provide legal services. There has been no change because law societies do not sponsor the innovations that would maintain the necessary cost-efficiency in the production of legal services.

(2) “The democratic disconnect”: the lack of accountability to the political and democratic process, *i.e.*, benchers’ main duty is to the public, to make legal services adequately available, but they are not elected by the public, and, accountability to an elected government has not been effective, and in fact is not operative. Accountability exists only in law but not in fact.⁴⁵

offices are above the 60th parallel of north latitude where Canada’s territories are? LSUC should be called, “The Law Society of Ontario, formerly the Law Society of Upper Canada.” But even I might resist making Osgoode Hall in downtown Toronto into a museum, as a beautiful example of early 19th century architecture. See also note 5 *supra*, and 149 *infra*, and accompanying texts.

⁴³ For a fuller analysis of the defects of law society management structure, see: Ken Chasse, [A2J: Preventing the Abolition of Law Societies by Curing the Defects in their Management Structure: A Solution to the Unaffordable Legal Services Problem \(posted on the SSRN, September, 2015\)](#).

⁴⁴ The [Bencher election announcement](#) on LSUC’s website, dated October 27, 2014, states (3rd paragraph): “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.” LSUC’s current Convocation of benchers was elected on April 30, 2015, for a set 4-year term.

⁴⁵ See as an example of such law society duties in Ontario’s [Law Society Act](#), s. 4.2, set out in the Introduction on p. 2 above, and the references in notes 28 and 37, *supra*, and notes 55, 118, and 127, *infra*. Section 12 makes the federal and provincial attorneys general benchers, but that has not brought accountability for the unaffordable legal services problem’s continued existence.

(3) “The absence of expertise”: the absence of a permanent service or civil service-type institute for developing continuing expertise for solving such difficult problems. Such problems didn’t exist in the slower, smaller, and simpler world when Canada’s law societies were formed.

Cabinet ministers (elected heads of government departments) don’t have the necessary depth of expertise but the civil service that serves them does. And it is a permanent institution whose expertise is constantly under development and is required to remain vigilant as to public need. Law societies don’t have such institutions. Only one is necessary to serve all of Canada’s law societies. It would be paid for by having CanLII provide the legal opinion services to all lawyers in Canada by using the centralized legal research methods developed at LAO LAW. The legal opinions would be provided at cost, plus a profit with which to pay for the civil service.

Current “access to justice committees” (A2J committees) will never solve the problem because they don’t deal with its true cause. Such committees have existed for several years now but the major victims of the problem continue to grow in size and number, and the problem worsens. They fail because:

(1) They are committees made up entirely of lawyers, but the problem is not a legal problem—lawyers lack the necessary expertise. (Judges included.)

(2) They assume that the necessary solution lies in aiding the present method of providing legal services by way of improvements or alternative services, when in fact the solution requires that the method itself be changed. That requires law societies to sponsor the creation of the specialized support services that enable legal services to be provided at an affordable cost, instead of lawyers relying only upon their law firms’ own internal resources; and,

(3) They make recommendations without sufficient trial-and-error learning. Therefore they lack the opportunity to learn that: (a) the problem is not a legal problem; and, (b) they are trying to solve a problem for which they lack the necessary expertise. Recommendations to ease the damage being done by the problem are to be distinguished from those aimed at ending the problem. The former are comparatively easy to implement; the latter are much more difficult, but much more necessary.

The solution requires benchers to engage in trial-and-error learning, and an uncertain amount of time, and accepting the risk of a failed innovation. Such failure might be costly, hurt one’s popularity, and hurt one’s reputation. Such requirements are incompatible with ensuring that one can adequately serve one’s clients or employer, and with the motivations for which lawyers become benchers, especially if one wishes to be re-elected as a bencher, or wishes to become a judge, or obtain some other appointment or distinction. A bencher dares not risk becoming stretched too thin for time and stress endurance needed for one’s clients or employer, by one’s bencher work. Therefore they promote alternative legal services, because the work to provide them is done by others. They do not promote solutions to the problem.

Therefore it is best not to tackle such difficult problems as unaffordable legal services—in spite of the great amount of suffering and damage being caused to the majority of the population, to the justice system, and to lawyers, and to the reputation of the legal profession itself. Do benchers give their duties in relation to serving their clients and employers priority over the duty imposed upon law societies to make legal services adequately available? That duty means making legal services affordable—legal services at reasonable cost. Law societies fail to serve that purpose, which is an integral part of the purpose for which they were created and the law requires. “Alternative legal services” do not serve that purpose.

The fiduciary duty is a lawyer’s most valuable service, *i.e.*, lifting clients’ legal problems onto their lawyers’ shoulders. Alternative legal services do not provide such a comforting, professional service of personal responsibility.⁴⁶ Law societies’ promotion of alternative legal services is being used as an excuse for not trying to solve the problem—a deceptive excuse providing merely the appearance of an adequate response. Therefore, they work against the interests of the members of the law society whose interests they are to represent.

A very effective defence against the rapid progress being made by LegalX, LegalZoom *etc.*, in taking over the lawyers’ market, particularly that of the general practitioner, would be for law societies to publically emphasize to those consumers of legal services, what those commercial operations do not provide, that is, to emphasize: (1) the importance of the solicitor-client relationship and the fiduciary duty that it provides; (2) the law society’s complaints division and its resources; and, (3) every private practitioner’s mandatory professional insurance. But that would make necessary law societies’ trying very hard to make legal services affordable so as to make more lawyers available to that majority that cannot afford legal services. That contradicts the strong promotion by benchers of alternative legal services. They too don’t provide the benefits of the solicitor-client relationship, *etc.* And as explained above, it is much more compatible with a bencher’s self-interest to take that “easy route,” than the “hard route” of solving the problem. The time needed to promote the former will never present a risk of not having enough time to serve and protect a bencher’s source of income—clients or institutional employer. But trying to solve the problem does. So no attempt is being made to solve the problem. And so again, when faced with a choice between serving the needs of the lawyers whose interests they are serve, and serving their own, benchers choose their own.

⁴⁶ The alternative legal service that is pro bono charity does involve the fiduciary duty and doing all the work arising out of a client’s problems, but it is too small a source of lawyers’ work to have a significant impact on the problem, and long, difficult cases cannot be expected to be done without fees paid. That is too much time away from paying clients. “Targeted, limited retainer” legal services, if they do provide the fiduciary duty, it is of uncertain scope and duration. Does the lawyer have to mend the damage done if the client does not make adequate use of the legal service provided?

The unaffordable legal services problem makes clear that, “No longer is it possible to be both a good lawyer and a good benchers.”

Fortifying and re-cycling the absence of expertise and awareness necessary to solve the problem and hold benchers accountable for the problem and its vastly destructive consequences, are benchers elections. They are conducted without speeches of substance, debates, or election campaign literature that displays detailed knowledge of issues and problems. It contains no detailed explanations of solutions or strategies.⁴⁷ Were they otherwise, lawyers would not tolerate being the victims of their benchers’ management.

Law societies need to be able to give priority to their duties to the public. That cannot be done with benchers who must give priority to their law firms and employers. They need assistance. Without it they have no answer to these accusations of the angry taxpayer and self-represented litigant:

Why can’t I have an affordable lawyer of my own? I pay for the justice system where you lawyers earn a very good living compared to me. But I must use that very poor second best which is “alternative legal services”—clinics, and pro bono and targeted legal services, and various forms of self-help. You say you take this “access to justice” problem very seriously. I don’t believe that. If you were serious and honest, you would be trying to solve the problem. You can’t show me anything that you have done about trying to solve the problem. I can’t have an affordable lawyer of my own because you use your monopoly over legal services to serve yourselves, but not the needs of the public for legal services. Would you send your close relatives to “alternative legal services”? Of course not; that’s not good enough for them, but it’s good enough for us—yes us, the majority of the population who cannot afford legal services. Why should I give my respect and tax money to your justice system?

Why indeed! Only when such statements and opinions become prominent in the social media and the news media will law societies fear the consequences of not changing. Then governments will have to be seen to react. But then it will be too late. Our law societies will not have an answer for accusations that they have done nothing to solve the problem, and that they cannot justify the monopoly they have been given over the provision of legal services.

There are better ways of doing what law societies do, and are supposed to be doing—see the *Clementi Report* (U.K., 2004), and the article by John Flood, cited herein below.⁴⁸ Knowledgeable journalists and governments will not accept law societies’ alternative legal services as being an acceptable answer. It is a Marie Antoinette, “let them eat cake” answer—if the masses of working people cannot afford a lawyer’s services, let them “eat” alternative legal services. They’re cheaper.⁴⁹

⁴⁷ See for example, note 53 and accompanying text *infra*.

⁴⁸ See notes 136, 141(2), and 146, and accompanying texts *infra*.

⁴⁹ See: Ken Chasse, “A2J: ‘Let Them Eat Cake.’ So, Let Them Use Alternative Legal Services.” *Slaw*, November 26, 2015.

It cannot be expected that the problem's major victims will continue to grow larger without that day of demands for public accountability always being near, followed closely by demands for the abolition of law societies. Replace them with a more sympathetic, less self-absorbed administration of legal services that is also more accountable to the democratic process.

The surveys carried out by the National Self-Represented Litigants Project deal with the desperate self-represented litigants who are greatly taxing the resources of our courts.⁵⁰ See also this work of the Canadian Forum on Civil Justice (CFCJ) Everyday Legal Problems and the Cost of Justice in Canada: Overview Report.

If matters remain as they are, most lawyers will spend the rest of their careers in a severely economically depressed profession—a profession that should be expanding to meet a rapidly growing need for legal services, instead of contracting.

The problem is a human-caused problem, capable of a law society-caused solution, if Canada's law societies act together. The creation of CanLII and the national mobility agreement, (which allows lawyers to work up to 100 days a year in other participating provinces, without becoming licensed to practice in those provinces), are impressive law society accomplishments. They show that the law societies together can solve the problem of unaffordable legal services.

Instead, lawyers will remain passive victims until they effectively pressure their benchers to make those changes such as doing what is necessary to solve the problem. The obvious, lawful sources of the necessary pressure are not active—governments, the population, and the lawyer-members of law societies:

(1) Governments are not holding law societies accountable for their failure to attempt to solve the problem, even though that is greatly increasing the number of accused persons in the criminal courts without lawyers, and therefore the probability of an increase in the number of wrongful convictions.⁵¹ It is a duty that is part of the monopoly that law societies have been given over the provision of legal services.

(2) The population has inadequate means of influencing the formation of law society policy and practice—"lay benchers" are now an ineffective method of representing "the public interest." They lack the expertise and resources to do so. And,

⁵⁰ The purpose of, The National Self-Represented Litigants Project (NSRLP) is to help self-represented litigants (SRLs) be more effective SRLs. It is committed to collaboration to enhance the responsiveness of the Canadian justice system to SRLs, and to continuing dialogue with lawyers, judges, and court services staff. The Project is also acting as a clearinghouse for information and resources related to the SRL problem. It is committed to information and resource-sharing among all interested and affected parties. It builds on the National Self-Represented Litigants Research Study conducted by Dr. Julie Macfarlane of the University of Windsor, Ontario, from 2011-2013. The project takes its mandate from the Final Recommendations of the Research Report: 10 Actions Steps for the SRL Phenomenon. Website: <<http://representingyourselfcanada.com/>>

⁵¹ See: Ken Chasse, "No Votes in Justice Means More Wrongful Convictions" (SSRN, June 5, 2016); and, "No Votes in Justice—Plea Bargaining and Wrongful Convictions," Slaw, June 22, 2016.

(3) Lawyers don't understand the cause of the problem sufficiently to assert the necessary pressure upon their benchers.⁵²

Our law societies have long advocated that the independence of the legal profession from government intervention should be recognized as a constitutional principle and not merely as, "an adjunct principle" in support of the independence of the judiciary from government interference, which is a constitutionally embedded principle essential to the separation of powers doctrine.⁵³ Such recognition should never be granted until the problem is solved.⁵⁴

The damage being caused makes painfully and patently revealing how very important law societies are to the proper functioning of the whole of the justice system.⁵⁵

8. Using the support services provided by LAO LAW as a model

LAO LAW's support-services method should be used by the law societies as a model. It uses specialization of three kinds: (1) of the staff of legal research lawyers, specialized to a higher degree than

⁵² That lack of awareness was evident in the campaign literature provided by candidates in LSUC 2015 Benchers Election held on April 30, 2015. All of it listed "access to justice" as a major problem, but none of it outlined a program or strategy for solving or dealing with the problem. The closest such statement expressed an intention to ask for better funding for Legal Aid Ontario. But the worsening of the problem makes such improved funding increasingly politically very unwise. To do so, government would have to take more money from taxpayers who themselves cannot afford lawyers, so as to provide free legal services for a comparatively small portion of the population. It would be a request to ignore the majority in favour of a very small minority. That shows the lack of understanding of a problem that will cause lawyers to spend the rest of their careers in a very economically-depressed profession. See also the text accompanying note 48 *supra*.

⁵³ Strong LSUC advocacy of such a constitutional principle is provided by: *In the Public Interest* (Law Society of Upper Canada, 2007). Its subtitle is, "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."

⁵⁴ At the least such recognition of the independence of the legal profession from government intervention as a constitutional principle would have to be balanced with "a right to affordable legal services" being equally recognized as a constitutional principle. Constitutional status based upon a Canadian Charter of Rights and Freedoms s. 2(b) access to the courts to maintain the rule of law, plus a s. 15 equality rights argument recognizing "legal services at reasonable cost" as a constitutional right. Based, *inter alia*, upon the concept that being middle class, or of "middle income," and unable to obtain legal services at reasonable cost, is a state of one's condition that is "immutable, or changeable only at unacceptable cost to personal identity," and to one's ability to invoke constitutional rights and freedoms, and the rule of law. Such a right would provide a legal platform from which law society neglect of the problem and its failure to perform its duties, such as those stated by s. 4.2 of Ontario's Law Society Act, could be attacked (set out in the Introduction on page 1 above). See also notes 7 and 28 *supra*.

And see also by Ken Chasse: (1) "Access to Justice – The Unavailability of Legal Services at Reasonable Cost and the Canadian Charter of Rights and Freedoms"; and, (2) "Access to Justice – Canada's Unaffordable Legal Services – *CanLII* as the Necessary Support Service."

Conversely, recognizing the independence of the legal profession from government intervention as a constitutionally-protected principle, including its law societies, would make them almost "untouchable," *i.e.*, unaccountable for the damage that their neglect of the problem has caused, and unaccountable for the expense of self-represented litigants. The "*Robotham* order" for providing a lawyer for litigants of insufficient income would have to be extended in scope; see note 19 and accompanying text *supra*, concerning, *R. v. Moodie* 2016 ONSC 3469.

⁵⁵ See notes 52, 54, and 55, and accompanying texts *supra*.

exists in private practice; (2) of the materials used to write legal opinions; and, (3) of the database management procedures applied to the office database of all work-product. These types of innovation happened within LAO LAW, but not within lawyers' offices.

Lawyers who took legal aid cases were free to decide whether they would use LAO LAW's research services and materials—an external support service without precedent.⁵⁶ They did, causing our volume of production to grow quickly, thus did the cost-saving to LAO (Legal Aid Ontario). Such popularity has since brought about the development of related support services spun-off from the initial legal opinion service (see section 10, p. 58 below).

However, LAO has since suffered substantial cuts in funding, and therefore so has LAO LAW. Its staff is smaller than what I had, and its priorities have changed. It cannot emphasize as its main service, providing a complete legal opinion for every fact-pattern submitted by lawyers for their clients. Those lawyers who used the service didn't have to do any legal research. But there are now thousands of highly specialized memoranda of law that can be downloaded. Such downloading facilitates lawyers doing their own legal research. Therefore LAO LAW cannot generate the same large cost-saving to LAO. Cost-saving was the sole purpose of LAO LAW when I was its first Director of Research (1979-1988, under LSUC's management). Therefore a full legal opinion was provided to every lawyer who used the service. And therefore by 1988, it was producing legal opinions at the rate of 5,000 per year (with word-processing that would be considered rudimentary now. Because lawyers didn't type ("keyboard"), my staff learned after I hired them. At that time, a lawyer without a secretary, was a dysfunctional lawyer as to producing typed copy.).

However, LAO LAW still uses the same technology of centralized legal research that was devised during its first nine years of existence, 1979-1988. Without it, legal research cannot be done as cost-efficiently.⁵⁷ It now has a 38-year history of success, popularity, and saving LAO substantial amounts of money that would otherwise have been paid out on lawyers' accounts. Those services include the following (in addition to LAO LAW's case-specific legal research and legal opinion services):⁵⁸

⁵⁶ For a further description of such lawyers, see note 20 *supra*.

⁵⁷ A lawyer specialized in one area of law, with sufficient preparation, might produce a research service or legal opinion as good as a specialized support service, but he/she won't be able to produce it at an equally low cost because he doesn't have the facilities and cost-efficiencies produced by high volume, scaled-up methods of production. Therefore the cost-saving produced by the technology of centralized legal research that LAO LAW uses, is to be judged by its ability to provide a complete research and legal opinion service, and not simply to provide memoranda and other materials so counsel can do their own legal research.

⁵⁸ The quoted sentences are reproduced herein from LAO LAW's website pages of materials. To view the following materials and their footnoted websites, a Law Society of Upper Canada (LSUC) solicitor number and LAO solicitor number are needed for signing-on.

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

Aboriginal Legal Issues: 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 Law: 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 in mental health court in relation to Part XX.1 of the Criminal Code ["Mental Disorder," ss. 672.1-672.95].

Correctional Law: 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 Resources: 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.”

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

A service like LAO LAW should be designated an essential service. A large majority of lawyers, particularly general practitioners, cannot keep up with the rapidly growing volumes and complexity of legal literature in each area of law in which they provide legal services. And there is an inability to challenge the performance of the technology that produces a large part of the evidence for legal proceedings and legal services such as, that which produces records, mobile phone tracking evidence, and, breathalyzer/intoxilyzer device readings. Such electronically-based systems and devices are far from infallible in their manufacture, use, and maintenance. Law societies do nothing about this problem of maintaining competence.

A source of volume and complexity of legal literature is the Canadian Charter of Rights and Freedoms. It has had a great impact upon the practice of criminal law, if not transformed it. It generates long and highly analytical decisions from the courts, particularly from the Supreme Court of Canada and from the 10 provincial and three territorial courts of appeal. The general practitioner who has to represent people in the criminal courts cannot keep up with such voluminous and complex legal literature. CPD/CLE programs are not enough for such highly specialized and voluminous areas of the law. And such programs do not provide information with which to challenge the reliability of the technology that now produces almost all of the evidence that isn’t eye-witness evidence.

My staff at LAO LAW provided the necessary service for that need. Lawyers provided the fact-patterns concerning each client’s legal problems and my specialized staff of legal research lawyers composed the legal opinions that enabled those lawyers to provide good representation concerning Charter issues. CanLII should be providing that service for all lawyers and judges. It would be able to provide it at a price that no law firm, online service, or other group of lawyers could possibly match.

A specialized and suitably separated judges' division, operated using materials from the same databases, could be created so as to take advantage of the great cost-efficiency that comes from this principle, "nothing is as effective at cutting costs as scaling-up the volume of production." "Clerking" should be considered obsolete. Also, the much greater competence of career-oriented legal research lawyers will provide much greater competence, cost-efficiency, and much better response times than is possible by giving legal research work to "clerking" for judges by law students and graduates from law schools, neither having the necessary experience to produce the highest quality work.

As to providing advice in regard to technical sources of evidence, consider these three technologies: (1) electronic records management systems; (2) mobile phone tracking evidence; and, (3) breathalyzer/intoxilyzer devices. They are heavily relied upon to produce the most frequently used kinds of evidence, but they are far from infallible. Among other potential sources of error, their software source code has a high error rate.⁵⁹ But because they are not challenged, the case law and other legal literature show a poor knowledge of such sources of evidence. To say, "we've had no trouble before," is an illusion created by not having challenged the performance of such technologies before.

Taking each in turn:

Records are now the most frequently used kind of evidence. Almost all of them come from large, complex electronic records management systems (ERMSs). They go unchallenged as to their maintenance, history of performance, software source code error rates,⁶⁰ and ability to produce reliable records. But such evidence of "systems integrity" is required by the provisions of the Evidence Acts, *e.g.*, s. 31.2(1) of the Canada Evidence Act. I know from long experience working with experts in ERMS technology that bad records management is very common. That is because: (1) there is no law of general application requiring ERMSs be kept in accordance with any authoritative records management standard, such as the National Standards of Canada for electronic records management⁶¹; and, (2) many organizations believe

⁵⁹ In computing, "source code" is any collection of computer instructions, possibly with comments, written using a human-readable programming language, usually as ordinary text.

⁶⁰ In addition to the prevalence of serious, ignored errors in records management in ERMSs, are the numerous errors in the software that all ERMSs depend upon. Many ERMSs operate on several million lines of software source code, and it has an error rate, as do most things created by people. For example, the Windows 3.1 operating system has close to 3 million lines of software code. The Google Chrome web browser has approximately 5 million lines. The Firefox browser is near 10 million, and Windows 7 has under 40 million lines of code, which is a little less than Windows XP's 40 million lines, and more than 10 million less than Windows Vista. It is estimated that there are approximately 80 million lines of code in Windows 10, and at least 30 million lines of software code in the Mac version of Microsoft Office, of 2006, and that it has probably gone up since then. The code base is very large and complex. And an Android phone has more than 12 million lines of code. These are estimates by computer and software engineers. Such programs are proprietary; the manufacturers not wanting to reveal precise volumes of lines of software code.

⁶¹ The National Standards of Canada for electronic records management systems are: (1) Electronic Records as Documentary Evidence CAN/CGSB-72.34-2017 ("72.34", published in March 2017); and, (2) Microfilm and

that they can “get along just fine” using only their most recently made and received records. If ERMSs are not well maintained, they will lose and destroy records, and corrupt the data stored in electronic records.

The police, when obtaining records as evidence, are not trained to ask their sources about the state of records management, or whether their ERMSs have been certified as being in compliance with Canada’s national standards, or with any other authoritative standards. Nor are Crown and defence counsel.

For civil proceedings, the application of *The Sedona Canada Principles—Addressing Electronic Discovery* 2d edition, is made mandatory by Rule 29.1.03(4) of the Ontario Rules of Civil Procedure. But *Sedona Canada* shows a complete ignorance of ERMS technology and of the highly dependent relationship between records and the ERMSs they come from. The reason is; it is a text written by a committee composed entirely of lawyers who didn’t bother to obtain the advice of experts in ERMS technology. And so electronic discovery is conducted with no knowledge as to whether it is in fact producing all relevant records. That is comparable to using expert opinion evidence without obtaining evidence as to the qualifications of the expert. The qualifications of an electronic record are the “qualifications” of the ERMS that it comes from.

We all carry mobile phones (cellphones). Therefore evidence of mobile phone calls is very frequently admitted into evidence because it can be used to locate a person at the time of a call to, or from that person’s mobile phone. For example, such “mobile phone tracking evidence” was of critical importance to the recent conviction for second degree murder in *Oland*.⁶² The technology that facilitates mobile phone calls is very complex. But it isn’t infallible. At best it is maintained to a commercial standard only, and not to a standard that guarantees evidence capable of “proof beyond a reasonable doubt.” It has to be challenged if one is to have a fair trial in civil as well as criminal proceedings. But lawyers don’t have the technical knowledge to do so. Therefore when such evidence lacks corroboration, as in *Oland*, convictions will be based upon whatever the quality of the performance of the electronic sources of such evidence is, and not upon “proof beyond a reasonable doubt.” And for civil proceedings, “proof on a balance of probabilities” is unworkable if the “probabilities” of the reliability of the evidence cannot be known.

As a result, the evidence produced by electronic records and mobile phone tracking evidence, goes unchallenged as though enjoying in effect, a “presumption of regularity” by way of a minimal “evidential/evidentiary burden” which transfers the onus of proof to opponents to rebut by way of “evidence to contrary,” which is not possible to provide, particularly so when the evidence adduced

Electronic Images as Documentary Evidence CAN/CGSB-72.11-93 (“72.11”) (updated to 2000). However, see: “Evidence Based Upon National Standards Might Thereby Be Unreliable.”

⁶² See *R. v. Oland* in notes 63, 78, 80, 95, 97, and 106, *infra* and accompanying texts.

comes from large, complex electronic systems as do records and mobile phone communications.⁶³ The case law is very inadequate because of the lack of knowledge of counsel to advocate what it should be and why.

And breathalyzer/intoxilyzer devices have comparable weaknesses that are never exposed or challenged in Canada.⁶⁴ Challenging the evidence produced by such devices has proceeded only to demanding their individual maintenance records, and that has had only a mixed success.⁶⁵ But breathalyzer/intoxilyzer device readings are the basis of almost all impaired driving prosecutions.

And such challenges of technology would often require employing experts costing many thousands of dollars, especially so if examining an ERMS or the electronic systems of commercial services that provide mobile phone communications. But in many cases that expense could be avoided if lawyers were able to be sufficiently informed by such specialist research lawyers. The need to employ one's own experts could be avoided, or much reduced. Otherwise, if there is no expert support service with which to mount challenges to the use of technology as a source of evidence, where such evidence is of critical importance, burdens of proof are in effect satisfied by the inconsistent standards and practices of the many sources of such evidence.

CPD/CLE programs do not make sufficient reference to the technical literature needed to challenge such technologies in their production of evidence.⁶⁶ What should law societies be doing to enable the

⁶³ See: Ken Chasse: (1) "[Guilt by Mobile Phone Tracking Shouldn't Make 'Evidence to the Contrary' Contrary Impossible](#)" (SSRN (Social Science Research Network), October 13, 2016); (2) "[No Votes in Justice Means More Wrongful Convictions](#)" (SSRN, June 5, 2016), (at p. 14), concerning, *R. v. Oland*, 2015 NBQB 245, wherein "mobile phone tower location evidence" was of critical importance to a conviction for second degree murder. Two very large and complex national electronic systems are involved: (1) that which operates the cellphone service and records the data concerning all calls; and, (2) the electronic records management systems in which that data is recorded and stored. In decisions such as *Oland*, there are no references to the quality of the maintenance and records management of such systems, or the high error rates in the software code of their software programs, or to the relevant national standards. The National Standards of Canada are those of the Canadian General Standards Board (CGSB): *Electronic Records as Documentary Evidence* CAN/CGSB-72.34-2017; and, *Microfilm and Electronic Images as Documentary Evidence* CAN/CGSB-72.11-93 (amended to 2000). In regard to *Oland*, see also notes, 62 *supra*, and notes 78, 80, 95, 97, and 106, *infra* and accompanying texts

See, by Ken Chasse: (1) "[Records Management Law – A Necessary Major Field of the Practice of Law](#)" (pdf., SSRN December 2015); (2) "[Admissibility of Electronic Records Requires Proof of Records Management System Integrity](#)" (pdf., SSRN December, 2015); and, (3) "[Sometimes Laws Are Too Important to Be Left to Lawyers—Lawyers Without Technical Support](#)" (*Slaw* (a blog), January 28, 2016).

⁶⁴ See: Charles Short, Note: "[Guilt by Machine: The Problem of Source Code Discovery in Florida DUI Prosecutions](#)," 61 Florida Law Review 177 (January 2009).

⁶⁵ See: *R. v. Vallentgoed*, 2016 ABCA 358; and, it is the policy of the Alberta Attorney General's office to refuse requests for the disclosure of maintenance logs of breathalyzer devices (*R v Proctor*, 2015 ABQB 97, paras. 133-134). This is a policy that refuses to follow the several cases that have followed, *R. v. Kilpatrick*, 2013 ABQB 5 (paras. 97-99).

⁶⁶ I have written a number of articles in regard to the vulnerabilities of these technologies in the production of evidence. They are posted on [my SSRN author's page](#) (pdf), and shorter blog articles are posted on [my Slaw author's page](#).

lawyers that they have licensed to practice law, to be adequately informed as to how to challenge the technology that produces critically important evidence?

Consider; no doctor's office can make available all treatments and remedies for all patients without the support services provided by all other parts of the medical services infrastructure. It is an infrastructure made up entirely of mutually interdependent, highly specialized support services. There are no "generalists." Similarly, the general practicing lawyer should be recognized as being a type of specialist as is the family doctor, and provided specialized support services as is the family doctor. If the unaffordable legal services problem is to be solved, the infrastructure of the legal profession has to be made somewhat similar to that of the medical profession; *i.e.*, it has to be transformed from its present "handcraftsman's-cottage industry" methods to the use of support services.

Similarly, all automobile manufacturers rely upon the specialization and cost-efficiency of the automobile parts industry. Everywhere highly specialized support systems are used in manufacturing because of their ability to produce the highest degree of competence along with the greatest cost-efficiency. But the legal profession has no counterpart, therefore the unaffordable legal service problem is what is, which in turn is caused by law society management being what it is, a 19th century management structure with comparable motivations and institutional culture as to what its duties are and purpose is.

As automation and electronic technology advance, the sources of evidence will become more completely complex technology. Needed therefore, are law society designated, specialized legal research lawyers. They will be expected to have the knowledge of such technologies with which to advise other lawyers, especially general practitioners as to how to cross-examine witnesses producing such technical evidence. But they will have to be made available in a centralized support service. And such support service should be national, available to all lawyers in Canada, and thereby be able to maximize its economies-of-scale because of its volume of production. Law societies have to be providing such support services, available at cost from [CanLII](#). Instead, law society CPD/CLE programs are simplistic in their references to technology, but the sources of evidence become more complex and completely dependent upon technology.

As a result, because judges have to depend upon the evidence and argument presented by lawyers, the case law shows an inadequate knowledge of technology. Our law societies are responsible and accountable for the competence of the practicing lawyers they have licensed.

What other way is there to adequately cope with such problems without some variety of a support services solution? Otherwise, only rich people would have true "access to justice" in the courts because they can afford to employ the necessary experts. So we must ask our clients, "how much justice can you afford?" (*Slaw*, April 10, 2017).

Society has become dependent upon electronic technology in its many applications. There's a price to be paid whenever society moves up to a more complex technology. Consider the massive legal infrastructure of laws and resources that has been made necessary by the transition from mass transportation by horses, to mass transportation by motor vehicles, including the size of police and governments departments, and the number of lawyers whose practices are related to the damage, injury, and death caused by motor vehicles. But there has been more than 120 years to adjust to that transition. The transition to the services provided by electronic technology has been amazingly quick, thorough and complex, making populations much more dependent upon such technology than they are upon motor vehicles.

An important part of the price of moving up to more sophisticated technologies is that the law and legal proceedings have to become equally complex, will cost more, and require more time. The law moves steadily and quickly to greater volumes and complexity, but simplistic law society "alternative legal services" take legal services and access to justice in the opposite direction. Management of law societies by part-time amateurs cannot cope.

Have law school curricula adequately coped with these consequences of technology upon law and practice? Law societies have a power of approval of such curricula to ensure that law students "admitted to the bar" have been adequately schooled in the law. That's another aspect of the heavy dependence of the justice system upon law societies.

That dependence has been made substantially more dangerous to the population and the court system by the unaffordable legal services problem. The probability of wrongful convictions has been greatly increased because the majority of the population cannot afford lawyers and can't qualify for legal aid.⁶⁷ Therefore, many more people are appearing in criminal courts without lawyers to defend them. And so, law society failures have a domino-effect in undermining the competence of the justice system in that one failure aggravates others and produces more. As a result, they are the cause of many more defendants' not being able to use their constitutional rights to have an opportunity "to make full answer and defence" and a "fair trial" as is supposed to be guaranteed by the Canadian Charter of Rights and Freedoms (ss. 7 and 11(d); Part 1 of the Constitution Act, 1982). Comparable damage is being done in civil proceedings. The percentage of litigants who are self-represented litigants (SRLs) constantly grows, and judges warn that they are bringing their courts to a halt because SRL cases take longer to move through court systems. Governments have never been generous in the resources that they provide the courts. The response of law societies is, promoting "alternative legal services," instead of trying to solve the unaffordable legal services problem.

⁶⁷ See *supra* note 19, as to the limited availability of legal aid's free legal services and R. v. Moodie, 2016 ONSC 3469.

Law societies are the “lynch pin” of the justice system. When they fail, it fails. Abolish them, or most of you will go through the rest of your careers as lawyers in a severely financially depressed profession of shrinking numbers, with no possibility of it ever being otherwise. And being a law student is a very high stakes gamble. In good faith and conscience, I cannot recommend to my grandchildren that they become lawyers. And in good faith and conscience what of becoming a law society bencher?

9. CanLII could facilitate the solution if it could do what LAO LAW does, and more

CanLII⁶⁸ and LAO LAW are very different but complimentary services. LAO LAW is an effective centralized legal research support service available to the many thousands of Ontario lawyers in private practice who service legal aid cases (a “judicare” service). But its services are limited to those areas of law for which LAO provides legal services, *i.e.*, issues legal aid certificates that clients take to lawyers who do legal aid cases. And, its services are available only to those Ontario lawyers. In contrast, CanLII is a popular and well-used national service. But the materials it makes available are limited to statute law and caselaw only,⁶⁹ and it was never intended to have any impact upon the problem.

Therefore the obvious solution is to enable CanLII to provide the services that centralized legal research methods are capable of, including legal opinions, but provide them nationally to lawyers, and provide them at cost, including the cost of the civil service institute.⁷⁰ Such cost-recovery could quickly

⁶⁸ CanLII (online: <http://www.canlii.org/>). CanLII’s website states: “CanLII is a non-profit organization managed by the Federation of Law Societies of Canada. 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.” Clicking on the “About” option provides this statement, *inter alia*: “Unique in the world among Legal Information Institutes (LIIs), CanLII’s operational funding is, and has always been, exclusively provided by members of Canada’s provincial and territorial law societies. Funding for specific projects such as expansion of historical collections has been gratefully received from provincial law foundations and other sources. ... In 2011, CanLII received nearly 7 million site visits and delivered over 81 million page views to users.”

⁶⁹ CanLII is beginning to add secondary materials. Colin Lachance, the previous President of CanLII, has written this article in the January, 2014 issue of *The Advocate*, a journal received by all members of the Law Society of British Columbia: “Think You Know CanLII? A Closer Look Into A Prized Asset Of The British Columbia Legal Community.” In it he describes the accomplishments of CanLII, the materials it provides nationally to lawyers, and the secondary materials it is adding. *The Advocate* is published six times each year by the Vancouver Bar Association. The article is at, (2014), volume 72, part 1, pp. 37-43.

⁷⁰ As to the advisory institute and its functions, see section 10 below (p. 46). A separate judges’ division would be much more cost-efficient because it would be feeding off the same large and rapidly growing databases used by all of CanLII’s services to lawyers, and thus could take advantage of the economies of scale provided by larger production volumes. And it would be staffed by career research lawyers, rather than legal research being done by law students and inexperienced lawyers working as “clerks” for judges; see: Ken Chasse, “The SCC and Lawyers Need Better Researchers Than ‘Clerking’ and Law Students,” *SLaw*, February 1, 2016. Specialist legal research lawyers can be required to have knowledge of the most frequently used technology used to provide the most frequently used evidence—evidence such as that produced by: (1) electronic records management systems (records are now the most frequently used kind of evidence; (2) mobile phone tower tracking evidence; and, (3) breathalyzer/intoxilyzer devices. But such lawyers would have to be made available in a support service for all other lawyers.

pay back any needed “start-up funding” from government. And if necessary, further funding could be obtained by arrangements with the many research organizations that study the justice system.

CanLII could provide legal research services and memoranda online that enable law offices throughout Canada to provide legal services at reasonable cost. That is a far more pressing and important a national need than providing free online access to caselaw and statutes and regulations.⁷¹ Badly needed are specialist legal research lawyers—lawyers who know the technology that now produces most of the evidence for legal proceedings and services, and can advise other lawyers how to test its reliability.

Consider the other advantages such a facility could provide to all 14 jurisdictions in Canada (10 provinces; three territories; and the federal jurisdiction):

1. CanLII can finance a “civil service for law societies” (see section 10, page 58 below).
2. It can put an end to the practice of having the legal profession’s most junior people—its law students, young lawyers, and judges’ clerks—do the bulk of the legal research work. Legal research is the foundation of all legal advice services. It can have a substantial impact upon the cost, quality, and response time of all legal services based upon it. Therefore it should be done by highly specialized and career-oriented experienced research lawyers, and preferably so within subdivisions of each traditional area of practice, as I had devised such specialization at LAO LAW.⁷²

For example, to maximize cost-efficiency, specialized legal research lawyers build databases to maximize the re-use of all finished work-product, and develop and apply good database management procedures to a high level of sophistication. Law students and junior lawyers don’t, and can’t, because they don’t have the experience, nor the authority with which to enforce the necessary rules of quality control and good database management.⁷³ The traditional justification for leaving legal research work to such

⁷¹ Nonetheless, CanLII’s accomplishments are impressive. Its “Strategic Priorities” text contains these statements: “In 2011, CanLII is on track to receive more than 7 million site visits and to deliver over 81 million page views to users. ... Approximately 2.2 million unique visitors connect with CanLII each year. There are more than 7 million visits on the website annually, generating over 80 million pages viewed.” See online: <<http://www.canlii.org/en/info/board.html#board>>. In comparison, Canada’s population is approximately 36 million. And CanLII is now adding access to secondary materials; see note 69 and accompanying text *supra*.

⁷² In regard to complex legal research and analysis, the legal profession should feel discomforted by the thought of ever having to make a public confession of the fact that it has this most critically important of legal services performed by its most junior and least experienced members. Experience has a greater impact on the quality of all legal services than do talent and training. Such “confession” would not be well received by clients, especially those of middle income or less, who find legal services very expensive. The work of a family doctor is also a “foundation service” for other medical services. We wouldn’t tolerate our medical profession leaving such work to medical students. See Ken Chasse, “The SCC and Lawyers Need Better Researchers Than ‘Clerking’ and Law Students,” *Slaw* February 1, 2016.

⁷³ In contrast therefore, beginning in July, 1979 at LAO LAW, I made legal research the work of specialized legal research lawyers. Such is one of the many important benefits of discarding the method of producing anything

junior people, “oh, but we supervise them,” is no longer valid, credible. The law is now too voluminous, complex, and accessed through many different services, sources, and strategies.

3. Helping lawyers to challenge the reliability of technology as a source of frequently used evidence; for example: (1) electronic records management systems; (2) breathalyzer/intoxilyzer devices; and, (3) mobile phone tower tracking evidence.⁷⁴

Records are now the most frequently used kind of evidence. But they are produced by systems that frequently have serious errors of records management.⁷⁵ And all electronic systems operate on software that has tens of millions of lines of software code that has high error rates. Such sources are not now being challenged and many of them contain dangers and procedures that do not justify their being considered sufficiently reliable to produce reliable evidence.⁷⁶

In the United States there is a well developed line of cases, and other legal literature, challenging the reliability of the source code in the software used in breathalyzer/intoxilyzer devices (used in impaired driving and “over 80” (DUI & DWI) prosecutions), but there isn’t one in Canada.⁷⁷

Because we all carry mobile phones, mobile phone tracking evidence is frequently used.⁷⁸

without specialized support services. Using law students to do legal research insufficiently supervised, would be like using medical students to do the sorting and channeling work of family doctors, in that it is work that is the foundation of the highly developed specialized support-services infrastructure of all medical services.

⁷⁴ See: Ken Chasse, “Guilt by Mobile Phone Tracking Shouldn’t Make ‘Evidence to the Contrary’ Impossible” (SSRN, October, 2016, pdf.).

⁷⁵ See: Ken Chasse, “Records Management Law – A Necessary Major Field of the Practice of Law” (SSRN, January, 2016, pdf.).

⁷⁶ My knowledge of electronic records management systems (ERMSs) comes from having worked with experts in ERMSs for many years, and having been the legal advisor on the committees that drafted the National Standards of Canada: *Electronic Records as Documentary Evidence* CAN/CGSB-72.34-2017; and, *Microfilm and Electronic Images as Documentary Evidence* CAN/CGSB-72.11-93 (2000) (see note 61 *supra*, and notes 91, 105 and 106, *infra*). And see the references to such technology, which produces evidence that is very frequently used in legal proceedings and legal services, and challenging its reliability, in notes, 29 and 60 *supra*, and notes 79-82, 95, and 103 *infra* and accompanying texts. See: Ken Chasse, “Records Management Law – A Necessary Major Field of the Practice of Law” (SSRN, pdf). See also the articles cited in notes 78 and 80 *infra*.

⁷⁷ See: (1) 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. And (2) Charles Short, “Note: Guilty by Machine: The Problem of Source Code Discovery in Florida DUI Prosecutions,” 61 Florida Law Review 177 (January 2009). “DUI” means, driving under the influence of alcohol or a drug.

⁷⁸ See: (1) Ken Chasse, “Guilt by Mobile Phone Tracking Shouldn’t Make ‘Evidence to the Contrary’ Impossible” (SSRN, pdf); and, (2) R.P. Coutts and H. Selby “Problems with cell phone evidence tendered to ‘prove’ the location

Sources of evidence that are not challenged are by default, treated as being infallible. Rarely is such an assumption justified. Most evidence is based on technology of one type or another, including that provided by expert opinion evidence. The data used to formulate expert opinions comes from such systems. However the law of evidence makes difficult obtaining an opportunity to conduct such challenges. Arguments must be prepared and expert opinion evidence marshalled to extend the law to make adequate an opportunity to challenge the reliability of the sources of evidence. Most evidence now comes from technology. But law school courses and law society CPD/CLE courses are not adequate to enable lawyers to challenge electronic technology's production of evidence. A specialized legal research lawyer is needed for each major area of law. Such lawyers would have knowledge of such major evidence-producing types of technology. And they would have to be made available to all other lawyers as a CanLII support service. Otherwise, Canadian lawyers will continue to be unable to challenge the performance of major sources of evidence.

As electronic technology becomes the complete foundation of our lives, the majority of laws will be based upon, or dependent upon such technology—particularly so the records provisions of the Evidence Acts, and all laws dealing with electronic commerce, and the use of electronic records. Few are the laws that don't deal with, produce depend upon, or refer to records. To be effective, such laws must be as complex as the technology they regulate. Electronic records management systems (ERMSs) have a high rate of defects in their records management quality and error rates in their software.⁷⁹

of a person at a point in time” Digital Evidence and Electronic Signature Law Review,” 13 (2016) 76 (pdf). And see these decisions in the murder case of: *R. v. Oland* 2015 NBQB 245 (September 2, 2015); and, *R. v. Oland* 2015 NBQB 244 (July 29, 2015), and 063, and 64 *supra*, and notes 81, 95, 97, and 106, *infra* and accompanying texts.

⁷⁹ See note 78 *supra*. The technology that produces, transmits, and analyzes electronic records is very complex, particularly so when it is the basis of large institutional electronic records and information management systems. As to the use of such technology and its serious defects of software and records management and control, see these articles (authored by me, Ken Chasse):

(1) “Admissibility of Electronic Records Requires Proof of Records Management System Integrity” (posted on my SSRN author’s page, December, 2015 (pdf download));

(2) “Electronic Records as Evidence” (SSRN, May, 2014);

(3) “A Legal Opinion is Necessary for Electronic Records Management Systems” (SSRN, Oct., 2014);

(4) “Records Management Law – A Necessary Major Field of the Practice of Law” (SSRN, January, 2016);

(5) “Electronic Records for Evidence and Disclosure and Discovery” (2011), 57 *Criminal Law Quarterly* 284-326;

(6) “Electronic Discovery in the Criminal Court System,” (2010), 14 *Canadian Criminal Law Review* 111-180;

(7) “The Admissibility of Electronic Business Records,” (2010), 8 *Canadian Journal of Law and Technology* 105-193, and,

(8) for the defects of the phrase, “the usual and ordinary course of business,” as used in the business record, and electronic record provisions (*e.g.*, ss. 30(1) and 31.3(c) of the Canada Evidence Act); see: (1) the long list of very common and serious errors in electronic records management systems set out in the above articles; and, (2)

Technology requires legal infrastructure, and legal infrastructure requires lawyers—lawyers who are informed as to the nature, weaknesses, and dangers of such technology so that they may competently use and challenge such sources of evidence.

Unfortunately, the underlying theme of much of legal literature about the changes that electronic technology has brought to the law of evidence is, “don’t worry, nothing much has changed.”⁸⁰ There is insufficient regulatory law. For example, the rules of electronic discovery and admissibility force the evidence produced by different technologies into the same fixed rules of procedure. Such attitudes, engendered by an entrenched campaign to reduce the time and cost of legal proceedings, unrealistically downplay the complexity of electronic records management systems and the prevalence of their errors and defects. It is therefore dangerous to the ability of the courts to avoid wrongful decisions, civil as well as criminal. There is a price to be paid in legal infrastructure and legal proceedings for societies’ dependence upon new technologies. For example, the transition of mass transportation by horses to that of motor vehicles has exacted a huge increase in infrastructure including laws, the size of police forces, the justice system, and the size of governments and various professions, which increases have not stopped because of the need to maintain the safety and effectiveness of motor vehicle transportation.

Technology does not change its nature to suit the law of evidence. The law of evidence must be amended and flexibly applied to realistically set a fair division for each different technology; for example, deciding what is sufficient evidence of reliability (and fairness) to justify transferring the onus of proof to provide “evidence to the contrary.” Instead, the caselaw attempts to force each technology to endure a fixed procedural law. As so it is that the law goes off in one direction and reality in another direction. Recognizing and applying Canada’s national standards for electronic records

“Electronic Records As Documentary Evidence” (2007), 6 Canadian Journal of Law and Technology 141, at 150-151. An electronic records management system that has no serious defects is very rare.

And there are a number of short “electronic records management systems” articles (ERMSs articles) listed on [my *Slaw* author’s page](#).

My knowledge comes from having worked with experts in electronic records management systems technology for many years in the servicing of such institutional records systems. I provide the legal opinions that accompany their reports to institutional clients.

⁸⁰ See for example this article by David M. Paciocco, “Proof and Progress: Coping with the Law of Evidence in a Technological Age” (2011), 11 Canadian Journal of Law and Technology 181. It was heavily relied upon in the *Oland* murder case, notes 63, 64, and 78 *supra*, and notes 95, 97, and 106 *infra* and accompanying texts. It underplays to a fault, the impact that technology should have upon discovery, admissibility, and other procedures for dealing with evidence—particularly records because they are now the most frequently used kind of evidence.

management in electronic discovery and admissibility of evidence proceedings would be “a great leap forward.”⁸¹

But who will educate the legal profession? That should be the function of a support service that is part of a civil service, or CanLII. Now instead, the caselaw feeds on itself, recycling its own ignorance of technology. And CPD/CLE programs for lawyers merely make that recycling spin faster by giving it a wider audience. Judges must decide cases using only the evidence and arguments provided by the lawyers who appear before them. So lawyers very badly need such a support service as shown by the decision in *Oland*, and the use of records as evidence.⁸²

- 4 All the services that LAO LAW provides and more, can be provided by CanLII at cost, and in both of Canada’s official languages (English and French). “At cost” would include financing the expert “civil service-type institute” discussed in the next section (section 10, p. 49). Cutting costs by cutting competence,” by way of giving legal research work to law students and unspecialized, inexperienced lawyers, can no longer be justified. The law is now too voluminous and complex. If the necessary supervision of such “junior” people were adequate, there would be no cost-saving.
5. Being a single source of law and legal opinion services, it would be a powerful instrument for making Canadian law uniform throughout Canada, just as the model Acts of the Uniform Law Conference of Canada have brought a great similarity among the provincial, federal, and territorial statutory laws of Canada, and their case law based upon those laws.
6. Its materials would enable technology-based rules of procedure and guidelines to be correct, instead of the serious omissions in texts like the Sedona Canada Principles—Addressing Electronic Discovery 2d.⁸³

⁸¹ For the National Standards of Canada for electronic records management systems (ERMSs)(notes 61 and 72 *supra*, and notes 91, 103, 105 *infra*), and the attitudes in regard to applications for further disclosure, see notes 61 and 62 and accompanying texts *supra*. For an example of procedural law being unfairly applied due to a disregard of the nature of the technology that produces critically important evidence, see: Ken Chasse, “Guilt by Mobile Phone Tracking Shouldn’t Make ‘Evidence to the Contrary’ Impossible” (SSRN, October 2016, pdf). See also: R.P. Coutts & H. Selby: “Problems with cell phone evidence tendered to ‘prove’ the location of a person at a point in time” Digital Evidence and Electronic Signature Law Review, Digital Evidence and Electronic Signature Law Review, 13 (2016) 76.

⁸² See the text accompanying note 60, and notes 62 and 81 *supra*, and notes 91 and 97 *infra* and accompanying texts. The law on the use of evidence produced by complex technology and technical systems is too simplistic. It is like astrology before it became astronomy and alchemy before it became chemistry. It doesn’t provide sufficient opportunity to challenge the reliability of such sources of evidence, particularly so in criminal cases.

⁸³ See, the 4 *Sedona Canada* texts, which are:

(1) The Sedona Canada Principles—Addressing Electronic Discovery 2d (2015, pdf).

7. The resulting concentration of expertise, and scaling-up of the volume of production in one facility in providing such services would bring further innovation, so as to maintain their high quality and continuing evolution as the needs of those who use those services evolve.
8. Such a facility can provide materials and speakers, and other support services for every continuing professional development (CPD and CLE) program provided by all of Canada's law societies. And it can become very expert at providing legal education conferences and online seminars throughout Canada. Such materials would include descriptions of and the vulnerabilities of the technology that is the source of much of the evidence used in legal proceedings and services. Ignorance of technology and its relation to evidence is lacking in the case law and therefore in what is provided in CPD/CLE programs.⁸⁴
9. The variety of support services it can provide to the practice of law will evolve as the practice of law evolves in its various forms and needs in all parts of Canada. As LAO LAW's years of experience since its creation in July 1979 have proved, many other support services can be developed from (spun-off from) its initial database of legal research materials. The bigger the volume of production of such a facility, the greater will be this benefit and therefore its ability to cut the costs of legal services.

and, E-Discovery Canada website.

And see also concerning the first edition (but the 2nd edition shows the same lack of understanding of the importance of the quality of records management of electronic records management systems to the reliability of electronic records): Ken Chasse, (1) "The Sedona Canada Principles are Very Inadequate on Records Management and for Electronic Discovery" (Nov., 2014); and, (2) "Electronic Discovery—*Sedona Canada* is Inadequate on Records Management—Here's *Sedona Canada* in Amended Form" (2011), 9 Canadian Journal of Law and Technology 135.

(2) *The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery*, available from The Sedona Conference, Working Group 7 series, October 2010; online: <http://www.thesedonaconference.org/dltForm?did=Canadian_Proportionality.pdf>;

(3) *The Sedona Canada Commentary on Practical Approaches for Cost Containment*; (April 2011); online: <<https://thesedonaconference.org/publication/sedona-canada-commentary-practical-approaches-cost-containment-public-comment-version>>; and,

(4) *The Sedona Canada Principles—Addressing Electronic Document Production* (Feb. 2007), available from the Working Group 7 site of the *Sedona Conference* website; online: <www.theSedonaConference.org>.

More helpful as to the critically important ERMS dependence (electronic records management system dependence) dependence of electronic records is: *e-Discovery for Dummies* (Wiley Publishing, Inc., 2010), (346 pages; \$23.82 at Amazon.ca); see chapter 14: "Managing and Archiving Business Records" (pp. 235-250).

⁸⁴ See: Ken Chasse, "Sometimes Laws Are Too Important to Be Left to Lawyers – Lawyers Without Technical Support," *Slaw*, January 28, 2016; and, "Guilt by Mobile Phone Tracking Shouldn't 'Evidence to the Contrary' Impossible," (SSRN, October 13, 2016).

10. The importance of such a facility to the practice of law will make clear the need to recognize the legal research lawyer as a formally designated specialist.
11. CanLII's enhanced services could aid more lawyers to practice "preventive law." "Preventive legal services" are more likely to bring clients back for more than the stresses and expense of remedial law. Preventive law is less expensive for the client, but potentially has a larger client base, and will be applied more often for the average client than remedial legal services.⁸⁵ And,
12. It could instruct law offices on how to create an office database of reusable materials so as to maximize the re-use of all finished work-product. That is the single most effective practice for improving cost-efficiency.

10. The support services to be provided by a "civil service for law societies"

Two hundred years ago, doctors and lawyers had similar work situations. Each had only his/her own personal resources and maybe an assistant or two. But now there is no comparison: no doctor's office provides all treatments and all remedies for all patients the way a lawyer's office does for all clients. In the medical profession the innovation never stops. In the legal profession it never started. To blame is the lack in innovation in law society management structure, *i.e.*, maintained as always by part-time amateurs who are able to give top priority to the place where they earn their own living, such that everything else must remain compatible with that prioritization of duties.

⁸⁵ For example, because of the importance of electronic records to business, litigation, and all forms of recorded communication, and the complete dependence of electronic records upon their electronic records management systems for their existence, accessibility, and integrity, "records management law" will have to become a major field of the practice of law, and then an area of specialization. Electronic discovery will be one of its subdivisions, which has already begun to happen; see this announcement: [BLG hires Canada's leading electronic discovery lawyer](#). And see these articles by Ken Chasse (pdf.):

- (1) "[Records Management Law – A Necessary Major Field of the Practice of Law](#)" (December, 2015);
- (2) "[A Legal Opinion is Necessary for Electronic Records Management Systems](#)" (October, 2014);
- (3) "[Electronic Records as Evidence](#)" (May, 2014);
- (4) "[The Dependence of Electronic Discovery and Admissibility Upon Electronic Records Management](#)"; and,
- (5) "[Solving the High Cost of the 'Review' Stage of Electronic Discovery](#)" (June, 2015).

These articles explain the consequences of the "system integrity concept" ([Canada Evidence Act](#) s. 31.2(1)(a)) that is expressly the foundation of the electronic records provisions that are in 11 of the 14 Evidence Acts in Canada (including the articles of "Book 7, Evidence" of the [Civil Code of Québec](#) and the related statute, [An Act to Establish a Legal Framework for Information Technology](#), R.S.Q. 2001, c. C1-1, ss. 2, 5-8, and 68). And that concept always applies regardless the content of any Evidence Act or law of evidence. Technology does not change its nature, dangers, and vulnerabilities, to suit any law or practice. Laws must have flexibility to adjust to the nature of each technology and not vice versa.

Law societies should be sponsoring highly specialized, high volume support services so as to take advantage of this simple management principle: “nothing is as effective at cutting costs as scaling-up the volume of production.” Bigger is better. If automobiles were still produced in the same way that legal services are produced, they too would be unaffordable to the majority of the population. If medical services were provided like legal services, doctors, like lawyers, would work separately in highly ‘silo-ed’ offices that share nothing. But the pressure that spawned socialized medicine also created the honeycomb of specialized cells that constitute the infrastructure by which medical services are provided.

Trying to improve the way legal services are presently provided without creating the necessary support services is like adding a motor to a bicycle when the solution requires a motor vehicle. That is why law society “access to justice” committees have made no progress towards a solution. If the problem were solved, all ABS proposals would be unnecessary and irrelevant. Therefore it is irresponsible for a law society to provide such great attention to ABS proposals, while the problem remains dormant without an attempt at a solution.

The assumption that legal services are now produced by lawyers in the only possible way of producing them, has no basis in fact. There has been no study of the cause of the problem by the appropriate experts. It is not a legal problem. It requires expertise that lawyers don’t have, but they don’t retain (hire) that expertise. As a result, law societies have no program to solve the problem of unaffordable legal services, and their “access to justice” committees have made no progress towards a solution, while the victims continue to grow in number, they being:

- (1) the majority of the population that cannot afford a lawyer’s advice;
- (2) the courts overwhelmed by self-represented litigants;
- (3) the legal profession itself, and,
- (4) improved funding for legal aid organizations being now very politically unwise because the necessary tax money would come from that majority that cannot afford legal services and cannot qualify for legal aid services.

In other words, when law societies fail, the justice system fails.

Therefore, the necessary solution to the unaffordable legal services problem is for Canada’s law societies acting together to create the necessary support services that will again make legal services affordable. That will require more than the creation of legal research support services. It is necessary to isolate those parts of the work involved in providing each legal service that could be more cost-efficiently done by a specialized support service for each such part. And each such support service would be available to all lawyers. The necessary high degree of specialized competence would thereby be

combined with scaled-up volumes of production so as to maximize the economies-of-scale obtainable.⁸⁶ Costs would be lower than those of any law firm. There being no competition, success and large revenues would follow.

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 (see below p. 68). They will use support services that help them to improve their practice.

Because general practitioners 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 their procedures. As a whole, their performance determines the reputation and financial welfare of the legal profession. But it is impossible to improve the existing method of delivering legal services sufficiently to make legal services affordable. The method itself must be replaced by conversion to reliance upon specialized support-services, as has happened everywhere else where the pressure of competition or of the population it serves compels innovation, as is true of medical services. LAO LAW happened because of pressure applied to LSUC's management of Legal Aid Ontario (LAO).

If legal services were affordable: (1) lawyers would be well supplied with clients; (2) the profession would be expanding; (3) have a very good economic future; and, (4) be asking the law schools to expand their enrolments. Instead, the opposites are true.⁸⁷

Thus is created the legal profession's 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, but without increasing their price. For that purpose, specialized support services are needed to improve cost-efficiency, and to keep lawyers informed of the various developments in: (1) a rapidly expanding volume of laws; (2) their complexity; (3) their dependence upon and regulation of technology; and, (4) the great increase in the volume of records produced by the electronic automation of records and their management.

Necessary to a solution to the problem is a support services for each of those parts of the work of providing each legal service that can be provided more cost-efficiently than can any law firm. Legal research is the most necessary example. A support service achieves its high efficiency by highly specializing each major factor of production—staff, materials, equipment, database management, 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.⁸⁸ They are

⁸⁶ “Nothing is as effective at cutting costs as scaling up the volume of production .” Bigger is better. As Henry Ford said, “If you want to sell your product at a price, make more of them.”

⁸⁷ See: Ken Chasse, “[The failure of law societies to accept their duty in law to solve the unaffordable legal services problem](#)” (August 11, 2014, and [excerpted on *Slaw*](#) on September 11, 2014.

⁸⁸ The larger law firms have begun to develop their own electronic discovery specialists; for example, [this announcement](#): “BLG hires Canada’s leading electronic discovery lawyer to lead e-discovery for the Firm. Toronto

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 volume of production possible.

Therefore law societies should develop the expertise necessary to detect those parts of legal services work in each major area of legal services that do need to be aided by a specialized support service. Unfortunately, law society management in Canada shows an unwillingness to bring about such innovations, and most likely they are not aware of the need.⁸⁹

(1) The Principles of Centralized Legal Research—a “support services” method

This section exemplifies the principles of the support services method of producing legal services. In developing LAO LAW as a legal research support service, I specialized the staff, the materials used, and the principles of database management, as follows. The staff of research lawyers were divided into separate sections such as, criminal law, family law, etc. And if I had had a larger administrative budget, I would have further subdivided them. The criminal group could have been divided into separate sub-specialties such as, homicide, motor vehicle, and sexual offences, and the principles of sentencing. Standard memoranda were written for “high volume issues,” such as “drunkenness as a defence,” and, “expert opinion evidence,” and, in family law, “best interests of the child.” They were kept up-to-date to the day by adding new cases, statutory amendments, and other references. Groups of them were assigned to each researcher for updating, each group being related to each researcher’s sub-specialty.

As a result, a legal opinion could be provided by accompanying a text, written to fit the fact-pattern provided for each lawyer’s client, with one or more standard memoranda.⁹⁰ With time, “drunkenness as a defence” became a group of memoranda, each designed to fit different contexts for that defence. After

(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#>. See also the articles cited in notes 30, 62, 74, and 80-83 *supra*, and note 105 *infra*.

⁸⁹ See section 1 above (p. 6).

⁹⁰ I do not mean to include very contract-oriented *etc.*, highly personalized, and lengthy legal opinions provided for large commercial transactions. For that see, Wilfred M. Estey, *Legal Opinions in Commercial Transactions* 3rd ed. (766 pages) (LexisNexis Canada Inc., 2013). Rather, I’m referring to legal opinions that provide the legal infrastructure of case law and other legal literature for a fact-pattern and how to apply it.

several years, there were 400 standard memoranda in criminal law alone. Now, there are 1,000 criminal law and evidence memoranda that can be downloaded by those lawyers who do legal aid cases.

The standard memoranda were put into an advertised catalogue and sold separately. But LAO (Legal Aid Ontario), not being a commercial agency, I did not have the funds or the time for sophisticated marketing. And all dollars earned became part of LAO's general funding and not monies that I could use to pay the costs, improve salaries, or expand the services of LAO LAW. LAO being a poorly funded social welfare agency is not intended to launch a viable and aggressive commercial operation.⁹¹

Nonetheless, such a legal research service provided for the benefit of lawyers' non-legal aid paying clients, would have earned LAO a lot of money for its administration. The shortages in its administrative budget were LAO's greatest problem, as I was told in relation to my budgeting for LAO LAW. The service could have been expanded to meet the demand, which would have been considerable because LAO LAW's services were a proven success, and had a very good reputation and had no competitors. But my request to do that was refused with no reason given for the refusal.⁹²

As a result of the Legal Aid Services Act, 1998, LSUC was removed as the manager of LAO because of its conflict of interest and refusal to innovate.⁹³ Those are the very same two causes of the present unaffordable legal services problem.

⁹¹ As was explained to me by one of the benchers of LAO's Legal Aid Committee, such improvement would make LAO a better foundation upon which to build a government program for socialized law, which was LSUC's greatest fear and conflict of interest. Because of conflict of interest, it was recommended that the LSUC not be the manager of LAO. See the references to the *McCamus Report* in notes, 13(10) *supra*, and 88 *infra*, by Professor John McCamus of Osgoode Hall Law School at York University in Toronto.

⁹² Such refusal was consistent with LSUC's conflict of interest. That conflicted self-serving management was explained to me by a bencher of LSUC's Legal Aid Committee, shortly after I began work at OLAP [the Ontario Legal Aid Plan, being the predecessor to Legal Aid Ontario] in Toronto, on Tuesday, July 3, 1979, to create the centralized legal research unit, now called LAO LAW. The Legal Aid Committee was OLAP's board of directors. He told me that every year at that time, there was a vote in LSUC's Convocation of benchers on the issue of whether LSUC should remain as OLAP's manager. It was always a close vote he said, the minority view being that the bad reputation OLAP had, by reason of the population's dislike of OLAP's providing free legal services to what were considered to be "deadbeats," being people who did not want to work, and criminals, would badly hurt LSUC's reputation. His expression was, "legal aid is like a lightning rod for attracting criticism." Therefore LSUC should distance itself from OLAP. But the majority view expressed the fear of socialized law, and that therefore LSUC should remain, "in the best strategic position in order to cope with any such government program," he said. There could be no better position for exercising one's choice of strategies than to be the manager of the most important piece of infrastructure for any government program of socialized law.

⁹³ See: (1) the report by Professor McCamus of Osgoode Hall Law School in 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 by the Ontario *Legal Aid Services Act, 1998*, S.O. 1998, c. 26;

(2) the report by Professors Zemans and Monahan, also of Osgoode Hall Law School at York University, in their 1997 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 (at pages 2-3, and 65-66), stating: "At the same time, we do not believe that the Law Society has demonstrated the capacity or the willingness to undertake the fundamental restructuring of the Plan that we believe to be necessary if

The third major factor of production specialized for LAO LAW's legal opinion service was, "the principles of database management," which are: (1) catch all finished work-product in a database for purposes of maximizing its re-use; (2) all work-product is to be highly indexed, so as maximize speed and accuracy of accessing relevant material; and, (3) purging, meaning that the researcher, on completing a legal opinion, is to index it in detail, and purge the database of thus superseded legal opinions. "Purging" meant deleting the index strings for each superseded text from the database that was the index. Therefore there was no need to delete the superseded opinions themselves. The database thereby stayed "lean," with a minimal of duplication. Maximizing re-use to maximize cost-efficiency will rapidly create a database of duplicative and over-lapping materials unless such is "purged" on completion of each new legal opinion. Thus accessing relevant material could be done very quickly and very accurately.

Because researchers were each working in a narrow speciality, they became very familiar with the relevant materials in our database, and with all relevant published materials in their area of research. That made indexing and purging by researchers very easily done. Very often the legal opinions they used to create new ones, were ones that they themselves had written. Such are the substantial benefits provided by high degrees of specialization.

The results of such "support service methods" are: (1) the highest degree of competence possible; (2) the greatest cost-saving; (3) the best response time; and, (4) the lowest possible probability of making an error that hurts the client. When students and unspecialized, inexperienced lawyers do the legal research work, the opposite results prevail. Using this system, a researcher could often complete two legal opinions per day, and, we worked to the rule that a request for a legal opinion today, could be supplied within a day or two. But quality control for such production methods requires close vigilance that the rules are being applied. Every day I read some of the opinions of my researchers because every opinion was to be proofread by another researcher before it was sent to the requesting lawyer.

Ontario is to achieve the maximum benefit from the still-considerable funding that is available for legal aid in this province." (The "Plan" being the Ontario Legal Aid Plan (OLAP), the predecessor of LAO.);

(3) The "Trebilcock report," *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. It adopted all of the recommendations of the McCamus Report; and,

(4) Ken Chasse, "No Longer Is It Possible to be Both a Good Lawyer and a Good Bencher" (*Slaw*, May 29, 2017, at p. 4).

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 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.

Such a legal research support service requires a very high degree of quality control. And its legal opinions and all legal materials are far more up-to-date than are the products of law book companies. The response time is much better as is the cost-efficiency, and the probability of making an error that hurts clients is substantially lower. The same differences apply even more so to the use of law students and “clerking” for judges to do legal research. The greatest contributor to the quality of legal research is experience. Law students and clerking do not have it; a career-oriented, highly specialized legal research lawyer has it in comparative abundance.⁹⁴

The law is becoming too voluminous, complex, and bound up with technology, as are the methods of doing legal research. The most common sources of evidence are highly complex electronic systems. They are not being challenged for their reliability and history of performance. Legal services should not continue to be based upon the work of inexperienced people. The lawyers who supervise them cannot themselves keep up with that complexity and technology. As shown by the ignorance of technology in the case law, continuing professional development programs (CPD and CLE programs) have proven to be not enough.⁹⁵

They do not provide such knowledge and information, and therefore, nor do electronic discovery in civil proceedings, and the disclosure that the Crown is required to provide to accused persons in criminal proceedings.⁹⁶ Ignorance of technology prevails in the profession. As a result, so it does in the case law, both substantially and procedurally, *i.e.*, the changes in procedure that new technological sources of

⁹⁴ See: Ken Chasse, “The SCC and Lawyers Need Better Researchers Than ‘Clerking’ and Law Students” (*Slaw*, Feb. 1, 2016).

⁹⁵ As to the inadequacies of the case law, see for example: (1) the references to the *Oland* murder case in notes 63, 64, 78 and, 80 *supra*, and notes 97 and 106 *infra* and accompanying texts; (2) the articles cited in notes 30, 61, 74, 78, and 80-83 *supra*; and, (3) for a particular example, the decision in, *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.* 2012 ONSC 7243, [2012] O.J. No. 6082, in effect holds that the state of a party’s electronic records management system (ERMS) is irrelevant to electronic discovery proceedings. Specifically, it holds that the parties are not to demand to know how searches for relevant records were conducted, nor can they investigate parts of an opposing party’s ERMS (electronic records management system).

This ignores the fact that the accessibility and storage of electronic records are essential parts of ERMS technology. Because an electronic record is but an electronic impression on an electronic storage device, it is dependent upon its ERMS for everything that it is and can be used for. Therefore, using an electronic record without inquiring into the state of records management of its ERMS, is like using an expert witness without inquiring into the qualifications of that expert. And therefore, electronic discovery cannot produce fair and accurate results unless the quality of the parties’ electronic records management is investigated, particularly so its compliance with the National Standards of Canada for electronic records management, *Electronic Records as Documentary Evidence* CAN/CGSB-72.34-2017. The case law may give access to a third party expert to look for particular documents or to check a harddrive (hard drive), a desktop computer, or a particular database, but not to check the state of overall electronic records management. It isn’t asked for and the *Sedona Canada Principles* text (note 76 *supra*, and note 95 *infra*) doesn’t deal with it. Bad records management loses, destroys, and corrupts relevant records—see the records management articles cited in notes: 30, 61, 71, 77, and, 80-83 *supra*, and note 104 *infra*, and accompanying texts.

⁹⁶ See: *R. v. McNeil*, 2009 SCC 3, [2009] 1 SCR 66; *R. v. O’Connor* 1995 CanLII 51 (SCC), [1995] 4 SCR 411; *R. v. Chaplin*, 1995 CanLII 126 (SCC); and, *R. v. Stinchcombe*, 1991 CanLII 45 (SCC).

evidence should dictate.⁹⁷ Law societies are not aware of such problems until they are major problems for general practitioners and other lawyers. That is why a legal research support service is necessary. CanLII could do it, and more than pay for itself. The long experience of LAO LAW proves that. But being aware of a problem does not produce an adequate response until there is sufficient pressure to do so.

There are many other parts of lawyers' work that could be supplied by such support services. See: "Access to Justice—Unaffordable Legal Services' Concepts and Solutions," sections 9 and 10 (pdf. July, 2017). And those services that are compatible with flat-fee billing (instead of hourly billing) are also the services that are most easily automated—see: "Automation, Support Services, and Flat-Fee Billing" (*Slaw* July 28, 2017). But allowing ABSs to own law firms is the most expensive way to get that automating software. All lawyers bargaining as a single unit is the least expensive way, *e.g.*, represented by the Federation of Law Societies of Canada, or by a civil service-type agency serving all of Canada's law societies.

The support services strategy is to cut costs by increasing competence by means of a high degree of specialization. The volume and complexity of laws, and their great dependence upon complex technology, which lawyers don't understand and cannot challenge its integrity as a reliable source of evidence, makes specialized legal research support services essential to maintaining competence, particularly that of the general practitioner. CPD/CLE programs lack the necessary quality to do that.

For example, electronically-produced records are now the most frequently used kind of evidence. But the case law provides no examples of challenging the reliability and integrity of a complex electronic records management system. If they are not well maintained, such systems will lose and destroy records and corrupt their data, such that electronic discovery proceedings cannot be relied upon to fulfill their purpose, nor disclosure by the Crown to defence counsel fulfill its purpose to produce adequate retrieval and disclosure of relevant evidence.⁹⁸ The incidence of bad records management is surprisingly high, and their software has high error rates. CPD/CLE speakers and materials don't deal with that. See:

⁹⁷ For example, s. 30 of the Canada Evidence Act still dominates admissibility proceedings in regard to electronically-produced records, which are now the most frequently used kind of evidence. But s. 30 is obsolete. It was enacted in 1969 when such sources of evidence were still far off in the future. But the electronic records provisions, ss. 31.1-31.8 CEA, which incorporate the "system integrity concept" (s. 31.2(1)(a)), which is the foundational principle of electronic records management systems technology, is not applied and all but ignored. Compare for example, this article, David M. Paciocco (of the Court of Appeal for Ontario), "Proof and Progress: Coping with the Law of Evidence in a Technological Age" (2013), 11 *Canadian Journal of Law and Technology* 181, which was heavily relied upon in *R. v. Oland* 2015 NBOB 245, with the technical detail as to mobile phone tracking evidence provided by this article: R.P. Coutts and H. Selby, "Problems with cell phone evidence tendered to 'prove' the location of a person at a point in time" (2016), 13 *DE&ESLR* 76-87 (pdf.). In regard to *Oland*, see notes 63, 64, 78, 80, and 95 *supra*, and note 106 *infra*.

⁹⁸ For example, police officers are not trained to ask their sources of records, "has your records management system been certified as being in compliance with the National Standards of Canada for electronic records management (72.34 and 72.11), and if so, when, and may we have a copy of the document certifying compliance? The same

- (1) “Records Management Law – A Necessary Major Field of the Practice of Law” (SSRN, pdf., January 2016);
- (2) “Guilt by Mobile Phone Tracking Shouldn’t Make ‘Evidence to the Contrary’ Impossible” (SSRN, pdf., October, 2016); and,
- (3) “Electronic Records as Evidence” (SSRN, pdf., May 2014).

(2) A civil service for law societies

The longstanding massive damage and misery being caused by the unaffordable legal services problem compels this conclusion: the problems of law societies are now such that they need an agency that performs a civil service function—one to serve all of Canada’s law societies. The problem has victimized the majority of society for years. It shows that: (1) law societies are the “lynch pin” of the justice system—when they fail, it fails; and that, (2) law societies’ major problems: (a) will be national; (b) require national solutions to maximize cost-efficiency and competence; and, (c) will be problems for which lawyers lack the necessary expertise.

Needed is a civil service for law societies because it has these advantages over present law society management:

- (1) it is permanent;
- (2) it is a organization of continuously development expertise;
- (3) it is charged with a duty of vigilance as to public need; and,
- (4) it is capable of carrying out programs requiring long-term development—development capable of bridging elections such as bencher elections.

Only one such civil service for all of Canada’s law societies is necessary. Their major problems will be the same, have the same cause, and require the same solution, just as does the unaffordable legal services problem.

A civil service can be proactive before problems are major problems, rather than waiting until they are sufficiently advanced to be observable by the inexperienced and inexpert. That will be needed to bring, for example, the automation of routine legal services, and better marketing of legal services. And it would be much more expert in conducting in Ontario, the Law Society of Upper Canada’s (LSUC’s) recent “Dialogue on Licensing” estimate as to the future need for lawyers. It could do so for all of Canada and would be in a better position to estimate the impact of the highly competitive LegalZoom, LegalX *etc.*, commercial legal services market than can any law society. The materials being distributed (pdf) by LSUC for its “Dialogue on Licensing” are extensive. But this is a subject it has been developing for 220 years (since 1797), and one that Canada’s law societies can share, and it is one within lawyers’ expertise.

should apply in civil proceedings. Without information as to the state of records management system maintenance, there can be no assurance that all relevant records have been produced.

It is an example of the long-term development that a “civil service for law societies” can conduct in relation to any topic and do so in a much shorter time.

Law societies should be sponsoring innovations in the methods of doing the work to provide legal services comparable to what is being provided commercially by, LegalZoom, MaRS, and, MaRS LegaX and LgalRnD, to improve access to legal services. If there were such a civil service advisor, benchers could then justify giving priority to their own sources of income, *i.e.*, to their clients and employers. Now, their much greater public duty to solve the problem of unaffordable legal services dictates that they should not give priority to personal duties over their public duties.

Ryerson University in Toronto and the University of Ottawa provided that necessary civil service function to create LSUC’s Law Practice Program (an alternative to traditional “articling” by law students within law firms); Ryerson-the English language version; Ottawa-the French language counterpart.⁹⁹ Expand their function to a bilingual national civil service for all of Canada’s law societies. Such a function is within the faculties and skills of universities as show by the many varieties of institutions, agencies, colleges, and associations that are now an integral part of their facilities and management.

As to financing it: create CanLII’s legal opinions service, provided at cost, plus the necessary profit. I learned how when I created LAO LAW, which began on Tuesday, July 3, 1979 (see section 8, p. 40 above). Word-processing was rudimentary, lawyers wrote out their texts such that a lawyer without a secretary was a dysfunctional lawyer. Nevertheless, by 1988, my research staff was producing 5,000 legal opinions a year for lawyers willing to do legal aid cases. That production volume was achieved because it helped lawyers make money instead of doing their own legal research. Therefore I can confidently state that CanLII’s national market will earn more than enough money. Therefore, I am not recommending the use of some radical, untried technology.

Otherwise, a substantial change in the management of the legal profession is needed. The great volume of laws and their complexity *etc.*, mean that people have never needed lawyers more. If legal services were affordable, lawyers would be overwhelmed with work and begging the law schools to increase their student populations. Instead, the opposites prevail. Therefore, if law societies won’t accept their need for a “civil service for law societies,” let us rid our profession and Canada’s population of: (1) the law societies’ pathetic “access to justice” performance; and, (2) the idea that the self-regulation of the legal profession can be competent.¹⁰⁰

⁹⁹ And Ryerson University’s recent proposal for a law school, that would provide new forms of legal education, would greatly compliment such a civil service function. See also arguments for and against another Ontario law school by Michelle Cook, “Ryerson’s Law School Proposal: Gaps in Legal Education” in, the Court.ca: Part 1 (Oct. 27, 2016), and, Part 2, (November 23, 2016).

¹⁰⁰ For a recent Canadian treatise on the “self-regulation” debate, see: Professor Noel Semple, *Legal Services Regulation at the Crossroads—Justitia’s Legions* (Edward Elgar Publishing Limited, 2015).

Law firms need the higher degree of specialization, and scaling-up of production volumes, and resulting higher level of cost-efficiency that only such support services can bring to the practice of law. These are also the types of advice and services that a national civil service-type organization, serving all of Canada's law societies, lawyers, and judges, could bring about and supervise.

The "alternative business structures" model (ABS model), which allows strings of law firms to be owned by investors and enfranchised,¹⁰¹ would provide only some of the services set out in the list below. And they would be controlled and provided to law firms by the investor corporations that owned those law firms to whatever percentage allowed. Once a law firm entered an "ABS contract," it would be "stuck" with its fixed manner of receiving such benefits. Instead, the use of specialized support services can be determined for each client's needs. And those support services would be provided within the regulatory jurisdiction of law societies and total control of law firms. But that requires the institute that I propose, provide the know-how so as to avoid the "deprofessionalizing" that the ABS model causes by bringing about a transition to much more highly "commercialized and industrialized" methods of providing legal services.¹⁰²

Also, individual law firms contracting with an ABS provider, will have a very weak bargaining position. The terms will thereby be dictated by the investment provider, particularly so law firms desperate for clients and survival. In contrast, what I recommend herein leaves all such benefits and more, within the control of law firms and their law societies. And a single agent acting on behalf of all law firms wishing to have such support services (such as automating software for routine legal services, and professional marketing advice), would have a bargaining position of maximum strength. For example, a contract to supply thousands of lawyers with automating software would be extremely attractive to the providers of such software packages.

Law societies are now like an elected government without a civil service. Therefore they lack the ability to govern, *i.e.*, they don't have the competence to cope with such major problems because such problems are not legal problems. And law societies don't retain the necessary expertise with which to produce the innovations that would keep legal services affordable. How to create the necessary "civil service for law societies" and pay for it, is set out in that last article cited below. The component parts for

¹⁰¹ See: *Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper* (LSUC, September 24 2014) at pp. 11 and 15. See also section 11 below, "Alternative Business Structures and Affordable Legal Services," (p. 63), and notes 11, and 26 *supra*, and notes 101, 114, 119, 123, 125, 129, 130, and, 144, and accompanying texts *infra*.

¹⁰² *Ibid.* See also: (1) Raymond H. Brescia, "*Uber for Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services*," 64 *Buffalo Law Review* (2016) (forthcoming) Draft: March 25, 2016; and, (2) John Flood, "Will There Be Fallout From Clementi? The Repercussions for the Legal Profession after the Legal Services Act 2007," *2012 Michigan State Law Review* 537, at 538 (in Issue 2). See also note 41 *supra*, and notes 135, 140(2), and 146, and accompanying texts *infra*.

competent law society management already exist. They need merely to be assembled with good management then and thereafter. The component parts being:

- (1) LAO LAW's technology of centralized research to create a legal opinion service at CanLI, provide at-cost;
- (2) CanLII's present resources and national market; and,
- (3) Ryerson University and the University of Ottawa to provide the law societies' bilingual civil service agency.^{103 104}

(3) The civil service's services for law societies

Here are some the services that a law societies-sponsored, or Federation of Law Societies of Canada-sponsored, civil service, could provide: (1) so as to deserve the continuation of the self-regulation of the legal profession, free from government intervention; and, (2) be able to compete with the commercial production of legal services by such as, LegalX LegalZoom, and, RocketLawyer. They are replacing the general practitioner. (Consider the following along with the support services that CanLII could provide—see section 9, pages 49-57):

(1) Provide the cost-efficiency that will again make legal services affordable by determining what new specialized support services, in addition to legal research, are necessary to maintaining the existence of the middle-sized and smaller law offices, and maintaining their ability to provide legal services at reasonable cost. That would enable legal services to remain affordable and of high quality so that lawyers can 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 management technology.

For example, support services could be established for these areas of general practice: family law; real estate; estate planning; contracts; bankruptcy; tax law; criminal law; immigration; and, aboriginal issues. Among other services, they could provide the standard forms and other texts used in each of these areas

¹⁰³ Ryerson University in Toronto and the University of Ottawa, together, provided that civil service function for LSUC's Law Practice Program (LPP). Ryerson University provided the English language version, and the University of Ottawa the French language counterpart. Ryerson University's "About Ryerson's LLP" webpage states (first paragraph): "Ryerson's Law Practice Program (LPP) is the first of its kind in Ontario. It's an innovative alternative to traditional articling through a rigorous and demanding eight-month program combining on-line training and experiential learning with a hands-on work term. Ryerson works with the Law Society of Upper Canada and the legal community, including a strategic alliance with the Ontario Bar Association, to deliver a dynamic program that prepares Law School graduates to succeed in their legal practice and careers."

¹⁰⁴ And Ryerson University's recent proposal for a law school, would greatly compliment such a civil service function. See the arguments for and against another Ontario law school by Michelle Cook, "Ryerson's Law School Proposal: Gaps in Legal Education" in, the Court.ca: Part 1 (Oct. 27, 2016), and, Part 2, (November 23, 2016).

of practice. Lawyers can decide if and when they want the assistance of a support service. Such support services can be made to have a substantial impact upon the cost of legal services.

(2) Remove ignorance of technology—technology that produces the evidence by which legal proceedings and legal services are determined. Otherwise the probability of wrongful decisions and legal services will be unacceptably high.¹⁰⁵ The nature of the technology underlying laws must be well understood by lawyers and judges, otherwise the laws will be very inadequately applied.¹⁰⁶ A civil service could provide that necessary advice as to the nature of that technology and how it relates to the laws that regulate the use of the evidence it provides. Most evidence now comes from complex electronic systems and devices that go unchallenged; *e.g.*: electronic records management systems; mobile phone communications system used for tracking the locations of mobile phone users; and, breathalyzer devices.

(3) Automation: a civil service agent 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-

¹⁰⁵ An example of the ignorance of technology that is diminishing the quality of justice is the text, *The Sedona Canada Principles—Addressing Electronic Discovery* 2d ed. (November, 2015). It is the predominate authority for conducting electronic discovery proceedings in Canada (and it is 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 of the first edition (from which the same shortcomings have been carried forward into the second edition), Ken Chasse, “The Sedona Canada Principles is Very Inadequate on Records Management and for Electronic Discovery” (pdf., SSRN, November, 2014). The *Sedona Canada Principles* text is very similar to the American, *The Sedona Principles, 2nd Edition* (June 2007).

¹⁰⁶ An example of technology's complexity and weaknesses not being adequately understood is provided by, *R. v. Oland* #4 2015 NBQB 245 (CanLII), along with, *R. v. Oland* #3 2015 NBQB 244, being pre-trial voir dire decisions concerning the admissibility of cellphone tower location records in a case that resulted in a conviction for second degree murder. The analyses by the trial judge, J.J. Walsh J., is very thorough and very good. But it had to be based upon case law and secondary legal literature that reveals a very inadequate knowledge of technology. The records provided information as to the time and place of a cellphone, which was of crucial importance to the conviction. The court's decision in *Oland* #4, which determined the admissibility of those records, contains no reference to national or international standards concerning the use and maintenance of the technology involved. It is heavily based upon the opinions and assumptions taken from the writings of lawyers and judges who obviously did not obtain expert advice as to: (1) the high error rates in the software code of the software programs used to operate such large and complex electronic systems as those that provide cellphone services; and, (2) the nature of electronic records management systems technology, and are unaware of the very serious and common defects created by the way it is used. See also notes 63, 64, 78, 80, 95, and 97 *supra* and accompanying texts.

See: (1) the articles listed in notes 30, 61, 74, 86 and, 85-93 *supra*, and, note 104 *infra*; (2) Ken Chasse, “Sometimes Laws Are Too Important to Be Left to Lawyers—Lawyers Without Technical Support.” (*SLaw*, January 28, 2016). (For a list of such serious, common defects of electronic records management systems, see: Ken Chasse, “Records Management Law”—a Necessary Major Field of the Practice of Law, (pdf.) under the heading (p. 2): “The serious defects caused by the inadequate legal infrastructure controlling the use of electronic records as evidence.” As well as being posted on the SSRN (Social Science Research Network), this article also appears at: (2015), 13 Canadian Journal of Law and Technology 57-100.

exactly franchised law firms.¹⁰⁷ 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.¹⁰⁸

(4) Advice as to which legal services can be automated; provide advice in regard to the important relationship between those legal services that can be automated, and those that are compatible with “flat fee billing,” as distinguish from hourly billing. And they are also services that can be most cost-efficiently served by specialized support services. Ease of automation and billing method are both determined by, predictability and repetition. That relationship is explained in this article by, Erika Winston, “Is Your Practice Area a Good Match for Flat-Fee Billing?”:¹⁰⁹

The benefits of flat-fee billing arrangements are numerous, from predictability to efficiency to increased client satisfaction. But not all legal matters are appropriate for flat fees.

¹⁰⁷ LSUC’s ABS “Discussion Paper” notes 11, and 94 *supra*, and, notes 114, 125, 130, and, 144 *infra*) states: (at page 11): “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. 15) “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.”

The ABS Working Group Report to LSUC’s February 25, 2015 Convocation, states (p. 17), that it will continue to review the responses received to its Discussion Paper for purposes of framing the issues for continuing dialogue, and that no recommendations will be forthcoming until that process is completed. See also the summary of progress at pages 71-73 below.

¹⁰⁸ The independence of the judiciary is a constitutional principle arising from the separation of powers 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 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. It 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.

¹⁰⁹ This article appeared in *attorney at work*, on June 16, 2016.

So, how do you know which practice areas are right for a flat-fee structure? The short answer comes down to two words: predictability and repetition.

Some practice areas involve a consistent pattern of tasks, with minimal variation for most clients. For example, templates are often used to create wills. Lawyers retain the basic language of the document and change only the details specific to each client. Charging a flat fee is possible because, in most situations, the drafting of a will is predictable. It involves repetitive processes, so you can adequately predict the amount of time necessary to conclude the matter.

In comparison, litigation is unpredictable and does not as easily lend itself to flat-fee billing. Though not impossible, it's difficult to make an accurate estimate about necessary preparation. You can't predict what pleadings the other side may file, or the pace of the court's schedule. Unforeseen circumstances add to the uncertainty. Despite this, however, there are growing efforts among firms to create viable flat-fee structures for litigation clients

The Shift Toward Flat-Fee Billing and AFAs

After years of debate, it seems the tide has shifted from a critical — almost disdainful — view of flat-fee billing to a more willing discussion that even encourages the transition away from hourly billing. According to an article in the Washington Post, the number of law firm leaders who expect non-hourly billing practices to eventually dominate the legal industry jumped from 28 percent in 2009 to 80 percent in 2013.

Even though litigation is slower to get on board the flat-fee billing train, it seems flat fees and other alternative billing arrangements will eventually become the norm across all practice areas.

- **Related:** *Make What You're Worth: Utility of the Fee Schedule* by Jared Correia

Let's look at some practice areas where flat-fee billing is already standard.

Estate planning. Besides standard wills, other estate planning matters meet the predictability and repetitiveness test. Setting up a trust or processing a simple probate matter involves the same general procedure each time, providing the certainty that makes them ideal for fixed-fee arrangements.

Transactional law. Transactional law is all about contracts: writing them, reviewing them, modifying them. You get the picture. Whether you concentrate on real estate matters or corporate law, contracts and agreements are the bread-and-butter of your practice. The efficient transactional lawyer is armed with an arsenal of templates, essential to effective fixed-fee billing.

Bankruptcy. This is an area of law that follows a very limited set of procedures. The process for filing bankruptcy is extremely predictable. Whether you are filing for an individual or a large corporation, federal law clearly defines the procedural requirements.

Domestic relations. Family law attorneys are no strangers to flat-fee arrangements. (Just take a look at the advertisements for set fee specials for uncontested divorces.) The process of ending a marriage is usually pretty consistent, making many divorce and custody cases well suited for flat-fee billing. Not all domestic relations cases fall into this category, though. Highly contested matters, which will likely require extensive litigation, may be best left under the hourly billing umbrella.

Tax law. There are essentially two types of tax law, transactional and controversial. Transactional tax law deals with the preparation and filing of tax documents, while controversial tax matters deal with conflicts that arise between a client and a department of taxation. The latter often involves unpredictable negotiations and legal appearances, but transactional tax law is much more predictable and conducive to flat-fee arrangements.

While not appropriate for all legal matters, flat-fee provides a viable option for a variety of practice areas. Of course, there are many other considerations, but when evaluating whether flat fees are good for you, start with predictability and repetition.

- **Related:** *Take the Guesswork Out of Flat Fees* by Peggy Gruenke (*Five questions to ask about profitability before implementing flat fees*)

Investigating this important relationship between billing methods, and automation of legal services, is what a civil service could best do. Closely related is providing legal services via the internet and by telephone. Automation will happen, but within which of these three business models: (a) traditional, independent private practice; (b) the commercialized production of legal services; or, (c) ABS-owned law firms?¹¹⁰

(5) Related non-legal services: providing expertise as to how law firms can make available non-legal services that are related to their legal services, such as social workers, accountants, human resources professions, and investment counsellors, and automobile repairs and replacement vehicles and rehabilitation, housing, and employment.

(6) The family doctor intake strategy: the legal profession needs a counterpart, so as to be able to capture the 85% of legal problems that go unserved, by lawyers.¹¹¹ For example, projects that help self-represented litigant (SRLs) should evolve to provide for the legal profession a service comparable to that provided by the family doctor for the medical profession—the “intake” sorting and triage work that directs patients to the right parts of the massive medical infrastructure of, specialized doctors, technicians, technical tests, specialized drugs, and hospital services. And see a “WalMart version” described in item 11 below, “Marketing strategies” (p. 77).¹¹²

¹¹⁰ As to the fear that automated legal services will threaten private practice, see note 18 *supra*, and note 125 *infra* and accompanying texts. As to alternative business structures, see notes 11, 26, and, 102 *supra*, and notes 111, 124, 132, 136, 152, 158, 159, 164, 165, and, 185 *infra*.

¹¹¹ 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.

¹¹² See note 114 and accompanying text *infra*.

(7) The percentages of self-represented litigants: they are a public 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. The assistance of the National Self-Represented Litigants Project (NSRLP) should be sought for purposes of establishing a lawyer-referral service. Such service could negotiate fees in exchange for referrals, which would bring about greater cost-efficiency. (See also item (11) below in this list; “Marketing Strategies.”)

Part of the reason why legal fees for litigation are so high is because lawyers’ in-court work has to make up for the cost-inefficiencies of their out-of-court work. Of course there have to be lawyers in specialized practices that the majority of the population infrequently needs. And so their fees reflect the needs of their clientele and of the demands of their specialization. But the demand that all lawyers increase their cost-efficiency by the creation and use of specialized support services is justified.

The profession as a whole cannot justify its failure to make litigation affordable for the majority of the population. Such failure justifies some version of socialized law.

(8) Solving the high cost of the “review” process of electronic discovery:¹¹³ make the preparation work of a lawyer, including Crown prosecutors, 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, as an integral part of its electronic records management system.¹¹⁴ In this way the same advantages provided by legal research facilities can be made available to litigation lawyers: (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.

Therefore a records management lawyer should show the client how to make a comparable index of the client’s own records database. It will give the client as much useful information for doing business daily, as do its financial records, as well as provide continuous preparation for discovery and trial. Then

¹¹³ See the articles cited in notes 30, 61, 74, 78, and, 80-83 *supra*.

¹¹⁴ Such “classification and indexing” requirements are set out in the National Standard of Canada, *Electronic Records as Documentary Evidence* CAN/CGSB-72.34-2017 (“72.34”, section 6.4.3 at p. 17), published in March 2017. 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 organization (an SDO). The Council and its process of voluntary standardization are created by the Standards Council of Canada Act ss. 3-4. 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 (pdf., SSRN).

the high cost of the “review” stage of electronic discovery would 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”). Such “TAR technology” is based upon an inexact and costly method of review, and is still without a history of proven reliability. It is yet to be proved that it can adequately reduce the cost of electronic discovery for the great volume of litigation that is not the litigation of large organizations and the cost of reviewing the 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.¹¹⁵ Such TAR devices operate on millions of lines of software code. Software code has a very high error rate.¹¹⁶

¹¹⁵ Which makes very important the need for indexing of client databases in order to solve the high cost of the “review” stage of electronic discovery. See the reference to the national standard “72.34” *ibid*. Such indexing involves the use of the key words and phrases that each client uses to conduct business and other actions.

¹¹⁶ A NIST study (the U.S. National Institute of Standards and Technology) in 2002 states: [at: http://web.archive.org/web/20090610052743/http://www.nist.gov/public_affairs/releases/n02-10.htm] “Software bugs, or errors, are so prevalent and so detrimental that they cost the U.S. economy an estimated \$59.5 billion annually, or about 0.6 percent of the gross domestic product, according to a newly released study commissioned by the Department of Commerce’s National Institute of Standards and Technology (NIST). At the national level, over half of the costs are borne by software users and the remainder by software developers/vendors. ...

“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.”

The industry average for software defects is 25 for every 1,000 lines of code. For example, for breathalyzer/intoxilyzer devices (used in Criminal Code s. 253 impaired driving and “over 80” prosecutions), the Draeger 7110 device has 53,774 lines of code that print out on 896 pages. Applying that industry average, it is reasonable to expect 1,344 defects in that device. See: 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’?.” (pp.13-14) presented at the *International Council on Alcohol, Drugs and Traffic Safety*, Seattle Washington, August 30, 2007.

At: https://www.google.ca/?gws_rd=ssl#q=http:%2F%2Fwww.icadts2007.org%2Fprint%2F196sourcecode.pdf

See also, Charles Short, “Note: Guilty by Machine: The Problem of Source Code Discovery in Florida DUI Prosecutions,” 61 Florida Law Review 177 (January 2009). “DUI” means, driving under the influence of alcohol or a drug. See also: “Discovering Source Codes: A Survey,” *Highway to Justice* (ABA, 2009) p. 3, re. compelling production of software source code, which in some cases can be resisted with claims that the manufacturer’s trade secret protects it from discovery.

(9) The electronic discovery lawyer: this specialist would be available to all law firms; the larger firms are now appointing their own electronic discovery” specialist.¹¹⁷ Such specialists are but a necessary first step to recognizing “records management law” as an established field of practice.¹¹⁸ That will be necessary because:

- (a) electronically-produced 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;
- (d) the technology of electronic records and electronic records management systems is the foundation of all of commerce, communication, and movement of information, expert evidence, and of all legal processes;
- (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), upon which Canada’s national standards are based; *e.g.*, see the list of “Normative References” in the 72.34 national standard, section 2, p. 1; and,¹¹⁹
- (f) aiding clients who are frequently at high risk of litigation to always be ready for it; and,
- (g) because records are now the most frequently used kind of evidence, providing information as to the strengths, weaknesses, and required maintenance of electronic records management systems.

Also, inadequate discovery and investigation by lawyers is the number one cause of claims against their providers of professional insurance.¹²⁰ Advice and assistance from a discovery and disclosure specialist would reduce the number of such claims arising from both civil and criminal proceedings.

¹¹⁷ See for example, (at note 84 *supra*) this announcement: “BLG hires Canada’s leading electronic discovery lawyer”; online at: http://www.blg.com/en/newsandpublications/news_1439.

¹¹⁸ See: Ken Chasse, “Records Management Law – A Necessary Major Field of the Practice of Law” (December 1, 2015), online on the Social Science Research Network (SSRN), at (pdf download): <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492724>.

¹¹⁹ The National Standards of Canada for electronic records management systems are listed in note 61, and referred to in notes 74, 91, 105, and, 106, and accompanying texts *supra*.

¹²⁰ The article, “Inadequate Investigation/Discovery Now the #1 Cause of Claims” posted on the blog *Slaw*, on June 3, 2013, by Dan Pinnington, the Vice President Claims Prevention and Stakeholder Relations at LAWPRO, the legal profession’s insurer in Ontario, states that inadequate discovery and investigation by lawyers is the number one cause of claims against the insurer. That is a good indication of the damage caused by the inadequacy of the law that controls the scope of the issues relevant to electronic discovery proceedings. Clients must accept the consequences of the high probability of an opponent’s making an inadequate production of documents. The full article, “Take the Time to Get it Right,” is presented in the August 2012 edition of LAWPRO magazine (vol. 11, no. 3). A .pdf copy is accessible by clicking on the title, Inadequate Investigation/Discovery Now the #1 Cause of Claims as cited in the

Defence counsel in criminal proceedings relying upon “*Stinchcombe* disclosure” from Crown council of “the fruits of the investigation.”¹²¹ But that is limited by the extent of police training, particularly so by a lack of knowledge of electronic records management systems. They can be challenged as to their state of maintenance. Records can be lost, destroyed, and corrupted by improperly maintained and used electronic records management systems, thus resulting in inadequate disclosure. Records are the most frequently used kind of non-witness evidence in criminal proceedings. In comparison, the ABS alternative will not be providing such expert assistance to lawyers in general practice.

(10) Creating new types of specialist lawyers: for example, there is a need for a records management lawyer, see: Ken Chasse, “Records Management Law – A Necessary Major Field of the Practice of Law,” (SSRN January 2016, pdf). As in the medical profession, the on-going specialization of doctors, hospital services, and medical technology, enables a great scaling-up of the work done by each specialist. That provides: (1) an on-going increase in the competence with which such work is done; (2) a reduction in its cost because of that scaling-up; (3) a great reduction in response time because specialization brings greater competence and cost-efficiency; (4) flexibility to adapt to new technology; and, (5) a great reduction in the probability of making an error that damages the client’s legal position.

In contrast to using “greater specialization as the route to greater cost-efficiency,” the present methods of production used by law firms are based upon a “cutting costs by cutting competence” strategy. For example, legal research costs are lowered by having law students, paralegals, or inexperienced young lawyers do it. But legal research is the foundation of good legal advice which is the purpose of the legal profession.¹²²

Slaw blog post; online: <<http://www.slaw.ca/2013/06/03/inadequate-investigationdiscovery-now-the-1-cause-of-claims-2/>>.

¹²¹ In *R. v. Stinchcombe* [1991] CanLII 45 (SCC), [1991] 3 SCR 326, Sopinka J., delivering the judgment of the Court, established the obligation of Crown counsel to provide to defence counsel, the “fruits of the investigation” that are the basis of the resulting criminal offence charges. The need for such assistance provided to general practitioners by a specialized electronic records management lawyer has been created by the further development of this disclosure obligation; see: (1) *R. v. McNeil* 2009 SCC 3, [2009] 1 SCR 66; (2) the Martin Committee Report, 1993 (*Report of the Attorney General’s Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions*), Chapter 3, ‘Disclosure’ (pp. 143-274); (3) *R. v. O’Connor*, 1995 CanLII 51; (4) *R. v. Chaplin*, 1995 CanLII 126; (5) the *Report of the Criminal Justice Review Committee*, 1999, Chapter 5, “Crown Disclosure,” which amplifies the work of the Martin Committee; and the latest Supreme Court decision, (6) *World Bank Group v. Wallace*, 2016 SCC 15.

¹²² As to legal research work, see: Ken Chasse, “The SCC and Lawyers Need Better Researchers Than ‘Clerking’ and Law Students,” (posted on the blog, *Slaw*, February 1, 2016). The records management lawyer-specialist’s functions include:

- (1) writing legal opinions as to records systems’ ability to satisfy the requirements of major laws such as those concerning: discovery; admissibility; privacy; electronic commerce; taxation; and the legal requirements of the National Standards of Canada for electronic records management;
- (2) aiding clients to develop indexing systems for all of their records to facilitate doing business as well as litigation;
- (3) provide the “due diligence” to maximize the efficacy of electronic discovery and admissibility proceedings;

Instead, the legal research lawyer specialist needs to be developed. Such a specialized lawyer would have a knowledge of technology so as to be able to advise other lawyers in a support services facility such as a legal opinions service provided by [CanLII](#).

Law schools should therefore be enabled to develop a fourth year—a year in which law students begin to develop an area of specialization, comparable to the purpose of the residency programs used to develop doctors' specializations. And by way of CPD/CLE programs, continue to advance the development of specialist lawyers.

(11) Marketing strategies: providing: (a) knowledge of the use of supply chains, marketing techniques, and models of distribution, “data mining” from the use of related services; and, (b) the use of multiple support services to provide special sales of strategically provided particular legal services, and the know-how as to making the need for lawyers' advice better known to the public, more easily obtained by the public, more desired by the public, and thereby improving the reputation of lawyers.¹²³ Making people aware that problems might involve legal issues that those without legal training will not detect, and that unattended legal problems cause more legal problems. Such are some of the factors related to the methods of commercialized business that could be used to make legal services more accessible and affordable, without losing the necessary professionalism in fact and in appearance.¹²⁴

(4) provide information and advice re. case law;

(5) working with experts in electronic records management systems for clients and employers;

(6) assisting litigation counsel;

(7) providing “preventive legal services” so as to avoid litigation and costly disputes;

(8) make litigation more affordable for middle and lower income people;

(9) providing lawyers with information about the electronic systems and devices that provide the most frequently used kinds of evidence;

(10) providing information as to electronic records management technology;

(11) providing information as to the methods used in forensic science.

See: Ken Chasse, “[Records Management Law – A Necessary Major Field of the Practice of Law](#)” (SSRN, and also at, (2015), 13 *Canadian Journal of Law and Technology* 57).

¹²³ As stated in LSUC's alternative business structures discussion paper (see notes 11, 94, and, 98 *supra*, and, 125, 130, and, 144 *infra*, and accompanying texts *infra*): “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. For that reason, members of the public may seek services from online service providers such as [LegalZoom](#), because of cost but also because of their hours, operations, location or client services. People who use online providers are, from the perspective of the legal profession, lost clients. In other words, the existing business structures are not effectively serving the market. From the perspective of lawyers and paralegals, people who are currently not seeking their assistance represent a significant market opportunity.”

For the impressive accomplishments of [LegalZoom](#) in marketing and avoiding being convicted for, “the unauthorized practice of law” (UPL), see: Benjamin H. Barton, *Glass Half Full—The Decline and Rebirth of the Legal Profession*, chapter 5, “LegalZoom and Death from Below,” (pp. 85-105), (Oxford University Press, 2015).

¹²⁴ See: Raymond H. Brescia, “[Uber for Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services](#),” 64 *Buffalo Law Review* (2016) (forthcoming) Draft: March 25, 2016.

For example, such a civil service agent could negotiate on behalf of all law societies with large commercial outlets such as WalMart, for collaboration. Such is described in this article by Victor Li, in the American Bar Association's *ABA Journal*, posted June 21, 2016, "Law firms are already inside some US Wal-Marts":

When Evan Kaine, a personal injury attorney in Atlanta read a story in the May 2016 issue of the *ABA Journal* about Axess Law opening up offices in Wal-Mart in Canada,¹²⁵ he remembered reading a line about whether these firms would soon be in your backyard.

"My reaction was: 'Yes it is going to be in your backyard,'" Kaine says. "In fact, it already is."

His firm, Kaine Law, has offices inside three Atlanta-area Wal-Marts. Kaine says that he opened his first Wal-Mart office in 2012 before expanding to two additional stores last year.

Like many lawyers, Kaine had seen the statistic about how 80 percent of all low-income Americans have unmet civil legal needs. To that end, he came up with the idea to set up shop in an area where most of those underrepresented people shop.

Kaine says his offices are full-service, although he emphasizes that he has built up relationships with a number of other local firms that specialize in different areas of the law and often refers work to them. In fact, he estimates that he only keeps about 20 percent of the cases that come into the Wal-Mart offices. Kaine says the Wal-Mart offices operate on a fixed-fee basis and even offer a number of free services, including a basic last will and testament and notary public services.

"It's about being able to offer a service to the community," he says. "We have to minimize the stigma of expensive attorneys."

There's a reason why Kaine's Wal-Mart offices have received very little publicity. "We kept it quiet for a number of reasons," he says. "The legal industry does not welcome change, and we wanted to make sure our model was sustainable before we went public with it." Indeed, he's kept such a low profile that when The Law Store opened offices inside Wal-Marts in Joplin and Neosho, Missouri, on June 1, they believed that they were the first firm in America to do it.

According to Kurt Benecke, chief operating officer of The Law Store, the firm had been analyzing the legal market for over a year and could see a giant gap in terms of delivery of legal services between traditional hourly rate lawyers and do-it-yourself sites like LegalZoom. "People were not getting the legal services they needed," Benecke says. "We wanted to step into that gap and provide legal services for everyday people."

When the local Wal-Mart started looking for additional services to provide for their customers, The Law Store jumped at the opportunity. "Wal-Mart is where people go," Benecke says. "The activity of the community used to center around the city square. Now it's Wal-Mart."

¹²⁵ See: "In Canada, Axess offers legal services in Wal-Marts," by Julie Sobowale, posted in the *ABA Journal* on May 1, 2016. Axess Law, a "proudly Canada" in Toronto, offers services in regard to: "Real Estate, Wills & Power of attorney, Probate, Business, Family Law, Immigration, Small Claims & Landlord Tenant, Notary."

Similarly to Kaine Law, Benecke says The Law Store is full service. Unlike their Atlanta counterparts, The Law Store actually handles a variety of cases without referring them to other firms. The firm handles estate planning, family law, traffic violations and misdemeanors, and some personal injury and workers compensation claims. According to Katrina Richards, the head of public relations for the firm, The Law Store provides a menu of its services and will charge clients a fixed fee.

“We want to be as transparent as possible,” Richards says. “We want the consumer to know what they’re purchasing and what their price will be. No hourly billing.” Richards says the firm will also offer fingerprinting services and are currently in talks to become a Transportation Security Administration precheck provider.

Meanwhile, Benecke plans on utilizing technology to help better serve the firm’s clients. The Law Store provides clients with an online portal so that they may track their cases. Additionally, clients can fill out forms at home and submit them through the portal.

“We’re building a platform that will allow us to become more automated,” Benecke says. “That way we can be more efficient and user-friendly. Plus, it allows us to reduce our overhead and enables us to pass those savings to the customer.”

In the meantime, both Kaine Law and The Law Store hope to expand to more Wal-Marts. The Law Store will be moving into five more Wal-Marts by the end of the year (two in Dallas and three in Missouri).

Kaine hopes to expand, but is taking a more cautious approach. “We hope to open more offices but want to do it in a more systematic, calculated way. Expansion doesn’t do any good if the firm can’t serve the public.”

Note the references to:

- (1) farming-out most cases to other law firms, which is comparable to: (a) using them as support services with which to make one’s services more comprehensive and attractive; and, (b) the family doctor as the in-take source for the other specialists and specialized and hospital services of the whole medical services infrastructure; and,
- (2) “a giant gap in terms of delivery of legal services between traditional hourly rate lawyers and do-it-yourself sites like LegalZoom.”

Such are within the realm of “marketing strategies” that a law societies’ civil service could make known to all lawyers in Canada.

(12) Monitoring and advising proper levels of legal fees: the profession should become more responsive to and compatible with the changes in the economic situation of the population. Information should be obtained and provided as to the ranges of fees charged. It could be obtained as part of spot audits and the regulation of law firms as well as their lawyers. The information thus obtained would be used as part of a continuing surveying process. The results obtained would 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 (CPD) programs should deal with legal fees as a function of affordability, and not only 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 (CPI); the "economic health" of each of Canada's provinces and territories; "have" and "have not" provinces and territories; and, variations in the gross domestic product (GDP). And research should be conducted as to the effect on legal fees of alternative business structures (ABSs) in those countries that have allowed ABSs such as, law firms being owned by commercial investors. Such commercial organizations would be providing legal services to their customers and clients by way of their employee lawyers.

"Law societies will never bother themselves to do such analysis," you say. If so, they should be replaced. The unaffordable legal services problem must be solved.

(13) Legal services insurance (legal expense 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. This was a recommendation of the Trebilcock Report into the management of Legal Aid Ontario, *Report of the Legal Aid Review 2008*.

(14) Making available continuously developing innovative services: such is possible because the high degree of specialization and volume of production inherent within such support services make other innovations readily apparent and achievable. For example, Ontario lawyers who service legal aid cases can freely download any one or more of 1,000 specialized memoranda in criminal law alone, as well as hundreds of model factums. And do so in the other areas of law for which Legal Aid Ontario (LAO) grants legal aid certificates—services developed from the original legal opinion service.¹²⁶ A civil service serving all law societies, should monitor and provide advice to law societies as to how to bring about such innovations. Such work should be coordinated with the uses of CanLII.

(15) Examine court administrative procedures that unnecessarily extend the time and expense of the lawyers that use them, and then with the law societies' support, get such procedures changed. Again, group action maximizes one's bargaining position—in this case, of direct benefit to the courts systems and the justice system.

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

¹²⁶ See note 59 and accompanying lines of text *supra*.

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 limited only by benchers' motivations, experience, and, creativity. 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. The law societies must be so engaged in order to comply with their duty to "facilitate access to justice."¹²⁷

An alternative would be Legal Aid Ontario's Clinic Funding Division has funded as many as 70 law offices that could provide a foundation for a government-sponsored socialized law program.¹²⁸

11. Alternative Business Structures (ABSs) and Affordable Legal Services

The ABS issue (law firms becoming investment properties of investors) well exemplifies the inherently incompetent nature of law society management structure. An investment issue, ABS is also a relatively new issue, but one given considerable attention while the very long-standing problem of unaffordable legal services stands stationary, without even an attempt at a solution. There is: (1) no analysis of the cause; (2) no program the purpose of which is to solve the problem; (3) no retention of the necessary expertise; and, (4) no acknowledgement of a duty in law to deal with the affordability of legal services as an aspect of the duty to regulate the legal profession so as to make legal services adequately available.

And the ABS issue well exemplifies how easily law society management structure might give itself up to corruption. Therefore, as to the propriety of the statements of suspicion in this section: where there are millions of dollars to be obtained, as might well be the motivation behind ABS proposals, and those who would so benefit are not sufficiently accountable to an appropriate authority, one should presume that there will be conflicts of interest and other forms of money-driven corruption. However, such is but a prudent presumption and not an inevitability without exception. But the onus of proof of integrity and purity of motivation and action beyond a reasonable doubt, should rest upon those who would so benefit.

¹²⁷ As is required for example, by the duties expressly imposed by Ontario's *Law Society Act* s. 4.2, set out in the Introduction on page 1 above, and the references in notes 28, 37, 45, and, 55 *supra*, and, 127 *infra*, and accompanying texts.

¹²⁸ Thirty years after my being made aware of such capacity of Legal Aid Ontario (by a bencher of that law society committee, the use of LAO's legal clinics in that way was one of the recommendations of University of Toronto Law Professor Michael Trebilcock's *Report of the Legal Aid Review 2008* (note 89(3) *supra*), *i.e.*, to convert LAO's more than 70 legal clinics to provide legal services at cost to middle income people, along with promoting the purchase of legal services insurance, just as we buy home and auto insurance. (Page 77 of the Report. But he did not use the phrase, "socialized law.")

They should accept that, rather than displaying indignation, anger, and threats that draw strength from their “power of position.” Those who would not benefit and are suspicious and concerned should be able “to speak truth to power” by freely expressing their concerns without penalty, rather than “power” being able to project and impose its own “truth” without concern.

(1) The ABS issue has split the profession

The ABS issue (law firms becoming investment properties of corporate investors) has re-activated a long existing “class-oriented split” among Ontario’s lawyers, specifically, between those whose clients can be investors, and those whose clients are “of the people and small business and institutions,” *i.e.*, the clients of the general practitioner and small, unspecialized law firms in general. Suspicions that the decisions of LSUC’s benchers as to such matters of administration, as well as the penalties resulting from disciplinary proceedings, favour the inhabitants of the big law firms, have long troubled its management.¹²⁹ That is leading to a division between those law firms whose lawyers will represent the investors, and those law firms that might have to be owned by investors in order to escape dissolution. And, because of the millions of dollars in legal fees and investment profits that legalized ABSs will bring, the same issues might well arise in the other jurisdictions of Canada.

Definition: a lawyer can provide legal services to his/her employer. But unless the bylaws controlling the practice of law are amended to allow alternative business structures (ABSs), a lawyer cannot provide legal services to his/her employer’s clients and customers. A law firm owned to any degree by an investor is comparable to a lawyer’s employer. Therefore, such an investor needs an exemption from prosecution for the “unauthorized practice law” (UPL).

(2) The context of the ABS decision

Whether to exempt from prosecution for “the unauthorized practice of law” (UPL), various types of charitable and non-profit organizations, and other such “civil society organizations” (CSOs), that provide legal services, should be decided within the context that,

- (1) other lawyers, (a) working for the commercial producers of legal services, such as, LegalZoom, LegalX, RocketLawyer, *etc.*, and, (b) lawyers working within law firms that are the investment properties of “alternative business structures” (ABS) investors; are both in no different position than lawyers working for such civil society organizations (all three

¹²⁹ See, Christopher Moore, *The Law Society of Upper Canada and Ontario Lawyers, 1797-1997* (University of Toronto Press, 1997), particularly at pp. 323-329. Benchers from the big law firms are thought to wield disproportionate power, perhaps because name-recognition provides election candidates a distinct advantage (p. 138).

groups of lawyers working for organizations that cannot themselves be licensed to practice law); and,

- (2) such prosecutions by law societies of the commercial producers should also be barred, because of the law societies' failure to try to solve the unaffordable legal services problem—*i.e.*, such commercial producers are bringing to that majority of the population that cannot afford lawyers' services, relief from a problem that the law societies themselves refuse to try to solve; and,
- (3) when such commercial producers are servicing thousands, if not hundreds of thousands of customers as they now are in the United States, such prosecutions will be viewed as being intended for the improper purpose of eliminating a market competitor, rather than to protect society from incompetently provided legal services, which is the proper purpose of the UPL offence. The UPL offence was created in the context of individuals, who are not lawyers, providing legal advice.

Creating such an exemption from prosecution is now (August, 2017) being proposed by the Alternative Business Structures Working Group of the Law Society of Upper Canada (LSUC in Ontario).¹³⁰

Since 2012 an ABS Working Group proposal has been given “fast track treatment” by LSUC, while the problem of unaffordable legal services is given nothing to solve it.¹³¹ It has three components,

¹³⁰ Would it make any difference if the government were the prosecutor? Is the situation different from that of two lawyers as members of the same law firm, each representing a different one of the opposing parties in negotiating a contract? Is it sufficient that the parties have given their consent to such representation?

¹³¹ On September 27, 2012, LSUC's Working Group on Alternative Business Structures reported its Terms of Reference to Convocation. The latest report of substantive content is that of September, 2015 (pdf.): “Alternative Business Structures Working Group Report – Next Steps”: (at Tab 2.5 (pp. 110-132) of the Report to Convocation of the Professional Regulation Committee, September 24, 2015). For earlier reports and a summary of activities, see LSUC's “Alternative Business Structures” webpage. See also notes 11, 94, 98 and, 114 *supra*, and notes 125, 130, and, 144 *infra*, and accompanying texts.

LSUC's “Alternative Business Structures” webpage stated, in summation of activities (as it appeared on July 15, 2017):

In September 2015, the ABS Working Group delivered an **interim report** to Convocation outlining its initial assessment and the directions it will consider further. At that time the Working Group decided not to continue to consider structures involving majority ownership, or control, of traditional law firms by non-licensees. Through its research and consultations, the Working Group considers that the experience to date in other jurisdictions does not show that the benefits of majority non-licensure ownership, or control, outweigh regulatory concerns.

Since September 2015, the Working Group has focused its study on change with the potential to foster innovation or enhance access to justice. This includes:

1. minority ownership by non-licensees;
2. franchise arrangements;
3. ownership by civil society organizations such as charities; and
4. new forms of legal service delivery in areas not currently well served by traditional practices.

At LSUC's June 2017 Convocation, the ABS Working Group presented an **interim report** outlining a proposal to enable lawyers and paralegals to deliver legal services through civil society organizations, such as charities, not for

originally having four variations: (1) law firms can be owned by investors up to 49%, (majority, ownership is no longer being considered), by non-lawyer persons or organizations (consideration of majority ownership was excluded in 2015); (2) related non-legal services, and sophisticated marketing strategies can be provided by law firms in conjunction with legal services; and, (3) routine legal services be automated with the money provided by the investors. ABS proponents argue that (2) and (3) are dependent upon allowing (1), because lawyers need the marketing advice of the commercial world, and automating routine legal services requires the investment money that makes non-lawyer ownership necessary.

Critically important to the analysis of ABS proposals are these unanswered questions as to their ability to:

- (1) solve the problem of unaffordable legal advice services;
- (2) do what the legal profession cannot do for itself; and,
- (3) protect “core values” such as: (a) the fiduciary relationship with clients, and acting in the best interests of clients and not that of an ABS; (b) solicitor-client privilege; (c) the independence of the legal profession from investor as well as government intervention or control; and, (d) the quality of legal services.

For example, the profession could provide the automating software itself, if all lawyers would accept a single bargaining agent to negotiate with its producers for such automation. Proponents imply that ABSs can help with the unaffordable legal services problem. That is misleading. ABS proposals cannot solve the problem because they propose maintaining the present method of producing legal services other than automating the production of routine services. ABS investors are in pursuit of the market for routine legal services, such as personal injury legal services, and not the market for providing legal advice services, which is the source of the problem of unaffordability.

profit organizations, and trade unions, to clients of such organizations in order to facilitate access to justice. A decision on the motion was deferred. Comments could be submitted by September 1, 2017.

My ABS articles argue against such proposals; see by Ken Chasse:

- (1) “Alternative Business Structures Proposals or Solving the Unaffordable Legal Services Problem,” (March 30, 2015);
- (2) “LSUC’s Worrisome ABS Proposals” (November 25, 2014); and,
- (3) “Legal Advice Services Cannot Be Automated by Alternative Business Structures” (October 7, 2014).

But some of the proponents of ABS say that those who are against law societies supporting the legalization of ABS are “protectionists” guilty of protectionism. See for example: Mitch Kowalski, “ABS in Ontario Killed by the Foul Stench of Protectionism,” *Slaw*, September 28, 2015; and, Malcolm Mercer, “Unmet Legal Needs – the Challenge to Legal Practice and to Self-Regulation,” *Slaw*, July 13, 2016; referring to negative responses to ABS proposals by a division of the American Bar Association: “Some will no doubt see the responses by the [ABA] House of Delegates as principled. Others will see self-interested protectionism by a voluntary bar.”

The following two paragraphs from a recent American Bar Association publication summarize the approach of bigger law firms to the need for improved cost-efficiency (being an analysis arising from the ABA's "law firms in transition survey"):¹³²

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.¹³³

But ABS proposals are not the best means of obtaining such improved practice efficiency.

There is a difference of opinion between those law firms who will be representing the investor-enfranchisers of law firms and those who might become enfranchised law firms. Law firms having clients that can be ABS investors would reap the millions of dollars in legal fees from negotiating with hundreds, if not thousands, of law firms willing to be owned and enfranchised. Such fees would be endlessly produced by the continual negotiation of changing terms of ownership, services, and duties between investors and law firms. As a result, those benchers whose law firms will be representing ABS investors, and who are also working to obtain law society support for, and the legalizing of ABS proposals, have a large conflict of interest in that they are using their position as benchers to improve the fortunes of their law firms. But there is no indication that LSUC's Convocation of benchers has considered it.

It well exemplifies the conflict between law societies' regulatory and representative functions, *i.e.*, to regulate the legal profession so as to make legal services adequately available, versus representing the interests of lawyers, particularly benchers represented their own interests in such cases. The Clementi Report (U.K., 2004), cited such conflict in justification of the recommendation to remove the regulatory function from law societies to a separate agency.¹³⁴

¹³² "2014: Law Firms in Transition," by Eric A. Seeger, vol. 40 no. 5 (Sept.-Oct. 2014) *Law Practice Magazine* 48.

¹³³ "Lateral movement" means lawyers transferring to another law firm. And "reduced leverage" refers to equity partners having fewer fixed income associate lawyers with which to "leverage" increases in the profits shared by those partners.

¹³⁴ The Clementi Report in the U.K. of 2004, by Sir David Clementi, entitled, *Review of the Regulatory Framework for Legal Services in England and Wales*, recommended that the regulatory and representative functions be separated into two different institutions by creating a regulatory oversight body controlled by non-lawyers, but the

Alternative business structures 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. And whatever benefits they propose to bring can be achieved by the legal profession itself. Other than the District of Columbia and the state of Washington, American jurisdictions prohibit the division of fees with non-lawyers, and therefore non-lawyer ownership of law firms.¹³⁵

However, LSUC's ABS Working Group seems to have lost faith in the ability of ABS proposals to provide any assistance in dealing with the unaffordable legal services problem. On May 25, 2017, LSUC's "[Alternative Business Structures](#)" webpage stated in part, in summation of its activities:

The Working Group has decided not to continue to consider structures involving majority ownership, or control, of traditional law firms by non-licensees. Through its research and consultations, the Working Group considers that the experience to date in other jurisdictions does not show that the benefits of majority non-licensee ownership, or control, outweigh regulatory concerns.

The Working Group plans to focus its study on change with the potential to foster innovation or enhance access to justice. This includes minority ownership by non-licensees, franchise arrangements, ownership by civil society organizations such as charities and new forms of legal service delivery in areas not currently well served by traditional practices.

And, as it appeared on August 24, 2017, LSUC's ABS webpage stated (in part):

In September 2015, the ABS Working Group delivered an **interim report** to Convocation outlining its initial assessment and the directions it will consider further. At that time the Working Group decided not to continue to consider structures involving majority ownership, or control, of traditional law firms by non-licensees. Through its research and consultations, the Working Group considers that the experience to date in other jurisdictions does not show that the benefits of majority non-licensee ownership, or control, outweigh regulatory concerns.

Since September 2015, the Working Group has focused its study on change with the potential to foster innovation or enhance access to justice. This includes:

1. minority ownership by non-licensees;
2. franchise arrangements;
3. ownership by civil society organizations such as charities; and

head of which could be a lawyer. See also notes 41 and, 95(2) *supra* and notes 136 and, 139(1),(2) *infra*, accompanying texts. See also: John Flood, "Will There Be Fallout From Clementi? The Repercussions for the Legal Profession after the Legal Services Act 2007," [2012 Michigan State Law Review 537](#)

¹³⁵ See: (1) The ABA Commission on the Future of Legal Services-For Comment: [Issues Paper Regarding Alternative Business Structures](#) (final report expected in August, 2016); (2) 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, (3) the State Bar of Texas, [Ethics Opinion 642, Nonlawyer Officers Prohibited in Law Firms](#), May, 2014.

4. new forms of legal service delivery in areas not currently well served by traditional practices.

(The September 2015 report is more fully reproduced in the Appendix below, p. 141.)

(3) The “charity ABSs proposal”

See: Ken Chasse, “Alternative Business Structures’ “Charity Step” to Ending the General Practitioner” (SSRN, August 2017, pdf.)

The latest proposal in Ontario’s ABS controversy is for LSUC to secure the necessary bylaw changes, “to enable lawyers and paralegals to deliver legal services through [non-profit “civil society organizations” (CSOs)], to clients of such organizations in order to facilitate access to justice.” That proposed approval of such “charity ABSs” comes from this statement on LSUC’s ABS website, as it appeared on August 24, 2017:

In June 2017, the ABS Working Group presented an **interim report** to Convocation outlining a proposal to enable lawyers and paralegals to deliver legal services through civil society organizations, such as charities, not for profit organizations and trade unions, to clients of such organizations in order to facilitate access to justice. The Working Group’s proposal followed a series of focus group meetings with front line workers, “embedded lawyers” (lawyers who provide services from offices within a hospital or not for profit organizations with mandates to assist vulnerable populations) and public policy / funding organizations. Meeting participants were overwhelmingly supportive of the idea of permitting the delivery of legal services by lawyers and paralegals through civil society organizations as a means of facilitating access to justice. In its June 2017 interim report, the Working Group proposed that the Law Society amend its By-Laws to permit civil society organizations to register with the Law Society. Lawyers and paralegals would be permitted to provide legal services directly to clients through the registered civil society organizations. The recommended approach is further described in the June 2017 interim report.

The ABS Working Group invites comments from lawyers, paralegals and the general public about the policy proposal to enable delivery of legal services by lawyers and paralegals through civil society organizations.

Comments may be submitted online by September 1, 2017.

Submissions will be provided to the Working Group. Submissions may also be provided to the Law Society’s Professional Regulation Committee and Convocation, and may be reproduced, and/or made publicly available by the Law Society with attribution.

The Law Society reserves the right to redact submissions at its discretion, for reasons including the protection of confidentiality, copyright, and brevity.

The Working Group is also continuing to consider minority ownership by non-licensees and franchise models, and new forms of legal service delivery in areas not currently served by traditional practices. It will be reporting further with respect to these issues in due course.

[Then follow hyperlinked lists of: (1) the ABS Working Group's Reports to Convocation; (2) "Additional Resources/Background Materials"; and, (3) the "Submissions received in response to September 2014 Discussion Paper"]

The request for comments resulted from demands for more consultation made by the large number of lawyers who are opposed to LSUC's legalizing ABSs. As a result, LSUC's benchers (lawyer managers) withdrew a motion on Wednesday, June 28, 2017, set to go to Convocation (LSUC's governing body of benchers) the following morning that would have allowed such non-profits, charities, and trade unions, to offer legal services directly to clients See this June 30th, legal news media blog article: "[LSUC benchers push back decision on ABS.](#)"

(4) Published Commentary on the Commercial Producers of Legal Services—LegalZoom *etc.*

Because the existence ABSs in any form will enable the commercial producers to argue that they should not be barred by law society UPL prosecutions in Canada, such ABS existence could:

- (1) greatly aid bringing about the end of the general practitioner throughout Canada; and,
- (2) be used by law societies as a substitute for not trying to solve the problem of unaffordable legal services ("the problem").

Commercial producers of legal services such as, [LegalZoom](#), [RocketLawyer](#), and [LegalX](#), have shown in the United States that they can rapidly eat into the market of the general practitioner. And they have begun to have a presence in Canada; see: [LegalZoom.ca](#); and, [MaRS launches LegalX](#). And RocketLawyer is soon to follow. But because law societies in Canada have done nothing to try to solve the problem, they have undercut their own ability to prosecute them for UPL.

Lawyers and law societies can "downplay" and "look down upon" these commercially-produced legal services as providing only simple services, and therefore believe that they can be ignored. That has been a fatal mistake in many industries. Such automated producers, work their way up from the simple product or service to displace the high-end producers of the more sophisticated products and services. Because the legal profession has priced itself beyond the majority of the population, people will use the commercial producers and get used to using them as they ride along with automation from providing simple to more complex legal services. And, if ever held to account for their neglect of the problem by an authority they fear, there is a danger that the law societies will, in desperation, allow the use of all forms of ABSs, so as to allege that ABSs can help solve or reduce the problem. That would be a very dishonest representation, and a great disservice to the victims of that neglect: (1) the population; (2) the courts; and, (3) the legal profession itself, *i.e.*, a majority that cannot afford legal services means that a majority of law firms is very short of clients.

ABS investors cannot help law offices challenge such competition. They will merely finance the automation that will make the production of routine legal services more cost-efficient. Such services are not the cause of the problem. The method of producing all legal services has to be changed to a “support services method of production,” which ABS investors cannot do. Once established, if lawyers prefer their traditional ways of producing legal services they wouldn’t have to use such services. But they will, because sophisticated, highly specialized, high volume support services will help them earn money and serve their clients better. In that way, maximizing the use of automation can stay within the context of the law office and within the regulation of the legal profession, instead of developing outside the legal profession. Support services methods of production exist everywhere else in the production of goods and services. But law society management structure will have to be made capable of sponsoring the creation of such support services.

The commercial producers of legal services will continue to take-over more and more of the work of lawyers. They are making strategic use of lawyers to help them do it by: (1) providing only a “last look check” of finished work; and, (2) free phone conversations to answer the questions of customers, so as to attract more customers for the commercial producers, and potential clients for the lawyers. Thus lawyers are providing greatly diminished services, and always under threat of further losses. But ABS investors are not the answer. They provide merely a form of dependence for the financing of automation, but one that cannot make available an adequate defence against or challenge to the commercial producers. That is because a large volume of individual ABS contracts between an investor and many individual law firms cannot provide the type of large management structure and facilities necessary to cope with such competition.

The legal profession needs its own management structure that will enable it to escape being controlled by ABS investors, and not be at the mercy of the commercial producers—a structure that can bring the benefits of automation and the progress of electronic technology to the population as effectively as any other management structure, and do it without being owned. The necessary components for such a management structure already exist; see: Access to Justice—Unaffordable Legal Services’ Concepts and Solutions” (SSRN pdf., August, 2017).

But strong law society leadership is needed to assemble the parts into a management body that enables the legal profession to be in control of its own present and future. However, that is where my recommendation may be weak and vulnerable to attack—law societies have no history of providing such leadership. But that is so only because their membership has not demanded it.

Whether to allow ABSs investors to buy-into law firms in whole or in part, whether as charities or commercial investors, has to be decided in this wider context of aggressive, large commercial producers

of legal services, which cannot be controlled by prosecutions for UPL (the unauthorized practice of law), certainly not while law societies themselves make no attempt to solve the problem.

the automation that the ABS investors say that they can finance will be able to provide the many forms of legal services that the commercial producers have created. For example, LegalZoom began offering legal service products to the public on March 12, 2001. The Wikipedia article on LegalZoom states in part [footnotes omitted]:

LegalZoom.com, Inc. is an online legal technology company that helps its customers create an array of legal documents without having to necessarily hire a lawyer. Available documents include wills and living trusts, business formation documents, copyright registrations and trademark applications. The company also offers attorney referrals and registered agent services.

LegalZoom is often described as a disruptive innovator in the market for legal services. By using computer technology to render services at lower prices, the company also helps expand the ability of consumers and small business owners to access legal services.

. . .

LegalZoom has been recognized a number of times over the years for its entrepreneurial acumen. In 2011, Business Insider ranked LegalZoom 27th on its list of the world's most valuable startups, and in 2012, Fast Company ranked LegalZoom 26th on its list of the most innovative companies.

In September 2012 it was announced that LegalZoom had formed a partnership with the United Kingdom-based legal services provider QualitySolicitors, as part of which the companies will jointly offer online legal services in the United Kingdom including company formations and divorce documents.

The September 2012 issue of Consumer Reports magazine evaluated and compared the computer-aided legal forms generated by LegalZoom and two of its competitors, Nolo (formerly Nolo Press) and Rocket Lawyer. The evaluation found that all three companies provided documents "for a fraction of what you'd pay a lawyer." Additionally, the CR review found that "[u]sing any of the three services is generally better than drafting the documents yourself without legal training or not having them at all. But unless your needs are simple . . . none of the will-writing products is likely to entirely meet your needs." It also found in some cases, the other non-will documents weren't specific enough or contained language that could potentially lead to an unintended result.

In 2013 LegalZoom purchased a 206,000-square-foot building at 9900 Spectrum Drive in the Davis Springs Spectrum Business Park in Austin, Texas for a reported \$21 million. The Austin office acts as one of their headquarters and in July 2014 they installed a 260 kW solar electric system.

On January 6, 2014 European private capital firm Permira announced its intent to acquire \$200 million in the outstanding equity of LegalZoom and become its largest shareholder pending regulatory approval. On February 14, 2014 Permira announced that the deal was complete.

. . .

Services

LegalZoom provides legal services in various common categories including copyrights, DBAs ["doing business as" titles], business formation, trusts, wills, patents, power of attorney, pre-nuptial agreements, real estate leases. The company also provides an attorney referral service and offers legal plans attorneys.

A 2016 analysis posted on the e-commerce blogging site "Blogtrepreneur" examined some of the reviews given to LegalZoom by experts and by its customers. The analysis found that "not all of the LegalZoom reviews have been flattering," but noted that the company is accredited by the Better Business Bureau, that it has been in business since 2001, and called LegalZoom "a fairly noteworthy and respected business."

Middle class families and small business owners are the primary target markets for LegalZoom's services. The company's efforts to render affordable, quality legal services to these two groups reflects a broader global trend in which legal service providers are attempting to harness computer technology to supply ever-more-proficient services at lower costs.

Increasing access to legal services

Since LegalZoom often uses computer technology to render legal services at lower prices than traditional lawyers, it is frequently cited as an example of "disruptive innovation" in the legal marketplace. This disruption benefits people who otherwise could not hire a lawyer by expanding their access to legal services.

In 2015 LegalZoom and the North Carolina State Bar Association settled years of litigation by agreeing that companies like LegalZoom which offer automated legal document preparation will not violate North Carolina's prohibitions against the unauthorized practice of law if the companies register with the state and comply with certain consumer protection procedures. Following the settlement, the US Federal Trade Commission and the US Department of Justice jointly advised the North Carolina Legislature that the state should avoid placing overly broad restrictions on companies that offer computer-facilitated legal services. In discussing the potential benefits from such software and websites, the two agencies stated that "[i]nteractive software for generating legal forms may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase access to legal services"

These services do use lawyers, and provide referrals to lawyers, but only for summary services that boosts the marketability of their own products. The *ABA Journal* of the American Bar Association posted this article on March 17, 2017, by Victor Li: "Avvo, LegalZoom and Rocket Lawyer CEOs say their productions help bridge access-to-justice gap." which states in part:

[Avvo is a lawyer referral service]

The ABA Techshow's highly anticipated, and somewhat controversial keynote session took place on Friday afternoon at the Hilton Chicago. As promised, Avvo CEO Mark Britton, LegalZoom CEO John Suh and Rocket Lawyer CEO Charley Moore took part in a panel discussion that focused on their careers, their thoughts on the regulatory landscape, and their visions about the future of the legal industry.

In a panel moderated by Judy Perry Martinez, former chair of the American Bar Association's Commission on the Future of Legal Services, and Paula Frederick, general

counsel for the State Bar of Georgia, the trio underscored their commitment to bridging the gap in access to justice while reiterating their common, customer-oriented philosophy.

“It all starts with the consumer,” Britton said. “There are large numbers of people who just aren’t using lawyers.” Suh noted that LegalZoom’s primary commitment is to middle-class families and small-business owners—groups that have seen radically diminished access to justice over the last 30-40 years.

. . .

The three also reflected on how far they’ve come and noted that they no longer face as much resistance from lawyers as they did a few years ago. “I think we’re long over that hump,” Britton said, pointing out that Avvo is about to hit its 10th anniversary, while Rocket Lawyer has been around for eight years and LegalZoom for 16. “We drive billions, literally billions, of dollars a year for lawyers. Half of solos and small firms are on the Avvo platform, so I’d say go talk to the other half.”

Moore agreed and said he takes pride in the number of lawyers using Rocket Lawyer’s forms in their everyday practice.

Suh, meanwhile, pointed out that solos and small firms shouldn’t be worried about legal service providers. “There are deep structural problems with being a solo practitioner that have very little to do with alternative legal providers,” he said. “There’s been a real decline in solo practice income, the bulk of which happened in the ’80s and ’90s, so you can’t blame that on the internet.”

That may be true, but the reception the three executives received was considerably less warm than the raucous ovation that greeted last year’s keynote speaker, Cindy Cohn of the Electronic Frontier Foundation. Then again, she was speaking about her experiences relating to a hot-button political topic that had many in the audience concerned. In that vein, the loudest cheers the three men received came during the Q&A session, when all reiterated their commitment to access to justice and promised to do what they could to protest President Donald Trump’s proposed budget eliminating funding for the Legal Services Corp. “If you can’t afford a lawyer, then you don’t live in a democracy,” Moore said.

But other commentators see the commercial producers as being a very strong threat to the legal profession’s market. Benjamin H. Barton is a Professor of law at the University of Tennessee College of Law. In his book, *Glass Hall Full—the Decline and Rebirth of the Legal Profession* (Oxford University Press, 2015), he states (p. 88 of Chapter 5, “*LegalZoom* and Death from Below”):

LegalZoom and *Rocket Lawyer*, among others, have already begun to encroach upon, and may eventually cripple, the business of solo and small-firm practitioners. This chapter focuses on *LegalZoom* as an instructive and well known example of this phenomenon, but others will also be discussed.

The “phenomenon” that brings “death from below,” is that of a producer, using a new “disruptive technology,” that starts at the bottom of an industry by offering a worse, or much simpler, low-margin product than that provided by the high-end producers, but providing it at a much lower price. As a result, producers at the high-end of the market, concentrate on providing more high-margin goods. At first, they are unconcerned. But the new producer, once it has mastered low-end production, gradually works its way

up to successfully competing for the higher-margin work. The high-end producers do not recognize the need to invest in such “disruptive technologies” themselves until it is too late.

Then follows this description of LegalZoom’s recent success (at pp. 93 and 95; endnotes omitted):

... *LegalZoom* generated 20 percent of the new LLC filings in California in 2011. Astounding! *LegalZoom* reports that in 2011 it formed more than 1,500 LLCs and 200 corporations in South Carolina as well, so California is not an outlier.

LegalZoom served nearly a half a million new clients just in 2011. Some of these customers may not have been able to afford a lawyer in the first instance, but drafting LLC forms or incorporating businesses has long been a staple of legal practice. The loss of 20 percent of that business in California is not a promising sign for traditional lawyers. *LegalZoom* (and its competitors) seem unlikely to stall at only 20 percent of that business.

. . .

The greater worry for lawyers is that *LegalZoom* and its competitors may eventually be cheaper *and* better. Right now lawyers are reaping the benefits of using interactive computer forms themselves, but *LegalZoom* may eventually do a volume of business that will allow them to surpass the quality of individualized work. As *LegalZoom* put it: “The high volume of transactions we handle and feedback we receive from customers and government agencies give us a scale advantage that deepens our knowledge and enables us to further develop additional services to address our customers’ needs and refine our business processes.”

And even legal advice and litigation services are not safe from such incursions (at p. 98)

LegalZoom and *Rocket Lawyer* are just two of the many websites that are seeking to intermeditate between consumers and inexpensive legal advice, taking a cut and lowering the overall price. Even if UPL enforcement [“unauthorized practice of law” prosecutions] suddenly sprang to life against online legal advice, these Internet suppliers would still drive the price of legal advice down.

Like the provision of forms by *LegalZoom*, much current online provision of legal advice is hardly a threat to lawyers. ... But, like *LegalZoom*’s forms business, the advice business is a serious matter, and *Avvo*, *LegalZoom*, and *Rocket Lawyer* are explicitly targeting small-firm and solo practitioners. As the technology improves, the competitive pressures on traditional lawyers will grow even stiffer.

In regard to litigation (pp. 99-100; endnote omitted)

In-court litigation is also the sole route to a truly enforceable judgment. Even as mediation and arbitration grow more popular, a litigant that wishes to enforce a judgment through a property or income lien must use a government-court, and lawyer and judges are, and will likely stay, the gatekeepers to that power. The importance of this power should not be underestimated, because it makes all private dispute resolution second best.

Small-firm and solo practitioners will thus still be able to count on litigation work. Moreover, like the “bet-the-company” cases that will continue to float Big Law, small-firm and solo practitioners have a hardcore class of work that technology will not replace anytime soon and where ability to pay is more of an issue than willingness to pay. ...

... ..

Nevertheless, the number of trials is in a free fall, and every year there is less in-court work to be done. If lawyers (Big Law or small firm) lose the parts of the litigation process that do

not occur in court—and they are already losing chunks of the discovery process to legal process outsourcing—keeping the in-court work will be cold comfort indeed.

And litigation itself may not [be] immune from computerization. Online dispute resolution (ODR) has been gaining traction, and court delays and overcrowding make it a more attractive option. Some ODR websites are quite simple. For example, *Cybersettle* is a platform for settlement through a computerized system of double-blind offers and demands.

“Outsourcing” does not mean use of an external, high volume, highly specialized support service in its true sense. Rather, it means the use of an external source that works in the same way as a lawyer or paralegal, but costs less.

And under the heading, “Today Small Firms, Tomorrow the World” (pp. 101-102):

Is it unimaginable that *LegalZoom* could use its experience in drafting LLC and incorporation documents to begin stealing IPO [initial public offering; shares sold to institutional investors] or other higher-end work? Many Big Law deals work off of similar templates. ... Given the standardization of much transactional work, Big Law should certainly look beyond their near-term competitors (in-house counsel and alternative law firms) and consider the disruptive possibilities of interactive forms.

The same is true of replacement for litigation. Arbitration has already grown tremendously in popularity, but most arbitration is really “court-light” and still involves lawyers. Mediation or non-lawyer dispute resolution should be of greater concern to Big Law. As *Modria* and other ODR providers improve, corporations may choose to eschew expensive litigation or even arbitration in favor of computerized dispute resolution.

And to end Chapter Five, “The Upshot,” (pp. 102-103):

Technological changes often come more slowly than we think. Some technological innovations that seem likely to succeed now will never get off the ground. Conversely, successful innovations bring unforeseen, profound, and transformative changes.

Competition from machines has finally arrived for lawyers. These changes mean that the slowdown in the legal market is not recessionary, but structural, ongoing, and likely to accelerate. The venture capital backing *LegalZoom*, *Modria*, *Avvo*, and *Rocket Lawyer* tells you volumes about the potential for online disruption of traditional legal services. As *LegalZoom* and others begin to perfect their services, they will expand into other areas of legal work, until lawyers offer only true bespoke services: cases where the work is complicated, is relatively unusual, and has important consequences.

Just as was the case for Big Law, a concentrated chunk of bespoke legal work will remain. This will consist of the small-firm versions of “bet-the-company” work—child custody battles or contract battles that could sink a small business. Likewise, because of the structure of American courts and UPL protections, most profitable in-court work will likely remain the province of lawyers or confused and overmatched *pro se* [self-represented] litigants for the foreseeable future. Outside of court, it seems likely that any work that can be routinized or rationalized will be swallowed up. Death from below.

And so, “lawyers and law professors are particularly ill suited to address a post-*LegalZoom* world” (p. 175).

They will have to learn to live with the commercial producers of legal services (p. 236-237; endnote omitted):

If bar associations or state supreme courts took any radical actions, like prosecuting UPL more aggressively, they would face a significant public backlash. *LegalZoom* and other computerized providers of legal services have grown prevalent and profitable enough to present a strong challenge to any UPL [unauthorized practice of law] enforcement effort. Generally speaking, UPL enforcement has been at its most robust when aimed against individuals. . . . Similarly, publishers of legal forms have had more success fighting UPL than individual non-lawyer scribes. This is because individuals often lack the funds or political power to defend themselves. So, UPL prosecutions of small legal websites are likelier to proceed and succeed than any prosecution large enough to slow the current tide.

The alternative—a full scale attempt to bring non-lawyers, outsourcing, and computerization to heel via UPL or more aggressive regulation—would require a great deal of political will and capital from state supreme courts. Truly aggressive moves would be likely to draw federal antitrust and congressional attention. If push came to shove, state supreme courts and lawyer regulators would face a potentially existential crisis: attempts to maintain their inherent authority to regulate lawyers would come up against an angry populace and an engaged federal government. It is beyond the scope of this book to determine whether federal supremacy would overrule bedrock state constitutional law in such a showdown. Simply describing the parameters of the potential showdown helps explain why lawyer regulators have stepped lightly and why they will continue to do so.

As to the, “Rebirth of Legal Profession” part of Professor Barton’s book (pp. 173-242), the “rebirth” is that of a profession that has made mistakes that have reduced its size and expectations, retrenched, and made it accept that it must render itself compatible with the many commercial producers of legal services. For example he cites how lawyers are being used as a “front” for such producers, by which to reduce the probability of prosecution for UPL (pp. 237-238):

More aggressive prosecution of UPL or enforcement of the Rules of Professional Conduct could challenge a number of recent trends, including computerization, outsourcing, and settlement mills; or immigration, bankruptcy, and disability firms where one or two front for a mass of non-lawyers who do almost all the actual work.

. . .

The likeliest result is that law schools and lawyer regulation stay basically the same but grow less relevant, as everything except for in-court and other bespoke legal work is swamped by competition from computers, outsourcing, and non-lawyers. Rather than try to regain lost ground, lawyers and law schools will try to hold on to what they still have, even as it shrinks around them. I think of it as a sand castle facing a rising tide: the outer walls will be lost, but perhaps the citadel can be maintained.

And he cites the several occasions since the American Civil War wherein the legal profession in the U.S. has been in a crisis situation but survived with renewed vigour (pp. 240-242):

. . . In the middle of the nineteenth century it looked more likely that the law would be fully open to practice by lay people than that lawyers would rise from the grave and reorganize to create the profession we have today. The practice was virtually unregulated in a majority of

states, and legislatures passed new codes of civil procedure to further erode lawyer hegemony. Judicial elections were introduced. After the Civil War, lawyers who were already facing deregulation confronted the loss of the lucrative business of conducting title searches. ... When confronted with extinction the profession has continuously reinvented itself.

. . .

... It is telling that when faced with a crisis America turned to one of its most potent weapons: lawyers and courts.

... Computers, lawyers, and legal complexity are thus involved in a convoluted race. Computers, non-lawyers, and outsourcing will continue to try to peel off simpler legal tasks and more basic legal questions and commoditize them. Lawyers will try to make all legal work so complex that clients need an expensive human guide. As overlapping laws, court decisions, and regulations proliferate, lawyers will continue to be needed to navigate complicated issues, for those who can afford it. This especially so because judges, not computers, will interpret the law, making a nuanced understanding of human judgment critical.

American and its legal profession have been intertwined from the beginning, and lawyers—sharp-elbowed and ambitious—will find a new purchase in these changed times. They have before. They will again.

But Professor Barton is vague as to: (1) how the necessary innovation will come about, other than with financing; (2) what exactly that innovation will be; and, (3) its purpose is to make law offices more efficient, which in my experience without support services methods, is not sufficient in itself to make legal advice services affordable. Therefore he offers no solution to the unaffordable legal services problem, nor a method by which to halt the reduction in the per capita number of lawyers, and the reduction in the average income of lawyers. So the “rebirth” is more a scenario of survival than it is a return to former prestige and high earnings.

(5) Filling the legal services vacuum

The commercial producers of legal services, such as LegalZoom, *etc.*, are on their way to filling a legal services economic vacuum—a vacuum that contradicts and defeats what the Canadian Charter of Rights and Freedoms and Canada’s law societies are supposed to guarantee, *i.e.*, rights, freedoms, the rule of law, and access to justice, by means of affordable lawyers. See for example, the duties set out in s. 4.2 of the Ontario Law Society Act. This is happening at a time when, because of the volume and complexity of laws, people have never needed lawyers more. If legal services were affordable, lawyers would be overwhelmed with work.

If law societies won’t try to fill that vacuum with affordable lawyers, other sources should not be barred by such law society UPL prosecutions. The commercial producers represent a possibility of providing relief from the problem which ABSs cannot provide. ABSs can finance the automation of routine legal services for individual law offices, but they cannot tailor the development and use of automation, and progress with its development from the simple to the complex service, the way that the

large organizations that provide commercially-produced legal services can. ABS investors cannot make law firms competitive with the commercial producers.

(6) Conflict of interest while refusing to deal with the problem

The adopting of these “charity ABS proposals” will be used by law society benchers to campaign for the legalizing of all ABS proposals. That is to say, deciding whether to allow charity ABSs is to be judged within the wider context of:

- (1) the consequences of allowing all types of ABSs; and,
- (2) LSUC’s history of self-interested “follow the money management”; and,
- (3) using that reality and that history to explain why LSUC refuses to try to solve the problem in spite of its growing size and the misery and damage caused to its victims; and,
- (4) how that refusal and the approved ABSs will make more difficult LSUC’s prosecuting the commercial producers of legal services for their “unauthorized practice of law.”

In this case the money being pursued is the money that lawyers representing ABS investors can earn. They will make millions of dollars in legal fees from representing them in individual negotiations with hundreds of client-starved law firms—like shooting fish in a barrel; the “fish” having no bargaining power. Opportunistic it is to press hard for the legalizing of ABSs at this time of a severely financially depressed profession and financially threatened law firms.

Has there been any discussion within LSUC’s Convocation as to the existence of a conflict of interest of those ABS Working Group benchers who are working hard to have the law society amend the relevant bylaws?¹³⁶ And because of the great potential in investment profits and legal fees to be earned, if LSUC allows ABSs, the counterparts of such law society bylaws will be created for the law societies in every jurisdiction in Canada. A law firm having offices across Canada could represent an investor in buying-into and enfranchising hundreds of law firms.¹³⁷ And for those law firms that don’t have other offices, the mobility agreement among the provinces can be put to comparable use.¹³⁸

¹³⁶ Under s. 56(4) of Ontario’s Law Society Act, bylaws can be enacted that allow non-lawyers (*e.g.*, investors owning law firms) to, “practice law or provide legal services” (s. 26.1(5)). Such bylaws are enacted by a board of five trustees of whom two are appointed by the Attorney General of Ontario and three by the law society (s. 54(1)). Such non-lawyers would thus avoid prosecution for “the unauthorized practice of law” (s. 26.1).

¹³⁷ Investors enfranchising the law firms they have invested in is referred to on LSUC’s ABS website, and on page 11 of LSUC’s ABS Discussion Paper (pdf.), and on page 1 of the ABS Working Group’s June 29, 2017, Interim Report to Convocation (pdf.), (page 1 being page 179 (Tab 4.4) of the full report of the Professional Regulation Committee’s Report to Convocation). Both the ABS Discussion Paper and the June Report can be accessed from the ABS website (pdf. download).

¹³⁸ The National mobility agreement of the Federation of Law Societies of Canada allows lawyers to work up to 100 days a year in other participating provinces, without being licensed to practice in those other provinces.

The ABS proposals are business proposals for making money. But unaffordable legal services are a social welfare problem. LSUC and the other law societies have made no effort to solve this problem. But, in sharp contrast, LSUC has given comparatively “fast-track” treatment to the ABS issue while the problem stands dormant without even an attempt at a solution.

Bencherers can be like lobbyists. The client is the investor. The lobbyist is the investor’s law firm with the bencher from that law firm being the spearhead of that lobbying effort. And the law society is the government whose control of laws, regulations, and administrative practices the lobbyist-bencher is paid to influence and alter. But that means using one’s position as a bencher to serve self-interest, in violation of the law society’s rules as to ethical conduct. Such benchers would ignore the problem and disregard their duty to serve the purposes of a law society, *i.e.*, to regulate the legal profession so as make legal services adequately available, which means: competently provided; ethically provided; and, affordably provided.

But law societies do nothing about affordability. And so, the majority of the population cannot obtain legal services at an affordable price—“legal services” being legal advice services. As a result, the majority of the membership of each law society is a victim of its law society—a victim of the fact that it is law societies who have caused the problem by letting it grow for decades without confronting it for decades

Bencherers using comparable means of enrichment in their law practices would be liable to prosecution by their law societies. But as managers of law society conduct, there is no one to hold them to account for such illegal behaviour—behaviour that is a “breach of trust by a public officer” (s. 122 of the Criminal Code). Law societies, like all institutions with time, develop an institutional culture as to what a bencher is to say and do. The affordability of legal services has no long history among the traditional duties of a law society. Therefore now it is not a duty performed. Such institutions do not change until the fear of the consequences of not changing is greater than the fear of the consequences of changing. Bencherers show no sign that they fear the consequences of not changing to the extent of being willing to undertake reforms that might put at risk the great advantages of power and position they now have.

(7) Ignorance of the cause of the problem shows in bencher elections

So why does the majority of LSUC’s membership tolerate such preference given to the interests of benchers of law firms that serve large institutions and potential investors and not middle and lower income people? It is because of ignorance of the cause of the problem, which is assumed without analysis, to be uncontrollable like the weather, volcanoes, and earthquakes.

That is shown by the simplicity and lack of sophistication of bencher elections. They are simple popularity contests. The candidates' emailed election literature provides no outline of programs or strategies with which to solve the problem of unaffordable legal services, other than to ask the Government of Ontario to fund Legal Aid better—that would be politically very risky, given that the majority of taxpayers cannot afford legal services for themselves and their families. It would amount to the law society's trying to make the government a victim of a problem that the law society itself caused.

And for such bencher elections, there are no candidates' debates. And so, bencher elections based upon nothing more name-recognition and "prominent name" endorsements, lead to a merely "populist" style of leadership instead of strong leadership, *i.e.*, "true grit" leadership that endures whatever is necessary to achieve the goals that guarantee the unimpaired good health and longevity of the legal profession and the primacy of its principles of service to the public (rather than to investors).

(8) Duplicity in law society management

All law societies are equally at fault. They do not question the adequacy of their management structure. They have had their "access to justice" committees in effect for several years now, but do not question their lack of progress to a solution, or the fact that the victims continue to grow. There is no analysis beyond the legal profession's version of unaffordable services, *i.e.*, looking at how other professions and competitive manufacturing deal with their versions of the same problem. There is no questioning of the method of producing legal services. It is obsolete because law society management structure is obsolete. It does not sponsor the innovations that would maintain the legal profession as a producer of affordable legal services. It can't because it lacks the knowledge to do so. Law societies are like an elected government without a civil service. Therefore they can no longer govern effectively.

Nevertheless for example, even though it has made no attempt to solve the problem, periodically, LSUC's Treasurer writes a letter (later published) to the Ontario government urging better financing for Legal Aid Ontario. See the reference to the letter, dated, February 7, 2014, in the Minutes of LSUC's February 2014 Convocation (pdf.), under the heading, "Law Society writes Finance Minister re: legal aid funding." With neither an apology for, nor express recognition of the unethical contradiction, it cites (second paragraph) as a reason for the letter, the duty imposed upon LSUC by Ontario's Law Society Act s. 4.2, "to facilitate access to justice," even though LSUC itself doesn't try to solve the problem, as is required by s. 4.2. And, for the Ontario government, the problem makes financing legal aid better politically very unwise, given that the necessary tax money would come from that majority that cannot afford legal services.

That is to say, LSUC's letter asks the government to ignore the majority of taxpayer's inability to obtain legal services, in favour of a comparatively very tiny minority that is very, very poor people in need of free legal services. And so again, the law society blames the government for a problem that the law society itself caused—like a bank robber asking that the banks be better financed, *i.e.*, the more poor people who get free legal services, the fewer poor people the law society need concern itself with, as might otherwise be required by the Canadian Charter of Right and Freedoms combined with the law society's monopoly over the provision of legal services. Government financing of legal services is a variety of socialized law, but such poor people would never be lawyers' clients anyway.

And to show that in contrast to the government, LSUC is doing what it can to deal with the access to justice problem, the letter refers to its Treasurer's Advisory Group on Access to Justice (TAG). But TAG has never been allowed to deal with the cause of the problem, or solving the problem, or the consequences of not solving the problem. Instead, TAG deals with programs and seminars to help the population learn to live with the problem.

That is strategically very shrewd. LSUC attracts all those eager young lawyers, paralegals, and law students who wish to be active in regard to the problem, but then it limits what they can discuss and do. Thus those enthusiastic and commendable people help to provide LSUC with the appearance of adequately responding to the problem, and an excuse for not trying to solve the problem. But they thereby make more certain that they themselves will go through their careers as lawyers in a very financially depressed profession—at a time when people have never needed lawyers more.

For its October 2016, "Connect, Create, Communicate: Public Legal Education and the Access to Justice Movement," TAG put out a Call for Proposals for the conference. All proposals had to "align with the following core themes of the conference: Connecting; Creating; and, Communicating." Under each was a list of topics. But none dealt with solving the problem, particularly not law society efforts of that nature, or the consequences of not solving the problem. All topics related to helping conference participants and the public get used to living with the problem. TAG's "About" webpage states:

The Action Group on Access to Justice (TAG) is catalyzing solutions to Ontario's access to justice challenges by facilitating collaboration with institutional, political and community stakeholders. TAG is guided by a group of senior thought leaders from across the justice system. It is funded by the Law Foundation of Ontario with support from the Law Society of Upper Canada.

TAG's costs as to "catalyzing solutions" would be much more justifiable if its "group of senior thought leaders" would help it catalyze its way to a solution. TAG's address is that of the Law Society of Upper Canada. If the law societies are not going to try to solve the problem, there is no one to try to solve it, except government intervention.

(9) LSUC's conflicted management of Legal Aid for 30 years

And there are more reasons to be suspicious of the current promotion of the “charity ABSs.” LSUC has a history of management by conflict of interest—“follow the money management.” If you are a bencher, or not suffering from the problem, such revelations may seem “petty and alarmist.” But if you are a self-represented litigant fighting for the custody of your child, or to save a family business, or a lawyer desperately short of clients, such “similar fact evidence” of intentional neglect and bad management is very important in deciding whether to start complaining about the law society on the social media, to the news media, to the government, or to the law society itself.

LSUC managed Legal Aid in Ontario for 30 years; 1967-1997. But it was removed as the manager of Legal Aid because of its conflict of interest—the conflict between its representative function for Ontario lawyers, and its failure to innovate so that Legal Aid could cope with a changing reality—see the McCamus Report of 1997. And see also the 1997 study conducted by Professors Zemans and Monahan for the York Centre for Public Policy and Law, at York University in Toronto, entitled, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (Toronto, 1997). It also recommended that LSUC be removed as the manager of Legal Aid, stating (at pages 2-3, and 65-66):

At the same time, we do not believe that the Law Society has demonstrated the capacity or the willingness to undertake the fundamental restructuring of the Plan that we believe to be necessary if Ontario is to achieve the maximum benefit from the still-considerable funding that is available for legal aid in this province.

The “Plan” being the Ontario Legal Aid Plan (OLAP), the predecessor of Legal Aid Ontario (LAO).

LSUC's failure to innovate so as to manage Legal Aid competently wasted taxpayer's money. It was due to LSUC's fear of socialized law, because of the great success of socialized medicine in Canada. Any such government program would build upon LAO as essential infrastructure, particularly so because of the 70 law offices (“legal clinics”) for disadvantaged persons financed by LAO's clinic funding department. Even now, they could be converted to delivering at cost, legal services to low income and then middle income people. Therefore it was not within LSUC's self-interest to manage LAO as best it could. So it didn't. With that authoritative precedent well established, why should anyone back away from any such conflict of interest?

Thirdly, the Trebilcock Report of the Legal Aid Review 2008 (by Professor Trebilcock of the University of Toronto's law school, adopted the recommendations of the McCamus Report (p. 13). It added a recommendation that the government promote legal services insurance in conjunction with such

augmented use of the legal clinics. The result of the McCamus Report was the, Legal Aid Services Act, 1998, which incorporated LAO, without LSUC as the manager.

Professor Trebilcock's report summarizes the McCamus Report's recommendation that LSUC no longer be the manager of Legal Aid (p. 13-14):

One of the key considerations of the Review was whether the Law Society should continue to have a governing role in the administration of Ontario's legal aid plan. The Report considered the governance of legal aid in other jurisdictions in Canada, as well as the United States, Australia and the United Kingdom. The Report outlined the following goals and objectives in making a case for change in governance of the legal aid plan in Ontario: independence; accountability for efficient use of public funds; obtaining adequate resources for legal aid; ability to deliver quality services in a broad range of areas of the law; capacity to promote confidence in the legal aid system; responsiveness to client needs; efficient governance; coordinated management of the entire legal aid system; and innovation and experimentation. The Report recognized that it is difficult for the Law Society to insulate itself from the interests of the legal profession. The Law Society would thus face special challenges in implementing reforms to the judicare system.

Taking all of the above-listed goals into consideration, the McCamus Report recommended that the governance of the legal aid system be transferred from the Law Society to an independent statutory agency. This new agency could more effectively: understand, assess and respond to the broad range of legal needs of low-income Ontarians; integrate management and financial expertise at the highest level of governance; conduct a greater level of experimentation and innovation with delivery models; coordinate the certificate system and clinic system; and promote confidence in the legal aid system. The Report recommended that the mandate of the agency be set out in the enabling legislation, which should require that the agency provide services in the areas of criminal law, family law, immigration and refugee law, and poverty law.

The conflict of interest was between LSUC's public duty to manage Legal Aid well, versus its fear that it would be used as the basic infrastructure for a government program of socialized law—being a very valid fear, given the great popularity of Canada's socialized medicine as a strong inducement to attempt to duplicate its vote-getting success. Reference to the resulting 30-year conflict of interest and refusal to innovate are to be found in these last two sentences of the first paragraph quoted above, "The Report recognized that it is difficult for the Law Society to insulate itself from the interests of the legal profession. The Law Society would thus face special challenges in implementing reforms to the judicare system."

If a government and the society it represents cannot expect the highly educated and experienced lawyers who managed a law society, to be able to detect and avoid such a serious conflict of interest involving responsibility for the expenditure of millions of taxpayers' dollars for 30 years, and the need to innovate to keep Legal Aid competent, then such a law society should be given no responsibility, *i.e.*, it should be abolished.

That conflicted self-serving management was explained to me by a bencher of LSUC's Legal Aid Committee, shortly after I began work at Legal Aid in Toronto, on Tuesday, July 3, 1979, to create the centralized legal research unit, now called LAO LAW. LSUC's Legal Aid Committee was Legal Aid's manager as well as its board of directors. He told me that every year at that time, there was a vote in LSUC's Convocation of benchers on the issue as to whether LSUC should remain as Legal Aid's (OLAP's) manager. It was always a close vote he said, the minority view being that the bad reputation Legal Aid had, by reason of the population's dislike of its providing free legal services to what were considered to be "deadbeats," being people who did not want to work, and criminals, would badly hurt LSUC's reputation. His expression was, "legal aid is like a lightning rod for attracting criticism." Therefore LSUC should distance itself from Legal Aid. But the majority view expressed the fear of socialized law, and that therefore LSUC should remain he said, "in the best strategic position in order to cope with any such government program." There could be no better position for exercising one's choice of strategies than to be the manager of the most important piece of infrastructure for any government program of socialized law.

That fear of socialized law was, and still is well justified. And it is even more so now. The great size and number of victims of the problem, along with the great powers of communication that we all have by means of the social media, make likely such matters of misery caused and damage done, will come to the attention of the news media and opposition political parties, and then on to political accusation and debate.

In 1979, Legal Aid's "Clinic Funding" division was funding 70 legal clinics that served, as they do now, "low income Ontarians," (click on, "Clinic Law Services Strategic Direction" (pdf. download)). Being law offices, they could be converted and increased in number to provide legal services at cost, to middle income people. And with sufficient specialization among those law offices, acting as mutually interdependent support services (as do doctors' offices and all other parts of medical services' infrastructure), along with LAO LAW's sophisticated and unmatched centralized legal research support service, LAO LAW, they could provide legal services much more cost-efficiently than can any law office. And thereby they could easily be made to pay for themselves, and grow in services and number of offices to provide a large volume of legal services at-cost. Thus would be the beginning and growth of one variety of socialized law.

That's a "support services" method of production, which all competitive producers of goods and services use because of its great flexible capacity for increased competence and cost-efficiency, which enables the continual improvement of products and services without having to increase their price. But the legal profession, having always used a "cottage industry-handcraftsman" method, without any evolution to a support services method of producing legal services, cannot maintain the quality of its services without increasing their price. That is because they now take more time to produce, due to: (1) the rapidly

ever-increasing volumes of law; (2) their complexity; (3) the technology to be understood that increasingly is the foundation of laws; and, (4) the great volumes of electronic records due to the automating capacity of electronic records technology. This fourth factor alone has caused the great prohibitive cost of electronic discovery proceedings in civil litigation—prohibitive to middle and lower income people using the courts for civil litigation.

Before electronic records and records management systems, one had to make a decision to write or type-out a record of a transaction. Now the transaction itself instantly produces the record and often several different types of record for the same transaction. That has caused an explosion in the volume of records every business and institution has.

Therefore, the cost-versus-price problem has two forms: (1) having to improve a product or service without increasing its price, as is necessary to be a successful manufacturer of automobiles for each new yearly model vehicle; and, (2) having to maintain the quality of a product or service as the time and cost of producing it increases, without increasing its price. It is this second form that the legal profession is not capable of coping with because its method of producing legal services is obsolete. Because the legal profession doesn't have a method of constantly improving its cost-efficiency, as is provided by support services methods of production, the price of legal services must increase. The statement that, “regardless the size of a law firm, there are no economies-of-scale in the practice of law,”¹³⁹ is correct, but only because there are no support services used in the production of legal services.

University of Toronto Law Professor Michael Trebilcock's *Report of the Legal Aid Review 2008* made the possibility of the beginning of socialized law a recommendation, *i.e.*, to convert LAO's more than 70 legal clinics to provide legal services at cost to the middle income people, along with promoting the purchase of legal services insurance, just as we buy home and auto insurance. As stated by Professor Trebilcock (p. 77):

... both LAO and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides).

But he didn't call it socialized law, as would the law societies in denigrating all such forms of producing legal services.

¹³⁹ Steven J. Harper, *The Lawyer Bubble* (Basic Books, 2013), “Part II BIG LAW FIRMS” at p. 114. Part II deals with what causes big law firms to fail. For a Canadian example, see: Norman Bacal, *Breakdown, an insider account of the rise and fall of Heenan Blaikie* (Barlow Books, 2017).

And so inevitably, LSUC's management of Legal Aid was not what it should have been for the 30 years that it was its manager, enjoying its conflict of interest from Wednesday, March 29, 1967, until the Legal Aid Services Act, 1998, came into effect.¹⁴⁰

Therefore, there are three authoritative reports that state that LSUC should not be the manager of LAO because of two factors—conflict of interest and refusal to innovate. They are the same causes of the present unaffordable legal services problem. LSUC benchers's conflict of interest now being that between being a good lawyer and a good benchers, which benchers deal with by being good lawyers, but not good benchers in that they make no attempt to solve the unaffordable legal services problem. Therefore, LSUC's history of self-serving conflict of interest reaches at least as far back as 1967. Law society management structure too easily lends itself to self-serving conflicts of interest.

In fact, it existed before 1967. Martin L. Friedland, is a professor emeritus in the Faculty of Law at the University of Toronto, and its former dean. His book, *My Life in Crime and Other Academic Adventures* (University of Toronto Press, 2007), contains important facts about the history of Legal Aid in Ontario. He was called to the bar in Ontario in April, 1960 (p. 110). I was called on Friday, March 25, 1966. He taught me "the law of evidence," in my first year of law school (1961-62) at Osgoode Hall Law School, when it was still LSUC's law school before it moved uptown to York University, thereby ceasing to be a law society law school.

In 1996 Professor Friedland prepared a study for the McCamus committee (which produced the McCamus Report of 1997), that, "examined governance structures for legal aid in other jurisdictions as well as the governance of other institutions that receive government money, such as universities and hospitals" (p. 117). One of the conclusions was (p. 117):

... We doubted the commitment of the Law Society to engage in extensive innovation and experimentation. The governance of the legal-aid plan, our study concluded, 'should no longer reside with the Law Society,' even though it may have been an appropriate model in earlier times.

The McCamus review came to similar conclusions and the government brought in legislation, the *Legal Aid Services Act, in 1998* setting up a semi-independent body named Legal Aid Ontario. ... The McCamus report recommended greater use of staff lawyers for both trial and appellate advocacy, bulk contracts, and greater case management.

But during the formative years before Legal Aid began on Wednesday, March 29, 1967, LSUC was strongly against Legal Aid's using a staff system of employee lawyers who would provide the legal

¹⁴⁰ I remember that day in 1967 quite clearly even now. I had just completed my first year as a lawyer and as an assistant Crown Attorney in Toronto's Magistrates Courts as they were called until that title was converted in 1968 to, "Provincial Judges' Courts," and in 1990 to be the "Ontario Courts of Justice." The Duty Counsel in each of the criminal courts that first day of Legal Aid were all the most senior criminal defence lawyers in Toronto. Thereafter; not so senior.

services directly for people sufficiently poor to receive it. Instead, LSUC, representing the interests of its members, as distinguished from the public interest, wanted a judicare system whereby serving Legal Aid-approved clients would be provided by lawyers in private practice who were willing to do legal aid cases, in spite of its very low tariff of fees.

The momentum to give LSUC its desired conflict of interest began 33 years earlier. In 1963, a Joint Committee on Legal Aid of six members was established by the Attorney General of Ontario, with three members appointed by the Attorney General and three by LSUC. The preface to the committee's report stated (p. 110 of Professor Friedland's book):

We retained Professor Martin L. Friedland of Osgoode Hall Law School to survey the extensive literature on legal aid in England and the United States and also to ascertain if any meaningful statistics existed with respect to legal aid and the need for legal aid in Ontario.

As to the resulting report (p. 114):

The Joint Committee reported to the attorney general in 1965 and recommended that a new legal-aid plan be brought in to replace the voluntary plan that had been in operation since 1951. It should, the committee stated, be administered by the Law Society of Upper Canada and be paid for by the provincial government. The report rejected an American-style public-defender system and opted for the English-style judicare model, whereby indigent accused persons could choose private counsel paid for by the legal-aid scheme.

The committee did not think much of the public-defender model stating: 'It has never been seriously considered in England. It has been rejected in Scotland. There is moreover almost no support for the idea in Ontario.' 'The chief advantage of the public defender system,' the committee stated, 'is that it is cheap.' 'On the other hand,' the committee went on to say, 'the system seems to be wrong in principle in that both prosecutor and defender are employed by the same master. Observation of the system in action tends to support the fear that defences will become perfunctory, that little attention can be given to the run-of-the-mill case, that the entire scheme operates on an impersonal production-line basis, and that its overall effectiveness is not impressive.'

However, the committee wanted to prevent distribution of Professor Friedland's work (pp. 114-115):

Perhaps because my view of the public-defender system was far less critical than that of the committee, they objected to the distribution of my study. Although they were generous in their acknowledgment of my work in their acknowledgment of my work in their report and filed my study with their report to the attorney general, they did not want it otherwise distributed. I objected. I was an academic and one's academic work, I argued, should be made available. The issue of my study's distribution had not been discussed when I took on the task. In the end, a compromise was reached. The study could be sent to law libraries, but not otherwise distributed.

The above reasons given for recommending a judicare system over a public defender system are completely untenable, and very contrary to my experience in the criminal courts of Toronto, having taken on many Legal Aid cases. Such reasons are more applicable to Ontario's judicare system because of the

very low tariff of fees, and Legal Aid's slowness in making payment. And conflict of interest is suggested by the fact that LSUC was part of a successful effort to restrict distribution of a report paid for by public funds.

Such management was what I experienced at Legal Aid, hired in 1979 to be its Director of Research in establishing the centralized legal research unit now known as LAO LAW.¹⁴¹ By its ninth year of development, 1988, it was producing legal opinions for lawyers servicing legal aid cases, at the rate of 5,000 year—a unique support service created in the worst resourced institution in the legal profession in Canada. It had to be created because of LSUC's bad management. Bad management of the substantial funding of legal aid, which funding, according to Professor Friedland (p. 116): "Costs had risen over the previous ten years, 1985 to 1995, from about \$75 million to about \$350 million." Legal Aid was not a small operation.

When I was hired in 1979, I was told that due to its periodic audits in 1978-79, the Government of Ontario demanded of LSUC's Legal Aid Committee, which was the manager of Legal Aid, that the amount of money being paid out on lawyers' accounts for legal research hours claimed was excessive and unaffordable. A good manager would have dealt with the problem itself. But the excess payments were going to lawyers, and it is lawyers who elect law society benchers. There was a large suspicion that lawyers were "exaggerating" their claims for legal research hours.

Whereas other legal services involve interaction with people, which provides a chain for investigation, there isn't one created by doing legal research. As one Legal Aid Committee bencher, Sidney Linden, said to me, "it's something you can't investigate; you can't go up to law library books and ask, 'did he read you?'" At that time the Internet and email were still 20 years in the future. And so it was my job to reduce somehow, the cost that Legal Aid's Accounts Department was paying out for legal research hours claimed.

Being a specialized criminal lawyer, I didn't know how to do that. But neither did anyone else. The CEO and the benchers managing Legal Aid provided no guidance as to how and what I was to produce. There was no timetable or requirement as to reporting; no supervision of any kind. And so, after a few

¹⁴¹ After joining the Law Society of British Columbia in 1978, I was in Vancouver arguing criminal appeals for the Crown before the B.C. Court of Appeal. But my wife couldn't adjust to Vancouver, and wanted to be back in Toronto. So in 1979, I desperately needed a job, any paying job back in Toronto. But jobs were hard to find 3,000 miles away, there not yet being any Internet and all that goes with it. However, by chance I happened to see an advertisement in the paper-bound Ontario Reports stating that Legal Aid in Toronto needed a Director of Research. Researching what, was not stated. I applied and won the job, I think because of my criminal law experience, criminal law being by far the area of law for which the most legal aid certificates are given out for those who cannot afford lawyers. But for that family problem, I would never have gone to Legal Aid. Its salaries are very poor because its funding is poor, and its specialty for a lawyer is the administration of poverty law services, for which skill there is no market in the legal profession. But ironically, my nine years at Legal Aid in Toronto are the ones of my career of which I am the most proud, because of what I created there—LAO LAW, the best legal research unit in Canada, and it still is, 38 years later.

months I realized that my job was to create merely the appearance that LSUC was taking the government's complaint seriously. My employer, I believed, didn't really want me to succeed in creating such a research unit because that would have provided a distinct improvement to Legal Aid, and therefore an increase in its ability to serve as an effective foundation for socialized law. Therefore I was caught between an employer who didn't want me to succeed, and no management experience. However I didn't want to lose my job (young family with three small children and a big mortgage), so every day of my nine years creating LAO LAW I knew I had to make the service very popular, and producing high volume, so it could generate the large cost-saving intended, *i.e.*, the bigger the volume of legal opinions, the greater the popularity and the greater the cost-saving for Legal Aid. Therefore the more I was successful, the greater would be the difficulty for LSUC's Legal Aid Committee to cancel the project and be able to say to the provincial government, "see we tried; it just can't be done."

Also, I knew that I could create something different in regard to legal research work. Having been a trial lawyer in the Toronto Crown Attorney's office for ten years, beginning in April of 1966, and later arguing criminal appeals for the Crown in Vancouver for a year, along with being the editor of the Criminal Reports (a Carswell publication) for 11 years, I felt that the system for doing legal research using paper publications was unnecessarily awkward.

It wasn't until several years after 1979 that I realized how unique that situation was, in that: (1) it was the only time where the necessary pressure that innovation requires was applied to any part of the legal profession; and the result was, (2) LAO LAW was the first time in the legal profession a true support service was created for doing the work to produce legal services; and, (3) it proved that lawyers will use external support services. Nine years later in 1988, my staff was producing legal opinions at the rate of 5,000 per year. No law office produces 5,000 legal services per year, let alone 5,000 of any one of them. I then realized:

(1) support services have for many years existed everywhere in the production of goods and services because of this management principle: "nothing is as effective at cutting costs as scaling-up the volume of production," *i.e.*, I had re-invented the wheel, but it was a new wheel in the production of legal services;

(2) there are many other parts of lawyer's work that could be done more competently and cost-efficiently by a highly specialized, high volume, support service;

(3) lawyers will use a support service if it helps them make money and serve their clients better;

(4) it's the key to the solution for the "costs of legal services problem," that provides law offices with the option of not using any support services if they wish; but they will stay competitive;

(5) the fact that such an innovation had occurred in the worst possible and least likely place in the legal profession (because of the very poor funding of Legal Aid), tells a lot about the lack of pressure to innovate in the legal profession in Canada, as does the

fact that it has never been duplicated in spite of its ability to greatly reduce the cost of legal research;

(6) because of the high degree of specialization, and high volume of production necessary for maximizing cost-efficiency, no law office, no matter how big, could itself bring about such a support service; it requires a sponsoring agency that has over-all management of an industry or profession, such as a law society; and,

(7) how very obsolete law society management structure is.

Unfortunately, my experience is unique in the training and experience of lawyers. Therefore I am the only one who analyzes the unaffordable legal services problem this way: (1) in terms of solving it; and, (2) how to solve it. And so I say, ABSs are not necessary. But law societies:

- (1) are still managed by “part-time amateurs”—“amateurs” because the major problems of law societies are beyond the expertise of lawyers (again, because of the lack of pressure to innovate law society management structure beyond its 19th century model of a government without a civil service);
- (2) have no history of sponsoring such innovations;
- (3) have no history of generating the kind of strong leadership that is perpetually vigilant to put in place that which keeps legal services affordable; and that,
- (4) that is so because law societies are not in fact accountable to the political-democratic process—in law they are; but in fact they are not. No democratically-governed community would accept the law society performance set out above, if it were adequately made aware of it.

Therefore it is very likely that if LSUC were under sufficient pressure to do something about the problem, it would have to “save itself” from substantial embarrassment, and public demands for its abolition, by putting in place the easiest to implement solution no matter how inadequate it was—a solution such as ABSs. Such “solution” would also serve well those benchers whose law firms stand to benefit greatly in representation of ABS investors.

That is why I have set out above a portion of LSUC’s management history—a history of corrupt self-service and not service in the public interest. Such history is a very good example of the conflict of interest inherent in law society management, warned of by the Clementi Report (2004).¹⁴² See also, Professor of Law and Sociology John Flood’s, “Will There Be Fallout From Clementi?—The Repercussions For The Legal Profession After The Legal Services Act 2007,”¹⁴³ An introductory paragraph states in part (bottom of page 538):

¹⁴² *Review of the Regulatory Framework For Legal Services in England and Wales*. Sir David Clementi in the U.K. recommended that the regulatory and representative functions should be clearly split because they are in conflict. 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 public perception.

¹⁴³ 2012 Michigan State Law Review 537 (2014).

... I argue that the present trend of the legal profession is moving away from traditional conceptions of professionalism to a commercialized and industrialized alternative. In speculating about the potential outcomes, with the use of hypotheticals and real case studies, I suggest that deskilling and deprofessionalization will be among the logical outcomes.

Therefore, all of the members of LSUC must become much more vigilant as to what its benchers do, particularly so now, as to the very contentious ABS issue in all of its forms and dimensions.

(10) The excuses used for not trying to solve the problem

Given that ABSs cannot solve the problem, it is irresponsible, if not very unethical, for a law society to deal with ABS proposals while not attempting to solve the problem. And so there are excuses used to attempt to justify the failure to attack the cause of the problem instead of giving its victims “palliative care,” *i.e.* “alternative legal services” (ALSs)¹⁴⁴ for that majority that cannot afford legal services instead of trying to cure the “disease.” Excuses such as:

- (1) the problem has many causes, *i.e.*, if the law society is at fault, it is only a very small contributor to the damage being caused by the problem. Such statements are made without any supporting analysis of the cause of the problem by the requisite experts such as management and economics experts. In fact, there is only one cause, affordability. But so far, law society benchers refuse to deal with affordability.

But see in the November 1, 2016, issue of the blog *Slaw* (“*Canada’s online legal magazine*”) this post: “Access to Justice and Market Failure”, by LSUC bencher Malcolm Mercer, which begins: “The problem of access to justice is likely the result of a number of causes.” And the third last paragraph states:

If we are serious about the access to justice gap, we should accept that no one solution will slay the access dragon. Indeed, we have to accept that we cannot predict with confidence what solutions will be effective. But it is time to be creative and to actually attempt solutions.

Very good! So where are the attempts? Almost a year has passed. When might they begin?

Other excuses are:

- (2) the number of lawyers in private practice is not shrinking;¹⁴⁵ and,

¹⁴⁴ Alternative legal services are: clinics of various types, self-help webpages, phone-in services, paralegal and law student programs, family mediation services, court procedures simplification projects, public legal education information services, programs for targeted (unbundled) limited retainer legal services (as distinguished from a full retainer to provide the whole legal service), pro bono (free) legal services, and the National Self-Represented Litigants Project, the purpose of which is to help self-represented litigants to be better litigants without lawyers. See: “Access to Justice: A Critique of the Federation of Law Societies of Canada’s Inventory of Access to Legal Services Initiatives of the Law Societies of Canada” (pdf.).

¹⁴⁵ “the number of lawyers going into private practice is not shrinking” (in answer to statements that the per capita number of lawyers is shrinking because of increasing numbers of people who cannot afford lawyers: see: (1) the dissenting comment to Colin Lachance’s *Slaw* article of June 16, 2016, “Law’s Reverse Musical Chair Challenge” which provides proof by way of the statistics of such shrinking; and, (2) for proof of how long, sole and small firm

(3) many self-represented litigants do not want lawyers.¹⁴⁶

But LSUC is no worse than all of the other law societies. None is trying to solve the problem. I asked a former LSUC Treasurer why the law societies don't make a joint national effort to deal with the problem, it being a national problem requiring a national solution. The answer was: (1) the law societies each have their own problems to deal with; and, (2) there is a question of funding.

Such law society treasurers need to be made true leaders and not merely "chairman of the board" types. Therefore, they should be elected by the members of the law society, as part of every bench election. And therefore, candidates to be a law society's Treasurer (or President, *etc.*) would be expected to campaign by setting out proposals, plans, strategies, *etc.*, and engage in public debates. Law society management by way of 19th century "gentlemen's agreement" is now incompetent management.

(11) Good benchers versus being good lawyers

Trying to solve the problem would involve an unknown amount of time, and would require some trial-and-error learning. That might conflict with the time needed by benchers to be good practicing lawyers, and lawyers don't become benchers to be associated with trial-and-error failures. So LSUC disobeys with impunity what s. 4.2 of Ontario's Law Society Act requires.

So if left unchallenged, both ABSs and the commercial producers of legal services (LegalZoom, *etc.*) are a threat to the majority of law society members. Both the commercial producers of legal services and ABSs, involve the use of employee lawyers to service their employers' customers and clients. Such employers are therefore, non-lawyer providers of legal services in need of a law society bylaw-based exception for their unlicensed UPL.

practices have been losing practitioners, see LSUC's, "Final Report of the Sole Practitioner and Small Firm Task Force," pages 50-54 (paragraphs 117-130) (March 24, 2005, reviewed in Convocation, April 28, 2005). And, (3) that shrinkage was recognized as far back as 1981; see, Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers 1797-1997* (University of Toronto Press Inc., 1997), which refers to a report to LSUC by University of Toronto economist David Stager (p. 308), which stated that the number of lawyers in private practice had decreased from 88 percent in 1973, to 71 percent in 1982 (the report was originally delivered in 1981, and summarized in 1983—see note 44 (on 308) which is set out on p. 380).

¹⁴⁶ The expertise, surveys, and materials available from the National Self-Represented Litigants Project do not support this excuse (that people don't want lawyers). The purpose of the NSRLP is to help self-represented litigants (SRLs) be more effective SRLs. It is committed to collaboration to enhance the responsiveness of the Canadian justice system to SRLs, and to continuing dialogue with lawyers, judges, and court services staff. The Project is also acting as a clearinghouse for information and resources related to the SRL problem. It is committed to information and resource-sharing among all interested and affected parties. It builds on the National Self-Represented Litigants Research Study conducted by Project Director, Dr. Julie Macfarlane of the University of Windsor, Ontario, from 2011-2013. See also the work of the Canadian Forum on Civil Justice (CFCJ) Everyday Legal Problems and the Cost of Justice in Canada: Overview Report.

Given: (1) the misery and damage caused to the majority of the population by the problem; and, (2) the law societies' refusal to try to solve the problem, the commercial producers have a strong argument that they should be treated as equally deserving an exemption from UPL prosecutions because of their providing relief from the consequences of the law societies' (and benchers') breach of trust, which is their failure to perform the duties attendant to their monopoly over the provision of legal services, as set out, for example, in s. 4.2 of Ontario's Law Society Act. Such breach of trust may well be a violation of s. 122 of the Criminal Code, "breach of trust by a public officer,"¹⁴⁷ which would further weaken the law societies' position as a prosecutor for UPL by the commercial producers.

Also, such a law society prosecutor:

- (1) would be a very biased and self-interested prosecutor fighting off a commercial threat, rather than prosecuting individuals for the UPL offence's intended purpose of protecting the public from the dangers of incompetently provided legal services;
- (2) would be like a law society limiting the numbers of law school graduates called to the bar for the improper purpose of increasing the competitiveness of those already called to the bar;
- (3) would be a prosecutor in violation of the principle that, "the Crown never wins and the Crown never loses;"¹⁴⁸
- (4) would be attempting to prevent anyone else from trying to solve the problem that is the greatest threat to the availability of legal services in the history of Canada, and therefore to Canada's existence as a constitutional democracy that guarantees constitutional rights, freedoms, and, "the rule of law," which is a problem that the law society refuses to try to solve itself; and,
- (5) would be appearing before the Law Society's "Hearing Division," being also a biased—not capable of providing a "fair trial."

In other words, law societies are the lynch pin of the justice system—when they fail, it fails. And, there would very likely be considerable public opposition to, and possibly government intervention into, such

¹⁴⁷ The constituent elements of the offence in s. 122, including the definition of "public officer," were first elucidated in, *R. v. Boulanger* 2006 SCC 32. See: "No Longer Is It Possible to Be both a Good Lawyer and a Good Bench," *Slaw*, May 29, 2017.

¹⁴⁸ For support of the principle that, "The Crown never wins, and the Crown never loses"; see: *R. v. Bain*, 1992 CanLII 111, [1992] 1 S.C.R. 91, at para. 2; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R.74, at para. 109; *Henry v. British Columbia*, 2014 BCCA 15, at para. 9, quoting as the source of that principle, the now classic paragraph of Rand J., in, *Boucher v. The Queen*, 1954 CanLII 3, [1955] S.C.R. 16, at pp. 23-24, as to the duty and motivations of Crown counsel: "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

prosecutions if the commercial producers had developed a market that services hundreds of thousands of people, as has happened in the U.S.

However, the progress of these commercial producers of legal services in the U.S. shows that they will not be much hindered by prosecutions for “the unauthorized practice of law.” See: (1) “‘Counsel, I Demand Justice!’” – ‘Most Definitely! How Much “Justice” Can You Afford?’” (*Slaw*, April 10, 2017); and, (2) “Technology, the Fiduciary Duty, and the Unaffordable Legal Services Problem” (*Slaw*, December 6, 2016). And see also the several books by Richard Susskind (cited in the third paragraph of the, “‘Counsel, I Demand Justice!’” article).

Therefore, such an exception from prosecution created for ABSs, will greatly weaken the law societies’ ability to prosecute the commercial producers especially when they are large producers. In turn, that will weaken the general practitioner’s chances of survival. If the law societies had been at least honestly trying to solve the problem, they would have a good reply to the argument that, because they have not yet solved the problem, they shouldn’t be allowed to prevent anyone else from trying to solve it, or lessen the great misery and damage that it is causing to the majority of Canada’s population.

(12) Commercially-produced legal services because *Chaoulli* enables private medical services

Law society neglect of the problem, which is in law its duty to solve, has created a large permanent class within society that cannot obtain affordable legal services. That provides a basis for a Canadian Charter of Rights and Freedoms section 7, “life, liberty, and security of the person,” defence for the commercial suppliers of legal services against prosecution for the offence of, “the unauthorized practice of law.” Consider therefore, the relevance of the extensive analysis of, *Chaoulli and Zeliotis v. A.G.s (Quebec & Canada)*, 2005 SCC 35, provided by this book: Colleen M. Flood, Kent Roach, and Lorne Sossin (eds.) *Access to Care, Access to Justice—the Legal Debate over Private Health Insurance in Canada*.¹⁴⁹ *Chaoulli* is a “deprivation of private medical services” case, comparable to a “deprivation of legal services” situation. Dr. Chaoulli won, and so should the commercial producers of legal services win, if law societies remain as they are, and especially so should they approve the existence of ABSs.

In *Chaoulli* the appellants did not ask for an order that the Quebec government spend more money on health care. Nor did they ask for an order that waiting times for treatment under the public health care system be reduced. Rather, they argued that because such delays put their health and safety at risk, they should be allowed access to private medical services. Three of the seven justices of the Supreme Court of Canada who heard the case decided that the Quebec law prohibiting private health care and insurance

¹⁴⁹ University of Toronto Press, 2005.

violated s. 7 of the Canadian Charter of Rights and Freedoms, and three decided that it did not. The seventh justice held that the prohibition violated the Quebec Charter of Human Rights and Freedoms, and therefore that it was not necessary to decide whether there was also a violation of Charter s. 7.

To use the language of Canadian Charter of Rights and Freedoms s. 15 equality rights case law, the result of the law societies' refusal to solve the problem, is that, being middle class, or of "middle income," and unable to obtain legal services at reasonable cost, is a state of one's condition that is "immutable, or changeable only at unacceptable cost to personal identity," and to one's ability to invoke constitutional rights and freedoms, and the rule of law.

But unfortunately, there is not yet an "equality rights" argument or defence provided by Charter s. 15, even though law societies have created a permanent class of people, seriously disadvantaged by their inability to afford a lawyer's advice. That class is the majority of the population. It is a growing majority because there is no law society program the purpose of which is to solve the problem. And as well, the percentage of litigants who are self-represented litigants will steadily become a bigger percentage. That seriously undermines constitutional declarations as to an enforceable "rule of law," and also greatly undermines claims that Canada is a constitutional democracy. But such "class discrimination" is not of the "enumerated or analogous" type that s. 15 requires.¹⁵⁰ Without the help of a lawyer, the Canadian Charter of Rights and Freedoms is a "paper tiger." If section 7 requires a situation of true "deprivation," then s. 15 should be available even where there is no immediate loss from that deprivation.

(13) The "slippery slope" to the abolition of the general practitioner

And because of the millions-of-dollars-potential of ABSs, the enabling of the proposed "charity ABSs" will inevitably lead to legalizing all ABSs (as abundant caution requires, we must assume to be intended by the promoters of the "charity ABSs"). Thus the "charity ABSs" will establish a "slippery slope" to the abolition of the general practitioner. That is to say, in quick time, the definition of what is a "charity ABS" will become ever more charitable, particularly so for those benchers whose clients can be ABS investors. And will the "charity ABSs" be adequately monitored to ensure that their provision of legal services

¹⁵⁰ The purpose of the Canadian Charter of Rights and Freedoms s. 15 "equality rights" provision, is to guarantee basic rights as to equality before and under the law and to the equal protection and benefit of the law, without discrimination. Subsection 15(1) extends protection against the forms (grounds) of discrimination listed in section 15, and to analogous grounds of discrimination; see for example: (1) Eldridge v. British Columbia (A.G.) 1997 CanLII 327 (SCC), [1997] 3 SCR 624; (2) Andrews v. Law Society of British Columbia 1989 CanLII 2, [1989] 1 SCR 143; (3) Corbiere v. Canada (Minister of Indian and Northern Affairs), 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203; and, (4) Law v. Canada (Minister of Employment and Immigration) 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497). The "analogous grounds" recognized by the Supreme Court of Canada so far are: (1) citizenship; (2) marital status; (3) sexual orientation; and perhaps, (4) language: Professor Peter Hogg, *Constitutional Law of Canada, 2015 Student Edition* (Thomson Reuters, Carswell, 2015), section 55.8(b), "Addition of analogous grounds" (pp. 55-22 to 55-25).

doesn't become "for profit" and less for charity? The other nine provinces and three territories of Canada can learn from Ontario's experience.

(14) LSUC's progress on ABSs

If now worried about the economic future of your legal career, start with LSUC's "Alternative Business Structures" webpage, from which its ABS Discussion Paper of September 24, 2014, can be downloaded (pdf). Then scroll down on that same site to see: (1) the hyperlinked list of, "ABS Working Group Reports to Convocation," (LSUC's "legislature of benchers") and, (2) the hyperlinked, alphabetized list of 41 contributors' responses to the Discussion Paper. Mine, ("Chasse, Ken") is 67 pages long.¹⁵¹

It was LSUC's ABS Working Group benchers who wrote the ABS Discussion Paper, and the ABS Summary Report that summarizes all the responses to the Discussion Paper (see, Report to Convocation—February 26, 2015, tab 8.2). The Discussion Paper is not an unbiased presentation of relevant facts and issues, but rather a promotional text for ABSs, complete with a letter, dated September 26, 2014, from LSUC's Treasurer, encouraging participation in the ABS discussions as a true LSUC publication might do. And the Summary Report's descriptions of the supporting and opposing statements and arguments are too brief, and their accuracy cannot be checked because they lack sufficient references to the specific texts from which such statements and arguments are drawn, as any formal writing should.¹⁵²

Those who wrote the Summary Report know that other benchers, in determining their voting position on the ABS issue, will most likely read the Summary Report alone, and not the 41 responses. Therefore an impartial assessment of the integrity of the Summary Report is necessary. Conflict of interest is a concern—the conflict between benchers' using their position as benchers to serve the fortunes of their law firms first, and the legal duties of a law society a very poor second.

And that June 2017 interim report states (page 3, para. 38): "...ABSs nevertheless have 'real potential' to enhance access to justice."¹⁵³ If that means that ABSs can help with the problem of unaffordable legal

¹⁵¹ This paper is also posted on the SSRN, (free pdf. download): "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."

¹⁵² For example, the two very short, cursory references in paragraphs 48b and 75, to my submission, make necessary reading the whole 67 page paper in order to understand what such references mean, *i.e.*, the recommended solution of a civil service-type agency for all of Canada's law societies, and financed by enabling CanLII to provide a legal opinion service at cost, plus a profit to pay for it.

¹⁵³ The whole of paragraph 38 states: "In its February 2014 Report to Convocation, the Working Group described in detail the relationship between ABS and access. It observed that while ABSs are not a 'panacea' and are not 'the sole, nor likely the most important' access to justice solution, ABSs nevertheless have 'real potential' to enhance

services, it is false. To be valid it has to mean that a “charity ABS” can provide routine legal services, and provide legal advice services below cost as a service of the charity, union, not-for-profit organization, or other CSO (civil society organization), that is providing them. The use of ABSs in Australia and England proved that ABSs are not relevant to the problem because they deal with routine legal services and not legal advice services. The June 2017 Interim Report to Convocation acknowledges that within its lengthy discussion of CSO’s. Paragraph 44 (page 4) states:

In September 2015, the Working Group also recognized that: a. Although ABS efforts in Australia and England and Wales were not designed to facilitate access to justice *per se*, there have been practices which have emerged to provide legal assistance to vulnerable persons.

The ABS Discussion Paper also strongly implies that ABSs could be of assistance in dealing with the problem. For example, it quotes (page 13) percentages of unrepresented litigants, which percentages ABSs cannot help to alter. Although the decision-making capability of artificial intelligence is transforming whole industries, (see: “The Dark Secret at the Heart of AI”),¹⁵⁴ the automation that ABSs will finance, cannot yet help to reduce the cost of litigation. It is not a routine legal service.

We must challenge our ABS-bencher advocates more closely, and bencher candidates for election more rigorously. Law society management must escape its 19th century origins and culture, or be abolished.

(15) The practice of law is not a business

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 as necessary, and make legal services as affordable as required. For example, financing the purchase of automating software can be achieved by increases in law society fees. That is far less worrisome and risky in relation to the competent and ethical practice of law than allowing non-lawyer commercial investment organizations to own law firms. And, all law societies acting together, would have much more bargaining strength, and offer a much more attractive contract for purchasing

access to justice.” [The footnote accompanying this comment states: “see the ABS Working Group February 2014 Report to Convocation, Convocation – Professional Regulation Committee Report, at paras. 6-89, online at <http://lsuc.on.ca/uploadedFiles/ABS-report-to-Convocation-feb-2014.pdf>, at paras. 107, 119 and 120.”

¹⁵⁴ The subtitle states: “No one really knows how the most advanced algorithms do what they do. That could be a problem.” That is “the dark secret.” The article adds: “Starting in the summer of 2018, the European Union may require that companies be able to give users an explanation for decisions that automated systems reach. This might be impossible, even for systems that seem relatively simple on the surface, such as the apps and websites that use deep learning to serve ads or recommend songs. The computers that run those services have programmed themselves, and they have done it in ways we cannot understand. Even the engineers who build these apps cannot fully explain their behavior.”

automation and continuing support thereafter, than can individual law firms bargaining with large commercial investors.

This warning is provided by an assessment of the result of legalization in the U.K. of ABS-owned law firms (as a result of the Legal Services Act 2007):¹⁵⁵

I argue that the present trend of the legal profession is moving away from the traditional conceptions of professionalism to a commercialized and industrialized alternative. In speculating about the potential outcomes, with the use of hypotheticals and real case studies, I suggest that deskilling and deprofessionalization will be among the logical outcomes.

(16) ABS cannot reduce the cost of legal advice services

Proposals to allow “alternative business structures” that will allow investors to own law firms to any degree do not contain any reference to the use of specialized support services. Therefore they will never reduce the cost of legal services, particularly legal advice services, to an affordable level. That is a social welfare problem. But they are not in the social welfare business. Their intention is to take over the routine legal services market, commercialize it by way of industrial forms of production to maximize the return on investment. Because they involve no change in the way legal services are produced, they have no capacity to make legal advice services affordable again. But that is what lawyers are for—the giving of legal advice and implementing it.

The American Bar Association’s 2016 Report on the Future of Legal Services in the United States (pdf.), which examined the use of ABSs in and outside the U.S., states (p. 42): “At the same time, the Commission also found little reported evidence that ABS has had any material impact on improving access to legal services.”¹⁵⁶

If law societies were suddenly subject to public and authoritative accusations that they have done nothing to solve the unaffordable legal services problem, alternative business structures might suddenly become an attractive answer. Benchers have taken no steps to solve the unaffordable services problem, but rather, to mollify it with alternative legal services.

17. ABSs cannot solve the problem of unaffordable legal services

The unaffordable legal services problem (“the problem”) cannot be solved or lessened by ABS proposals. ABSs concern “routine legal services.” But the problem is caused by legal advice services, *i.e.*, services that require a significant amount of a lawyer’s time and advice. The majority of the population

¹⁵⁵ John Flood, “Will There Be Fallout From *Clementi*, The Repercussions for the Legal Profession after the Legal Services Act 2007,” 2012 Mich. St. L. Rev. 537 at 538 *supra* note 98(2) and 127 and accompanying texts.

¹⁵⁶ The Report is summarized in this article: “Will Alternative Business Structures Fly?,” *attorneyatwork* September 27, 2016.

cannot afford them. Those lawyers and investors who wish to have ABSs made legal are looking to make a return on investment by way of providing routine legal services in greater volume. That is a commercial investment proposal. But the problem is a social welfare problem and ABS investors are not in the social welfare business. Below are cited the articles that provide the detailed explanations for my arguments.

The ABS Discussion Paper and the Reports to Convocation imply that ABSs can have a positive impact upon the problem. But they don't describe how. They provide no adequate description as to how the financing that ABS investors would provide to law firms would produce the innovation that would have any significant impact upon the problem. They could finance the automation for providing routine legal services, but such automation is something that the legal profession can provide for itself, better by itself, without: (1) law offices having to be owned by investors; and, (2) the risk of the fiduciary duty owed to clients being suppressed by the resulting profit duty owed to investors. The independence of the legal profession would be under a far greater and insidious threat of intervention than that provided by any government—dictate control of the evidence and argument provided by counsel, then one can control the judgment dictated by the judge.

All of the literature on the problem of unaffordable legal services is written by lawyers. But the problem is not a legal problem. And therefore there is no consideration of what other professions and manufacturers do in regard to their versions of the same problem. Such an analysis would show that the solution to the problem exists everywhere in the production of goods and services; *i.e.*, the use of “support services methods” of production. They are the product of the kind of pressure that produces innovation. No pressure; no innovation. Therefore legal services are produced in the same way in which they have always been produced. And so the problem exists. It is a law society-caused problem, but it is capable of a law society-caused solution. There being however no law society attempted solution, other sources of a solution should not be barred—sources such as LegalZoom, etc.

ABS advocates do not propose to make any change to the method by which legal services are produced, such as moving production to a “support services method.” Therefore they can have no impact on the size and seriousness of the problem. The purpose of ABS investors is not to solve the problem but rather “to corner the market” for routine legal services because that's where “the quick and easy money is.” It is not in the provision of legal advice services; the money they produce being most frequently neither quick nor easy, and therefore not yet ready for automation.

(18). Instead of ABSs and ALSs

Instead of ABSs and ALSs, law societies should be coping with the fact that very aggressive commercial organizations like, LegalZoom, RocketLawyer, and LegalX are on their way to replacing the

general practitioner-replacing more than half the membership of a law society. Their American advertising is both sophisticated and everywhere.¹⁵⁷ It is unopposed by law society advertising—not even a rear-guard action to protect the general practitioner. And, the advertising shows that it will be equally good in Canada.

The strategy of such commercial, highly competitive producers is based upon affordability and maximizing the use of automation and its very rapid progress from the simplistic to the complex service—the very things that law societies should be helping law offices to achieve. They are unopposed because there are no law society public promotions of the advantages of the solicitor-client relationship over the merely buyer-seller relationship of commercial producers. Those advantages are:

- (1) the fiduciary duty owed to clients;
- (2) law society complaints department and financial oversight based upon a code of professional conduct;
- (3) mandatory professional insurance; and,
- (4) “continuing professional development” (CPD/CLE) programs.

But such law society promotions would require that the services promoted be made affordable. Similarly, every such recommendation for change is blocked by the problem.

(19) ABSs as a threat to the independence of the judiciary

Also, ABSs are a greater threat to the independence of the judiciary than is the threat of government intervention. If an investor can control a lawyer, that can be a very effective way of controlling a judge. That is so because judges are completely dependent upon the evidence and arguments provided by the lawyers who appear before them (“counsel,” as they are referred to in legal proceedings). Therefore the independence of the legal profession is a necessary “adjunct principle” in support of the constitutional principle that is the independence of the judiciary from government intervention. And therefore law societies have long advocated that, that “adjunct principle” should be recognized as being in itself a constitutional principle—see for example, this LSUC publication: *In the Public Interest* (2007); it being an excellent collection of essays by authoritative authors concerning, “the rule of law and the independence of the bar.”

But now benchers want to contradict that desire by surrendering the profession’s independence to the commercial ownership of ABSs. Potentially, that can lead to a type of improper intervention, the source

¹⁵⁷ As a surprising example of just how “everywhere” LegalZoom’s advertising is, see the webpage of the Merriam-Webster Learner’s Dictionary that provides a definition of, “cronyism” (a term used in section 22 below), to wit: “the unfair practice by a powerful person (such as politician) of giving jobs and other favors to friends.” Might law society benchers be the right kind of friends?

and power of which will be far more difficult to determine than improper government intervention, given the complexities of the many forms and levels of corporate ownership and control of investors.

Therefore, should we be so cynical as to advise, if you want to know what really motivates a bencher in regard to ABSs, “follow the money.” If LSUC’s Convocation has not already discussed the appearance of a conflict interest in the promotion of ABSs, it is not being too cynical. Particularly so because the greatest threat to the rule of law has long been without even an attempted solution. That justified society’s cynical view of the integrity of the legal profession.

(20) Rejecting ABS Proposals

These are the reasons for rejecting ABS proposals that allow ownership of law firms by non-lawyers:¹⁵⁸

- (1) ABS proposals cannot solve the unaffordable legal services problem, as they allege, because they cannot reduce the cost of legal advice services.
- (2) Legal advice services cannot be automated. Although automating software will provide increasingly complex legal advice services, electronic technology will create a need for new types of legal advice that cannot yet be automated; *e.g.*, advice concerning the development of electronic records management systems technology. A large part of the evidence used in legal proceedings and services comes from complex electronic systems and devices.
- (3) Investors will buy-up groups of law firms, enfranchise them (pp. 9 and 13 of LSUC’s ABS Discussion Paper), 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, such as, no longer doing work pro bono because it produces no income, and shifting work down to paralegals, students, and less experienced lawyers because they cost less.
- (4) The reputation of an owner of, or investor in a law firm that is seriously damaged by scandal or other forms of corrupt or illegal behaviour, will equally damage the reputation of the law firm, and perhaps taint that of the legal profession.
- (5) Individual law firms have very little bargaining power when negotiating with commercial investors, especially because such investors will want a lot of detailed powers of decision-making 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.

¹⁵⁸ See also, Ken Chasse, “Alternative Business Structures’ ‘Charity Step’ to Ending the General Practitioner” (SSRN, August 2017, pdf.). And see my *SLaw* blog posts on this subject of ABSs and “the problem”:
 “Alternative Business Structures Proposals or Solving the Unaffordable Legal Services Problem,” (March 30, 2015);
 “A2J: ‘Let Them Eat Cake,’ So, Let Them Use Alternative Legal Services” (November 26, 2016);
 “LSUC’s Worrisome ABS Proposals” (November 25, 2014);
 “Legal Advice Services Cannot Be Automated by Alternative Business Structures” (October 9, 2014);
 And see also: “Access to Justice—Unaffordable Legal Services’ Concepts and Solutions,” and other relevant articles listed on my SSRN author’s page.

- (6) The law societies, together, bargaining on behalf of the whole of Canada's legal profession will have much greater bargaining power in obtaining the necessary automation, and lowest maintenance fees arrangements, and any needed "centralized access to management systems, technology, marketing and other expertise," than they would if enfranchised, and also in obtaining "centralized infrastructure and assistance with marketing and branding strategies, buying power and practice support," offered in LSUC's ABS Discussion Paper, which benefits are proposed to be made available by the investors who will buy law firms.¹⁵⁹
- (7) ABSs are not subject to the established methods of prevention and discipline, *i.e.*, by: (a) legislation; (b) law societies as the regulators of the legal profession; (c) by the insurer, *e.g.*, in Ontario, 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 instead of reporting such misadventure to the law society).
- (8) The automation of routine legal services is being held out as a substantial improvement for all law firms, when in fact it can bring at most, only a very limited improvement to the over-all cost of legal services because external support services will not be made available, but 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. Lawyers should be available to check the work of automated routine-ized services, and to check for unexpected and hidden legal problems, and to provide legal advice accordingly.¹⁶⁰
- (9) The problem of "unaffordable legal services" should be solved first, before further favouring, by way of ABSs, 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) if the law societies had been sufficiently responsive to the population's need for legal services, the problem would not exist.¹⁶¹
- (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.¹⁶² In fact they cannot solve the problem, nor have they made any headway in that direction.¹⁶³

¹⁵⁹ The LSUC's ABS Discussion Paper is entitled, "Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper." (That LSUC webpage is entitled, "Alternative Business Structures." For a pdf. copy of the Discussion Paper, click on the fourth entry under the heading, "ABS Working Group Reports to Convocation"). See also notes 11, 93, 98, and, 114 *supra*, and notes 130 and, 144(1) *infra* and accompanying texts.

¹⁶⁰ As to fears that automated legal services will threaten private practice, see: John Gillies, "Law Firms [Slowly] in Transition," *Slaw*, December 1, 2015; and, Dana Remus and Frank S. Levy, "Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law" (SSRN, Nov. 2016, pdf). But no matter how quickly or slowly automation (AI) replaces lawyers, there will still be an unaffordable legal services problem afflicting the majority of the population. And see also note 18 and accompanying text *supra*.

¹⁶¹ 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 the reproduction of s. 4.2 in the Introduction on page 2 above, and the references in 7s 3, 27, 36, 44, 54, and, 112, and accompanying texts *supra*.

¹⁶² 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

- (11) The inappropriate “partiality” presented by the LSUC’s ABS Discussion Paper (pdf.) released on September 24, 2014, as a LSUC publication.¹⁶⁴ 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 as it should be.¹⁶⁵
- (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.¹⁶⁶
- (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, and complex investment and other business relationships that ABSs 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 the business of ABSs are beneficial to law firms sufficiently represented by benchers, without analytical opposition that is significantly challenging, 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 irreversible investment and other business relationships they will create.
- (16) As proposed,¹⁶⁷ 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.

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.”

¹⁶³ See LSUC’s, “ABS Working Group Reports to Convocation” (pdf.). The latest, September 2015, particularly paragraphs 91 to 93 (reproduced below at pp. 76-78).

¹⁶⁴ 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. And see LSUC’s Alternative Business Structures Working Group Report to Convocation (at Tab 4) of the Professional Regulation Committee Report, February 27, 2014, and the ABS Committee’s Interim Report of September, 2015. LSUC’s Alternative Business Structures webpage contains a summary of progress which is reproduced in pp. 69-72 below. See also notes 11, 94, 98, 114, and, 125 *supra*, and note 144 *infra*, and accompanying texts.

¹⁶⁵ See by Ken Chasse: (1) “LSUC’s Worrisome ABS Proposals” *Slaw*, November 25, 2014; (2) . “Legal Advice Services Cannot Be Automated by Alternative Business Structures” *SSRN*, October 17, 2014; and on, *Slaw*, October 9, 2014; (3) “Self-Represented Litigants’ Tax Money Provides more Funding for Legal Aid Ontario” *Slaw*, July 15, 2015; and, (4) “ABS Proposals Reveal Conflicts of Interest in Law Society Management,” Part 1 (January 20, 2015); Part 2 (January 22, 2015), posted on the *Access to Justice in Canada* blog. And see also the other ABS articles listed in note 127 *supra*.

¹⁶⁶ Note 118 and accompanying text *supra*.

¹⁶⁷ Note 118 and accompanying text *supra*.

- (17) The control ABS agreements would provide non-lawyer investment organizations over law firms is a threat to judicial independence because judges' decisions are completely dependent upon the evidence and arguments presented by the lawyers who appear before them. Given the many variations of hidden corporate control of investors, ABSs are a more insidious threat to the integrity of, and respect for the justice system than is government intervention. And, perhaps they are equally unconstitutional.
- (18) Investment ownership will fix and potentially freeze innovation to suit investors and not the law firms owned or their law societies. For example, ABS proposals do not propose changing the method of delivering legal services to a support services method, which is a necessary part of solving the unaffordable legal services problem.
- (19) Violations of required competent and ethical conduct due to the actions of investors would often be undetectable.

(21) The solution to the ABS controversy

Some of the members of LSUC's ABS Working Group have spent a lot of time on writing the ABS texts and the Reports to Convocation, attending meetings with groups of concerned lawyers, and writing blog articles in favour of ABSs. Some of them must have spent far more than the 31 days, on average, that benchers are said to devote to their law society duties.¹⁶⁸ What of their clients? They might say that, that shows their dedication to their duties as benchers. Really? Then why didn't they spend as much time trying to solve the unaffordable legal services problem? That would have helped many more people—millions more people. And it would serve the great majority of the LSUC's members far better than any amount of time devoted to ABSs. Instead, the problem sits dormant, no closer to a solution than it was many years ago, if not decades ago, and the duties within s. 4.2 of Ontario's Law Society Act along with it, as the problem's victims continue to grow.

To allow "charity ABSs" will result in allowing all ABSs. And in regard to whom and what may be prosecuted for "the authorized practice of law," the commercial producers of legal services such as LegalZoom etc., must be considered to be just another form of ABS using lawyers directly or indirectly as employees. As a result, approving any form of ABSs may prevent law societies from protecting the market of the general practitioner from the rapid advance of those commercial producers into that market. Specifically now for Ontario's lawyers, it is a choice between improving the market of those law firms whose clients can be investors, or losing the market of a much larger part of LSUC's membership.

If we lose the general practitioner's market to the commercial producers, we will never get it back. And if we lose general practitioners, more than half of law society membership will be lost. They are the

¹⁶⁸ The third paragraph of the bencher election announcement on LSUC's website, which election occurred on April 30, 2015, stated: "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."

lawyers whose greater contact with middle and lower income people determines the reputation of the legal profession. And when they are gone, courts and judges will be much less important to society. Why should people continue to respect and pay for a justice system they cannot use effectively? Best we abolish law societies. Or, is it possible to make them competent for this century?

12. Problems law societies must deal with, or they can't deal with, because of the unaffordable legal services problem

The plight of Canada's law societies provides a good example as to why we warn clients that, "legal problems left unattended, most often lead to more serious problems of greater misery and damage." Consider the "knock-on effect" (the domino effect) of problems created for law societies because the problem of unaffordable legal services remains unsolved, while its victims become bigger and more desperate victims:

1. The probability of wrongful convictions must be expected to increase proportionately with the increase in the number of accused person appearing without lawyers.¹⁶⁹
2. Using young lawyers, paralegals, and law students who wish to be active in regard to the problem, and therefore do the work to provide the ALSs which law societies sponsor, thus providing the appearance of law societies being sufficiently responsive to the problem, but in fact not; but they thereby make more certain that those law students etc., will go through their careers as lawyers etc., in a very financially depressed profession—at a time when people have never needed lawyers more.
3. What compromise will they reach with the commercial producers of legal services?
4. In opposition to the commercial producers (LegalZoom, LegalX, etc.) they can't advertise and otherwise promote the benefits of the solicitor-client relationship over the buyer-seller relationship, because those advantages can't be available to people who cannot afford legal services.
5. Have to encourage the use of "targeted legal services," (being legal service provided on a limited retainer) even though they result in a disproportionately large number of claims against the professional insurer; (LawPRO in Ontario).
6. Can't in good faith ask the government to fund Legal Aid better to compensate for the consequences of a problem they themselves caused by not dealing with it.
7. Lawyers are major victims of their own law societies. That is why the legal profession is diminishing in several ways. Law societies will have to cope with demands that they limit the number lawyers called to be bar in the hope of limiting competition.
8. Hindered in prosecuting the commercial producers for the unauthorized practice of law by the argument that such producers are providing relief from a problem that the law societies refuse to try to solve; therefore other sources of legal services should not be barred; as a

¹⁶⁹ Law society negligence magnifies the effects of government negligence. The frequency of wrongful convictions is also due to government negligence in not providing sufficient resources to the criminal justice system. See: "No Votes in Justice Means More Wrongful Convictions," (SSRN, June 2016, pdf).

result, law societies are not able to protect general practitioners from the loss of their market.

9. The per capita number of lawyers in private practice, particularly general practitioners and sole practitioners, is rapidly diminishing.
10. As part of creating an appearance of adequately reacting to the problem, having to go along with the pretence that alternative business structures can have some significant impact upon the problem.
11. Equality rights, Canadian Charter of Rights and Freedoms s. 15; coping with the accusation that law societies have created a large permanent class within society that cannot obtain affordable legal services, *i.e.*, the result of the law societies' refusal to solve the problem, is that, being middle class, or of "middle income," and unable to obtain legal services at reasonable cost, is a state of one's condition that is "immutable, or changeable only at unacceptable cost to personal identity," and to one's ability to invoke constitutional rights and freedoms, and the rule of law.
12. Reacting to the problem by providing nothing more than "alternative legal services," is a declaration to that majority that cannot afford legal services, that never again will they have their own lawyer, in a solicitor-client relationship with its fiduciary duty, to do all of the work in connection with a client's legal problems, and do it affordably; that's gone, so they had been accept the charity that is alternative legal services.
13. Coping with the accusation that the best thing that could be done for the availability of legal services, and for the legal profession itself, is the abolition of law societies.
14. Coping with the accusation that they refuse to take the necessary ethical step of informing the government that they cannot deal with the problem, which should not in good conscience, be left to grow worse; this is a very selfish posture just to avoid government intervention.
15. Not being able to advocate that the independence of the legal profession should be elevated to the status of being a constitutional principle; to so entrench that principle would further make law societies unassailable and neglectful of their duties in law to make legal services adequately available; if such were made a constitutional principle, so should the right to legal services.¹⁷⁰
16. Because of their refusal to maintain adequately affordable legal services, law societies have greatly weakened their ability to oppose socialized law. They are a 19th century institution managed by part-time amateurs who cannot cope with 21st century law society problems because they have never been sufficiently accountable to the political-democratic process—accountability in law, does not ensure accountability in fact. "There are no votes in justice" so governments ignore the performance of law societies.
17. Finding or creating alternatives for articling for law students because law firms have greatly reduced their use of articling law students; being a law student, is an expensive gamble in a seriously financially depressed profession.
18. The just accusation that, except in wartime, law societies cause more damage to the population than does any other group of people, including organized crime.

¹⁷⁰ LSUC has long advocated that the independence of the legal profession be made a constitutional principle; see: *In the Public Interest* (LSUC, 2007), being, "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."

19. Coping with the accusation that law societies are like a worn out aristocracy that has long outlived its worth, but lives off the best of the land—the justice system—and is content to satisfy feelings of duty to the people by providing charity in the form of “alternative legal services.”
20. Solve the problem or: (1) be accused of using ALSs as “window dressing” that creates a false appearance of adequate action and concern; and, (2) promoting approval of ABSs to enrich those benchers whose clients can be investors.
21. Because of the size of the problem, which is the greatest threat to the availability of legal services since the Second World War, if not in all of Canadian history, Canada’s law societies are vulnerable to public demands that they be abolished, because:
 - (1) they have no program the purpose of which is to solve the problem of unaffordable legal services;
 - (2) they have made no public declaration that the problem is their problem and it is their duty in law to solve this problem; and,
 - (3) they have not done the obvious, which is to pool their resources, form a national committee, retain the necessary expertise with which to formulate a strategy for attacking the problem—and this is happening at a time when the population has great powers of communication by means of: (1) the social media; (2) the news and broadcast media; (3) the many sophisticated pressure groups; and, (4) the resources of political parties in opposition to governments.

13. The problem enjoyed that the unaffordable legal services problem has made possible—cronyism

The older definition of “cronyism,” “an intimate friend,” in the 20th century it took on the current meaning of favors of privilege, power, and money corruptly provided among friends.

In a law society it could work this way (only in theory and never in Canada, of course):

- (1) First, the benchers of an imaginary law society create the unaffordable legal services problem by doing nothing about it until its victim-population is of a size, seriousness, and quantity of widely spread misery, that the law society has to be seen to be doing something about it, but doing it without requiring its benchers to do anything that interferes with their maintaining their present incomes, regardless the state of the problem.
- (2) So, in accordance with such requirements, the benchers sponsor “access to justice” committees and “alternative legal services.” But the work required for the continuous and on-going operation of these devices is supplied by young and inexperienced students, paralegals, and lawyers, eager for experience, credits for law school “practice” courses, and CPD or CLE supplements, etc.

For example, the benchers are not among the people who stand behind fold-out tables in the corridors of shopping malls providing, “legal information only, without creating a solicitor-client relationship,” so stated in writing.

The benchers are thus able to limit their participation to “promotional, public-face-of-the-law-society” work, such as, being a speaker or chair at a seminar urging other lawyers to do more pro bono, or targeted legal services work, or meeting with groups of lawyers who have various concerns and complaints. The key feature of such bencher work is that the bencher remains in control of how much time is to be spent, and such work is done for those who elect benchers and not directly for the public.

All the while, no law society program to solve the unaffordable legal services problem is launched because: (1) that would involve an unknown amount of benchers' time in managing such a program; (2) it's necessary trial-and-error learning process would create a high risk of benchers being associated with failure; and, (3) therefore being accused of wasting money, and because there isn't yet seen to be enough pressure to force innovation of any kind, of "trying to fix something that isn't broken."

And so law society management structure and purpose remain: (1) unchanging; (2) responsible only for the competence and ethical practice of lawyers, but not the affordability of their legal services; and, (3) fearless in the face of the consequence of not changing.

(3) Once the majority of law firms and lawyers is suffering a great loss of clients due to the problem, discretely raising the possibility of "alternative business structures" (ABS), allegedly to create a solution to the unaffordable legal services problem. Of course all forms of self-service must serve the greater good of the public interest. Then such benchers having clients who could be investors, offer to do the bulk of the work to operate an ABS Committee of Working Group. That enables such benchers to control the writing of all necessary texts to promote the implementation of such an alleged solution.

As the investigation processes, there will be benchers who have doubts about the ability of ABSs to have any impact upon the problem. But those benchers having such clients will argue that their research shows that ABS investment money can bring other benefits. And so to quiet concerns as to controlling ownership of lawyers, a compromise is reached.

(4) Strategically taking advantage of the varied use of ABSs as might be discovered in other countries, the benefiting-benchers promote the idea of allowing ABSs to be operated in CSOs to be known as the "charity ABSs." Then when the commercial producers of legal services such as LegalZoom etc., are seen to be a threat to the general practitioner and other lawyers who make up the majority of law society membership, the benefiting-benchers promote the idea that with the help of ABSs benchers, all such lawyers and law firms can provide a more-than-adequate challenge to those commercial producers and thus preserve their market and clientele. Therefore the scope of permissible ABSs must throw off its "charity ABSs only" limitations. Thus the benefiting-benchers can work together, as close mutually-benefiting close friends might to preserve the law society in its present power, purpose, and prestige.

(5) All benchers, whether benefiting or not benefiting, must all such universe use of ABSs in order to perpetuate the appearance of adequately responding to the problem of unaffordable legal services.

(6) However, when finally apparent to all that ABSs cannot solve the problem such that the majority of the population must be content with the products of the commercial producers of legal services and never again have their "own lawyer," the news media, and opposition political parties, etc., will point out that the law society has perpetrated a fraud upon society and its own membership. That is to say, it is a bitter irony that society's best educated professionals for detecting and dealing with fraud and similar forms of corruption, have themselves been defrauded by their own colleagues whom they have elected as benchers to be in a position to carry out such a fraud upon their electing body.

(7) But it must be said with all due respect, that to no greater extent has such activity been within the traditions and history of Canada's law societies. Amen.

And indeed it is near needless to say, that the members of Canada's law societies, being as vigilant as they are, and experienced in dealing with such matters as they are, would never allow such a thing to happen.

The above scenario is not nearly as outrageous as: (1) the many convocations of a law society's allowing the unaffordable legal services problem to develop for decades; (2) to create for decades, great misery and damage to the population, great damage to its courts system, and to the reputations and welfare of the tens of thousands of lawyers that are its members; but, (3) do nothing for those decades—including, (4) not trying to solve the problem; (5) nor alerting the government that it wouldn't or couldn't do anything about solving the problem; (6) while using "alternative legal services" (ALS) to divert attention from its refusal to deal with the problem, and to the careers of those who do the work to provide such ALSs; (7) knowing such ALSs were simplistic, merely of the nature of palliative care, and therefore could not solve the problem, and that they carried the insult of charity to a population whose tax money paid for the justice system whereat the law society's benchers earned a far better income than do those taxpayers; and then, (8) giving "fast-track attention" to "alternative business structures" by means of an Alternative Business Structures Working Group of 11 people, without regard to its inherent conflict of interest, along with an Access to Justice Committee of 16 people, (5 of whom are members of both the Committee and the Working Group); and, (9) during all of the years taken up by this activity, none of it has brought the law society in any way closer to a solution to the problem, or preventing its victims from becoming bigger victims; (10) nor was it expected to; and, (11) it has taken all of us much further from a solution that increases in difficulty and damage-caused exponentially with time that passes.

LSUC's intentional mismanagement of Legal Aid in Ontario for 30 years is a crime, trivial in comparison.

Such is a very egregious example of a very serious problem left unattended to cause a succession of many other very serious problems; for example, it's the "cover-up" of alternative legal services (ALSs) and alternative business structures (ABSs) that indicts. The damage caused is like that of a plague spreading not merely linearly as in one direction only, but in all directions in many different ways, as do all economic disasters and crises. Law societies are the lynchpin of the justice system and therefore they are an essential part of the legal infrastructure that makes a society a constitutional democracy in fact, and not merely in law. But in Canada, law societies have retained their 19th century management structure. Therefore inevitably failing in the 21st century.

14. The need to challenge the performance of law societies

As is proved by the long-term existence and magnitude of the problem, the self-regulation of the legal profession has shown itself to be incompetent. That has been said many times in academic and other

formal writings since Osgoode Hall Law School Professor Emeritus Harry Arthurs' landmark article, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995), 33 *Alberta Law Review* 800. And for a more extensive analysis, see University of Windsor law Professor Noel Semple's book, *Legal Services Regulation at the Crossroads—Justitias's Legions* (Edward Elgar Publishing Ltd., 2015). But it doesn't have to be that way.

Proposals to implement ABSs are merely "tinkering" with the problem, which problem is the most serious threat to the availability of legal services in the history of Canada, and therefore to the validity of the claim that Canada is a constitutional democracy, *i.e.*, that which needs an affordable lawyer to be enforced is now unavailable to the majority of society. And it is therefore, equally threatening to the continued existence of law societies. Such tinkering adds to the evidence that law societies have no strategy for preserving the general practitioner and the resulting great shrinkage of the legal profession and law societies with it.

But it didn't have to be that way if lawyers had applied the necessary pressure to their law societies that forces the innovation that brings affordability. And it wouldn't be that way if governments would hold law societies accountable in fact, and not merely in law, to the democratic political process for their failure to perform their statutory duties.¹⁷¹

15. The institutional culture of law societies in Canada

Do benchers care as much about their colleagues who are general practitioners and for the future of the legal profession, as they do for the investors they could be representing? Surely law society management has shed its 19th century cronyism! In Christopher Moore's, *The Law Society of Upper Canada and Ontario's Lawyers 1797-1997*,¹⁷² there is this statement: (pp. 44-45):

Throughout the English-speaking world, the gentlemanly ethos slowly lost some of its force during the nineteenth century. ... But throughout the nineteenth century, Ontario's legal profession would still be governed as much by codes of gentility, as by books and rules.

And (at p. 176), only after, "more than five years of struggle and resistance to change," did LSUC's convocation of December 4, 1896, allow Clara Brett Martin to be called to the bar—"the first woman barrister not only in Ontario but anywhere under the British Crown." She challenged, "the old gentlemanly criteria" and won.

¹⁷¹ That theme of a lack of political accountability, as shown by comparisons among several countries, is well developed in Gillian K. Hadfield's article, "[Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans](#)" (University of Southern California Law, January 2015): "... the American legal profession is a politically unaccountable regulator ..." (p. 39).

¹⁷² *Supra* note 4 and accompanying text.

Also, there was some support for the idea that law societies should exist to serve the interests of lawyers. Referring to LSUC's "mission statement" of 1994, Christopher Moore's book as to LSUC's history, 1797-1997, states:¹⁷³

... The traditional declaration that the Law Society existed to govern the profession in the public interest, for instance, seemed merely to acknowledge that the public and the legislature would never delegate self-governing authority to the profession on any other understanding.

[note 75, p. 381: "LSUCA, Minutes of Convocation, vol. 104, Feb. 1994 (approval of draft mission statement), and vol. 106 Apr. 1994 (tabulation of responses)."]

That was not the reaction of the profession. Circulated to members in the spring of 1994, the mission statement provoked a third of respondents to deny that the society should subordinate the interests of the profession to those of the public. Almost half could not accept that the society did not exist to advance members' interests. In the election a year later, the mission statement continued to provoke many benchers candidates. "To Serve and Protect Lawyers" should be the motto of the society,' declared one. 'It is time to put the needs of the profession to the forefront,' proclaimed another.

That attraction of a more self-interested law society could explain the law societies' refusal to deal with affordability, *i.e.*, that traditionally the duties of a law society as to maintaining the adequate availability of legal services required only the disciplining of competence and ethics, but not affordability.

To answer such arguments, the Clementi Report (December 2004),¹⁷⁴ which dealt with the management of the law societies in England and Wales, concluded: (1) the "regulatory function" and "the representative function" of law societies (to represent the interests of lawyers) are in conflict; and; (2) therefore the regulatory function should be removed to a permanent institution of greater competence and responsiveness to public need.

If not effectively challenged, ABSs and the commercial producers of legal services will lead to the de-professionalization and the commercial and industrial production of legal services; see again: Professor John Flood, "Will There Be Fallout From Clementi? The Repercussions for the Legal Profession After the Legal Services Act 2007":¹⁷⁵

This Article explores the genesis of the Act [Legal Services Act 2007 (U.K.) and its consequences both actual and anticipated. I argue that the present trend of the legal profession is moving away from traditional conceptions of professionalism to a commercialized and industrialized alternative. In speculating about the potential

¹⁷³ Moore *supra* note 4, at pp. 337-338.

¹⁷⁴ *Supra* note 11 and accompanying text. Sir David Clementi, Report of the Review of the Regulatory Framework for Legal Services in England and Wales, 2004.

¹⁷⁵ 2012 Michigan State Law Review 537 at 538; *supra* note 12 and accompanying text. John Flood, Professor of Law and Sociology at the University of Westminster, Leverhulme Research Fellow. LL.B., London School of Economics and Political Science; LL.M., University of Warwick; LL.M., Yale Law School; Ph.D., Northwestern University.

outcomes, with the use of hypotheticals and real case studies, I suggest that deskilling and deprofessionalization will be among the logical outcomes. Yet in spite of this dystopian view, which among other things will compromise the role of the law school, there are signs of optimism to be found among the newer generation's—that is Generation Y's—approach to work-life practise that signal the tendency towards immaterial labor as the descriptive metaphor for the new world.

Christopher Moore's final paragraphs contain this warning of a troubled profession in 1997:¹⁷⁶

Around the world, legal scholars increasingly speculated that the century of the modern, self-governing profession was coming to an end. Their foremost local exponent, Professor Harry Arthurs of Osgood Hall Law School at York University, declared that self-governance by the legal profession was quite simply 'a dead parrot.' Since the drafting of the first Law Society Act in 1797, the one central function of the Law Society has been to enable the profession to govern itself in the public interest. If the Law Society is judged to have ceased to perform that function, then it perhaps ceases to be an essential institution. As the Law Society of Upper Canada approached the end of its second century, solid reasons could be found to doubt that it would complete its third.

[note 76 (p. 381) H.W. Arthurs, 'The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?' *Alberta Law Review* 33, no. 4 (Aug. 1995).

16. Conclusion

The problem of unaffordable legal services has to be solved. Consider being a self-represented litigant fighting for the custody of your child, or to save a family business that is the economic foundation for you and your family, or coping with termination of employment without cause or compensation, or charged with a serious criminal offence. Alternative legal services cannot serve these legal problems adequately. The problem will be solved or the majority of the population will never again have affordable lawyers of their own for legal advice. The very competitive market that is made up of LegalZoom and LegalX *etc.*, will fill the economic vacuum with increasingly sophisticated legal services, making certain that the legal profession in Canada will remain increasingly financially depressed and badly led.

To combat that forceful tide, law society management by way of 19th century "gentlemen's agreement" must be replaced. Let law society memberships elect their leaders as well as their benchers.

The division of the traditional field of lawyers in private practice is being challenged (if not replaced) by four new sources of legal services:

- (1) alternative legal services;
- (2) commercial operations, in highly competitive markets, such as LegalZoom, LegalX, and RocketLawyer;
- (3) other professionals or legal technicians such as, independent paralegals, notaries public, and other professionals looking to expand their field of work; and,

¹⁷⁶ *Supra* note 4 at p. 139.

- (4) alternative business structures (not yet operative or rendered legal in Canada, but currently under consideration in Ontario by its Law Society of Upper Canada).

Such competition is reducing the number of lawyers in private practice per capita even though lawyers have never been needed more. The clients of lawyers will be like those of architects and engineers— institutional clients. Lawyers will be employed by governments, big law firms to serve their commercial organizations and institutional clients, and in specialized law firms, *e.g.*, patents and other intellectual properties, and in complex litigation, and legal services for wealthy people.

The managers that are the benchers of our law societies do not have the time or expertise to deal with such problems as the unaffordable legal services problem. It is a complex problem such that its solution will need continuous expert supervision over a period of years. Benchers are not able to provide that. And so, no longer is it possible to be both a good lawyer and a good bencher. Law societies must resolve that conflict or be replaced.

Canada's law societies are neither trying to solve the problem, nor are they confessing their inability to do so. Is that criminal conduct—possibly breach of trust by a public officer (Criminal Code s. 122). Nineteenth century law societies can't cope in a 21st century world.

The result is their promotion of “alternative legal services” instead of trying to solve the problem. And if there were suddenly public accusations of failing to serve their purpose, putting forth alternative business structures proposals (section 11, p. 70) would be a tempting response.

Law societies cannot be allowed to define their duty in law to make legal services adequately available so as to be compatible with their resources, *i.e.*, “if we don't have the time, expertise, and other necessary resources, then we don't have to do it.” Their traditions and practices of relying only upon their own “lawyer's expertise” as to regulating the provision of legal services do not justify their continued existence in a 21st century world. Either, they should be replaced with an agency that can do it, or they themselves become such an agency. That agency will serve them in a way that is similar to a civil service serving an elected government—and also facilitating and carrying out projects requiring long-term development that can bridge bencher elections and other significant events.

The flaw in this recommendation is that our law societies don't yet appear to feel any pressure to create such a civil service let alone support it, and take and implement its advice, and strive to make it successful. If the necessary pressure to solve the problem existed, they would have created it themselves without need of the recommendations of others. Might they not see such a facility as inevitably interfering with the benefits they now have?

Therefore, if badly needed changes in the method by which legal services are produced, are not sponsored by law societies it is best that they be abolished now or “gutted” of their regulatory function to be transferred to an agency of permanently developing expertise that is much more accountable to the

democratic process and responsive to public need. Otherwise, that majority of the population that cannot afford legal services will receive nothing better from law societies than simplistic programs and facilities for learning to live with the problem, *i.e.* palliative care instead of trying to cure the patient's life-threatening disease. They will not strive to give people their own affordable lawyers, and the legal profession will remain financially depressed. Their performance reflects an attitude that says, "if you are a bencher and a practicing lawyer, you can't be expected to do anything more than what benchers have always done." But enforcing the rule of law now makes necessary that they do more for the population than promote alternative legal services.¹⁷⁷

The legal profession as a whole cannot justify its failure to make litigation and other essential legal services affordable for the majority of the population. Such failure justifies some version of socialized law. The performance of Canada's law societies can bring it on. When the legal profession rebels against such government programs, it will find that it has even less public support than did the failed Saskatchewan Doctor's Strike of 1962. By 1970 every jurisdiction in Canada had a socialized medicine program. Since its inception it has been the most popular social welfare program in Canada. Therefore LSUC has feared "socialized law" for several decades.¹⁷⁸

It would bring the profession a step closer to the ideal of, a community's legal health being as important to it as its medical health, and its lawyers as important to it as its doctors. Otherwise, commercialized legal services will eat away lawyers' jurisdiction over legal services as legal software programs increase in capability to serve an increasing share of the legal services market with an ever-increasing number of legal services. Such automation should be happening within the supervision of the law office.

¹⁷⁷ As to the rule of law, the Canadian Charter of Rights and Freedoms states in its preamble: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law." The Charter is Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

¹⁷⁸ See note 89 *supra*. In Ontario the fear of socialized law is more realistic than elsewhere because LAO funds more than 70 legal clinics that serve low income and disadvantaged sections of the population. Being law offices, they could be converted and increased in number to provide legal services at cost, to middle income people. And with sufficient specialization among those law offices, acting as mutually interdependent support services, along with LAO LAW's centralized legal research support services, they could provide legal services much more cost-efficiently than can any law firm, and easily be made to pay for themselves. LSUC's Legal Aid Committee was aware of that potential capacity.

Thirty years after my being made aware of such capacity of LAO by a bencher of that committee, the use of LAO's legal clinics in that way was one of the recommendations of University of Toronto Law Professor Michael Trebilcock's Report of the Legal Aid Review 2008 (note 89(3) *supra*), *i.e.*, to convert LAO's more than 70 legal clinics to provide legal services at cost to middle income people, along with promoting the purchase of legal services insurance, just as we buy home and auto insurance. However he didn't call it "socialized law" as might the law societies, pejoratively of course. (See the Report's Section IV "System Improvements for Service Providers" (third paragraph).)

The way to escape both socialized law and commercially provided legal services is for law societies to begin working towards making legal services affordable. That includes such automated legal services be provided within lawyers' offices and not within the control of organizations providing automated legal services, or the investors owning law firms (alternative business structures).

Access to justice activists should consider such possibilities, and not consider only variations of alternative legal services. And their endeavours will provide more alternative actions as a result of researching all of the many ways in which the Canadian Charter of Rights and Freedoms can be applied to the problem of unaffordable legal services, its causes and consequences, and future development.

The unaffordable legal services problem is a law society-caused problem capable of a law society-caused solution. But the benchers—the lawyer-elected managers of Canada's law societies—have failed to bring about the innovations that will enable law societies to fulfill their purpose and perform their duties as imposed by law. The consequences are too great not to begin trying to solve the problem—very destructive consequences to: (1) the population; (2) the justice system; (3) the legal profession; and to, (4) legal aid because politically, legal aid's funding grows increasingly politically unwise, being as it is dependent upon the taxes paid by that majority that cannot afford legal services for themselves.

Law societies have not maintained its ability to perform its legislated functions, and do so within a reasonable time.¹⁷⁹ If Canada's law societies cannot bring affordable legal services to the population they have not fulfilled the whole of their purpose—to regulate the legal profession so as to make legal services adequately available. And the justice system will become very inadequate, being a system providing employment for lawyers and judges, but one paid for by taxpayers, the great majority of whom cannot afford legal services provided by lawyers.¹⁸⁰

But the legal profession is shrinking at a time when it should be expanding to meet public need, and worse is predicted.¹⁸¹

¹⁷⁹ See for example, the time limits imposed for bringing accused persons to trial, pursuant to Canadian Charter of Rights and Freedom s. 11(b) (“right to be tried within a reasonable time”), by the Supreme Court of Canada in, R. v. Jordan, 2016 SCC 27, and, R. v. Cody, 2017 SCC 31.

¹⁸⁰ The “Trebilcock report,” Report of the Legal Aid Review 2008, (*supra* notes 13(1) and, 89(3)), states (p. 77): “This leads me to suggest that both LAO [Legal Aid Ontario] and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides).”

¹⁸¹ 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 not have steady, continuous employment; but 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. See also note 31 and accompanying text *supra*.

The following factors threaten and justify a substantial reduction of the present self-regulation of Canada's legal profession as a result of the present state of the problem of unaffordable legal services:

- (1) the substantial and increasing loss, damage, and, misery suffered by the problem's major victims: (a) the majority of the population; (b) the courts and justice system; and, (c) the legal profession itself, very short of clients; such damage shows that the law societies are the "lynch pin" of the justice system. When they fail, the justice system fails;
- (2) the longstanding refusal to attempt to solve the problem, even though law societies are the only agencies having in law, the power and duty to solve the problem; law society sponsorship of alternative legal services (ALSs), merely helps the population learn to live with the problem; a program to solve the problem would require benchers do the work; but for ALSs, other people do the work;
- (3) there is no law society public declaration that in effect states, "this problem is our problem, and it is our duty in law to solve this problem"? (See for example the duties of the Law Society of Upper Canada (LSUC) set out in s. 4.2 of Ontario's Law Society Act);
- (4) improving the very poor funding of legal aid organizations is being made increasingly difficult for governments because taxpayers who cannot afford legal services for themselves, should not be 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, but the majority that cannot afford lawyer services is very large. Law societies should stop asking governments to ignore that majority to serve that small minority in regard to a problem that they themselves have caused by default, and are causing to become worse.¹⁸²
- (5) given that the problem is: (a) national, having the same cause everywhere—*i.e.*, the affordability of legal services; and, (b) causing extreme damage and misery to: (i) the population; (ii) the courts; and, (iii) the legal profession itself; Canada's law societies

¹⁸² An example of such a request is the letter written by LSUC's Treasurer, Tom Conway, dated February 7, 2014, to the Ontario Minister of Finance, Charles Sousa. It urges better funding for Legal Aid Ontario (see the reference to this letter in the Minutes of LSUC's February 2014 Convocation (pdf.)). Ironically it cites as a reason for the letter, the duty imposed upon LSUC by Ontario's Law Society Act s. 4.2, "to facilitate access to justice," in support of its detailed criticisms of government funding, *i.e.*, blame the government for LSUC's own refusal to try to solve the problem for which s. 4.2 makes LSUC responsible. The letter's fourth paragraph states:

"Add to this landscape these facts: more than half the parties in Ontario's family courts are unrepresented – leaving self-represented litigants to argue matters of custody, access and/or financial support for themselves or their children. In the criminal justice system, unrepresented accused must defend themselves against serious criminal or complex criminal charges without legal assistance. Lack of legal representation may result in wrongful convictions and the failure to protect important Charter or statutory rights and has also led to overburdened dockets in both the Criminal and Family law court systems."

If legal advice services were affordable there would not be such a dire need for an expansion of the availability of legal aid because middle-income people could afford a lawyer. LSUC blames the Ontario Government for the consequences of what might well be its own "breach of trust by a public officer" (Criminal Code s. 122). See the definition of "public officer" provided by the Supreme Court of Canada in, R. v. Boulanger 2006 SCC 32. Such a letter makes the law society look like a bank robber asking that the banks be better financed.

should have joined together in a common effort to retain the expertise with which to devise a strategy with which to solve the problem?

- (6) the absence of public declaration by law societies that in effect states, “this problem is our problem, and it is our duty in law to solve this problem”? (See for example the duties of the Law Society of Upper Canada (LSUC) set out in s. 4.2 of Ontario’s Law Society Act).
- (7) the breach of a duty imposed by law, to make and maintain legal services as adequately available;
- (8) the problem is the most serious threat to the availability of a lawyer’s advice and accompanying fiduciary duty and services, in Canadian history;
- (9) the problem is therefore the most serious threat to the continued existence of law societies;
- (10) the problem endangers the reputation of the justice system and its ability “to do justice”; *e.g.*, the increasing percentages of litigants who are self-represented litigants (served by the National SRLs Project) is increasing the probability of wrongful convictions, and causing judges to warn that their courts “are grinding to a halt” because of the greater time SRLs’ cases take to go through court processes;
- (11) the problem is damaging the legal profession by way of: (1) the increasing number of law firms in severe financial distress because of shortages of clients; (2) the reduction of the number of lawyers in private practice, particularly so as sole and general practitioners and small law firms; and, (3) damage to the profession’s reputation;
- (12) the use of ALSs by law societies to create the appearance of an adequate response to the problem, *i.e.*, helping the population learn to live with the problem is not trying to solve the problem;
- (13) law society “access to justice” committees have existed for several years without any apparent concern that they have accomplished nothing towards a solution;
- (14) there has been no investigation as to how other professions and providers of goods and services deal with such a problem—the provision of legal services is not unique in this field of analyses, which shows that the cause of the problem is the obsolescence of the method of providing legal services, (it is a craftsman’s-cottage industry method, long abandoned by the medical profession, and by all of competitive manufacturing in favor of “support services” methods that use highly specialized services for parts of their work);
- (15) there’s a conflict of interest: (1) being a good benchler only up to the point that it doesn’t interfere with being a good lawyer; therefore there are no programs or seminars on trying to solve the problem; and, (2) serving “the public good,” but not to the extent of trying to fulfill the purpose of a law society—to make legal services adequately available, so as to justify its monopoly over the provision of legal services.
- (16) the well developed progress for more than ten years, of the loss of self-regulation by law societies in several other countries;¹⁸³

¹⁸³ See these articles and reports concerning the loss of self-regulation by the legal profession:

(17) the possibility of regulation of non-lawyer providers of legal services by official agencies other than law societies;¹⁸⁴ and,¹⁸⁵

(1) The report of Sir David Clementi, (2004) *Report of the Review of the Regulatory Framework for Legal Services in England and Wales*. See also notes 41, 95(2), 120, and, 136, and accompanying texts *supra*.

(2) John Flood, "Will There Be Fallout From Clementi" (2012), notes 41, 95(2), and, 135, and accompanying texts *supra*.

(3) 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>>.

(4) Adam Dodek, "Taking Self-Regulation for Granted?" *Slaw*, July, 28, 2016.

(5) Prof. Noel Semple, (1) *Legal Services Regulation at the Crossroads, Justitia's Legions* (Edward Elgar Publishing Ltd., 2015); and, "Access to Justice through Regulatory Reform" (a paper prepared for the National Family Law Program, July 16, 2012. Dr. Semple was then a postdoctoral research fellow, Centre for the Legal Profession, University of Toronto Faculty of law. See also note 12(2) *supra*.

(6) Gillian K. Hadfield, "The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law" *International Review of Law and Economics* (October 30, 2013); download copy available at, SSRN: <http://ssrn.com/abstract=2333990>.

(7) 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>>.

(8) 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.

(9) *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>>.

(10) 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).

(11) 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.

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

¹⁸⁴ 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.

Together, these 17 factors together create three reasons justifying government intervention to preserve Canada's democracy:

- (18) without legal services available to the majority of the population, the rule of law cannot be enforced, with the result that Canada has fallen back from being a constitutional democracy to a parliamentary democracy, and as a result, the Canadian Charter of Rights and Freedoms is but a "paper tiger" for that majority, and therefore,
- (19) obviously, the public has very inadequate means of influencing the formation of the policies and practices of Canada's law societies, which means a much more competent and professional attitude in regard to law society management of such affordability problems is needed so as to command effective and continuous accountability; and,
- (20) lack of accountability in fact to the democratic process by law societies (accountable merely in law, but not in fact, *i.e.*, when law societies fail to make legal services adequately available, governments don't demand that they justify their monopoly over the provision of legal services).

These factors, if left without a persuasive response, will coalesce into a demand for government intervention to make legal services affordable again, so that the rule of law may be adequately enforced.

Because law societies fail to exercise control, the field of legal services is being divided up among: (1) lawyers; (2) alternative legal services; (3) other professionals such as notaries and independent paralegals; (4) commercially provided legal services such as, LegalZoom, Legal X, and, Rocket Lawyer; and (5) alternative business structures (see section 11, p. 70). Law society benchers are doing nothing to protect the future of the legal profession from the other four. In fact, they are promoting alternative legal services instead of trying to solve the problem. As a result, law societies are working against their own member lawyers. The decreasing number of lawyers per capita in the private practice of law proves that to be so. And the public views alternative legal sources as charity and an insult; see: see: "I Don't Want a Free Lawyer, I Want a Real Lawyer," (the Lawyerist.com (November 14, 2016)).

And this is happening when people have never needed lawyers more. If legal services were affordable, private practice would be expanding and the legal profession would have a very bright economic future. Instead, the opposites prevail.

Because of the increasing volume and complexity of laws, people cannot deal with their legal problems by themselves. But law societies do not try to solve the problem of unaffordable legal

¹⁸⁵ 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 notes 11, 94, 98, 114, 125, and, 130, and accompanying texts *supra*.

services.¹⁸⁶ If law societies won't accept as fact that their duty in law to make legal services adequately available includes making them affordable services, provided by a client's "own lawyer," the abolition of law societies best follows.¹⁸⁷

The refusal of law societies to try to solve the unaffordable legal services problem raises an issue as to whether such refusal is a "breach of trust by a public officer." As to the constituent elements of that offence, as stated in s. 122 of the Criminal Code, the CanLII headnote for, *R. v. Boulanger*, 2006 SCC 32, states in part (see paragraph 58 of the judgment):

The offence of breach of trust by a public officer is established where the Crown proves beyond a reasonable doubt that: (1) the accused is an official; (2) the accused was acting in connection with the duties of his or her office; (3) the accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office; (4) the accused's conduct represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and (5) the accused acted with the intention to use his or her public office for a purpose other than the public good, for example, a dishonest, partial, corrupt, or oppressive purpose.

The definition of "public officer" is broad enough to include a bencher—see paragraph 5 which deals with the definitions of "official" and "office" in s. 118 of the Criminal Code.

Paragraph 52 of *Boulanger* states in part:

This said, perfection has never been the standard for criminal culpability in this domain; "mistakes" and "errors in judgment" have always been excluded. To establish the criminal offence of breach of trust by a public officer, more is required. The conduct at issue, in addition to being carried out with the requisite mens rea, must be sufficiently serious to move it from the realm of administrative fault to that of criminal behaviour. ... What is required is "conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder..."

An intentional decision not to try to solve the problem, continued for many years, is not a mere "mistake or error in judgment." And given the damage and misery that the problem has caused and is causing, it would surely be "sufficiently serious."

Boulanger's paragraph 27 is referred to in, *Peracomo Inc. v. Telus Communications Co.*, 2014 SCC 29, (paragraph 57) in defining "willful misconduct" as being, "doing something which is wrong knowing it to be wrong or with reckless indifference." "Reckless" means, "an awareness of the duty to act or a subjective recklessness as to the existence of the duty." And for a further example as to what constitutes a,

¹⁸⁶ See: by Ken Chasse: "No Longer Is It Possible to be Both a Good Lawyer and a Good Bencher" (Slaw, May 29, 2017); and, "The failure of law societies to accept their duty in law to solve the unaffordable legal services problem," (SSRN, August, 2014, pdf).

¹⁸⁷ "Adequately available" should be measured by the needs of that majority of "middle income" people who cannot afford a lawyer for a lawyer's advice. See: Michael Trebilcock, Anthony Duggan, and, Lorne Sossin (eds.), *Middle Income Access to Justice* (University of Toronto Press, 2012).

“severe and marked departure from the standard expected,” see *R. v. Lavigne*, 2011 ONSC 1335, concerning a senator defrauding the Government of Canada. (For shortened reading, see paragraphs 5 and 91-94.)

However, perhaps a prosecution of a law society under Criminal Code s. 122 for its failure to perform its duties in regard to access to justice by at least trying to solve the unaffordable legal services problem would fail because, even if an official knows that a decision does affect his/her personal interests, there is no offence, “if the decision is made honestly and in a genuine belief that it was a proper exercise of his jurisdiction. Conversely, the offence may be made out where no personal benefit is involved.” (paragraph 57 of *Boulanger*).

Traditionally, a law society’s duty meant access to a competent and ethical lawyer, but not to an affordable lawyer. But that’s a 19th century defence for a 19th century law society. Can it be a successful defence in relation to a 21st century law society problem of such magnitude?¹⁸⁸

Christopher Moore, in his book, *The Law Society of Upper Canada and Ontario’s Lawyers, 1797 – 1997*, states in its second last page, concerning 1997:¹⁸⁹

Around the world, legal scholars increasingly speculated that the century of the modern, self-governing profession was coming to an end. Their foremost local exponent, Professor Harry Arthurs of Osgoode Hall Law School at York University [in Toronto], declared that self-governance by the legal profession was simply ‘a dead parrot.’ Since the drafting of the first Law Society Act in 1797, the one central function of the Law Society has been to enable the profession to govern itself in the public interest. If the Law Society is judged to have ceased to perform that function, then it perhaps ceases to be an essential institution. As the Law Society of Upper Canada approached the end of its second century, solid reasons could be found to doubt that it would complete its third.¹⁹⁰

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¹⁸⁸ See also by Ken Chasse, “No Votes in Justice Means More Wrongful Convictions” (SSRN, pdf., June 10, 2016); and, “‘Counsel, I demand Justice!’ – ‘Most definitely! How much Justice can you afford?’” (*Slaw*, April 10, 2017).

¹⁸⁹ (University of Toronto Press, 1997), at p. 339, see also notes 5 and 42 *supra* and accompanying texts.

¹⁹⁰ H.W. Arthurs, “The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?,” (1995) 33 (no. 4) *Alberta Law Review* 800.s

Appendix

LSUC's ABS Working Group Report to Convocation of September 2015

LSUC's "Alternative Business Structures" September 2015 Report provides additional information. The ABS webpage stated (as it appeared on, May 24, 2017):

The Law Society is considering whether it is in the public interest to liberalize its rules regarding the business structures through which lawyers and paralegals may provide legal services. This would permit what is known as alternative business structures, or ABS.

The Law Society's ABS Working Group delivered an interim report to September 2015 Convocation outlining its initial assessment and the directions it will consider further.

The Working Group has decided not to continue to consider structures involving majority ownership, or control, of traditional law firms by non-licensees. Through its research and consultations, the Working Group considers that the experience to date in other jurisdictions does not show that the benefits of majority non-licensee ownership, or control, outweigh regulatory concerns.

The Working Group plans to focus its study on change with the potential to foster innovation or enhance access to justice. This includes minority ownership by non-licensees, franchise arrangements, ownership by civil society organizations such as charities and new forms of legal service delivery in areas not currently well served by traditional practices.

The ABS Working Group was formed in 2012 after ABS was identified as a priority for the 2011-2015 bench term. It has engaged in extensive research since its formation, including meetings with lawyers and paralegals, consulting with experts and reviewing research and related literature. In September 2014, the Working Group released a discussion paper and sought input from the professions and other stakeholders. (see below for individual submissions). [there were 41 submissions which are available in a hyperlinked list for pdf download for each submission]

Then follows a list of accessible, "ABS Working Group Reports to Convocation" (pdf). The latest, September 2015, states in part (with paragraph numbers; but the footnotes are omitted):

76. There were many different rationales provided by the professions as to why law firms with greater than 49% non-licensee ownership levels should be rejected for Ontario. The concerns and risks identified by the responses included the following:

a. External ownership emphasizing profits over professionalism (with detrimental effects potentially including decreases in pro bono initiatives, commoditization of legal work eroding the quality of the work, downloading significant responsibilities onto lower cost clerks or junior counsel, etc.);

b. Difficulties preserving client confidentiality and solicitor-client privilege due to pressure by non-licensee owners to learn about the firm's cases;

c. Increased risks of conflicts, including conflicts inherent to the structure of certain ABSs when they are owned by non-licensees (such as the example provided by Nick Robinson of the inherent conflict of having an insurance company own a law firm practicing in insurance related areas);

d. Market consolidation, which could, among other impacts, limit the choice of the public to counsel in certain areas.

...

91. The experiences in Australia and in England and Wales demonstrate that, while there have been ABSs which facilitate certain forms of access to justice, generally, non-lawyer ownership of law firms in those jurisdictions does not appear to have caused transformative change to facilitate access to justice. To date, ABS has not served as a major catalyst to spark transformative access to justice innovations by regulated entities. In fact, in many instances, non-regulated entities (such as LegalZoom, Axiom, and Neota Logic in the United States) have been major innovators.

92. The regulatory changes required to permit and the consequences of permitting non-lawyer ownership, or effective control, for any and all legal practices do not appear to be justified at least from the perspective of the potential access to justice benefits.

93. ABS is still unfolding in England and Wales, but given what the Working Group has observed to date there and in Australia, there does not appear to be sufficient evidence to warrant introducing transformative change to existing Ontario legal practices in an attempt to achieve major access to justice gains.

...

98. That said, the Working Group agrees that there is not yet sufficient evidence from other jurisdictions from which to make proper judgments about the effect of public ownership on professionalism. The Working Group is of the same view with respect to the effect of substantial market consolidation. While some consider that very large non-licensee owned law firms can deliver more effective and efficient services, others have expressed concern that professionalism will be impaired where individuals are served by such firms. The Working Group considers that the better course is to wait for further experience to develop in other jurisdictions before attempting to reach conclusions as to the effect of public ownership and consolidation on professionalism. In taking this approach, we have recognized that public ownership and consolidation appear to particularly arise in sectors, such as personal injury, where access to justice is more readily available.

...

110. Perhaps most importantly from the Working Group's perspective, the innovation observed to date has focused on areas where legal needs are now being served. The Chair of the Legal Services Board has stated that he is "disappointed" that there has been little evidence of legal services providers trying to meet unmet legal needs.

111. Although ABSs appear to be innovating more than their non-ABS counterparts, the Working Group is of the view that it is too early to determine whether the levels of innovation taking place in England and Wales support a shift to majority or controlling non-licensee ownership of traditional law firms in Ontario.

112. Nevertheless, the Working Group believes that there are other types of ABS models which warrant exploration and assessment. Consideration should be given to whether a shift to some level of minority non-licensee ownership can facilitate innovation by access to new expertise and additional capital. This is consistent with the observation that innovation by existing practices is likely to be evolutionary and in respect of existing service provision rather than transformative and in unserved areas.

113. It is significant that there is significant ABS innovation occurring in England and Wales involving not-for-profit organizations. For example, a trade union, the British Medical Association, and a charity are all providing legal services through ABSs.

...

142. External ownership by particular civil society groups may be one way of leveraging nonlegal networks and expertise to facilitate access to legal services provided by licensees.

143. In addition to changes in ownership levels, the “one stop shop” model, if adopted by civil society organizations, might enable those they serve to access legal services at the same time that they access other services or resources.

144. The Working Group therefore intends to consider eligibility criteria, and how an ABS+ regulatory structure could facilitate access to justice while protecting core professional values.

(d) ABS+ : Promoting Innovation where legal services are not generally being provided by lawyers and paralegals

145. Certain innovations are occurring outside what may be described as the “regulatory sphere”. The *Law Society Act* provides that, except as permitted by the Law Society, only licensees may provide “legal services” which is a broadly defined term. Section 1(5) of the Act provides that “a person provides legal services if the person engages in conduct that involves the application of legal principles and legal judgment with regard to the circumstances or objectives of a person”. Given the broad definition of legal services and the few exceptions to the licensing requirement, the regulated sphere is very wide but is not fully served by licensees.

146. Certain services are already readily available in Ontario, but are operating outside or on the margins of the regulated sphere. As certain responses to its Discussion Paper note, major disruptive innovations occurring outside of the regulated sphere from outside Ontario are expected to eventually come to Ontario.

[Alternative Business Structures’ “Charity Step” to Ending the General Practitioner](#)[Ken Chasse](#)¹Posted on the [SSRN](#), August 21, 2017.Table of Contents

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¹ Ken Chasse (“Chase”), J.D., LL.M., member, Law Society of Upper Canada (province of Ontario; since 1966), and of the Law Society of British Columbia, Canada (since 1978). For further in-depth analysis, see my other “access to justice” articles listed on my [SSRN author’s page](#); and, shorter articles listed on my [Slaw author’s page](#) (a blog; “Canada’s online legal magazine”). The “SSRN” is the [Social Science Research Network](#).

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1. Introduction

Whether to allow the lawyers and paralegals of various types of charitable and non-profit “civil society organizations” to provide legal services, as now proposed by the Alternative Business Structures Working Group of the Law Society of Upper Canada (LSUC in Ontario), has to be decided within the context that, in regard to prosecutions for “the authorized practice of law” (UPL):

- (1) lawyers, (a) working for the commercial producers of legal services, such as, LegalZoom, LegalX, RocketLawyer, *etc.*, and, (b) lawyers working within law firms that are the investment properties of “alternative business structures” investors, are in no different position than lawyers working within such civil society organizations; and,
- (2) such prosecutions by law societies of the commercial producers would be undermined by the law societies’ failure to try to solve the unaffordable legal services problem—*i.e.*, such commercial producers are bringing relief to a problem which the law societies refuse to do; and,
- (3) when such commercial producers are servicing thousands, if not hundreds of thousands of customers as they are in the United States, such prosecutions will be viewed as being intended to eliminate a market competitor, rather than to protect society from incompetently provided legal services.

Therefore, the existence of alternative business structures (ABS investors owning law firms)²: (1) could be of great assistance in bringing about the end of the general practitioner throughout Canada; and, (2) be used by law societies as a substitute for not trying to solve the problem of unaffordable legal services (“the problem”). Commercial producers of legal services such as, [LegalZoom](#), [RocketLawyer](#), and [LegalX](#), have shown in the United States that they can rapidly eat into the market of the general practitioner. And they have begun to have a presence in Canada; see: [LegalZoom.ca](#); and, [MaRS launches LegalX](#). And RocketLawyer is soon to follow. But because law societies in Canada have done nothing to try to solve the problem, they have undercut their own ability to prosecute them for UPL

² Alternative business structures (ABSs) involve law firms becoming investment properties. The investors would provide: (1) financing the automation of routine legal services; (2) more advanced marketing techniques; and, (3) enable related non-legal services to accompany the provision of legal services. But because ABSs would not change the method whereby the work is done to produce legal services, they have no capacity to solve or reduce the problem of unaffordable legal services. That problem is caused by the unaffordability of non-routine legal services.

Lawyers and law societies can “downplay” and “look down upon” these commercially-produced legal services as providing only simple services, and therefore believe that they can be ignored. That has been a fatal mistake in many industries. Such automated producers, work their way up from the simple product or service to displace the high-end producers of the more sophisticated products and services. Because the legal profession has priced itself beyond the majority of the population, people will use the commercial producers and get used to using them as they ride along with automation from providing simple to more complex legal services. And, if ever held to account for their neglect of the problem by an authority they fear, there is a danger that the law societies will, in desperation, allow the use of all forms of ABSs, so as to allege that ABSs can help solve or reduce the problem. That would be a very dishonest representation, and a great disservice to the victims of that neglect: (1) the population; (2) the courts; and, (3) the legal profession itself, *i.e.*, a majority that cannot afford legal services means that a majority of law firms is very short of clients.

ABS investors cannot help law offices challenge such competition. They will merely finance the automation that will make the production of routine legal services more cost-efficient. Such services are not the cause of the problem. The method of producing all legal services has to be changed to a “support services method of production,” which ABS investors cannot do. Once established, if lawyers prefer their traditional ways of producing legal services they wouldn’t have to use such services. But they will, because sophisticated, highly specialized, high volume support services will help them earn money and serve their clients better. In that way, maximizing the use of automation can stay within the context of the law office and within the regulation of the legal profession, instead of developing outside the legal profession. Support services methods of production exist everywhere else in the production of goods and services. But law society management structure will have to be made capable of sponsoring the creation of such support services.

The commercial producers of legal services will continue to take-over more and more of the work of lawyers. They are making strategic use of lawyers to help them do it by: (1) providing only a “last look check” of finished work; and, (2) free phone conversations to answer the questions of customers, so as to attract more customers for the commercial producers, and potential clients for the lawyers. Thus lawyers are providing greatly diminished services, and always under threat of further losses. But ABS investors are not the answer. They provide merely a form of dependence for the financing of automation, but one that cannot make available an adequate defence against or challenge to the commercial producers. That is because a large volume of individual ABS contracts between an investor and many individual law firms cannot provide the type of large management structure and facilities necessary to cope with such competition.

The legal profession needs its own management structure that will enable it to escape being controlled

by ABS investors, and not be at the mercy of the commercial producers—a structure that can bring the benefits of automation and the progress of electronic technology to the population as effectively as any other management structure, and do it without being owned. The necessary components for such a management structure already exist; see: [Access to Justice—Unaffordable Legal Services’ Concepts and Solutions](#)” (SSRN pdf., August, 2017).

But strong law society leadership is needed to assemble the parts into a management body that enables the legal profession to be in control of its own present and future. However, that is where my recommendation may be weak and vulnerable to attack—law societies have no history of providing such leadership. But that is so only because their membership has not demanded it.

Whether to allow ABSs investors to buy-into law firms in whole or in part, whether as charities or commercial investors, has to be decided in this wider context of aggressive, large commercial producers of legal services, which cannot be controlled by prosecutions for UPL (the unauthorized practice of law), certainly not while law societies themselves make no attempt to solve the problem.

2. Published commentary on the commercial producers

Ask your hard-promoting ABS law society benchers³ whether the automation that the ABS investors say that they can finance will be able to provide the many forms of legal services that the commercial producers have created. For example, LegalZoom began offering legal service products to the public on March 12, 2001. The [Wikipedia article on LegalZoom](#) states in part [footnotes omitted]:

LegalZoom.com, Inc. is an online [legal technology](#) company that helps its customers create an array of [legal documents](#) without having to necessarily hire a [lawyer](#). Available documents include [wills](#) and living [trusts](#), business formation documents, [copyright registrations](#) and [trademark](#) applications. The company also offers attorney referrals and [registered agent](#) services.

LegalZoom is often described as a [disruptive innovator](#) in the market for legal services. By using computer technology to render services at lower prices, the company also helps expand the ability of consumers and small business owners to access legal services.

. . .

LegalZoom has been recognized a number of times over the years for its entrepreneurial acumen. In 2011, [Business Insider](#) ranked LegalZoom 27th on its list of the world's most valuable startups, and in 2012, [Fast Company](#) ranked LegalZoom 26th on its list of the most innovative companies.

In September 2012 it was announced that LegalZoom had formed a partnership with the United Kingdom-based legal services provider [QualitySolicitors](#), as part of which the companies will jointly offer online legal services in the United Kingdom including company formations

³ “Bencher”—Canadian usage: the terms *bencher* and *treasurer* are in use by the [legal profession in Canada](#). A bencher in the Canadian context is a lawyer elected by the other lawyer-members of the law society to be its board of directors (referred to as “Convocation”). The treasurer is elected by the benchers to function as the chair. Paralegals are also elected as benchers in those provinces where the law societies govern the paralegal profession.

and divorce documents.

The September 2012 issue of [Consumer Reports](#) magazine evaluated and compared the computer-aided legal forms generated by LegalZoom and two of its competitors, [Nolo \(formerly Nolo Press\)](#) and [Rocket Lawyer](#). The evaluation found that all three companies provided documents "for a fraction of what you'd pay a lawyer." Additionally, the *CR* review found that "[u]sing any of the three services is generally better than drafting the documents yourself without legal training or not having them at all. But unless your needs are simple . . . none of the will-writing products is likely to entirely meet your needs." It also found in some cases, the other non-will documents weren't specific enough or contained language that could potentially lead to an unintended result.

In 2013 LegalZoom purchased a 206,000-square-foot building at 9900 Spectrum Drive in the Davis Springs Spectrum Business Park in Austin, Texas for a reported \$21 million. The Austin office acts as one of their headquarters and in July 2014 they installed a 260 kW solar electric system.

On January 6, 2014 European private capital firm [Permira](#) announced its intent to acquire \$200 million in the outstanding equity of LegalZoom and become its largest shareholder pending regulatory approval. On February 14, 2014 Permira announced that the deal was complete.

. . .

Services

LegalZoom provides legal services in various common categories including copyrights, [DBAs](#) ["doing business as" titles], business formation, trusts, wills, patents, power of attorney, pre-nuptial agreements, real estate leases. The company also provides an attorney referral service and offers legal plans attorneys.

A 2016 analysis posted on the e-commerce blogging site "Blogtrepreneur" examined some of the reviews given to LegalZoom by experts and by its customers. The analysis found that "not all of the LegalZoom reviews have been flattering," but noted that the company is accredited by the Better Business Bureau, that it has been in business since 2001, and called LegalZoom "a fairly noteworthy and respected business."

Middle class families and small business owners are the primary target markets for LegalZoom's services. The company's efforts to render affordable, quality legal services to these two groups reflects a broader global trend in which legal service providers are attempting to harness computer technology to supply ever-more-proficient services at lower costs.

Increasing access to legal services

Since LegalZoom often uses computer technology to render legal services at lower prices than traditional lawyers, it is frequently cited as an example of "[disruptive innovation](#)" in the legal marketplace. This disruption benefits people who otherwise could not hire a lawyer by expanding their access to legal services.

In 2015 LegalZoom and the [North Carolina State Bar Association](#) settled years of litigation by agreeing that companies like LegalZoom which offer automated legal document preparation will not violate North Carolina's prohibitions against the [unauthorized practice of law](#) if the companies register with the state and comply with certain consumer protection procedures. Following the settlement, the US Federal Trade Commission and the US Department of Justice jointly advised the North Carolina Legislature that the state should avoid placing overly broad restrictions on companies that offer computer-facilitated legal services. In discussing the potential benefits from such software and websites, the two agencies stated that "[i]nteractive

software for generating legal forms may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase access to legal services"

These services do use lawyers, and provide referrals to lawyers, but only for summary services that boosts the marketability of their own products. The *ABA Journal* of the American Bar Association posted this article on March 17, 2017, by Victor Li: "[Avvo, LegalZoom and Rocket Lawyer CEOs say their productions help bridge access-to-justice gap.](#)" which states in part:

[[Avvo](#) is a lawyer referral service]

The ABA Techshow's highly anticipated, and [somewhat controversial](#) keynote session took place on Friday afternoon at the Hilton Chicago. As promised, Avvo CEO Mark Britton, LegalZoom CEO John Suh and Rocket Lawyer CEO Charley Moore took part in a panel discussion that focused on their careers, their thoughts on the regulatory landscape, and their visions about the future of the legal industry.

In a panel moderated by Judy Perry Martinez, former chair of the American Bar Association's Commission on the Future of Legal Services, and Paula Frederick, general counsel for the State Bar of Georgia, the trio underscored their commitment to bridging the gap in access to justice while reiterating their common, customer-oriented philosophy.

"It all starts with the consumer," Britton said. "There are large numbers of people who just aren't using lawyers." Suh noted that LegalZoom's primary commitment is to middle-class families and small-business owners—groups that have seen radically diminished access to justice over the last 30-40 years.

. . .

The three also reflected on how far they've come and noted that they no longer face as much resistance from lawyers as they did a few years ago. "I think we're long over that hump," Britton said, pointing out that Avvo is about to hit its 10th anniversary, while Rocket Lawyer has been around for eight years and LegalZoom for 16. "We drive billions, literally billions, of dollars a year for lawyers. Half of solos and small firms are on the Avvo platform, so I'd say go talk to the other half."

Moore agreed and said he takes pride in the number of lawyers using Rocket Lawyer's forms in their everyday practice.

Suh, meanwhile, pointed out that solos and small firms shouldn't be worried about legal service providers. "There are deep structural problems with being a solo practitioner that have very little to do with alternative legal providers," he said. "There's been a real decline in solo practice income, the bulk of which happened in the '80s and '90s, so you can't blame that on the internet."

That may be true, but the reception the three executives received was considerably less warm than the raucous ovation that greeted last year's keynote speaker, [Cindy Cohn](#) of the Electronic Frontier Foundation. Then again, she was speaking about her experiences relating to a hot-button political topic that had many in the audience concerned. In that vein, the loudest cheers the three men received came during the Q&A session, when all reiterated their commitment to access to justice and promised to do what they could to protest President Donald Trump's proposed budget eliminating funding for the Legal Services Corp. "If you can't afford a lawyer, then you don't live in a democracy," Moore said.

But other commentators see the commercial producers as being a very strong threat to the legal profession's market. Benjamin H. Barton is a Professor of law at the University of Tennessee College of Law. In his book, *Glass Hall Full—the Decline and Rebirth of the Legal Profession* (Oxford University Press, 2015), he states (p. 88 of Chapter 5, “*LegalZoom* and Death from Below”):

LegalZoom and *Rocket Lawyer*, among others, have already begun to encroach upon, and may eventually cripple, the business of solo and small-firm practitioners. This chapter focuses on *LegalZoom* as an instructive and well known example of this phenomenon, but others will also be discussed.

The “phenomenon” that brings “death from below,” is that of a producer, using a new “disruptive technology,” that starts at the bottom of an industry by offering a worse, or much simpler, low-margin product than that provided by the high-end producers, but providing it at a much lower price. As a result, producers at the high-end of the market, concentrate on providing more high-margin goods. At first, they are unconcerned. But the new producer, once it has mastered low-end production, gradually works its way up to successfully competing for the higher-margin work. The high-end producers do not recognize the need to invest in such “disruptive technologies” themselves until it is too late.

Then follows this description of *LegalZoom*'s recent success (at pp. 93 and 95; endnotes omitted):

... *LegalZoom* generated 20 percent of the new LLC filings in California in 2011. Astounding! *LegalZoom* reports that in 2011 it formed more than 1,500 LLCs and 200 corporations in South Carolina as well, so California is not an outlier.

LegalZoom served nearly a half a million new clients just in 2011. Some of these customers may not have been able to afford a lawyer in the first instance, but drafting LLC forms or incorporating businesses has long been a staple of legal practice. The loss of 20 percent of that business in California is not a promising sign for traditional lawyers. *LegalZoom* (and its competitors) seem unlikely to stall at only 20 percent of that business.

. . .

The greater worry for lawyers is that *LegalZoom* and its competitors may eventually be cheaper *and* better. Right now lawyers are reaping the benefits of using interactive computer forms themselves, but *LegalZoom* may eventually do a volume of business that will allow them to surpass the quality of individualized work. As *LegalZoom* put it: “The high volume of transactions we handle and feedback we receive from customers and government agencies give us a scale advantage that deepens our knowledge and enables us to further develop additional services to address our customers' needs and refine our business processes.”

And even legal advice and litigation services are not safe from such incursions (at p. 98)

LegalZoom and *Rocket Lawyer* are just two of the many websites that are seeking to intermediate between consumers and inexpensive legal advice, taking a cut and lowering the overall price. Even if UPL enforcement [“unauthorized practice of law” prosecutions] suddenly sprang to life against online legal advice, these Internet suppliers would still drive the price of legal advice down.

Like the provision of forms by *LegalZoom*, much current online provision of legal advice is hardly a threat to lawyers. ... But, like *LegalZoom*'s forms business, the advice business is a

serious matter, and *Avvo*, *LegalZoom*, and *Rocket Lawyer* are explicitly targeting small-firm and solo practitioners. As the technology improves, the competitive pressures on traditional lawyers will grow even stiffer.

In regard to litigation (pp. 99-100; endnote omitted)

In-court litigation is also the sole route to a truly enforceable judgment. Even as mediation and arbitration grow more popular, a litigant that wishes to enforce a judgment through a property or income lien must use a government-court, and lawyer and judges are, and will likely stay, the gatekeepers to that power. The importance of this power should not be underestimated, because it makes all private dispute resolution second best.

Small-firm and solo practitioners will thus still be able to count on litigation work. Moreover, like the “bet-the-company” cases that will continue to float Big Law, small-firm and solo practitioners have a hardcore class of work that technology will not replace anytime soon and where ability to pay is more of an issue than willingness to pay. . . .

... ..

Nevertheless, the number of trials is in a free fall, and every year there is less in-court work to be done. If lawyers (Big Law or small firm) lose the parts of the litigation process that do not occur in court—and they are already losing chunks of the discovery process to legal process outsourcing—keeping the in-court work will be cold comfort indeed.

And litigation itself may not [be] immune from computerization. Online dispute resolution (ODR) has been gaining traction, and court delays and overcrowding make it a more attractive option. Some ODR websites are quite simple. For example, *Cybersettle* is a platform for settlement through a computerized system of double-blind offers and demands.

“Outsourcing” does not mean use of an external, high volume, highly specialized support service in its true sense. Rather, it means the use of an external source that works in the same way as a lawyer or paralegal, but costs less.

And under the heading, “Today Small Firms, Tomorrow the World” (pp. 101-102):

Is it unimaginable that *LegalZoom* could use its experience in drafting LLC and incorporation documents to begin stealing [IPO](#) [initial public offering; shares sold to institutional investors] or other higher-end work? Many Big Law deals work off of similar templates. ... Given the standardization of much transactional work, Big Law should certainly look beyond their near-term competitors (in-house counsel and alternative law firms) and consider the disruptive possibilities of interactive forms.

The same is true of replacement for litigation. Arbitration has already grown tremendously in popularity, but most arbitration is really “court-light” and still involves lawyers. Mediation or non-lawyer dispute resolution should be of greater concern to Big Law. As *Modria* and other ODR providers improve, corporations may choose to eschew expensive litigation or even arbitration in favor of computerized dispute resolution.

And to end Chapter Five, “The Upshot,” (pp. 102-103):

Technological changes often come more slowly than we think. Some technological innovations that seem likely to succeed now will never get off the ground. Conversely, successful innovations bring unforeseen, profound, and transformative changes.

Competition from machines has finally arrived for lawyers. These changes mean that the slowdown in the legal market is not recessionary, but structural, ongoing, and likely to

accelerate. The venture capital backing *LegalZoom*, *Modria*, *Avvo*, and *Rocket Lawyer* tells you volumes about the potential for online disruption of traditional legal services. As *LegalZoom* and others begin to perfect their services, they will expand into other areas of legal work, until lawyers offer only true bespoke services: cases where the work is complicated, is relatively unusual, and has important consequences.

Just as was the case for Big Law, a concentrated chunk of bespoke legal work will remain. This will consist of the small-firm versions of “bet-the-company” work—child custody battles or contract battles that could sink a small business. Likewise, because of the structure of American courts and UPL protections, most profitable in-court work will likely remain the province of lawyers or confused and overmatched *pro se* [self-represented] litigants for the foreseeable future. Outside of court, it seems likely that any work that can be routinized or rationalized will be swallowed up. Death from below.

And so, “lawyers and law professors are particularly ill suited to address a post-*LegalZoom* world” (p. 175).

They will have to learn to live with the commercial producers of legal services (p. 236-237; endnote omitted):

If bar associations or state supreme courts took any radical actions, like prosecuting UPL more aggressively, they would face a significant public backlash. *LegalZoom* and other computerized providers of legal services have grown prevalent and profitable enough to present a strong challenge to any UPL [unauthorized practice of law] enforcement effort. Generally speaking, UPL enforcement has been at its most robust when aimed against individuals. ... Similarly, publishers of legal forms have had more success fighting UPL than individual non-lawyer scriveners. This is because individuals often lack the funds or political power to defend themselves. So, UPL prosecutions of small legal websites are likelier to proceed and succeed than any prosecution large enough to slow the current tide.

The alternative—a full scale attempt to bring non-lawyers, outsourcing, and computerization to heel via UPL or more aggressive regulation—would require a great deal of political will and capital from state supreme courts. Truly aggressive moves would be likely to draw federal antitrust and congressional attention. If push came to shove, state supreme courts and lawyer regulators would face a potentially existential crisis: attempts to maintain their inherent authority to regulate lawyers would come up against an angry populace and an engaged federal government. It is beyond the scope of this book to determine whether federal supremacy would overrule bedrock state constitutional law in such a showdown. Simply describing the parameters of the potential showdown helps explain why lawyer regulators have stepped lightly and why they will continue do so.

As to the, “Rebirth of Legal Profession” part of Professor Barton’s book (pp. 173-242), the “rebirth” is that of a profession that has made mistakes that have reduced its size and expectations, retrenched, and made it accept that it must render itself compatible with the many commercial producers of legal services. For example he cites how lawyers are being used as a “front” for such producers, by which to reduce the probability of prosecution for UPL (pp. 237-238):

More aggressive prosecution of UPL or enforcement of the Rules of Professional Conduct could challenge a number of recent trends, including computerization, outsourcing, and settlement mills; or immigration, bankruptcy, and disability firms where one or two front for a

mass of non-lawyers who do almost all the actual work.

. . .

The likeliest result is that law schools and lawyer regulation stay basically the same but grow less relevant, as everything except for in-court and other bespoke legal work is swamped by competition from computers, outsourcing, and non-lawyers. Rather than try to regain lost ground, lawyers and law schools will try to hold on to what they still have, even as it shrinks around them. I think of it as a sand castle facing a rising tide: the outer walls will be lost, but perhaps the citadel can be maintained.

And he cites the several occasions since the American Civil War wherein the legal profession in the U.S. has been in a crisis situation but survived with renewed vigour (pp. 240-242):

... In the middle of the nineteenth century it looked more likely that the law would be fully open to practice by lay people than that lawyers would rise from the grave and reorganize to create the profession we have today. The practice was virtually unregulated in a majority of states, and legislatures passed new codes of civil procedure to further erode lawyer hegemony. Judicial elections were introduced. After the Civil War, lawyers who were already facing deregulation confronted the loss of the lucrative business of conducting title searches. ... When confronted with extinction the profession has continuously reinvented itself.

. . .

... It is telling that when faced with a crisis America turned to one of its most potent weapons: lawyers and courts.

... Computers, lawyers, and legal complexity are thus involved in a convoluted race. Computers, non-lawyers, and outsourcing will continue to try to peel off simpler legal tasks and more basic legal questions and commoditize them. Lawyers will try to make all legal work so complex that clients need an expensive human guide. As overlapping laws, court decisions, and regulations proliferate, lawyers will continue to be needed to navigate complicated issues, for those who can afford it. This is especially so because judges, not computers, will interpret the law, making a nuanced understanding of human judgment critical.

America and its legal profession have been intertwined from the beginning, and lawyers—sharp-elbowed and ambitious—will find a new purchase in these changed times. They have before. They will again.

But Professor Barton is vague as to: (1) how the necessary innovation will come about, other than with financing; (2) what exactly that innovation will be; and, (3) its purpose is to make law offices more efficient, which in my experience without support services methods, is not sufficient in itself to make legal advice services affordable. Therefore he offers no solution to the unaffordable legal services problem, nor a method by which to halt the reduction in the per capita number of lawyers, and the reduction in the average income of lawyers. So the “rebirth” is more a scenario of survival than it is a return to former prestige and high earnings.

3. Filling the legal services vacuum

The commercial producers of legal services, such as LegalZoom, *etc.*, are on their way to filling a legal

services economic vacuum—a vacuum that contradicts and defeats what the [Canadian Charter of Rights and Freedoms](#) and Canada’s law societies are supposed to guarantee, *i.e.*, rights, freedoms, the rule of law, and access to justice, by means of affordable lawyers. See for example, the duties set out in s. 4.2 of the Ontario [Law Society Act](#). This is happening at a time when, because of the volume and complexity of laws, people have never needed lawyers more. If legal services were affordable, lawyers would be overwhelmed with work.

If law societies won’t try to fill that vacuum with affordable lawyers, other sources should not be barred by such law society UPL prosecutions. The commercial producers represent a possibility of providing relief from the problem which ABSs cannot provide. ABSs can finance the automation of routine legal services for individual law offices, but they cannot tailor the development and use of automation, and progress with its development from the simple to the complex service, the way that the large organizations that provide commercially-produced legal services can. ABS investors cannot make law firms competitive with the commercial producers.

4. Lawyers split on the latest step in the ABS issue—the “charity ABSs”

The ABS issue has activated and aggravated a long existing “class-oriented split” in the legal profession, specifically, between those lawyers whose clients can be investors, and those whose clients are “of the people and small business and institutions,” *i.e.*, the clients of the general practitioner. Suspicions that law society decisions as to such matters of administration and disciplinary proceedings favour the big law firms have long troubled its management.⁴

The latest proposal in Ontario’s ABS controversy is for the Law Society of Upper Canada ([LSUC](#)) to secure the necessary bylaw changes, “to enable lawyers and paralegals to deliver legal services through [non-profit “civil society organizations” (CSOs)], to clients of such organizations in order to facilitate access to justice.” That proposed approval of such “charity ABSs” comes from this statement on [LSUC’s ABS website](#)

In June 2017, the ABS Working Group presented an [interim report](#) to Convocation outlining a proposal to enable lawyers and paralegals to deliver legal services through civil society organizations, such as charities, not for profit organizations and trade unions, to clients of such organizations in order to facilitate access to justice. The Working Group’s proposal followed a series of focus group meetings with front line workers, “embedded lawyers” (lawyers who provide services from offices within a hospital or not for profit organizations with mandates to assist vulnerable populations) and public policy / funding organizations. Meeting participants were overwhelmingly

⁴ See, Christopher Moore, *The Law Society of Upper Canada and Ontario Lawyers, 1797-1997* (University of Toronto Press, 1997), particularly at pp. 323-329. Benchers from the big law firms are thought to wield disproportionate power, perhaps because name-recognition provides election candidates a distinct advantage (p. 138).

supportive of the idea of permitting the delivery of legal services by lawyers and paralegals through civil society organizations as a means of facilitating access to justice. In its June 2017 interim report, the Working Group proposed that the Law Society amend its By-Laws to permit civil society organizations to register with the Law Society. Lawyers and paralegals would be permitted to provide legal services directly to clients through the registered civil society organizations. The recommended approach is further described in the June 2017 interim report.

The ABS Working Group invites comments from lawyers, paralegals and the general public about the policy proposal to enable delivery of legal services by lawyers and paralegals through civil society organizations.

[Comments may be submitted online by September 1, 2017.](#)

. . .

The Working Group is also continuing to consider minority ownership by non-licensees and franchise models, and new forms of legal service delivery in areas not currently served by traditional practices. It will be reporting further with respect to these issues in due course.

The request for comments resulted from demands for more consultation made by the large number of lawyers who are opposed to LSUC's legalizing ABSs. As a result, LSUC's benchers (lawyer-managers) withdrew a motion on Wednesday, June 28, 2017, set to go to Convocation (LSUC's governing body of benchers) the following morning that would have allowed such non-profits, charities, and trade unions, to offer legal services directly to clients See this June 30th, legal news media blog article: "[LSUC benchers push back decision on ABS.](#)"

5. Conflict of Interest while refusing to deal with the problem

The adopting of these "charity ABS proposals" will be used by law society benchers to campaign for the legalizing of all ABS proposals. That is to say, deciding whether to allow charity ABSs is to be judged within the wider context of:

- (1) the consequences of allowing all types of ABSs; and,
- (2) LSUC's history of self-interested "follow the money management"; and,
- (3) using that reality and that history to explain why LSUC refuses to try to solve the problem in spite of its growing size and the misery and damage caused to its victims; and,
- (4) how that refusal and the approved ABSs will make more difficult LSUC's prosecuting the commercial producers of legal services for their "unauthorized practice of law."

In this case the money being pursued is the money that lawyers representing ABS investors can earn. They will make millions of dollars in legal fees from representing them in individual negotiations with hundreds of client-starved law firms—like shooting fish in a barrel; the "fish" having no bargaining power. Opportunistic it is to press hard for the legalizing of ABSs at this time of a severely financially depressed profession and financially threatened law firms.

Has there been any discussion within LSUC's Convocation as to the existence of a conflict of interest of those ABS Working Group benchers who are working hard to have the law society amend the relevant bylaws?⁵ And because of the great potential in investment profits and legal fees to be earned, if LSUC allows ABSs, the counterparts of such law society bylaws will be created for the law societies in every jurisdiction in Canada. A law firm having offices across Canada could represent an investor in buying-into and enfranchising hundreds of law firms.⁶ And for those law firms that don't have other offices, the [mobility agreement](#) among the provinces can be put to comparable use.⁷

The ABS proposals are business proposals for making money. But unaffordable legal services are a social welfare problem. LSUC and the other law societies have made no effort to solve this problem. But, in sharp contrast, LSUC has given comparatively "fast-track" treatment to the ABS issue while the problem stands dormant without even an attempt at a solution.

Benchers can be like lobbyists. The client is the investor. The lobbyist is the investor's law firm with the bencher from that law firm being the spearhead of that lobbying effort. And the law society is the government whose control of laws, regulations, and administrative practices the lobbyist-bencher is paid to influence and alter. But that means using one's position as a bencher to serve self-interest, in violation of the law society's rules as to ethical conduct. Such benchers would ignore the problem and disregard their duty to serve the purposes of a law society, *i.e.*, to regulate the legal profession so as make legal services adequately available, which means: competently provided; ethically provided; and, affordably provided.

But law societies do nothing about affordability. And so, the majority of the population cannot obtain legal services at an affordable price—"legal services" being legal advice services. As a result, the majority of the membership of each law society is a victim of its law society—a victim of the fact that it is law societies who have caused the problem by letting it grow for decades without confronting it for decades

Benchers using comparable means of enrichment in their law practices would be liable to prosecution by their law societies. But as managers of law society conduct, there is no one to hold them to account for such illegal behaviour—behaviour that is a "breach of trust by a public officer" (s. 122 of the Criminal

⁵ Under s. 56(4) of Ontario's [Law Society Act](#), bylaws can be enacted that allow non-lawyers (*e.g.*, investors owning law firms) to, "practice law or provide legal services" (s. 26.1(5)). Such bylaws are enacted by a board of five trustees of whom two are appointed by the Attorney General of Ontario and three by the law society (s. 54(1)). Such non-lawyers would thus avoid prosecution for "the unauthorized practice of law" (s. 26.1).

⁶ Investors enfranchising the law firms they have invested in is referred to on LSUC's [ABS website](#), and on page 11 of LSUC's ABS Discussion Paper (pdf.), and on page 1 of the ABS Working Group's June 29, 2017, Interim Report to Convocation (pdf.), (page 1 being page 179 (Tab 4.4) of the full report of the Professional Regulation Committee's Report to Convocation). Both the ABS Discussion Paper and the June Report can be accessed from the ABS website (pdf. download).

⁷ The National [mobility agreement](#) of the Federation of Law Societies of Canada allows lawyers to work up to 100 days a year in other participating provinces, without being licensed to practice in those other provinces.

Code). Law societies, like all institutions with time, develop an institutional culture as to what a bencher is to say and do. The affordability of legal services has no long history among the traditional duties of a law society. Therefore now it is not a duty performed. Such institutions do not change until the fear of the consequences of not changing is greater than the fear of the consequences of changing. Benchers show no sign that they fear the consequences of not changing to the extent of being willing to undertake reforms that might put at risk the great advantages of power and position they now have.

6. Ignorance of the cause of the problem shows in bencher elections

So why does the majority of LSUC's membership tolerate such preference given to the interests of benchers of law firms that serve large institutions and potential investors and not middle and lower income people? It is because of ignorance of the cause of the problem, which is assumed without analysis, to be uncontrollable like the weather, volcanoes, and earthquakes.

That is shown by the simplicity and lack of sophistication of bencher elections. They are simple popularity contests. The candidates' emailed election literature provides no outline of programs or strategies with which to solve the problem of unaffordable legal services, other than to ask the Government of Ontario to fund Legal Aid better—that would be politically very risky, given that the majority of taxpayers cannot afford legal services for themselves and their families. It would amount to the law society's trying to make the government a victim of a problem that the law society itself caused.

And for such bencher elections, there are no candidates' debates. And so, bencher elections based upon nothing more name-recognition and "prominent name" endorsements, lead to a merely "populist" style of leadership instead of strong leadership, *i.e.*, "true grit" leadership that endures whatever is necessary to achieve the goals that guarantee the unimpaired good health and longevity of the legal profession and the primacy of its principles of service to the public (rather than to investors).

7. Duplicity in law society management

All law societies are equally at fault. They do not question the adequacy of their management structure. They have had their "access to justice" committees in effect for several years now, but do not question their lack of progress to a solution, or the fact that the victims continue to grow. There is no analysis beyond the legal profession's version of unaffordable services, *i.e.*, looking at how other professions and competitive manufacturing deal with their versions of the same problem. There is no questioning of the method of producing legal services. It is obsolete because law society management structure is obsolete. It does not sponsor the innovations that would maintain the legal profession as a producer of affordable legal services. It can't because it lacks the knowledge to do so. Law societies are like an elected government without a civil service. Therefore they can no longer govern effectively.

Nevertheless for example, even though it has made no attempt to solve the problem, periodically, LSUC's Treasurer writes a letter (later published) to the Ontario government urging better financing for Legal Aid Ontario. See the reference to the letter, dated, February 7, 2014, in the Minutes of LSUC's [February 2014 Convocation](#) (pdf.), under the heading, "Law Society writes Finance Minister re: legal aid funding." With neither an apology for, nor express recognition of the unethical contradiction, it cites (second paragraph) as a reason for the letter, the duty imposed upon LSUC by Ontario's [Law Society Act](#) s. 4.2, "to facilitate access to justice," even though LSUC itself doesn't try to solve the problem, as is required by s. 4.2. And, for the Ontario government, the problem makes financing legal aid better politically very unwise, given that the necessary tax money would come from that majority that cannot afford legal services.

That is to say, LSUC's letter asks the government to ignore the majority of taxpayer's inability to obtain legal services, in favour of a comparatively very tiny minority that is very, very poor people in need of free legal services. And so again, the law society blames the government for a problem that the law society itself caused—like a bank robber asking that the banks be better financed, *i.e.*, the more poor people who get free legal services, the fewer poor people the law society need concern itself with, as might otherwise be required by the Canadian Charter of Right and Freedoms combined with the law society's monopoly over the provision of legal services. Government financing of legal services is a variety of socialized law, but such poor people would never be lawyers' clients anyway.

And to show that in contrast to the government, LSUC is doing what it can to deal with the access to justice problem, the letter refers to its Treasurer's Advisory Group on Access to Justice ([TAG](#)). But TAG has never been allowed to deal with the cause of the problem, or solving the problem, or the consequences of not solving the problem. Instead, TAG deals with programs and seminars to help the population learn to live with the problem.

That is strategically very shrewd. LSUC attracts all those eager young lawyers, paralegals, and law students who wish to be active in regard to the problem, but then it limits what they can discuss and do. Thus those enthusiastic and commendable people help to provide LSUC with the appearance of adequately responding to the problem, and an excuse for not trying to solve the problem. But they thereby make more certain that they themselves will go through their careers as lawyers in a very financially depressed profession—at a time when people have never needed lawyers more.

For its October 2016, "Connect, Create, Communicate: Public Legal Education and the Access to Justice Movement," TAG put out a [Call for Proposals](#) for the conference. All proposals had to "align with the following core themes of the conference: Connecting; Creating; and, Communicating." Under each was a list of topics. But none dealt with solving the problem, particularly not law society efforts of that nature, or the consequences of not solving the problem. All topics related to helping conference participants and the

public get used to living with the problem. [TAG's "About" webpage](#) states:

The Action Group on Access to Justice (TAG) is catalyzing solutions to Ontario's access to justice challenges by facilitating collaboration with institutional, political and community stakeholders. TAG is guided by a group of senior thought leaders from across the justice system. It is funded by the [Law Foundation of Ontario](#) with support from the [Law Society of Upper Canada](#).

TAG's costs as to "catalyzing solutions" would be much more justifiable if its "group of senior thought leaders" would help it catalyze its way to a solution. TAG's address is that of the Law Society of Upper Canada. If the law societies are not going to try to solve the problem, there is no one to try to solve it, except government intervention.

8. LSUC's conflicted management of Legal Aid for 30 years

And there are more reasons to be suspicious of the current promotion of the "charity ABSs." LSUC has a history of management by conflict of interest—"follow the money management." If you are a bencher, or not suffering from the problem, such revelations may seem "petty and alarmist." But if you are a self-represented litigant fighting for the custody of your child, or to save a family business, or a lawyer desperately short of clients, such "similar fact evidence" of intentional neglect and bad management is very important in deciding whether to start complaining about the law society on the social media, to the news media, to the government, or to the law society itself.

LSUC managed Legal Aid in Ontario for 30 years; 1967-1997. But it was removed as the manager of Legal Aid because of its conflict of interest—the conflict between its representative function for Ontario lawyers, and its failure to innovate so that Legal Aid could cope with a changing reality—see the [McCamus Report](#) of 1997. And see also the 1997 study conducted by Professors Zemans and Monahan for the [York Centre for Public Policy and Law](#), at York University in Toronto, entitled, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (Toronto, 1997). It also recommended that LSUC be removed as the manager of Legal Aid, stating (at pages 2-3, and 65-66):

At the same time, we do not believe that the Law Society has demonstrated the capacity or the willingness to undertake the fundamental restructuring of the Plan that we believe to be necessary if Ontario is to achieve the maximum benefit from the still-considerable funding that is available for legal aid in this province.

The "Plan" being the Ontario Legal Aid Plan (OLAP), the predecessor of [Legal Aid Ontario](#) (LAO).

LSUC's failure to innovate so as to manage Legal Aid competently wasted taxpayer's money. It was due to LSUC's fear of socialized law, because of the great success of socialized medicine in Canada. Any such government program would build upon LAO as essential infrastructure, particularly so because of the 70 law offices ("legal clinics") for disadvantaged persons financed by LAO's clinic funding department.

Even now, they could be converted to delivering at cost, legal services to low income and then middle income people. Therefore it was not within LSUC's self-interest to manage LAO as best it could. So it didn't. With that authoritative precedent well established, why should anyone back away from any such conflict of interest?

Thirdly, the Trebilcock [Report of the Legal Aid Review 2008](#) (by Professor Trebilcock of the University of Toronto's law school, adopted the recommendations of the McCamus Report (p. 13). It added a recommendation that the government promote legal services insurance in conjunction with such augmented use of the legal clinics. The result of the McCamus Report was the, [Legal Aid Services Act, 1998](#), which incorporated LAO, without LSUC as the manager.

Professor Trebilcock's report summarizes the McCamus Report's recommendation that LSUC no longer be the manager of Legal Aid (p. 13-14):

One of the key considerations of the Review was whether the Law Society should continue to have a governing role in the administration of Ontario's legal aid plan. The Report considered the governance of legal aid in other jurisdictions in Canada, as well as the United States, Australia and the United Kingdom. The Report outlined the following goals and objectives in making a case for change in governance of the legal aid plan in Ontario: independence; accountability for efficient use of public funds; obtaining adequate resources for legal aid; ability to deliver quality services in a broad range of areas of the law; capacity to promote confidence in the legal aid system; responsiveness to client needs; efficient governance; coordinated management of the entire legal aid system; and innovation and experimentation. The Report recognized that it is difficult for the Law Society to insulate itself from the interests of the legal profession. The Law Society would thus face special challenges in implementing reforms to the judicare system.

Taking all of the above-listed goals into consideration, the McCamus Report recommended that the governance of the legal aid system be transferred from the Law Society to an independent statutory agency. This new agency could more effectively: understand, assess and respond to the broad range of legal needs of low-income Ontarians; integrate management and financial expertise at the highest level of governance; conduct a greater level of experimentation and innovation with delivery models; coordinate the certificate system and clinic system; and promote confidence in the legal aid system. The Report recommended that the mandate of the agency be set out in the enabling legislation, which should require that the agency provide services in the areas of criminal law, family law, immigration and refugee law, and poverty law.

The conflict of interest was between LSUC's public duty to manage Legal Aid well, versus its fear that it would be used as the basic infrastructure for a government program of socialized law—being a very valid fear, given the great popularity of Canada's socialized medicine as a strong inducement to attempt to duplicate its vote-getting success. Reference to the resulting 30-year conflict of interest and refusal to innovate are to be found in these last two sentences of the first paragraph quoted above, "The Report recognized that it is difficult for the Law Society to insulate itself from the interests of the legal profession. The Law Society would thus face special challenges in implementing reforms to the judicare system."

If a government and the society it represents cannot expect the highly educated and experienced lawyers who managed a law society, to be able to detect and avoid such a serious conflict of interest involving responsibility for the expenditure of millions of taxpayers' dollars for 30 years, and the need to innovate to keep Legal Aid competent, then such a law society should be given no responsibility, *i.e.*, it should be abolished.

That conflicted self-serving management was explained to me by a bencher of LSUC's Legal Aid Committee, shortly after I began work at Legal Aid in Toronto, on Tuesday, July 3, 1979, to create the centralized legal research unit, now called [LAO LAW](#). LSUC's Legal Aid Committee was Legal Aid's manager as well as its board of directors. He told me that every year at that time, there was a vote in LSUC's Convocation of benchers on the issue as to whether LSUC should remain as Legal Aid's (OLAP's) manager. It was always a close vote he said, the minority view being that the bad reputation Legal Aid had, by reason of the population's dislike of its providing free legal services to what were considered to be "deadbeats," being people who did not want to work, and criminals, would badly hurt LSUC's reputation. His expression was, "legal aid is like a lightning rod for attracting criticism." Therefore LSUC should distance itself from Legal Aid. But the majority view expressed the fear of socialized law, and that therefore LSUC should remain he said, "in the best strategic position in order to cope with any such government program." There could be no better position for exercising one's choice of strategies than to be the manager of the most important piece of infrastructure for any government program of socialized law.

That fear of socialized law was, and still is well justified. And it is even more so now. The great size and number of victims of the problem, along with the great powers of communication that we all have by means of the social media, make likely such matters of misery caused and damage done, will come to the attention of the news media and opposition political parties, and then on to political accusation and debate.

In 1979, Legal Aid's "[Clinic Funding](#)" division was funding 70 legal clinics that served, as they do now, "low income Ontarians," (click on, "Clinic Law Services Strategic Direction" (pdf. download)). Being law offices, they could be converted and increased in number to provide legal services at cost, to middle income people. And with sufficient specialization among those law offices, acting as mutually interdependent support services (as do doctors' offices and all other parts of medical services' infrastructure), along with [LAO LAW](#)'s sophisticated and unmatched centralized legal research support service, LAO LAW, they could provide legal services much more cost-efficiently than can any law office. And thereby they could easily be made to pay for themselves, and grow in services and number of offices to provide a large volume of legal services at-cost. Thus would be the beginning and growth of one variety of socialized law.

That's a "support services" method of production, which all competitive producers of goods and services use because of its great flexible capacity for increased competence and cost-efficiency, which enables the continual improvement of products and services without having to increase their price. But the legal

profession, having always used a “cottage industry-handcraftsman” method, without any evolution to a support services method of producing legal services, cannot maintain the quality of its services without increasing their price. That is because they now take more time to produce, due to: (1) the rapidly ever-increasing volumes of law; (2) their complexity; (3) the technology to be understood that increasingly is the foundation of laws; and, (4) the great volumes of electronic records due to the automating capacity of electronic records technology. This fourth factor alone has caused the great prohibitive cost of electronic discovery proceedings in civil litigation—prohibitive to middle and lower income people using the courts for civil litigation.

Before electronic records and records management systems, one had to make a decision to write or type-out a record of a transaction. Now the transaction itself instantly produces the record and often several different types of record for the same transaction. That has caused an explosion in the volume of records every business and institution has.

Therefore, the cost-versus-price problem has two forms: (1) having to improve a product or service without increasing its price, as is necessary to be a successful manufacturer of automobiles for each new yearly model vehicle; and, (2) having to maintain the quality of a product or service as the time and cost of producing it increases, without increasing its price. It is this second form that the legal profession is not capable of coping with because its method of producing legal services is obsolete. Because the legal profession doesn’t have a method of constantly improving its cost-efficiency, as is provided by support services methods of production, the price of legal services must increase. The statement that, “regardless the size of a law firm, there are no economies-of-scale in the practice of law,”⁸ is correct, but only because there are no support services used in the production of legal services.

University of Toronto Law Professor Michael Trebilcock’s [*Report of the Legal Aid Review 2008*](#) made the possibility of the beginning of socialized law a recommendation, *i.e.*, to convert LAO’s more than 70 legal clinics to provide legal services at cost to the middle income people, along with promoting the purchase of legal services insurance, just as we buy home and auto insurance. As stated by Professor Trebilcock (p. 77):

... both LAO and the Government of Ontario, through the Ministry of the Attorney General, need to accord a high priority to rendering the legal aid system more salient to middle-class citizens of Ontario (where, after all, most of the taxable capacity of the province resides).

But he didn’t call it socialized law, as would the law societies in denigrating all such forms of producing legal services.

⁸ Steven J. Harper, *The Lawyer Bubble* (Basic Books, 2013), “Part II BIG LAW FIRMS” at p. 114. Part II deals with what causes big law firms to fail. For a Canadian example, see: Norman Bacal, *Breakdown, an insider account of the rise and fall of Heenan Blaikie* (Barlow Books, 2017).

And so inevitably, LSUC's management of Legal Aid was not what it should have been for the 30 years that it was its manager, enjoying its conflict of interest from Wednesday, March 29, 1967, until the Legal Aid Services Act, 1998, came into effect.⁹

Therefore, there are three authoritative reports that state that LSUC should not be the manager of LAO because of two factors—conflict of interest and refusal to innovate. They are the same causes of the present unaffordable legal services problem. LSUC benchers' conflict of interest now being that between being a good lawyer and a good benchers, which benchers deal with by being good lawyers, but not good benchers in that they make no attempt to solve the unaffordable legal services problem. Therefore, LSUC's history of self-serving conflict of interest reaches at least as far back as 1967. Law society management structure too easily lends itself to self-serving conflicts of interest.

In fact, it existed before 1967. Martin L. Friedland, is a professor emeritus in the Faculty of Law at the University of Toronto, and its former dean. His book, *My Life in Crime and Other Academic Adventures* (University of Toronto Press, 2007), contains important facts about the history of Legal Aid in Ontario. He was called to the bar in Ontario in April, 1960 (p. 110). I was called on Friday, March 25, 1966. He taught me "the law of evidence," in my first year of law school (1961-62) at Osgoode Hall Law School, when it was still LSUC's law school before it moved uptown to York University, thereby ceasing to be a law society law school.

In 1996 Professor Friedland prepared a study for the McCamus committee (which produced the McCamus Report of 1997), that, "examined governance structures for legal aid in other jurisdictions as well as the governance of other institutions that receive government money, such as universities and hospitals" (p. 117). One of the conclusions was (p. 117):

... We doubted the commitment of the Law Society to engage in extensive innovation and experimentation. The governance of the legal-aid plan, our study concluded, 'should no longer reside with the Law Society,' even though it may have been an appropriate model in earlier times.

The McCamus review came to similar conclusions and the government brought in legislation, the [Legal Aid Services Act, in 1998](#) setting up a semi-independent body named Legal Aid Ontario. ... The McCamus report recommended greater use of staff lawyers for both trial and appellate advocacy, bulk contracts, and greater case management.

But during the formative years before Legal Aid began on Wednesday, March 29, 1967, LSUC was strongly against Legal Aid's using a staff system of employee lawyers who would provide the legal services directly for people sufficiently poor to receive it. Instead, LSUC, representing the interests of its members,

⁹ I remember that day in 1967 quite clearly even now. I had just completed my first year as a lawyer and as an assistant Crown Attorney in Toronto's Magistrates Courts as they were called until that title was converted in 1968 to, "Provincial Judges' Courts," and in 1990 to be the "Ontario Courts of Justice." The Duty Counsel in each of the criminal courts that first day of Legal Aid were all the most senior criminal defence lawyers in Toronto. Thereafter; not so senior.

as distinguished from the public interest, wanted a judicare system whereby serving Legal Aid-approved clients would be provided by lawyers in private practice who were willing to do legal aid cases, in spite of its very low tariff of fees.

The momentum to give LSUC its desired conflict of interest began 33 years earlier. In 1963, a Joint Committee on Legal Aid of six members was established by the Attorney General of Ontario, with three members appointed by the Attorney General and three by LSUC. The preface to the committee's report stated (p. 110 of Professor Friedland's book):

We retained Professor Martin L. Friedland of Osgoode Hall Law School to survey the extensive literature on legal aid in England and the United States and also to ascertain if any meaningful statistics existed with respect to legal aid and the need for legal aid in Ontario.

As to the resulting report (p. 114):

The Joint Committee reported to the attorney general in 1965 and recommended that a new legal-aid plan be brought in to replace the voluntary plan that had been in operation since 1951. It should, the committee stated, be administered by the Law Society of Upper Canada and be paid for by the provincial government. The report rejected an American-style public-defender system and opted for the English-style judicare model, whereby indigent accused persons could choose private counsel paid for by the legal-aid scheme.

The committee did not think much of the public-defender model stating: 'It has never been seriously considered in England. It has been rejected in Scotland. There is moreover almost no support for the idea in Ontario.' 'The chief advantage of the public defender system,' the committee stated, 'is that it is cheap.' 'On the other hand,' the committee went on to say, 'the system seems to be wrong in principle in that both prosecutor and defender are employed by the same master. Observation of the system in action tends to support the fear that defences will become perfunctory, that little attention can be given to the run-of-the-mill case, that the entire scheme operates on an impersonal production-line basis, and that its overall effectiveness is not impressive.'

However, the committee wanted to prevent distribution of Professor Friedland's work (pp. 114-115):

Perhaps because my view of the public-defender system was far less critical than that of the committee, they objected to the distribution of my study. Although they were generous in their acknowledgment of my work in their acknowledgment of my work in their report and filed my study with their report to the attorney general, they did not want it otherwise distributed. I objected. I was an academic and one's academic work, I argued, should be made available. The issue of my study's distribution had not been discussed when I took on the task. In the end, a compromise was reached. The study could be sent to law libraries, but not otherwise distributed.

The above reasons given for recommending a judicare system over a public defender system are completely untenable, and very contrary to my experience in the criminal courts of Toronto, having taken on many Legal Aid cases. Such reasons are more applicable to Ontario's judicare system because of the very low tariff of fees, and Legal Aid's slowness in making payment. And conflict of interest is suggested by the fact that LSUC was part of a successful effort to restrict distribution of a report paid for by public funds.

Such management was what I experienced at Legal Aid, hired in 1979 to be its Director of Research in establishing the centralized legal research unit now known as [LAO LAW](#).¹⁰ By its ninth year of development, 1988, it was producing legal opinions for lawyers servicing legal aid cases, at the rate of 5,000 year—a unique support service created in the worst resourced institution in the legal profession in Canada. It had to be created because of LSUC’s bad management. Bad management of the substantial funding of legal aid, which funding, according to Professor Friedland (p. 116): “Costs had risen over the previous ten years, 1985 to 1995, from about \$75 million to about \$350 million.” Legal Aid was not a small operation.

When I was hired in 1979, I was told that due to its periodic audits in 1978-79, the Government of Ontario demanded of LSUC’s Legal Aid Committee, which was the manager of Legal Aid, that the amount of money being paid out on lawyers’ accounts for legal research hours claimed was excessive and unaffordable. A good manager would have dealt with the problem itself. But the excess payments were going to lawyers, and it is lawyers who elect law society benchers. There was a large suspicion that lawyers were “exaggerating” their claims for legal research hours.

Whereas other legal services involve interaction with people, which provides a chain for investigation, there isn’t one created by doing legal research. As one Legal Aid Committee bencher, Sidney Linden, said to me, “it’s something you can’t investigate; you can’t go up to law library books and ask, ‘did he read you?’” At that time the Internet and email were still 20 years in the future. And so it was my job to reduce somehow, the cost that Legal Aid’s Accounts Department was paying out for legal research hours claimed.

Being a specialized criminal lawyer, I didn’t know how to do that. But neither did anyone else. The CEO and the benchers managing Legal Aid provided no guidance as to how and what I was to produce. There was no timetable or requirement as to reporting; no supervision of any kind. And so, after a few months I realized that my job was to create merely the appearance that LSUC was taking the government’s complaint seriously. My employer, I believed, didn’t really want me to succeed in creating such a research unit because that would have provided a distinct improvement to Legal Aid, and therefore an increase in its ability to

¹⁰ After joining the Law Society of British Columbia in 1978, I was in Vancouver arguing criminal appeals for the Crown before the B.C. Court of Appeal. But my wife couldn’t adjust to Vancouver, and wanted to be back in Toronto. So in 1979, I desperately needed a job, any paying job back in Toronto. But jobs were hard to find 3,000 miles away, there not yet being any Internet and all that goes with it. However, by chance I happened to see an advertisement in the paper-bound Ontario Reports stating that Legal Aid in Toronto needed a Director of Research. Researching what, was not stated. I applied and won the job, I think because of my criminal law experience, criminal law being by far the area of law for which the most legal aid certificates are given out for those who cannot afford lawyers. But for that family problem, I would never have gone to Legal Aid. Its salaries are very poor because its funding is poor, and its specialty for a lawyer is the administration of poverty law services, for which skill there is no market in the legal profession. But ironically, my nine years at Legal Aid in Toronto are the ones of my career of which I am the most proud, because of what I created there—[LAO LAW](#), the best legal research unit in Canada, and it still is, 38 years later.

serve as an effective foundation for socialized law. Therefore I was caught between an employer who didn't want me to succeed, and no management experience. However I didn't want to lose my job (young family with three small children and a big mortgage), so every day of my nine years creating LAO LAW I knew I had to make the service very popular, and producing high volume, so it could generate the large cost-saving intended, *i.e.*, the bigger the volume of legal opinions, the greater the popularity and the greater the cost-saving for Legal Aid. Therefore the more I was successful, the greater would be the difficulty for LSUC's Legal Aid Committee to cancel the project and be able to say to the provincial government, "see we tried; it just can't be done."

Also, I knew that I could create something different in regard to legal research work. Having been a trial lawyer in the Toronto Crown Attorney's office for ten years, beginning in April of 1966, and later arguing criminal appeals for the Crown in Vancouver for a year, along with being the editor of the Criminal Reports (a Carswell publication) for 11 years, I felt that the system for doing legal research using paper publications was unnecessarily awkward.

It wasn't until several years after 1979 that I realized how unique that situation was, in that: (1) it was the only time where the necessary pressure that innovation requires was applied to any part of the legal profession; and the result was, (2) LAO LAW was the first time in the legal profession a true support service was created for doing the work to produce legal services; and, (3) it proved that lawyers will use external support services. Nine years later in 1988, my staff was producing legal opinions at the rate of 5,000 per year. No law office produces 5,000 legal services per year, let alone 5,000 of any one of them. I then realized:

(1) support services have for many years existed everywhere in the production of goods and services because of this management principle: "nothing is as effective at cutting costs as scaling-up the volume of production," *i.e.*, I had re-invented the wheel, but it was a new wheel in the production of legal services;

(2) there are many other parts of lawyer's work that could be done more competently and cost-efficiently by a highly specialized, high volume, support service;

(3) lawyers will use a support service if it helps them make money and serve their clients better;

(4) it's the key to the solution for the "costs of legal services problem," that provides law offices with the option of not using any support services if they wish; but they will to stay competitive;

(5) the fact that such an innovation had occurred in the worst possible and least likely place in the legal profession (because of the very poor funding of Legal Aid), tells a lot about the lack of pressure to innovate in the legal profession in Canada, as does the fact that it has never been duplicated in spite of its ability to greatly reduce the cost of legal research;

(6) because of the high degree of specialization, and high volume of production necessary for maximizing cost-efficiency, no law office, no matter how big, could itself

bring about such a support service; it requires a sponsoring agency that has over-all management of an industry or profession, such as a law society; and,

(7) how very obsolete law society management structure is.

Unfortunately, my experience is unique in the training and experience of lawyers. Therefore I am the only one who analyzes the unaffordable legal services problem this way: (1) in terms of solving it; and, (2) how to solve it. And so I say, ABSs are not necessary. But law societies:

- (1) are still managed by “part-time amateurs”—“amateurs” because the major problems of law societies are beyond the expertise of lawyers (again, because of the lack of pressure to innovate law society management structure beyond its 19th century model of a government without a civil service);
- (2) have no history of sponsoring such innovations;
- (3) have no history of generating the kind of strong leadership that is perpetually vigilant to put in place that which keeps legal services affordable; and that,
- (4) that is so because law societies are not in fact accountable to the political-democratic process—in law they are; but in fact they are not. No democratically-governed community would accept the law society performance set out above, if it were adequately made aware of it.

Therefore it is very likely that if LSUC were under sufficient pressure to do something about the problem, it would have to “save itself” from substantial embarrassment, and public demands for its abolition, by putting in place the easiest to implement solution no matter how inadequate it was—a solution such as ABSs. Such “solution” would also serve well those benchers whose law firms stand to benefit greatly by representing ABS investors.

That is why I have set out above a portion of LSUC’s management history—a history of corrupt self-service and not service in the public interest. Such history is a very good example of the conflict of interest inherent in law society management, warned of by the [Clementi Report](#) (2004).¹¹ See also, Professor of Law and Sociology John Flood’s, “Will There Be Fallout From Clementi?—The Repercussions For The Legal Profession After The Legal Services Act 2007,”¹² An introductory paragraph states in part (bottom of page 538):

... I argue that the present trend of the legal profession is moving away from traditional conceptions of professionalism to a commercialized and industrialized alternative. In speculating about the potential outcomes, with the use of hypotheticals and real case studies, I suggest that deskilling and deprofessionalization will be among the logical

¹¹ [Review of the Regulatory Framework For Legal Services in England and Wales](#). Sir David Clementi in the U.K. recommended that the regulatory and representative functions should be clearly split because they are in conflict. 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 public perception.

¹² [2012 Michigan State Law Review 537](#) (2014).

outcomes. . . .

Therefore, all of the members of LSUC must become much more vigilant as to what its benchers do, particularly so now, as to the very contentious ABS issue in all of its forms and dimensions.

9. The excuses used for not trying to solve the problem

Given that ABSs cannot solve the problem, it is irresponsible, if not very unethical, for a law society to deal with ABS proposals while not attempting to solve the problem. And so there are excuses used to attempt to justify the failure to attack the cause of the problem instead of giving its victims “palliative care,” *i.e.* “alternative legal services” (ALSs)¹³ for that majority that cannot afford legal services instead of trying to cure the “disease.” Excuses such as:

- (1) [the problem has many causes](#), *i.e.*, if the law society is at fault, it is only a very small contributor to the damage being caused by the problem. Such statements are made without any supporting analysis of the cause of the problem by the requisite experts such as management and economics experts. In fact, there is only one cause, affordability. But so far, law society benchers refuse to deal with affordability.

But see in the November 1, 2016, issue of the blog [Slaw](#) (“*Canada’s online legal magazine*”) this post: “[Access to Justice and Market Failure](#)”, by LSUC bencher Malcolm Mercer, which begins: “The problem of access to justice is likely the result of a number of causes.” And the third last paragraph states:

If we are serious about the access to justice gap, we should accept that no one solution will slay the access dragon. Indeed, we have to accept that we cannot predict with confidence what solutions will be effective. But it is time to be creative and to actually attempt solutions.

Very good! So where are the attempts? Almost a year has passed. When might they begin?

Other excuses are:

- (2) the number of lawyers in private practice is not shrinking;¹⁴ and,

¹³ Alternative legal services are: clinics of various types, self-help webpages, phone-in services, paralegal and law student programs, family mediation services, court procedures simplification projects, public legal education information services, programs for targeted (unbundled) limited retainer legal services (as distinguished from a full retainer to provide the whole legal service), pro bono (free) legal services, and the [National Self-Represented Litigants Project](#), the purpose of which is to help self-represented litigants to be better litigants without lawyers. See: “[Access to Justice: A Critique of the Federation of Law Societies of Canada’s Inventory of Access to Legal Services Initiatives of the Law Societies of Canada](#)” (pdf).

¹⁴ “[the number of lawyers going into private practice is not shrinking](#)” (in answer to statements that the per capita number of lawyers is shrinking because of increasing numbers of people who cannot afford lawyers: see: (1) the dissenting comment to Colin Lachance’s *Slaw* article of June 16, 2016, “[Law’s Reverse Musical Chair Challenge](#)” which provides proof by way of the statistics of such shrinking; and, (2) for proof of how long, sole and small firm practices have been losing practitioners, see LSUC’s, “[Final Report of the Sole Practitioner and Small Firm Task Force](#),” pages 50-54 (paragraphs 117-130) (March 24, 2005, reviewed in Convocation, April 28, 2005). And, (3) that shrinkage was recognized as far back as 1981; see, Christopher Moore, *The Law Society of Upper Canada and Ontario’s Lawyers 1797-1997* (University of Toronto Press Inc., 1997), which refers to a report to LSUC by University of Toronto economist David Stager (p. 308), which stated that the number of lawyers in private practice had decreased from 88 percent in 1973, to 71 percent in 1982 (the report was originally delivered in 1981, and

(3) many self-represented litigants do not want lawyers.¹⁵

But LSUC is no worse than all of the other law societies. None is trying to solve the problem. I asked a former LSUC Treasurer why the law societies don't make a joint national effort to deal with the problem, it being a national problem requiring a national solution. The answer was: (1) the law societies each have their own problems to deal with; and, (2) there is a question of funding.

10. Good benchers versus being good lawyers

Trying to solve the problem would involve an unknown amount of time, and would require some trial-and-error learning. That might conflict with the time needed by benchers to be good practicing lawyers, and lawyers don't become benchers to be associated with trial-and-error failures. So LSUC disobeys with impunity what s. 4.2 of Ontario's [Law Society Act](#) requires.

So if left unchallenged, both ABSs and the commercial producers of legal services (LegalZoom, *etc.*) are a threat to the majority of law society members. Both the commercial producers of legal services and ABSs, involve the use of employee lawyers to service their employers' customers and clients. Such employers are therefore, non-lawyer providers of legal services in need of a law society bylaw-based exception for their unlicensed UPL.

Given: (1) the misery and damage caused to the majority of the population by the problem; and, (2) the law societies' refusal to try to solve the problem, the commercial producers have a strong argument that they should be treated as equally deserving an exemption from UPL prosecutions because of their providing relief from the consequences of the law societies' (and benchers') breach of trust, which is their failure to perform the duties attendant to their monopoly over the provision of legal services, as set out, for example, in s. 4.2 of Ontario's [Law Society Act](#). Such breach of trust may well be a violation of s. 122 of the [Criminal Code](#), "breach of trust by a public officer,"¹⁶ which would further weaken the law societies' position as a prosecutor for UPL by the commercial producers.

summarized in 1983—see note 44 (on 308) which is set out on p. 380).

¹⁵ The expertise, surveys, and materials available from the [National Self-Represented Litigants Project](#) do not support this excuse (that people don't want lawyers). The purpose of the NSRLP is to help self-represented litigants (SRLs) be more effective SRLs. It is committed to collaboration to enhance the responsiveness of the Canadian justice system to SRLs, and to continuing dialogue with lawyers, judges, and court services staff. The Project is also acting as a clearinghouse for information and resources related to the SRL problem. It is committed to information and resource-sharing among all interested and affected parties. It builds on the National Self-Represented Litigants Research Study conducted by Project Director, Dr. Julie Macfarlane of the University of Windsor, Ontario, from 2011-2013. See also the work of the Canadian Forum on Civil Justice (CFCJ) [Everyday Legal Problems and the Cost of Justice in Canada: Overview Report](#).

¹⁶ The constituent elements of the offence in s. 122, including the definition of "public officer," were first elucidated in, *R. v. Boulanger* 2006 SCC 32. See: "[No Longer Is It Possible to Be both a Good Lawyer and a Good Bencher](#)," [Slaw](#), May 29, 2017.

Also, such a law society prosecutor:

- (1) would be a very biased and self-interested prosecutor fighting off a commercial threat, rather than prosecuting individuals for the UPL offence's intended purpose of protecting the public from the dangers of incompetently provided legal services;
- (2) would be like a law society limiting the numbers of law school graduates called to the bar for the improper purpose of increasing the competitiveness of those already called to the bar;
- (3) would be a prosecutor in violation of the principle that, "the Crown never wins and the Crown never loses;"¹⁷
- (4) would be attempting to prevent anyone else from trying to solve the problem that is the greatest threat to the availability of legal services in the history of Canada, and therefore to Canada's existence as a constitutional democracy that guarantees constitutional rights, freedoms, and, "the rule of law," which is a problem that the law society refuses to try to solve itself; and,
- (5) would be appearing before the Law Society's "Hearing Division," being also biased—not capable of providing a "fair trial."

In other words, law societies are the lynch pin of the justice system—when they fail, it fails. And, there would very likely be considerable public opposition to, and possibly government intervention into, such prosecutions if the commercial producers had developed a market that services hundreds of thousands of people, as has happened in the U.S.

However, the progress of these commercial producers of legal services in the U.S. shows that they will not be much hindered by prosecutions for "the unauthorized practice of law." See: (1) "[Counsel, I Demand Justice!](#)" – 'Most Definitely! How Much "Justice" Can You Afford?'" (*Slaw*, April 10, 2017); and, (2) "[Technology, the Fiduciary Duty, and the Unaffordable Legal Services Problem](#)" (*Slaw*, December 6, 2016). And see also the several books by Richard Susskind (cited in the third paragraph of the, "[Counsel, I Demand Justice!](#)" article).

Therefore, such an exception from prosecution created for ABSs, will greatly weaken the law societies' ability to prosecute the commercial producers especially when they are large producers. In turn, that will weaken the general practitioner's chances of survival. If the law societies had been at least honestly trying

¹⁷ For support of the principle that, "The Crown never wins, and the Crown never loses"; see: *R. v. Bain*, 1992 CanLII 111, [1992] 1 S.C.R. 91, at para. 2; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R.74, at para. 109; *Henry v. British Columbia*, 2014 BCCA 15, at para. 9, quoting as the source of that principle, the now classic paragraph of Rand J., in, *Boucher v. The Queen*, 1954 CanLII 3, [1955] S.C.R. 16, at pp. 23-24, as to the duty and motivations of Crown counsel: "It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."

to solve the problem, they would have a good reply to the argument that, because they have not yet solved the problem, they shouldn't be allowed to prevent anyone else from trying to solve it, or lessen the great misery and damage that it is causing to the majority of Canada's population.

11. Commercially-produced legal services because *Chaoulli* enables private medical services

Law society neglect of the problem, which is in law its duty to solve, has created a large permanent class within society that cannot obtain affordable legal services. That provides a basis for a [Canadian Charter of Rights and Freedoms](#) section 7, "life, liberty, and security of the person," defence for the commercial suppliers of legal services against prosecution for the offence of, "the unauthorized practice of law." Consider therefore, the relevance of the extensive analysis of, *Chaoulli and Zeliotis v. A.G.s (Quebec & Canada)*, [2005 SCC 35](#), provided by this book: Colleen M. Flood, Kent Roach, and Lorne Sossin (eds.) *Access to Care, Access to Justice—the Legal Debate over Private Health Insurance in Canada*.¹⁸ *Chaoulli* is a "deprivation of private medical services" case, comparable to a "deprivation of legal services" situation. Dr. Chaoulli won, and so should the commercial producers of legal services win, if law societies remain as they are, and especially so should they approve the existence of ABSs.

In *Chaoulli* the appellants did not ask for an order that the Quebec government spend more money on health care. Nor did they ask for an order that waiting times for treatment under the public health care system be reduced. Rather, they argued that because such delays put their health and safety at risk, they should be allowed access to private medical services. Three of the seven justices of the Supreme Court of Canada who heard the case decided that the Quebec law prohibiting private health care and insurance violated s. 7 of the Canadian Charter of Rights and Freedoms, and three decided that it did not. The seventh justice held that the prohibition violated the Quebec Charter of Human Rights and Freedoms, and therefore that it was not necessary to decide whether there was also a violation of Charter s. 7.

To use the language of Canadian Charter of Rights and Freedoms s. 15 equality rights case law, the result of the law societies' refusal to solve the problem, is that, being middle class, or of "middle income," and unable to obtain legal services at reasonable cost, is a state of one's condition that is "immutable, or changeable only at unacceptable cost to personal identity," and to one's ability to invoke constitutional rights and freedoms, and the rule of law.

But unfortunately, there is not yet an "equality rights" argument or defence provided by Charter s. 15, even though law societies have created a permanent class of people, seriously disadvantaged by their inability to afford a lawyer's advice. That class is the majority of the population. It is a growing majority because there is no law society program the purpose of which is to solve the problem. And as well, the

¹⁸ University of Toronto Press, 2005.

percentage of litigants who are self-represented litigants will steadily become a bigger percentage. That seriously undermines constitutional declarations as to an enforceable “rule of law,” and also greatly undermines claims that Canada is a constitutional democracy. But such “class discrimination” is not of the “enumerated or analogous” type that s. 15 requires.¹⁹ Without the help of a lawyer, the Canadian Charter of Rights and Freedoms is a “paper tiger.” If section 7 requires a situation of true “deprivation,” then s. 15 should be available even where there is no immediate loss from that deprivation.

12. The “slippery slope” to the abolition of the general practitioner

And because of the millions-of-dollars-potential of ABSs, the enabling of the proposed “charity ABSs” will inevitably lead to legalizing all ABSs (as abundant caution requires, we must assume to be intended by the promoters of the “charity ABSs”). Thus the “charity ABSs” will establish a “slippery slope” to the abolition of the general practitioner. That is to say, in quick time, the definition of what is a “charity ABS” will become ever more charitable, particularly so for those benchers whose clients can be ABS investors. And will the “charity ABSs” be adequately monitored to ensure that their provision of legal services doesn’t become “for profit” and less for charity? The other nine provinces and three territories of Canada can learn from Ontario’s experience.

13. LSUC’s progress on ABSs

If now worried about the economic future of your legal career, start with LSUC’s “[Alternative Business Structures](#)” webpage, from which its ABS [Discussion Paper](#) of September 24, 2014, can be downloaded (pdf). Then scroll down on that same site to see: (1) the hyperlinked list of, “ABS Working Group Reports to Convocation,” (LSUC’s “legislature of benchers”) and, (2) the hyperlinked, alphabetized list of 41 contributors’ responses to the Discussion Paper. Mine, (“[Chasse, Ken](#)”) is 67 pages long.²⁰

It was LSUC’s ABS Working Group benchers who wrote the ABS Discussion Paper, and the ABS

¹⁹ The purpose of the [Canadian Charter of Rights and Freedoms](#) s. 15 “equality rights” provision, is to guarantee basic rights as to equality before and under the law and to the equal protection and benefit of the law, without discrimination. Subsection 15(1) extends protection against the forms (grounds) of discrimination listed in section 15, and to analogous grounds of discrimination; see for example: (1) [Eldridge v. British Columbia \(A.G.\)](#) [1997 CanLII 327](#) (SCC), [1997] 3 SCR 624; (2) [Andrews v. Law Society of British Columbia](#) [1989 CanLII 2](#), [1989] 1 SCR 143; (3) [Corbiere v. Canada](#) (*Minister of Indian and Northern Affairs*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203; and, (4) [Law v. Canada](#) (*Minister of Employment and Immigration*) 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497). The “analogous grounds” recognized by the Supreme Court of Canada so far are: (1) citizenship; (2) marital status; (3) sexual orientation; and perhaps, (4) language: Professor Peter Hogg, *Constitutional Law of Canada, 2015 Student Edition* (Thomson Reuters, Carswell, 2015), section 55.8(b), “Addition of analogous grounds” (pp. 55-22 to 55-25).

²⁰ This paper is also posted on the [SSRN](#), (free pdf. download): “[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.](#)”

Summary Report that summarizes all the responses to the Discussion Paper (see, [Report to Convocation—February 26, 2015](#), tab 8.2). The Discussion Paper is not an unbiased presentation of relevant facts and issues, but rather a promotional text for ABSs, complete with a letter, dated September 26, 2014, from LSUC’s Treasurer, encouraging participation in the ABS discussions as a true LSUC publication might do. And the Summary Report’s descriptions of the supporting and opposing statements and arguments are too brief, and their accuracy cannot be checked because they lack sufficient references to the specific texts from which such statements and arguments are drawn, as any formal writing should do.²¹

Those who wrote the Summary Report know that other benchers, in determining their voting position on the ABS issue, will most likely read the Summary Report alone, and not the 41 responses. Therefore an impartial assessment of the integrity of the Summary Report is necessary. Conflict of interest is a concern—the conflict between benchers’ using their position as benchers to serve the fortunes of their law firms first, and the legal duties of a law society a very poor second.

And that [June 2017 interim report](#) states (page 3, para. 38): “...ABSs nevertheless have ‘real potential’ to enhance access to justice.”²² If that means that ABSs can help with the problem of unaffordable legal services, it is false. To be valid it has to mean that a “charity ABS” can provide routine legal services, and provide legal advice services below cost as a service of the charity, union, not-for-profit organization, or other CSO (civil society organization), that is providing them. The use of ABSs in Australia and England proved that ABSs are not relevant to the problem because they deal with routine legal services and not legal advice services. The [June 2017 Interim Report to Convocation](#) acknowledges that within its lengthy discussion of CSO’s. Paragraph 44 (page 4) states:

In September 2015, the Working Group also recognized that: a. Although ABS efforts in Australia and England and Wales were not designed to facilitate access to justice *per se*, there have been practices which have emerged to provide legal assistance to vulnerable persons.

The ABS Discussion Paper also strongly implies that ABSs could be of assistance in dealing with the problem. For example, it quotes (page 13) percentages of unrepresented litigants, which percentages ABSs cannot help to alter. Although the decision-making capability of artificial intelligence is transforming whole

²¹ For example, the two very short, cursory references in paragraphs 48b and 75, to my submission, make necessary reading the whole 67 page paper in order to understand what such references mean, *i.e.*, the recommended solution of a civil service-type agency for all of Canada’s law societies, and financed by enabling CanLII to provide a legal opinion service at cost, plus a profit to pay for it.

²² The whole of paragraph 38 states: “In its February 2014 Report to Convocation, the Working Group described in detail the relationship between ABS and access. It observed that while ABSs are not a ‘panacea’ and are not ‘the sole, nor likely the most important’ access to justice solution, ABSs nevertheless have ‘real potential’ to enhance access to justice.” [The footnote accompanying this comment states: “see the ABS Working Group February 2014 Report to Convocation, Convocation – Professional Regulation Committee Report, at paras. 6-89, online at <http://lsuc.on.ca/uploadedFiles/ABS-report-to-Convocation-feb-2014.pdf>, at paras. 107, 119 and 120.”]

industries, (see: [“The Dark Secret at the Heart of AI”](#)),²³ the automation that ABSs will finance, cannot yet help to reduce the cost of litigation. It is not a routine legal service.

We must challenge our ABS-bencher advocates more closely, and bencher candidates for election more rigorously. Law society management must escape its 19th century origins and culture, or be abolished.

14. The propriety of suspicious objections

As to the propriety of these statements of suspicion: where there are millions of dollars to be obtained, as might well be the motivation behind ABS proposals, and those who would so benefit are not sufficiently accountable to an appropriate authority, one should presume that there will be conflicts of interest and other forms of money-driven corruption. However, such is but a prudent presumption and not an inevitability without exception. But the onus of proof of integrity and purity of motivation and action beyond a reasonable doubt, should rest upon those who would so benefit. They should accept that, rather than displaying indignation, anger, and threats that draw strength from their “power of position.” Those who would not benefit and are suspicious and concerned should be able “to speak truth to power” by freely expressing their concerns without penalty, rather than “power” being able to project and impose its own “truth” without concern.

Cumulatively, the ABS Working Group’s 2015 and 2017 Interim Reports provide grounds to believe that there is been a compromise reached as to the views of its members. On the one hand, the recognition that ABSs cannot solve the problem should lead to the Working Group’s end. But those benchers wanting their law firms to be able to represent ABS investors, have conceded major ownership by investors and hold out the possibility that, (as stated in the [June 2017 interim report](#) (page 3, para. 38): “...ABSs nevertheless have ‘real potential’ to enhance access to justice.”²⁴

And so, the motion to approve the “charity ABSs” that was to be put before Convocation on June 29, 2017, for a vote, was withdrawn the day before, because of calls for further consultation. Further time has been allowed for comments until September 1, 2017. See: [“LSUC benchers push back decision on ABS.”](#)²⁵

15. ABSs cannot solve the problem of unaffordable legal services

²³ The subtitle states: “No one really knows how the most advanced algorithms do what they do. That could be a problem.” That is “the dark secret.” The article adds: “Starting in the summer of 2018, the European Union may require that companies be able to give users an explanation for decisions that automated systems reach. This might be impossible, even for systems that seem relatively simple on the surface, such as the apps and websites that use deep learning to serve ads or recommend songs. The computers that run those services have programmed themselves, and they have done it in ways we cannot understand. Even the engineers who build these apps cannot fully explain their behavior.”

²⁴ *Supra* note 22 and accompanying text.

²⁵ See Section 4 above (p. 10): [“Lawyers split on the latest step in the ABS issue—the ‘charity ABSs’”](#).

The unaffordable legal services problem (“the problem”) cannot be solved or lessened by ABS proposals. ABSs concern “routine legal services.” But the problem is caused by legal advice services, *i.e.*, services that require a significant amount of a lawyer’s time and advice. The majority of the population cannot afford them. Those lawyers and investors who wish to have ABSs made legal are looking to make a return on investment by way of providing routine legal services in greater volume. That is a commercial investment proposal. But the problem is a social welfare problem and ABS investors are not in the social welfare business. Below are cited the articles that provide the detailed explanations for my arguments.

The ABS Discussion Paper and the Reports to Convocation imply that ABSs can have a positive impact upon the problem. But they don’t describe how. They provide no adequate description as to how the financing that ABS investors would provide to law firms would produce the innovation that would have any significant impact upon the problem. They could finance the automation for providing routine legal services, but such automation is something that the legal profession can provide for itself, better by itself, without: (1) law offices having to be owned by investors; and, (2) the risk of the fiduciary duty owed to clients being suppressed by the resulting profit duty owed to investors. The independence of the legal profession would be under a far greater and insidious threat of intervention than that provided by any government—dictate control of the evidence and argument provided by counsel, then one can control the judgment dictated by the judge.

All of the literature on the problem of unaffordable legal services is written by lawyers. But the problem is not a legal problem. And therefore there is no consideration of what other professions and manufacturers do in regard to their versions of the same problem. Such an analysis would show that the solution to the problem exists everywhere in the production of goods and services; *i.e.*, the use of “support services methods” of production. They are the product of the kind of pressure that produces innovation. No pressure; no innovation. Therefore legal services are produced in the same way in which they have always been produced. And so the problem exists. It is a law society-caused problem, but it is capable of a law society-caused solution. There being however no law society attempted solution, other sources of a solution should not be barred—sources such as LegalZoom, etc.

ABS advocates do not propose to make any change to the method by which legal services are produced, such as moving production to a “support services method.” Therefore they can have no impact on the size and seriousness of the problem. The purpose of ABS investors is not to solve the problem but rather “to corner the market” for routine legal services because that’s where “the quick and easy money is.” It is not in the provision of legal advice services; the money they produce being most frequently neither quick nor easy, and therefore not yet ready for automation.

16. The obsolescence of the method of producing legal services

Legal services are unaffordable because of the method of producing them is obsolete. Where there has been the pressure that forces innovation, the manufacturing of services as well as goods has moved to a “support services method of production”; an on-going process for over 100 years. For example, the whole of the medical services infrastructure is made up of highly specialized, mutually-interdependent support services. That infrastructure is like a honeycomb of support services; all highly specialized and capable of the high volume production that maximizes cost-efficiency and competence. There are no “generalists,” but instead, specialized doctors, technicians, technical tests, drugs, and hospital services. Similarly, the “parts industry” is a massive and highly sophisticated support service for the automobile manufacturers. The “special parts companies” that make up the parts industry, produce those parts or services of a total product or service that cannot be made to provide a sufficient contribution to profit unless they are produced by a highly specialized, high volume support service.

The high revenue produced by supplying or servicing hundreds, or thousands of manufacturers enables every major factor of production to be highly specialized so as to produce the greatest cost-efficiency and the highest degree of competence. But also, it has long been known that maximizing the cost-efficiency of one’s own office or factory is not enough to guarantee affordability. Therefore the support services method of production exists everywhere except in the legal profession. ABSs can merely improve the cost-efficiency of the law office but they cannot create the support services that the affordability of legal advice services requires. And the legal profession itself can obtain the automation that produces greater cost-efficiency; see: “[Access to Justice—Unaffordable Legal Services’ Concepts and Solutions](#).”

The ABS Summary Report, summarizing the responses to the ABS Discussion Paper, refers in several places to ABSs being able to supply the financing that will spawn innovation. That is merely creating innovation within the individual law firm. If such innovation occurred in every law office, would that end the unaffordable legal services problem? It can’t; no more than increasing the cost-efficiency of all doctor’s offices would radically improve the present medical services infrastructure, and no more would innovation by a single automobile manufacturer have brought about the present parts industry.

To solve a problem the size of unaffordable legal services, financing and innovation have to be applied to the whole of a profession, sponsored by the agency having regulatory power over the whole of the profession such as a law society. And secondly, there is no description within the Summary Report of what that “innovation” would be, as though to say, “here’s the money, surrender to our ownership and the innovation will happen.” Its authors are definitely keen to promote ABSs. But they show no competence in describing what that innovation will be and how it can solve or have any impact upon the problem.

17. Highly specialized support services are needed

Two hundred years ago, doctors and lawyers had similar work situations. Each had only his/her own

personal resources and maybe an assistant or two. But now there is no comparison: no doctor's office provides all treatments and all remedies for all patients the way a lawyer's office does for all clients. In the medical profession the innovation never stops. In the legal profession it never started. To blame is the lack in innovation in law society management structure, *i.e.*, maintained as always by part-time amateurs who are able to give top priority to the place where they earn their own living, such that everything else must remain compatible with that prioritization of duties.

Law societies should be sponsoring highly specialized, high volume support services so as to take advantage of this simple management principle: "nothing is as effective at cutting costs as scaling-up the volume of production." Bigger is better. If automobiles were still produced in the same way that legal services are produced, they too would be unaffordable to the majority of the population. If medical services were provided like legal services, doctors, like lawyers, would work separately in highly 'silo-ed' offices that share nothing. But the pressure that spawned socialized medicine also created the honeycomb of specialized cells that constitute the infrastructure by which medical services are provided.

Trying to improve the way legal services are presently provided without creating the necessary support services is like adding a motor to a bicycle when the solution requires a motor vehicle. That is why law society "access to justice" committees have made no progress towards a solution. If the problem were solved, all ABS proposals would be unnecessary and irrelevant. Therefore it is irresponsible for a law society to provide such great attention to ABS proposals, while the problem remains dormant without an attempt at a solution.

The assumption that legal services are now produced by lawyers in the only possible way of producing them, has no basis in fact. There has been no study of the cause of the problem by the appropriate experts. It is not a legal problem. It requires expertise that lawyers don't have, but they don't retain (hire) that expertise. As a result, law societies have no program to solve the problem of unaffordable legal services, and their "access to justice" committees have made no progress towards a solution, while the victims continue to grow in number, they being:

- (1) the majority of the population that cannot afford a lawyer's advice;
- (2) the courts overwhelmed by self-represented litigants;
- (3) the legal profession itself, and,
- (4) improved funding for legal aid organizations being now very politically unwise because the necessary tax money would come from that majority that cannot afford legal services and cannot qualify for legal aid services.

In other words, when law societies fail, the justice system fails.

An example of a very effective support service would be the production of legal research services and products. They could be more competently and cost-efficiently provided at-cost by a highly specialized,

high volume legal research support service. At Legal Aid Ontario ([LAO](#)), [LAO LAW](#)'s technology of centralized legal research (successfully operative since Tuesday, July 3, 1979), combined with [CanLII](#)'s national market and great potential earning power, is an example described in the [Access to Justice](#) article cited in the last paragraph below. And because almost all evidence used for legal proceedings and services now comes from complex electronic systems and devices, few lawyers are able to challenge the reliability of such sources without the help of a specialized legal research unit. And so, we have the possibility of life imprisonment for murder, based upon the evidence produced by an electronic system maintained merely to a commercial standard and not so as to guarantee "proof beyond a reasonable doubt."²⁶

The "continuing professional development" programs (CPD and CLE programs) that lawyers must take don't provide such knowledge and information, and therefore, nor do electronic discovery in civil proceedings, and the disclosure that the Crown is required to provide to accused persons in criminal proceedings.²⁷ Ignorance of technology prevails in the profession. As a result, so it does in the case law, both substantially and procedurally, *i.e.*, the changes in procedure that new technological sources of evidence should dictate.²⁸ Law societies are not aware of such problems until they are major problems for general practitioners and other lawyers. That is why a legal research support service is necessary. [CanLII](#) could do it, and more than pay for itself. The long experience of LAO LAW proves that. But being aware of a problem does not produce an adequate response until there is sufficient pressure to do so.

There are many other parts of lawyers' work that could be supplied by such support services. See: "[Access to Justice—Unaffordable Legal Services' Concepts and Solutions](#)," sections 9 and 10 (pdf. July,

²⁶ See for example, the technical complexity discussed in these articles: "[Sometimes Laws Are Too Important to Be Left to Lawyers – Lawyers Without Technical Support](#)" (*Slaw*, January 28, 2016). "[Records Management Law – A Necessary Major Field of the Practice of Law](#)" (*SSRN*, pdf., January 2016); and, "[Guilt by Mobile Phone Tracking Shouldn't Make 'Evidence to the Contrary' Impossible](#)" (*SSRN*, pdf., October, 2016). Mobile phone tracking evidence was critically important evidence in the pre-murder trial *voir dire*s in: *R. v. Oland* [2015 NBOB 245](#); and, [2015 NBOB 244](#). The result was a conviction for second degree murder, for which a new trial has been ordered, but in relation to issues other than those concerning the evidence produced by mobile phone tower tracking of the location of mobile phones. See: *Oland v. R.* [2016 NBCA 58](#), and, [2016 CanLII 101484](#) (N.B.C.A., providing further reasons for judgment).

²⁷ See: *R. v. McNeil*, [2009 SCC 3](#), [2009] 1 SCR 66; *R. v. O'Connor* 1995 CanLII 51 (SCC), [1995] 4 SCR 411; *R. v. Chaplin*, [1995 CanLII 126 \(SCC\)](#); and, *R. v. Stinchcombe*, [1991 CanLII 45 \(SCC\)](#).

²⁸ For example, s. 30 of the [Canada Evidence Act](#) still dominates admissibility proceedings in regard to electronically-produced records, which are now the most frequently used kind of evidence. But s. 30 is obsolete. It was enacted in 1969 when such sources of evidence were still far off in the future. But the electronic records provisions, ss. 31.1-31.8 [CEA](#), which incorporate the "system integrity concept" (s. 31.2(1)(a)), which is the foundational principle of electronic records management systems technology, is not applied and all but ignored. Compare for example, this article, David M. Paciocco (of the Court of Appeal for Ontario), "[Proof and Progress: Coping with the Law of Evidence in a Technological Age](#)" (2013), 11 *Canadian Journal of Law and Technology* 181, which was heavily relied upon in *R. v. Oland* [2015 NBOB 245](#) (*supra* note 19): with the technical detail as to mobile phone tracking evidence provided by this article: R.P. Coutts and H. Selby, "Problems with cell phone evidence tendered to 'prove' the location of a person at a point in time" ([2016](#), [13 DE&ESLR 76-87](#)) (pdf.)

2017). And those services that are compatible with flat-fee billing (instead of hourly billing) are also the services that are most easily automated—see: “[Automation, Support Services, and Flat-Fee Billing](#)” (*Slaw* July 28, 2017). But allowing ABSs to own law firms is the most expensive way to get that automating software. All lawyers bargaining as a single unit is the least expensive way, *e.g.*, represented by the [Federation of Law Societies of Canada](#), or by a civil service-type agency serving all of Canada’s law societies.

The support services strategy is to cut costs by increasing competence by means of a high degree of specialization. The volume and complexity of laws, and their great dependence upon complex technology, which lawyers don’t understand and cannot challenge its integrity as a reliable source of evidence, makes specialized legal research support services essential to maintaining competence, particularly that of the general practitioner. CPD/CLE programs lack the necessary quality to do that.

For example, electronically-produced records are now the most frequently used kind of evidence. But find me a case, or a benchler, who can display an ability to challenge the reliability and integrity of a complex electronic records management system. If they are not well maintained, such systems will lose and destroy records and corrupt their data, such that electronic discovery proceedings cannot be relied upon to fulfill their purpose, nor disclosure by the Crown to defence counsel fulfill its purpose to produce adequate retrieval and disclosure of relevant evidence.²⁹ The incidence of bad records management is surprisingly high, and their software has high error rates. Show me where CPD/CLE speakers and materials deal with that. See:

(1) “[Records Management Law – A Necessary Major Field of the Practice of Law](#)” (SSRN, pdf., January 2016);

(2) “[Guilt by Mobile Phone Tracking Shouldn’t Make ‘Evidence to the Contrary’ Impossible](#)” (SSRN, pdf., October, 2016); and,

(3) “[Electronic Records as Evidence](#)” (SSRN, pdf., May 2014).

18. Support services methods instead of “cutting costs by cutting competence”

Giving legal research work to law students, paralegals, and junior lawyers, is “cutting costs by cutting competence.” In substantial contrast to support services methods, using inexperienced people produces very small cost-savings, if any, and increases the probability of errors. And they don’t build specialized databases of research materials and methods of production, and use experienced professionals as do specialized legal

²⁹ For example, police officers are not trained to ask their sources of records, “has your records management system been certified as being in compliance with the National Standards of Canada for electronic records management ([72.34](#) and [72.11](#)), and if so, when, and may we have a copy of the document certifying compliance? The same should apply in civil proceedings. Without information as to the state of records management system maintenance, there can be no assurance that all relevant records have been produced.

research support services. For the same reason, “clerking” for judges should be considered obsolete.

And there are several other examples of complex technology producing evidence that is very frequently used. Lawyers lack the knowledge necessary to effectively challenge highly technical sources of such evidence, *e.g.*, mobile phone tracking evidence (because we all carry mobile phones such evidence is frequently used). And the breathalyzer and intoxilyzer devices that produce the blood-alcohol readings used in almost all impaired driving and “over 80” prosecutions ([Criminal Code](#) s. 253). Such electronically-based systems and devices are far from infallible in their manufacture, use, and maintenance. Law societies do nothing about this problem of maintaining competence.

19. Law society management structure must change or be abolished

But the creation of such support services and bringing about that automation for law offices requires law societies that are not managed by part-time amateurs whose first and dominant priority is servicing their clients and employers. Innovation in the methods of producing legal services requires strong leadership, which requires a law society membership that is vigilant and demanding of the quality of law society bench-management. Law society structure and tradition provides only a “populist” style of leadership used to embellish and promote careers and law practices.

Law societies are now like an elected government without a civil service. Therefore they lack the ability to govern, *i.e.*, they don’t have the competence to cope with such major problems because such problems are not legal problems. And law societies don’t retain the necessary expertise with which to produce the innovations that would keep legal services affordable. How to create the necessary “civil service advisory agency” for law societies and pay for it, is set out in that last article cited below. The component parts for competent law society management already exist. They need merely to be assembled with good management then and thereafter. The component parts being:

- (1) LAO LAW’s technology of centralized research to create a legal opinion service at CanII, provide at-cost;
- (2) CanLII’s present resources and national market; and,
- (3) Ryerson University and the University of Ottawa to provide the law societies’ bilingual civil service agency.^{30, 31}

³⁰ Ryerson University in Toronto and the University of Ottawa, together, provided that civil service function for LSUC’s [Law Practice Program](#) (LPP). Ryerson University provided the English language version, and the University of Ottawa the French language counterpart. Ryerson University’s “About Ryerson’s LLP” webpage states (first paragraph): “Ryerson’s Law Practice Program (LPP) is the first of its kind in Ontario. It’s an innovative alternative to traditional articling through a rigorous and demanding eight-month program combining on-line training and experiential learning with a hands-on work term. Ryerson works with the Law Society of Upper Canada and the legal community, including a strategic alliance with the Ontario Bar Association, to deliver a dynamic program that prepares Law School graduates to succeed in their legal practice and careers.”

³¹ And Ryerson University’s recent [proposal for a law school](#), would greatly compliment such a civil service

In contrast, the ABS Discussion Paper states (p. 11) that one model of ABSs allows for, “law firms operating as franchises of the investor so they have centralized access to management systems, technology, marketing and other expertise.” But those same services can be provided by a national law society civil service agency, and do so without law firms having to be owned, enfranchised, and controlled by a profit duty that can conflict with a lawyer’s duty to clients. And, such alleged advantages provided by investors will not make legal services affordable such as to cure the problem of unaffordable legal services. They can’t, because they involve no change to the method of producing legal services. Merely improving the cost-efficiency of individual factories does not make an industry profitable. If it could, support services methods of production would not exist everywhere in the production of everything, as they do.

Law societies are a 19th century creation carried into the 21st century. They have been under no pressure to innovate as have the providers of medical services. As a result, no doctor’s office provides all treatments and remedies for its patients the way a lawyer’s office does for all clients, using only its own internal resources because there are no external support services to use (except for law book companies’ books and electronic legal research services, and that provided by [CanLII](#)). In medical services management the innovation never stops. In legal services management by law societies, it never started.

Because law society management structure has not changed since its 19th century creation (Monday, July 17, 1797, for LSUC at what is now called, beautiful Niagara-on-the-Lake, while the French Revolution still raged), they are not capable of solving the unaffordable legal services problem by sponsoring the innovations that would enable law firms to produce affordable legal services. Now the complexity and size of the major problems of law societies means that, “[No Longer Is It Possible to be Both a Good Lawyer and a Good Bench](#)er” (*Slaw*, May 29, 2017). But because law societies are not accountable in fact to the political process for their performance, benchers are free to choose to be good lawyers but not good benchers. And they are doing nothing to resolve that conflict. Nor do they confess their incompetence to governments or to their member-lawyers, while continuously their victims grow, which include the legal profession itself—if the majority cannot afford lawyers, the majority of lawyers is short of clients.

Instead, law society benchers content their sense of duty and legality with “alternative legal services” (ALSs)³² and ABS proposals even though they know from their use in Australia and England, that they cannot solve the problem. ALSs are simplistic, mere charity, and do not provide a solicitor-client relationship with its fiduciary duty. (*Pro bono*’s fee legal services are a small exception, but are available to serve only short, simple cases. And “targeted legal services” provide much less than that.) Charity is an

function. See the arguments for and against another Ontario law school by Michelle Cook, “Ryerson’s Law School Proposal: Gaps in Legal Education” in, [the Court.ca: Part 1](#) (Oct. 27, 2016), and, [Part 2](#), (November 23, 2016).

³² Alternative legal services are, *supra* note 6.

insult to that majority of taxpayers who cannot afford a lawyer but must pay for the justice system. They say, “[I Don’t Want a Free Lawyer, I Want a Real Lawyer](#),” (the [Lawyerist.com](#), November 14, 2016). That title succinctly states the insult.

However, institutions like law societies do not change until the fear of the consequences of not changing is greater than the fear of the consequences of changing, *i.e.*, giving up the benefits of what is, while in denial of what should be. Apparently, our law societies do not yet fear the consequences of not changing, even though they have no answer for the angry taxpayer who demands to know:

Why can’t I have an affordable lawyer of my own? I pay for the justice system where you lawyers earn a very good living compared to me. But I must use the second best “alternative legal services” of clinics, public legal education kiosks in shopping malls, help for self-represented litigants, pro bono free services, and targeted legal services, and various forms of self-help. You say you take this “access to justice” problem very seriously. I don’t believe that. If you were serious and ethical, you would be trying to solve the problem. You can’t show me anything that you have done about trying to solve the problem. Would you send your close relatives to “alternative legal services”? Of course not; that’s not good enough for them. But it’s good enough for us—yes us, the majority of the population who cannot afford legal services. Why should I give my respect and tax money for your justice system?

So, don’t let a crises go to waste, even though benchers refuse to see one.

20. Instead of ABSs and ALSs

Instead of ABSs and ALSs, law societies should be coping with the fact that very aggressive commercial organizations like, [LegalZoom](#), [RocketLawyer](#), and [LegalX](#) are on their way to replacing the general practitioner-replacing more than half the membership of a law society. Their American advertising is both [sophisticated](#) and [everywhere](#).³³ It is unopposed by law society advertising—not even a rear-guard action to protect the general practitioner. And, the advertising shows that it will be equally good in Canada.

The strategy of such commercial, highly competitive producers is based upon affordability and maximizing the use of automation and its very rapid progress from the simplistic to the complex service—the very things that law societies should be helping law offices to achieve. They are unopposed because there are no law society public promotions of the advantages of the solicitor-client relationship over the merely buyer-seller relationship of commercial producers. Those advantages are:

- (1) the fiduciary duty owed to clients;
- (2) law society complaints department and financial oversight based upon a code of professional conduct;

³³ As a surprising example of just how “everywhere” LegalZoom’s advertising is, see the webpage of the Merriam-Webster Learner’s Dictionary that provides a definition of, “[cronyism](#)” (a term used in section 22 below), to wit: “the unfair practice by a powerful person (such as politician) of giving jobs and other favors to friends.” Might law society benchers be the right kind of friends?

- (3) mandatory professional insurance; and,
- (4) “continuing professional development” (CPD/CLE) programs.

But such law society promotions would require that the services promoted be made affordable. Similarly, every such recommendation for change is blocked by the problem.

21. Problems law societies must deal with, or they can't deal with, because of the unaffordable legal services problem

The plight of Canada's law societies provides a good example as to why we warn clients that, “legal problems left unattended, most often lead to more serious problems of greater misery and damage.” Consider the “knock-on effect” (the domino effect) of problems created for law societies because the problem of unaffordable legal services remains unsolved, while its victims become bigger and more desperate victims:

1. The probability of wrongful convictions must be expected to increase proportionately with the increase in the number of accused persons appearing without lawyers.³⁴
2. Using young lawyers, paralegals, and law students who wish to be active in regard to the problem, and therefore do the work to provide the ALSs which law societies sponsor, thus providing the appearance of law societies being sufficiently responsive to the problem, but in fact not; but they thereby make more certain that those law students etc., will go through their careers as lawyers etc., in a very financially depressed profession—at a time when people have never needed lawyers more.
3. What compromise will they reach with the commercial producers of legal services?
4. In opposition to the commercial producers (LegalZoom, LegalX, etc.) they can't advertise and otherwise promote the benefits of the solicitor-client relationship over the buyer-seller relationship, because those advantages can't be available to people who cannot afford legal services.
5. Have to encourage the use of “[targeted legal services](#),” (being legal service provided on a limited retainer) even though they result in a disproportionately large number of claims against the professional insurer; ([LawPRO](#) in Ontario).
6. Can't in good faith ask the government to fund Legal Aid better to compensate for the consequences of a problem they themselves caused by not dealing with it.
7. Lawyers are major victims of their own law societies. That is why the legal profession is diminishing in several ways. Law societies will have to cope with demands that they limit the number of lawyers called to the bar in the hope of limiting competition.
8. Hindered in prosecuting the commercial producers for the unauthorized practice of law by the argument that such producers are providing relief from a problem that the law societies refuse to try to solve; therefore other sources of legal services should not be barred; as a result, law societies are not able to protect general practitioners from the loss of their market.

³⁴ Law society negligence magnifies the effects of government negligence. The frequency of wrongful convictions is also due to government negligence in not providing sufficient resources to the criminal justice system. See: “[No Votes in Justice Means More Wrongful Convictions](#),” (SSRN, June 2016, pdf).

9. The per capita number of lawyers in private practice, particularly general practitioners and sole practitioners, is rapidly diminishing.
10. As part of creating an appearance of adequately reacting to the problem, having to go along with the pretence that alternative business structures can have some significant impact upon the problem.
11. Equality rights, Canadian Charter of Rights and Freedoms s. 15; coping with the accusation that law societies have created a large permanent class within society that cannot obtain affordable legal services, *i.e.*, the result of the law societies' refusal to solve the problem, is that, being middle class, or of "middle income," and unable to obtain legal services at reasonable cost, is a state of one's condition that is "immutable, or changeable only at unacceptable cost to personal identity," and to one's ability to invoke constitutional rights and freedoms, and the rule of law.
12. Reacting to the problem by providing nothing more than "alternative legal services," is a declaration to that majority that cannot afford legal services, that never again will they have their own lawyer, in a solicitor-client relationship with its fiduciary duty, to do all of the work in connection with a client's legal problems, and do it affordably; that's gone, so they had been accept the charity that is alternative legal services.
13. Coping with the accusation that the best thing that could be done for the availability of legal services, and for the legal profession itself, is the abolition of law societies.
14. Coping with the accusation that they refuse to take the necessary ethical step of informing the government that they cannot deal with the problem, which should not in good conscience, be left to grow worse; this is a very selfish posture just to avoid government intervention.
15. Not being able to advocate that the independence of the legal profession should be elevated to the status of being a constitutional principle; to so entrench that principle would further make law societies unassailable and neglectful of their duties in law to make legal services adequately available; if such were made a constitutional principle, so should the right to legal services.³⁵
16. Because of their refusal to maintain adequately affordable legal services, law societies have greatly weakened their ability to oppose socialized law. They are a 19th century institution managed by part-time amateurs who cannot cope with 21st century law society problems because they have never been sufficiently accountable to the political-democratic process—accountability in law, does not ensure accountability in fact. "There are no votes in justice" so governments ignore the performance of law societies.
17. Finding or creating alternatives for articling for law students because law firms have greatly reduced their use of articling law students; being a law student, is an expensive gamble in a seriously financially depressed profession.
18. The just accusation that, except in wartime, law societies cause more damage to the population than does any other group of people, including organized crime.
19. Coping with the accusation that law societies are like a worn out aristocracy that has long outlived its worth, but lives off the best of the land—the justice system—and is content to satisfy feelings of duty to the people by providing charity in the form of "alternative legal

³⁵ LSUC has long advocated that the independence of the legal profession be made a constitutional principle; see: *In the Public Interest* (LSUC, 2007), being, "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."

services.”

20. Solve the problem or: (1) be accused of using ALSs as “window dressing” that creates a false appearance of adequate action and concern; and, (2) promoting approval of ABSs to enrich those benchers whose clients can be investors.
21. Because of the size of the problem, which is the greatest threat to the availability of legal services since the Second World War, if not in all of Canadian history, Canada’s law societies are vulnerable to public demands that they be abolished, because:
 - (1) they have no program the purpose of which is to solve the problem of unaffordable legal services;
 - (2) they have made no public declaration that the problem is their problem and it is their duty in law to solve this problem; and,
 - (3) they have not done the obvious, which is to pool their resources, form a national committee, retain the necessary expertise with which to formulate a strategy for attacking the problem—and this is happening at a time when the population has great powers of communication by means of: (1) the social media; (2) the news and broadcast media; (3) the many sophisticated pressure groups; and, (4) the resources of political parties in opposition to governments.

22. The problem enjoyed that the unaffordable legal services problem has made possible—[cronyism](#)

The older definition of “cronyism,” “an intimate friend,” in the 20th century it took on the current meaning of favors of privilege, power, and money corruptly provided among friends.

In a law society it could work this way (only in theory and never in Canada, of course):

- (1) First, the benchers of an imaginary law society create the unaffordable legal services problem by doing nothing about it until its victim-population is of a size, seriousness, and quantity of widely spread misery, that the law society has to be seen to be doing something about it, but doing it without requiring its benchers to do anything that interferes with their maintaining their present incomes, regardless the state of the problem.
- (2) So, in accordance with such requirements, the benchers sponsor “access to justice” committees and “alternative legal services.” But the work required for the continuous and on-going operation of these devices is supplied by young and inexperienced students, paralegals, and lawyers, eager for experience, credits for law school “practice” courses, and CPD or CLE supplements, *etc.*

For example, the benchers are not among the people who stand behind fold-out tables in the corridors of shopping malls providing, “legal information only, without creating a solicitor-client relationship,” so stated in writing.

The benchers are thus able to limit their participation to “promotional, public-face-of-the-law-society” work, such as, being a speaker or chair at a seminar urging other lawyers to do more pro bono, or targeted legal services work, or meeting with groups of lawyers who have various concerns and complaints. The key feature of such bencher work is that the bencher remains in control of how much time is to be spent, and such work is done for those who elect benchers and not directly for the public.

All the while, no law society program to solve the unaffordable legal services problem is launched because: (1) that would involve an unknown amount of benchers’ time in managing such a program; (2) it’s necessary trial-and-error learning process would create a high risk of benchers

being associated with failure; and, (3) therefore being accused of wasting money, and because there isn't yet seen to be enough pressure to force innovation of any kind, of "trying to fix something that isn't broken."

And so law society management structure and purpose remain: (1) unchanging; (2) responsible only for the competence and ethical practice of lawyers, but not the affordability of their legal services; and, (3) fearless in the face of the consequence of not changing.

(3) Once the majority of law firms and lawyers is suffering a great loss of clients due to the problem, discretely raising the possibility of "alternative business structures" (ABS), allegedly to create a solution to the unaffordable legal services problem. Of course all forms of self-service must serve the greater good of the public interest. Then such benchers having clients who could be investors, offer to do the bulk of the work to operate an ABS Committee or Working Group. That enables such benchers to control the writing of all necessary texts to promote the implementation of such an alleged solution.

As the investigation processes, there will be benchers who have doubts about the ability of ABSs to have any impact upon the problem. But those benchers having such clients will argue that their research shows that ABS investment money can bring other benefits. And so to quiet concerns as to controlling ownership of lawyers, a compromise is reached.

(4) Strategically taking advantage of the varied use of ABSs as might be discovered in other countries, the benefiting-benchers promote the idea of allowing ABSs to be operated in CSOs to be known as the "charity ABSs." Then when the commercial producers of legal services such as LegalZoom etc., are seen to be a threat to the general practitioner and other lawyers who make up the majority of law society membership, the benefiting-benchers promote the idea that with the help of ABSs benchers, all such lawyers and law firms can provide a more-than-adequate challenge to those commercial producers and thus preserve their market and clientele. Therefore the scope of permissible ABSs must throw off its "charity ABSs only" limitations. Thus the benefiting-benchers can work together, as close mutually-benefiting close friends might to preserve the law society in its present power, purpose, and prestige.

(5) All benchers, whether benefiting or not benefiting, must support the use of ABSs in order to perpetuate the appearance of adequately responding to the problem of unaffordable legal services.

(6) However, when finally apparent to all that ABSs cannot solve the problem such that the majority of the population must be content with the products of the commercial producers of legal services and never again have their "own lawyer," the news media, and opposition political parties, etc., will point out that the law society has perpetrated a fraud upon society and its own membership. That is to say, it is a bitter irony that society's best educated professionals for detecting and dealing with fraud and similar forms of corruption, have themselves been defrauded by their own colleagues whom they have elected as benchers to be in a position to carry out such a fraud upon their electing body.

(7) But it must be said with all due respect, that to no greater extent has such activity been within the traditions and history of Canada's law societies. Amen.

And indeed it is needless to say, that the members of Canada's law societies, being as vigilant as they are, and experienced in dealing with such matters as they are, would never allow such a thing to happen.

The above scenario is not nearly as outrageous as: (1) the many convocations of a law society's allowing the unaffordable legal services problem to develop for decades; (2) to create for decades, great misery and damage to the population, great damage to its courts system, and to the reputations and welfare of the tens

of thousands of lawyers that are its members; but, (3) do nothing for those decades—including, (4) not trying to solve the problem; (5) nor alerting the government that it wouldn't or couldn't do anything about solving the problem; (6) while using “alternative legal services” (ALS) to divert attention from its refusal to deal with the problem, and to the careers of those who do the work to provide such ALSs; (7) knowing such ALSs were simplistic, merely of the nature of palliative care, and therefore could not solve the problem, and that they carried the insult of charity to a population whose tax money paid for the justice system whereat the law society's benchers earned a far better income than do those taxpayers; and then, (8) giving “fast-track attention” to “alternative business structures” by means of an Alternative Business Structures Working Group of 11 people, without regard to its inherent conflict of interest, along with an Access to Justice Committee of 16 people, (5 of whom are members of both the Committee and the Working Group); and, (9) during all of the years taken up by this activity, none of it has brought the law society in any way closer to a solution to the problem, or preventing its victims from becoming bigger victims; (10) nor was it expected to; and, (11) it has taken all of us much further from a solution that increases in difficulty and damage-caused exponentially with time that passes.

LSUC's intentional mismanagement of Legal Aid in Ontario for 30 years is a crime, trivial in comparison.

Such is a very egregious example of a very serious problem left unattended to cause a succession of many other very serious problems; for example, it's the “cover-up” of alternative legal services (ALSs) and alternative business structures (ABSs) that indicts. The damage caused is like that of a plague spreading not merely linearly as in one direction only, but in all directions in many different ways, as do all economic disasters and crises. Law societies are the lynchpin of the justice system and therefore they are an essential part of the legal infrastructure that makes a society a constitutional democracy in fact, and not merely in law. But in Canada, law societies have retained their 19th century management structure. Therefore inevitably failing in the 21st century.

23. A civil service for Canada's law societies

Thus, the unaffordability problem ties law societies' hands in several ways. To state the least of remedies—they need their own civil service. Their major problems will be: (1) national; (2) best dealt with by national solutions and programs; (3) not exclusively legal problems; and, (4) ongoing and continually occurring. Therefore, no longer will access to necessary experts be adequately provided by way of intermittently used contracts of service. Long-term development of expertise and implementation of programs and remedies needs access to permanently available facilities and expertise. The pooling of the resources of all of Canada's law societies will provide their most cost-efficient and competent management. Do it now so that the youngest of us may look back, impaled to say, “management by part-time amateurs,

how could it have been tolerated for so long!”

No longer is it sufficient for law societies to obtain expert advice only intermittently, to investigate particular problems—investigate and advise only after problems have become observable to benchers.

A civil service has these features, which law societies need but don't have:

- (1) it is permanent, not subject to disruptions caused by elections;
- (2) it is an institution of permanently developing expertise;
- (3) it is charged with a duty of vigilance as to public need, by which it guides its development of expertise; and therefore,
- (4) it is capable of carrying out programs requiring long-term development, implementation, and management—long-term that bridges elections of benchers and governments.

As to setting it up and financing it:

- (1) have CanLII sell legal opinions at cost, plus a small profit to pay for this national civil service agency;
- (2) for such a service use the “centralized legal research” technology developed and used at LAO LAW when I was its Director of Research (1979-1988); and,
- (3) use the precedent that already exists for the third component—the civil service body itself: Ryerson University in Toronto and the University of Ottawa, together, provided that type of foundational function for LSUC's [Law Practice Program](#) (LPP).³⁶ The University of Ottawa provided the French language counterpart of Ryerson's English version.

And, Ryerson University is campaigning to have its own law school.³⁷ Integrated with such a “civil service function for the legal profession” would sponsor a very unique law school. That would overcome the opposition that argues, “we don't need another law school, especially in these times of diminishing law school enrollments and numbers of lawyers.”

In fact, Canada's legal profession needs just such a sophisticated civil service agency to prevent the “deskilling and deprofessionalization” of lawyers' work and status forecasted in the passage from Professor

³⁶ Ryerson University's “About Ryerson's LLP” webpage states (first paragraph): “Ryerson's Law Practice Program (LPP) is the first of its kind in Ontario. It's an innovative alternative to traditional articling through a rigorous and demanding eight-month program combining on-line training and experiential learning with a hands-on work term. Ryerson works with the Law Society of Upper Canada and the legal community, including a strategic alliance with the Ontario Bar Association, to deliver a dynamic program that prepares Law School graduates to succeed in their legal practice and careers.”

³⁷ The first paragraph of the article, [Ryerson Applies for a Law School—Does Canada Really Need More Law Graduates?](#), (Part 1; and, [Part 2](#), posted on Osgoode Hall Law School's, [the Court.ca](#), by Michelle Cook, on October 27, 2016, states:

“Last week, Ryerson University in Toronto, Ontario officially submitted their [letter of intent](#) to pursue a law school. This submission is the first step in the process to obtain a new Juris Doctor (JD) program in Ontario. While I have some comments on the proposal itself, this opinion piece will focus primarily on why I think it would be unwise to add another law school based on the current legal market. In addition, I argue that the introduction of a new law school runs counter to the purpose of the Law Practice Program, which serves as an alternative for students who are unable to secure articling positions.”

John Flood's article quoted in the previous section.

Only one such national civil service-type body is needed to serve all of Canada's law societies, because all major law society problems will be like the present unaffordable legal services problem: (1) national in scope; (2) needing a national solution to be most effective and cost-efficient; and, (3) requiring solutions and guidance that is beyond the expertise of lawyers.

24. The need to challenge the performance of law societies

As is proved by the long-term existence and magnitude of the problem, the self-regulation of the legal profession has shown itself to be incompetent. That has been said many times in academic and other formal writings since Osgoode Hall Law School Professor Emeritus Harry Arthurs' landmark article, "'The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?'" (1995), 33 *Alberta Law Review* 800. And for a more extensive analysis, see University of Windsor law Professor Noel Semple's book, *Legal Services Regulation at the Crossroads—Justitias's Legions* (Edward Elgar Publishing Ltd., 2015). But it doesn't have to be that way.

Proposals to implement ABSs are merely "tinkering" with the problem, which problem is the most serious threat to the availability of legal services in the history of Canada, and therefore to the validity of the claim that Canada is a constitutional democracy, *i.e.*, that which needs an affordable lawyer to be enforced is now unavailable to the majority of society. And it is therefore, equally threatening to the continued existence of law societies. Such tinkering adds to the evidence that law societies have no strategy for preserving the general practitioner and the resulting great shrinkage of the legal profession and law societies with it.

But it didn't have to be that way if lawyers had applied the necessary pressure to their law societies that forces the innovation that brings affordability. And it wouldn't be that way if governments would hold law societies accountable in fact, and not merely in law, to the democratic political process for their failure to perform their statutory duties.³⁸

25. ABSs as a potential threat to the independence of the judiciary

Also, ABSs are a greater threat to the independence of the judiciary than is the threat of government intervention. If an investor can control a lawyer, that can be a very effective way of controlling a judge. That is so because judges are completely dependent upon the evidence and arguments provided by the

³⁸ That theme of a lack of political accountability, as shown by comparisons among several countries, is well developed in Gillian K. Hadfield's article, "[Life in the Law-Thick World: The Legal Resource Landscape for Ordinary Americans](#)" (University of Southern California Law, January 2015): "... the American legal profession is a politically unaccountable regulator ..." (p. 39).

lawyers who appear before them (“counsel,” as they are referred to in legal proceedings). Therefore the independence of the legal profession is a necessary “adjunct principle” in support of the constitutional principle that is the independence of the judiciary from government intervention. And therefore law societies have long advocated that, that “adjunct principle” should be recognized as being in itself a constitutional principle—see for example, this LSUC publication: *In the Public Interest* (2007); it being an excellent collection of essays by authoritative authors concerning, “the rule of law and the independence of the [bar](#).”

But now benchers want to contradict that desire by surrendering the profession’s independence to the commercial ownership of ABSs. Potentially, that can lead to a type of improper intervention, the source and power of which will be far more difficult to determine than improper government intervention, given the complexities of the many forms and levels of corporate ownership and control of investors.

Therefore, should we be so cynical as to advise, if you want to know what really motivates a bencher in regard to ABSs, “follow the money.” If LSUC’s Convocation has not already discussed the appearance of a conflict interest in the promotion of ABSs, it is not being too cynical. Particularly so because the greatest threat to the rule of law has long been without even an attempted solution. That justified society’s cynical view of the integrity of the legal profession.

26. The institutional culture of law societies in Canada

Do benchers care as much about their colleagues who are general practitioners and for the future of the legal profession, as they do for the investors they could be representing? Surely law society management has shed its 19th century cronyism! In Christopher Moore’s, *The Law Society of Upper Canada and Ontario’s Lawyers 1797-1997*,³⁹ there is this statement: (pp. 44-45):

Throughout the English-speaking world, the gentlemanly ethos slowly lost some of its force during the nineteenth century. ... But throughout the nineteenth century, Ontario’s legal profession would still be governed as much by codes of gentility, as by books and rules.

And (at p. 176), only after, “more than five years of struggle and resistance to change,” did LSUC’s convocation of December 4, 1896, allow Clara Brett Martin to be called to the bar—“the first woman barrister not only in Ontario but anywhere under the British Crown.” She challenged, “the old gentlemanly criteria” and won.

Also, there was some support for the idea that law societies should exist to serve the interests of lawyers. Referring to LSUC’s “mission statement” of 1994, Christopher Moore’s book as to LSUC’s history, 1797-

³⁹ *Supra* note 4 and accompanying text.

1997, states:⁴⁰

... The traditional declaration that the Law Society existed to govern the profession in the public interest, for instance, seemed merely to acknowledge that the public and the legislature would never delegate self-governing authority to the profession on any other understanding.

[note 75, p. 381: “LSUCA, Minutes of Convocation, vol. 104, Feb. 1994 (approval of draft mission statement), and vol. 106 Apr. 1994 (tabulation of responses).”]

That was not the reaction of the profession. Circulated to members in the spring of 1994, the mission statement provoked a third of respondents to deny that the society should subordinate the interests of the profession to those of the public. Almost half could not accept that the society did not exist to advance members’ interests. In the election a year later, the mission statement continued to provoke many bench candidates. “‘To Serve and Protect Lawyers’ should be the motto of the society,” declared one. ‘It is time to put the needs of the profession to the forefront,’ proclaimed another.

That attraction of a more self-interested law society could explain the law societies’ refusal to deal with affordability, *i.e.*, that traditionally the duties of a law society as to maintaining the adequate availability of legal services required only the disciplining of competence and ethics, but not affordability.

To answer such arguments, the [Clementi Report](#) (December 2004),⁴¹ which dealt with the management of the law societies in England and Wales, concluded: (1) the “regulatory function” and “the representative function” of law societies (to represent the interests of lawyers) are in conflict; and; (2) therefore the regulatory function should be removed to a permanent institution of greater competence and responsiveness to public need.

If not effectively challenged, ABSs and the commercial producers of legal services will lead to the de-professionalization and the commercial and industrial production of legal services; see again: Professor John Flood, “[Will There Be Fallout From Clementi? The Repercussions for the Legal Profession After the Legal Services Act 2007](#)”:⁴²

This Article explores the genesis of the Act [Legal Services Act 2007 (U.K.)] and its consequences both actual and anticipated. I argue that the present trend of the legal profession is moving away from traditional conceptions of professionalism to a commercialized and industrialized alternative. In speculating about the potential outcomes, with the use of hypotheticals and real case studies, I suggest that deskilling and deprofessionalization will be among the logical outcomes. Yet in spite of this dystopian view, which among other things will compromise the role of the law school, there are signs of optimism to be found among the newer generation’s—that is Generation Y’s—approach to work-life practise that signal the tendency towards immaterial labor as the

⁴⁰ Moore *supra* note 4, at pp. 337-338.

⁴¹ *Supra* note 11 and accompanying text. Sir David Clementi, [Report of the Review of the Regulatory Framework for Legal Services in England and Wales](#), 2004.

⁴² 2012 Michigan State Law Review 537 at 538; *supra* note 12 and accompanying text. John Flood, Professor of Law and Sociology at the University of Westminster, Leverhulme Research Fellow. LL.B., London School of Economics and Political Science; LL.M., University of Warwick; LL.M., Yale Law School; Ph.D., Northwestern University.

descriptive metaphor for the new world.

Christopher Moore's final paragraphs contain this warning of a troubled profession in 1997:⁴³

Around the world, legal scholars increasingly speculated that the century of the modern, self-governing profession was coming to an end. Their foremost local exponent, Professor Harry Arthurs of Osgood Hall Law School at York University, declared that self-governance by the legal profession was quite simply 'a dead parrot.' Since the drafting of the first Law Society Act in 1797, the one central function of the Law Society has been to enable the profession to govern itself in the public interest. If the Law Society is judged to have ceased to perform that function, then it perhaps ceases to be an essential institution. As the Law Society of Upper Canada approached the end of its second century, solid reasons could be found to doubt that it would complete its third.

[note 76 (p. 381) H.W. Arthurs, 'The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?' *Alberta Law Review* 33, no. 4 (Aug. 1995).

27. Conclusion and the solution to the ABS controversy

Some of the members of LSUC's ABS Working Group have spent a lot of time on writing the ABS texts and the Reports to Convocation, attending meetings with groups of concerned lawyers, and writing blog articles in favour of ABSs. Some of them must have spent far more than the 31 days, on average, that benchers are said to devote to their law society duties.⁴⁴ What of their clients? They might say that, that shows their dedication to their duties as benchers. Really? Then why didn't they spend as much time trying to solve the unaffordable legal services problem? That would have helped many more people—millions more people. And it would serve the great majority of the LSUC's members far better than any amount of time devoted to ABSs. Instead, the problem sits dormant, no closer to a solution than it was many years ago, if not decades ago, and the duties within s. 4.2 of Ontario's [Law Society Act](#) along with it, as the problem's victims continue to grow.

To allow "charity ABSs" will result in allowing all ABSs. And in regard to whom and what may be prosecuted for "the authorized practice of law," the commercial producers of legal services such as LegalZoom etc., must be considered to be just another form of ABS using lawyers directly or indirectly as employees. As a result, approving any form of ABSs may prevent law societies from protecting the market of the general practitioner from the rapid advance of those commercial producers into that market. Specifically now for Ontario's lawyers, it is a choice between improving the market of those law firms

⁴³ *Supra* note 4 at p. 139.

⁴⁴ The third paragraph of the bencher election announcement on LSUC's website, which election occurred on April 30, 2015, stated: "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."

whose clients can be investors, or losing the market of a much larger part of LSUC's membership.

If we lose the general practitioner's market to the commercial producers, we will never get it back. And if we lose general practitioners, more than half of law society membership will be lost. They are the lawyers whose greater contact with middle and lower income people determines the reputation of the legal profession. And when they are gone, courts and judges will be much less important to society. Why should people continue to respect and pay for a justice system they cannot use effectively? Best we abolish law societies. Or, is it possible to make them competent for this century?

Lastly, see: "[Access to Justice—Unaffordable Legal Services' Concepts and Solutions](#)" (pdf. July, 2017). This article provides:

- (1) the supporting facts and authorities for the above statements;
- (2) it shows how the legal profession by itself can provide everything that ABS proposals contain, and provide it far more economically and compatibly with the principles of ethical practice that the independence of the legal profession requires;
- (3) preserve present law society management structure by equipping it with the equivalent of a civil service with which to implement a "support services method" of producing legal services—together, Ryerson University in Toronto and the University of Ottawa created a bilingual precedent for such a "law societies' civil service" by establishing LSUC's LPP ([Law Practice Program](#)); and,
- (4) deal with "alternative to ABSs" without the appearance of bench conflicts of interest.

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MITCHELL E. KOWALSKI M.A., LL.M.
BARRISTER & SOLICITOR

MEMORANDUM

TO: ABS Discussion
Policy Secretariat
Law Society of Upper Canada

FROM: Mitchell E. Kowalski

DATE: August 28, 2017

RE: **Response to Call for Input
June 2017 Interim Report
by the Alternative Business Structures Working Group**

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Thank you for allowing me to comment on the recent June 2017 Interim Report by the Alternative Business Structures Working Group which recommended: *Convocation approve that licensees may deliver legal services through civil society organizations, such as charities, not for profit organizations and trade unions, to clients of such organizations in order to facilitate access to justice.*

Those Benchers who are truly attuned to the world around them, will know that over the past decade, mission-driven companies have become a growing global movement. These are companies who seek to harness the energy and passion of employees to not only improve the bottom line but also to provide social benefit.

Legal services has traditionally harnessed purpose-driven people of generation X, generation Y, and the baby boomer generation by creating legal aid clinics or non-profit organizations that eschew profit. But the millennial generation sees another path: a truly “mission-driven” approach to commercial legal services where profits and purpose can sit comfortably side by side.



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This represents the most significant generational shift in thinking about what a career in legal services is—and can be, and has resulted in a creative way to address access to justice; one that does not rely upon government largesse or fickle donors; one that can use the corporate social responsibility mandates of modern corporations to be the fulcrum that supports a self-funded model for better access to justice.

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I have spent a great deal of time researching legal innovations in Australia. Australia has a population of about 24 million people, compared to Canada's population of about 35 million. Australia also boasts a growing legion of over 71,000 lawyers (compared with Canada's about 100,000 lawyers), and Australia has about 6,000 Incorporated Law Practices (known in Canada as, Alternative Business Structures or "ABS"). ABS has been permitted in Australia since July 1, 2001. It is well-tested and does not exhibit any of the evil caricatures that many Canadian lawyers are so quick to believe.

Of the nearly 6,000 Australian ILPs, the Salvation Army (the "Salvos") owns two of them: Salvos Legal Limited and Salvos Legal Humanitarian Limited. Salvos Legal Limited is a commercial firm that uses its profits to fund Salvos Legal Humanitarian Limited, which in turn provides free legal assistance to those who can't afford it.

Salvos Legal Limited and Salvos Legal Humanitarian Limited are both ILPs that are wholly-owned by the Salvos. In addition, there are four directors for each company, 75 percent of whom are appointed by the Salvos and must be trustees of the Salvos. Control by the Salvos is critical to prevent mission creep. The Salvos doesn't want the law firms to lose their way and the Salvos also wanted to ensure that the people being hired had the same values as the Salvos—and only practiced the kind of law that the Salvos wanted them to practice.



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The two firms share common policies, internal practices, and information (with appropriate privilege barriers maintained where necessary). The commercial firm is Law 9000-certified, a legal-specific version of the ISO 9001 standard, an arrangement that assists in properly and ethically managing confidential and privileged information.

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The combined entities are staffed by over 40 employees, and more than 250 volunteers, 60 percent of whom are lawyers. 80 percent of the employees of the combined entities' (including lawyers) are women, and 50 percent of the combined entities' leadership are women.

In 2014, the prestigious *Lawyers Weekly* Australian Law Awards selected Salvos Legal Limited as Australian Law Firm of the Year, beating out every other law firm in the country, including national firms with global partnerships. And since then the awards have continued: Australian Boutique Firm of the Year, Australasian Law Awards 2015, Australian Law Firm of the Year (up to 100 lawyers), Australasian Law Awards 2016, and Innovative Firms, Australasian Lawyer 2016, among others.

Since 2007, Salvos Legal Humanitarian Limited and its predecessor, Courtyard Legal, have completed over 19,000 pro bono cases, all without any government funding.

I am unaware of any investigation of these combined entities by any Australian law society for ethics violations or wrong-doing.

The proof is clearly in the pudding.

If there is a Bencher whose firm can claim the same *pro bono* record, and whose firm has received the same accolades, then that Bencher is clearly entitled to suggest that Ontario



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has no need for a mission-driven, social enterprise law firm operated by charities or not-for-profit entities.

If there is any special interest group opposed to the June 2017 Interim Report by the Alternative Business Structures Working Group which has a member who can match the Salvos' *pro bono* record, then that special interest group is clearly entitled to suggest that Ontario has no need for a mission-driven, social enterprise law firm operated by charities or not-for-profit entities.

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However, until such time as Benchers or special interest groups can provide data indicating that there is at least one Ontario law firm that is delivering the same amount of *pro bono* work as provided by the Salvos entities *without cost to the people of Ontario*, any argument against the June 2017 Interim Report by the Alternative Business Structures Working Group is unsupportable.

And until such time as Benchers and special interest groups can provide demonstrable evidence of ethical violations by the Salvos entities, any argument suggesting potential ethical conflicts as a basis to vote against the June 2017 Interim Report by the Alternative Business Structures Working Group is also unsupportable.

I trust that Convocation will reject any arguments that are not evidence-based and will move to approve the June 2017 Interim Report by the Alternative Business Structures Working Group as soon as possible.

Regards,

Mitch

OTLA Submission to the Law Society of Upper Canada

Request for feedback on the Interim Report on ABS in Ontario

September 1, 2017

The Ontario Trial Lawyers Association (OTLA) is pleased to provide this submission in response to the call for further input to the Law Society of Upper Canada's Interim Report on ABS in Ontario.

WHO WE ARE

OTLA was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

Our organization has more than 1,500 members who are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

INTRODUCTION

The Alternative Business Structures Working Group (Working Group) has recommended that Convocation approve the policy decision to permit the direct delivery of legal services to clients of civil society organizations (CSOs), including charities, not-for-profit organizations, and trade unions. The ultimate goal of such a policy is to facilitate access to justice in Ontario. In this report, the Working Group proposed that the Law Society amend its By-Laws to permit this structure.

OTLA supports the approval of this policy decision to permit the direct delivery of legal services to clients of CSOs provided that steps are taken to ensure that:

- a. the licensee has control over the delivery of their professional services;
- b. solicitor-client privilege will be protected;
- c. the fundamentals of professionalism, including independence, competence, integrity, and service to the public good through client relationships and responsibilities to the administration of justice will be safeguarded; and
- d. the CSO cannot directly or indirectly charge any fee to clients in respect of any legal service provided by the CSO to them through its embedded licensees, nor can the CSO take any fee or receive any donation directly or indirectly for referring any matter to a licensee not employed by the CSO.

It should be noted that OTLA proposes the addition of this fourth principle to the three criteria outlined in paragraph 33 of the June, 2017 interim report. The addition of this fourth principle is required for OTLA's support of this policy decision.

As mentioned in our previous submissions in response to the February, 2014 interim report, OTLA remains unequivocally opposed to unrestricted non-lawyer ownership.

HISTORY OF ABS

Following the Bencher election in September, 2011, the Law Society of Upper Canada (Law Society) prioritized the examination of Alternative Business Structures (ABS). In response, the Working Group was formed.

In September, 2014, LSUC released a discussion paper entitled “*Alternative Business Structures and the Legal Profession in Ontario: A Discussion Paper*” to advise members of the legal profession and the general public of its interest in ABS. The discussion paper centered around three key issues: (1) whether ABS can facilitate greater flexibility in the delivery of legal services; (2) whether ABS can foster technological innovation; and (3) whether ABS can improve access to legal services.

On February 27, 2014, the Working Group released a report that presented four potential models for alternative structures for the delivery of legal services in Ontario: (1) the provision of legal services only where non-licensees can have minority ownership; (2) the provision of legal services only where non-licensees can have majority ownership; (3) the provision of legal and non-legal services where non-licensees can have minority ownership; and (4) the provision of legal and non-legal services where non-licensees can have majority ownership.

The Law Society solicited feedback on these structures and OTLA provided a response in December, 2014. It was OTLA’s position that there was insufficient empirical evidence available from the jurisdictions in which ABS is currently permitted to endorse permitting ABS in Ontario. Specifically, OTLA was concerned that the introduction of non-licensee ownership can have the unintended consequences of hurting access to justice and ultimately serving against the public interest.

After receiving numerous submissions from members of the legal profession and from the public, the Working Group released an interim report in September, 2015 stating that the Working Group was no longer considering structures involving majority ownership or control of law firms by non-licensees. Instead, the focus shifted to other structures to foster innovation and enhance access to justice. The Working Group continued to explore minority ownership by non-licensees, franchise models, and new forms of legal service delivery to areas that are currently underserved by traditional practice. Most significantly, the Working Group presented a new potential structure allowing licensees to deliver legal services through CSOs to facilitate access to justice. These CSOs include charities, not-for-profit organizations and trade unions.

At present, the Working Group is soliciting input from licensees and the general public about the policy proposal to allow licensees to deliver legal services through CSOs.

OTLA'S SUBMISSION

Our submission reflects on the analyses from the June, 2017 interim report to Convocation. The following seven criteria were established in the September, 2015 interim report to guide the Working Group in its study of potential models for ABS:

1. access to justice;
2. response to the public;
3. professionalism;
4. protection of solicitor-client privilege;
5. promotion of innovation;
6. orderly transition; and
7. efficient and proportionate regulation.

These criteria are used again in the Working Group's study of the CSO model for ABS in the June, 2017 interim report.

The Working Group considered the above criteria and reached a unanimous agreement that the Law Society should use its regulatory powers to permit the delivery of legal services through CSOs. The Working Group came to the conclusion that permitting legal services to be delivered via CSOs and other new methods can improve access to justice in Ontario, especially for vulnerable individuals, in a way in which professionalism and solicitor-client privilege are safeguarded.

OTLA's submission will reflect and comment on a number of these criteria, including: (1) access to justice; (2) response to the public; (3) professionalism and regulation; and (4) protection of solicitor-client privilege.

I. ACCESS TO JUSTICE

Access to justice in Ontario remains a challenge in some areas of law. The Working Group states that the direct and integrated delivery of legal services within a CSO structure could have a significant benefit on improving access to justice in Ontario, specifically for members of vulnerable groups.

It has been generally accepted that access to justice remains a significant issue in some areas of law in Ontario. There are many individuals who require legal services, but who are either unable to afford the price of services that the private bar is capable of meeting, or are not eligible to receive government funding for Legal Aid assistance. There are a number of CSOs that already provide other services to these individuals.

The Working Group has presented the CSO model as a method of providing legal services to these individuals who fall somewhere between the private bar and public support. Under this model, private charitable and not-for-profit organizations that are dedicated to achieving social justice would have the capacity to independently raise funds and employ licensees to increase access to justice for these individuals who are currently lacking the ability to access legal services. The CSO

model may allow for a particularly efficient means of coordinated delivery of legal services alongside other existing services.

OTLA's mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. As outlined in the previous submissions, OTLA continues to support initiatives to improve access to justice, such as increasing funding for, and expanding the eligibility for, Legal Aid in Ontario, particularly in areas where access to justice is a prevailing issue, such as family and criminal law.

As such, OTLA supports the implementation of the CSO structure in Ontario, provided proper regulation and oversight is implemented as discussed further in Section III below.

II. RESPONSE TO THE PUBLIC

The Law Society report states that delivery of legal services through CSOs has the potential to be highly responsive to the needs of individuals by placing legal service providers directly into settings where CSOs are located. It is noted that this would provide greater access to legal services for the general public, allowing individuals to service multiple needs in one location and providing the added benefits of convenience and comfort.

Many potential benefits of CSOs came from focus group meetings and were outlined in the June, 2017 interim report. However, there are a number of potential challenges which were not considered and which may counteract the potential benefits. In particular, the cost of legal services to the client may remain unchanged.

Although the CSO model may improve access to legal services further, it does not change the fact that most forms of litigation are inherently expensive and end up being costly for the consumer. Implementing a CSO structure will not change the nature of these forms of litigation. The Working Group posits that the delivery of legal services through CSOs would be provided at little or no cost to the consumer through subsidies, grants, or other donations. **However, this leads to an important question: How much of the delivery of legal services will this funding cover?** This could result in the partial provision of legal services to those in need, forcing those individuals to either fund the remainder themselves, seek additional funding (which could be challenging) or pro bono services, or abandon the claim altogether.

The Working Group states that, for vulnerable populations who cannot access legal services, informal legal advice is often received through non-licensed individuals providing other services. In terms of rendering legal services through regulated legal professionals, the aforementioned funding issue may cause legal service providers embedded in CSOs to be overly selective in the files they take on, serving against the purpose of having licensees embedded – to holistically assist individuals in accessible locations.

The Working Group has suggested that, under the proposed CSO model, the CSOs would be allowed to directly employ licensees within the charitable organization itself to provide legal services on site. The intent of the proposal is not to simply generate referrals to the private bar, however, these referrals may occur in cases where clients of CSOs would benefit from un-

conflicted referrals to independent private practitioners or Legal Aid clinics. The CSOs would identify the needs of the populations that they serve and provide responsive services accordingly. Further consultation with legal clinics is required prior to the approval of the CSO structure in Ontario.

There are a number of legal issues that require various forms of legal services that are not adequately provided by either the private bar or through Legal Aid, including support for seeking Ontario Works claims, Ontario Disability Support Program claims, Canada Pension Disability Benefit claims, Criminal Injury Compensation Board claims, and residential tenancy issues. These types of services could be adequately provided to the public through the CSO structure. Individuals who attend immigrant and refugee support groups would likely benefit from the provision of legal services by licensees through a CSO structure. Individuals from vulnerable sectors, such as those who have experienced mental health issues or sexual assault, are not always able to attend a traditional law office setting. As such, these vulnerable groups would benefit from the provision of legal services in a holistic CSO setting, allowing their needs to be served where these individuals are already located.

III. PROFESSIONALISM AND REGULATION

The third criterion discussed by the Working Group was professionalism, noting that under the CSO arrangement, the licensee would be required to have independence over the legal services provided. Additionally, the licensee would be subject to the same professional and ethical requirements as any other licensee, found in the Law Society's rules and by-laws. Specifically, the licensee must deliver legal services competently, with integrity, and with full candour to the client. Additionally, the licensee would be obligated to maintain client confidences and avoid conflicts of interest.

A number of issues arise when it comes to the provision of legal services in a multidisciplinary environment like a CSO. The Working Group mentions that some of these issues have been addressed. For example, similar issues arise in the context of legal clinics that successfully provide holistic services, or in Medical-Legal Partnerships. In these settings, the necessary consents and ethical screens are in place, and supports for professionals to seek independent legal advice exist.

Despite these addressed issues, some concerns remain. Within the private bar generally, there is the concern that permitting CSOs to provide services through embedded licensees is an indirect way of moving towards non-licensee owned for-profit law firms in Ontario – a “slippery slope.” Debates over non-licensee ownership have already occurred. A decision not to pursue this form of ABS structure was made, and it should not be revisited under the guise of CSO structures.

Particularly, OTLA is opposed to any change that would allow publicly-traded law firms in Ontario. We believe that lawyers should always maintain a controlling interest in law firms, in order to ensure that the core values concerning conflicts of interest, client confidentiality and independence of lawyers are maintained and protected. The profession's core values, and the public interest, can only be protected by ensuring that lawyers maintain control over the delivery of legal services in accordance with the rules of professional conduct.

As mentioned in our previous submission in response to the February, 2014 interim report, OTLA is unequivocally opposed to unrestricted non-lawyer ownership. OTLA continues to have great reservations about the overall implementation of ABS in Ontario. As mentioned in our previous submissions, the Slater & Gordon model is an excellent case study demonstrating the perils of implementing ABS in Ontario. The Working Group envisions ABS as a new method of funding new services, expanding office locations, creating better work environments, investing in technology, and increasing the capacity and scale of pro bono work, much like Andrew Grech (former Managing Director of Slater & Gordon) did. As a publicly-traded law firm, the delivery of legal services by Slater & Gordon was swayed heavily in favour of the shareholders, rather than the clients being served. This completely contradicts our obligations pursuant to the Rules of Professional Conduct. They are now facing a major class-action suit. OTLA cannot support a structure that places licensees in a situation where they are catering to shareholders instead of those in need of legal services.

The personal injury bar is also concerned with CSOs having capacity to provide legal services because of the proposed “Aspire Law” model in the Working Group’s June 2017 interim report. This model involved a partnership between the British Paralegic Association (Aspire) and a private law firm. This model effectively involves Aspire channeling cases to the private law firm that they had partnered with and taking part of the profits on the referred case. Part of these profits was directed to the British Paralegic Association to be used for other social justice purposes and the remainder went to the private firm.

This “Aspire Law” model is concerning to the personal injury bar for a number of reasons. Under the guise of a CSO structure, it appears that a charity is able to profit within a space in the legal market where the private bar is already able to meet the needs of the market. The personal injury bar is concerned with the idea that a private actor in the for-profit market can gain an advantage, to the detriment of the client, by partnering with a charity. It is OTLA’s submission that this should not be permitted.

OTLA’s mandate of improving access to justice does not support infringing on the independence of the private bar. Instead, we seek to improve access to justice for underserved and vulnerable sectors of society. The idea behind CSOs generally achieves this goal, however it is the “Aspire Law” model that is extremely concerning to the personal injury bar. It is OTLA’s submission that this form of CSO structure should **not** be permissible in Ontario. The intent of the Working Group’s proposal is not to replicate private sector practices within a not-for-profit or charitable structure. The intent of the Working Group aligns with the ideals strived for by OTLA – improving access to justice in Ontario and being responsive to the needs of society. While it may be that CSOs should be allowed to charge below-market rate fees to serve those who cannot afford the rates of the private bar and who do not qualify for Legal Aid, the question of whether CSOs should be able to charge for legal services is outside the scope of this submission.

There is an additional concern that lawyers would be able to seek an advantage in the private market under the “Aspire Law” model by providing donations or sponsoring charities and CSOs in exchange for formal or informal referral arrangements. In Ontario, the *Rules of Professional Conduct* and the *Paralegal Rules of Conduct* restrict referral payments to non-licensees. Permitting

the CSO structure in Ontario, and allowing lawyers to make charitable donations in exchange for referrals, would pose an ethical dilemma for licensees operating in those structures. Accepting a referral from a CSO under these circumstances would violate Law Society's *Rules*. Exempting CSOs from these *Rules* would greatly disrupt the regulation of the legal profession, and will ultimately serve to tarnish the profession's reputation.

Associations and sponsorships between private firms and CSOs ultimately serve against the public interest. Permitting these associations can lead to conflict of interest situations that do not currently exist to the same scale. This could lead to the charity or not-for-profit organization directing clients to a particular firm because of a sense of obligation created by the financial support received from the firm, without regard to the competency of the lawyers at the firm. This poses the real risk of providing inadequate services to clients in order for the CSOs to minimize costs and maximize profits and ultimately failing to uphold the standards and values of the legal profession.

IV. PROTECTION OF SOLICITOR-CLIENT PRIVILEGE

Solicitor-client privilege is essential in the legal profession. Without such privilege, licensees are unable to successfully advocate for their clients. The Working Group posits that the delivery of legal services through CSOs can occur without jeopardizing solicitor-client privilege by placing the ultimate responsibility for this privilege with the individual licensee. According to the Working Group, each licensee working in a CSO would have the same obligation to ensure that solicitor-client privilege is protected to the same extent as it would be in any other practice setting.

Individual responsibility on each licensee is necessary to ensure solicitor-client privilege, however more precautions will necessarily be required to ensure that this privilege is protected from other service providers given the holistic nature of CSOs. Within these multidisciplinary settings, there is great potential for breach of both confidentiality and privilege. This can occur when multiple service providers, either within the same CSO or across different agencies, meet to coordinate consistent service for individual clients. Further, there is the potential for legal services being provided by non-regulated or under-educated staff that are not sufficiently knowledgeable in the complexities of the matters in issue. Effective and ongoing training, specifically within CSO settings, would be required to assist in protecting solicitor-client privilege given the multidisciplinary nature of CSOs and the potential number of service providers involved with each vulnerable client.

RECOMMENDATIONS

The Working Group recommended in the June, 2017 interim report that Law Society's by-laws should be amended to enable lawyers and paralegals to directly deliver legal services through the CSO structure. The Working Group outlined the principles which would guide the framing of any changes to the Law Society's By-Laws allowing CSOs to provide legal services to the public:

- a. the licensee has control over the delivery of their professional services;
- b. solicitor-client privilege will be protected; and

- c. the fundamentals of professionalism, including independence, competence, integrity, and service to the public good through client relationships and responsibilities to the administration of justice will be safeguarded.

Given the challenges noted above, it is OTLA's submission that a fourth principle should be added:

- d. the CSO cannot directly or indirectly charge any fee from clients in respect of any legal service provided by the CSO to them through its embedded licensees, nor can the CSO take any fee or receive any donation directly or indirectly for referring any matter to a licensee not employed by the CSO.**

The addition of this principle is, in OTLA's opinion, necessary to ensure proper implementation and successful regulation of the CSO structure in Ontario.

In also our view it appears that the Law Society appears to be over-extended in its ability to oversee and regulate the legal profession. OTLA therefore urges the Law Society to consider this submission, along with others prior to amending its By-Laws and permitting licensees to deliver legal services through CSOs.

We thank you for the opportunity to provide this submission.



September 20, 2017

Law Society of Upper Canada
130 Queen St W,
Toronto, ON M5H 2N6

Re: Civil Society organizations

I am writing, on behalf of the Law Foundation of Ontario (the Foundation), in response to the Law Society of Upper Canada's Alternative Business Structures (ABS) Working Group report on Civil Society Organizations.

The Foundation is established under the *Law Society Act* and makes grants to nonprofit organizations to advance access to justice. Given our role, we have a deep knowledge of the nonprofit justice sector and the range of legal information, referrals, advice, and representation services provided by it.

The ABS Working Group report refers to a number of activities conducted by civil society organizations. Many of these activities are permitted under the current regulatory regime, such as the provision of basic legal information and referrals by front-line community workers to their clients. As the LSUC contemplates changes in this area, we urge it to ensure that currently permissible activities remain so in order to assist members of the public.

In addition, the Foundation supports a regulatory regime where lawyers can provide free services to members of the public, through a nonprofit organization or charity, either by way of pro bono activities facilitated by that organization or by an employee of that organization. It supports regulatory change, if it is required to achieve that result. We make no comment on the provision of legal services by such organizations for a fee.

If the LSUC proceeds with the initiative and to drafting, the Foundation would be pleased to assist by providing any background or context that might help the LSUC achieve its objectives.

Yours truly,

Linda Rothstein
Chair
The Law Foundation of Ontario

The Law Foundation of Ontario

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FOR DECISION

**SIXTH REPORT OF THE ADVERTISING & FEE
ARRANGEMENTS ISSUES WORKING GROUP****MOTION**

73. That Convocation approve amendments to the Rules of Professional Conduct regarding price advertising for legal services with respect to residential real estate transactions as set out as **Tab 5.4.1** and **5.4.2** (English and French).

SUMMARY OF ISSUE UNDER CONSIDERATION

74. In this sixth report to Convocation, the Advertising and Fee Issues Working Group (“Working Group”)¹ reports its recommendation, initially presented to Convocation in June 2017, that all inclusive advertising with respect to residential real estate transactions should be permitted, subject to new requirements that promote disclosure and consistency so that consumers may more easily compare services. The Working Group has developed draft amendments to the advertising of fees rule, and to the Commentary to Rule 3.6 regarding reasonable fees and disbursements. The draft amendments are attached as **Tab 5.4.1 (English)** and **Tab 5.4.2 (French)** to this report.
75. The proposed rule is the same as that presented to Convocation in June 2017, except for the following additions:
- a. The cost of a condominium status certificate has been added to the list of permitted disbursements; and
 - b. The proposed rule now requires the advertised price to include, in a sale transaction, acting on the discharge of a first mortgage.

¹ The Advertising & Fee Arrangements Issues Working Group (“Working Group”) is providing this interim report on its work. Since it was established in February 2016, the Working Group has been studying current advertising, referral fee and contingency fee practices in a range of practice settings, including real estate, personal injury, criminal law and paralegal practices, to determine whether any regulatory responses are required with respect to them. The history of the Working Group can be found on the Law Society’s website at <https://www.lsuc.on.ca/advertising-fee-arrangements/>. The Working Group is chaired by Malcolm Mercer. Working Group members include Jack Braithwaite, Paul Cooper, Jacqueline Horvat, Michael Lerner, Marian Lippa, Virginia Maclean, Jan Richardson, Jonathan Rosenthal, Andrew Spurgeon and Jerry Udell. Benchers Robert Burd and Carol Hartman served on the Working Group until August, 2016.

BACKGROUND

76. In June 2017, the Working Group presented its Fourth Report to Convocation (“June 2017 Report”). The Working Group reported that it concluded after studying current advertising practices that change is warranted, that banning advertising of pricing in real estate law would be inappropriate, and that ultimately a rule amendment would provide the simplest way to encourage price advertising that facilitates transparency and consumer choice.²
77. At June 2017 Convocation, the Working Group presented its proposed rule amendments to the Rules of Professional Conduct regarding price advertising for legal services with respect to residential real estate transactions.
78. The proposed rule provides that if a lawyer advertises a price for the completion of a residential real estate transaction, then the lawyer must meet certain requirements, including that the price must be inclusive of all fees, disbursements and third party charges *except* for harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, payment for letters from creditors’ lawyers regarding similar name executions and any title insurance premium.
79. The June 2017 report was initially intended to be presented for decision. However, in the lead-up to Convocation, the question was raised as to whether payments to arms-length parties to conduct title searches should be a “permitted disbursement” or whether the cost should be absorbed within the advertised price.
80. The Working Group has since met to consider both this issue and additional proposed changes to the rule which have arisen since June 2017. Once again, in addition to relying on Working Group member Jerry Udell’s real estate expertise, the Working Group invited benchers Sidney Troister and Jeffrey Lem to participate in these meetings given their real estate expertise. Bencher Bradley Wright also participated in the meetings, and made various proposals which were fully considered by the Working Group.

DISCUSSION

Third Party Title Searches: A Cost Included Within the Advertised Fee

81. The Working Group carefully considered whether to require that third party title search

² The June 2017 Report is available online at Tab 4.5 of the Professional Regulation Committee June 2017 Report to Convocation, online at:

www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2017/Convocation-June2017-Professional-Regulation-Committee-Report.pdf.

costs be part of an advertised price, or be a separate permitted disbursement under the proposed rule.

82. Title searches are a variable in real estate transactions. In the majority of cases, title searching is a relatively straightforward issue. The lawyer pulls the PIN and the instruments. In certain situations, however, further title searching is needed. While a lawyer can do the full search that a third-party professional title searcher undertakes, it can be time consuming.
83. The Working Group considered the rationale for treating the cost of third party professional title searchers as a “permitted disbursement.” This would encourage lawyers to err on the side of caution and retain a professional title searcher when such services might be necessary. If third party professional title searchers are treated as part of the all-inclusive price, then real estate lawyers have an economic disincentive to retain such experts when they may be necessary. Proponents of treating the search costs as a permitted disbursement note that this aligns economic interests with competency requirements.
84. Ultimately, however, the Working Group concludes that third party professional title search fees should not be a “permitted disbursement” because the risks of including them outweigh the benefits. The Working Group reaches this conclusion on the following grounds:
 - a. As noted above, third party professional title searchers are not necessary in the vast majority of real estate transactions. It is reasonable to require their cost to be absorbed by lawyers who advertise all inclusive fees.
 - b. Concerns about lawyers cutting corners are addressed by the lawyer’s overarching ethical duties and duty to meet the standard of a competent lawyer. The proposed advertising rule does not displace the lawyer’s obligation to meet the standard of a competent lawyer; in fact, the proposed Commentary states that the lawyer who provides services pursuant to an advertised price must meet the standard of a competent lawyer. If a lawyer needs to hire a third party title searcher on a real estate transaction, then under the rule, the lawyer would be expected to do so, and adhere to the advertised price.
 - c. Treating title search costs as a “permitted disbursement” might limit price transparency, as the professional title search cost may be a material additional cost that would not be disclosed up front as part of the all in price.
 - d. Treating title search costs as a “permitted disbursement” might lead to “bait and switch” tactics, by advertising a low price, but charging a disbursement for title search services. This is the type of tactic that the proposed rule is seeking to address.
 - e. Treating professional title search costs as a “permitted disbursement” risks

encouraging lawyers to shift title searching, which in most cases is performed as an in-house task, to a third party, at additional cost to the client.

Including the Cost of a Condominium Status Certificate as a Permitted Disbursement

85. The Working Group adopts a recommendation put forward by benchler Bradley Wright that the cost of a condominium status certificate be included as a permitted disbursement.
86. The Working Group notes that not all residential real estate transactions require a condominium status certificate, and that the cost of obtaining such a certificate can vary. It therefore recommends including this cost as a permitted disbursement.

Requiring the Advertised Price to Include, in a Sale Transaction, Acting on the Discharge of a First Mortgage

87. The Working Group also adopts a recommendation put forward by benchler Susan McGrath that the draft rule be amended to require, in the case of a sale transaction, including the price of acting on the discharge of the first mortgage.
88. This is consistent with the Working Group's recommended requirement that in the case of a purchase transaction, the price includes the price for acting on both the purchase and on one mortgage. If this recommended change were not included, there would be a risk of lawyers acting on a sale transaction charging for acting on the discharge of a first mortgage as separate service, which could become an add-on cost in addition to the advertised price for acting on the sale transaction.

NEXT STEPS

89. The Working Group continues to consider current practices related to contingency fee arrangements and the operation of the *Solicitors Act*, and its consultation with respect to this issue is open until September 29, 2017. The Working Group also continues to explore issues regarding lawyers receiving compensation or other benefits and related practices with respect to title insurance and other services. The Working Group will report in due course once it has considered these issues further.

PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING ADVERTISING OF FEES AND REASONABLE FEES AND DISBURSEMENTS

REDLINE SHOWING CHANGES PROPOSED IN JUNE 2017

BLUELINE SHOWING ADDITIONAL CHANGES PROPOSED SEPTEMBER 2017

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements, third party charges and taxes will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

4.2-2.1 A lawyer may advertise a price to act on a residential real estate transaction if:

- (a) the price is inclusive of all fees for legal services, disbursements, third party charges and other amounts except for the harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, the cost of a condominium status certificate, payment for letters from creditors' lawyers regarding similar name executions and any title insurance premium;
- (b) the advertisement states that harmonized sales tax and the permitted disbursements mentioned in paragraph (a) of this Rule are not included in the price;
- (c) the lawyer strictly adheres to the price for every transaction; and
- (d) in the case of a purchase transaction, the price includes the price for acting on both the purchase and on one mortgage;-
- (e) in the case of a sale transaction, the price includes the price of acting on the discharge of the first mortgage.

Commentary

[1] A lawyer who agrees to provide services pursuant to an advertised price is required to perform legal services to the standard of a competent lawyer. Clients are entitled to the same quality of legal services whether the services are provided pursuant to an advertised price or otherwise.

[2] The requirements set out in Rule 4.2-2.1 are intended to ensure that prices advertised by lawyers in residential real estate transactions are clear to consumers and comparable. The rule applies where the lawyer advertises a price for acting on a sale, a purchase or a refinancing of residential real estate.

[3] This rule applies to all forms of price advertising including in traditional media, on the internet, on the lawyer's own website and in standardized price lists. Providing a price by a website is price advertising whether prices are listed on a webpage or are only available by response to a request made on a webpage. However, this rule does not apply where a specific fee quotation is provided through a website inquiry based on an actual assessment of the work and disbursements required for the transaction provided that full disclosure is made of the anticipated types of disbursements and other charges which the consumer would be required to pay in addition to the quoted fee.

[4] Where a lawyer chooses to advertise a price for the completion of a residential real estate transaction, the lawyer should ensure that all relevant information is provided. For example, the permitted disbursements should not be set out in small print or in separate documents or webpages. Particular care should be taken with mass advertising where consumers will not have the opportunity to read and understand all of the details of the price. Lawyers should take into account the general impression conveyed by a representation and not only its literal meaning.

[5] The price in paragraph (a) of Rule 4.2-2.1 is an all-inclusive price. The only permitted exclusions from the price are the harmonized sales tax and permitted disbursements specifically mentioned in the subrule. Fees paid to government, municipalities or other similar authorities for due diligence investigations are permitted disbursements as fees charged by government. For greater certainty, the all-inclusive price is required to include overhead costs, staff costs, courier costs, bank fees, postage costs, photocopy costs, third party conveyancer's title and other search or closing fees and all other costs and disbursements that are not permitted disbursements specifically mentioned under the subrule.

Reasonable Fees and Disbursements

3.6-1 A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

3.6-1.1 A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

Commentary

[1] What is a fair and reasonable fee will depend upon such factors as

- (a) the time and effort required and spent,
- (b) the difficulty of the matter and the importance of the matter to the client,
- (c) whether special skill or service has been required and provided,
 - (c.1) the amount involved or the value of the subject-matter,
- (d) the results obtained,
- (e) fees authorized by statute or regulation,
- (f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency,
- (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment,
- (h) any relevant agreement between the lawyer and the client,
- (i) the experience and ability of the lawyer,
- (j) any estimate or range of fees given by the lawyer, and
- (k) the client's prior consent to the fee.

[2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and

interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

[4] A lawyer should be ready to explain the basis of the fees and disbursements charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

[4.1] A lawyer should inform a client about their rights to have an account assessed under the *Solicitors Act*.

[\[4.2\] Lawyers must comply with the provisions of Rules 4.2-2 and 4.2-2.1 regarding advertising of fees.](#)

“CLEAN” VERSION SHOWING PROPOSED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT REGARDING ADVERTISING OF FEES AND REASONABLE FEES AND DISBURSEMENTS

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements, third party charges and taxes will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

4.2-2.1 A lawyer may advertise a price to act on a residential real estate transaction if:

- (a) the price is inclusive of all fees for legal services, disbursements, third party charges and other amounts except for the harmonized sales tax and the following permitted disbursements: land transfer tax, government document registration fees, fees charged by government, Teranet fees, the cost of a condominium status certificate, payment for letters from creditors' lawyers regarding similar name executions and any title insurance premium;
- (b) the advertisement states that harmonized sales tax and the permitted disbursements mentioned in paragraph (a) of this Rule are not included in the price;
- (c) the lawyer strictly adheres to the price for every transaction; and
- (d) in the case of a purchase transaction, the price includes the price for acting on both the purchase and on one mortgage;
- (e) in the case of a sale transaction, the price includes the price of acting on the discharge of the first mortgage.

Commentary

[1] A lawyer who agrees to provide services pursuant to an advertised price is required to perform legal services to the standard of a competent lawyer. Clients are entitled to the same quality of legal services whether the services are provided pursuant to an advertised price or otherwise.

[2] The requirements set out in Rule 4.2-2.1 are intended to ensure that prices advertised by lawyers in residential real estate transactions are clear to consumers and comparable. The rule applies where the lawyer advertises a price for acting on a sale, a purchase or a refinancing of residential real estate.

[3] This rule applies to all forms of price advertising including in traditional media, on the internet, on the lawyer's own website and in standardized price lists. Providing a price by a website is price advertising whether prices are listed on a webpage or are only available by response to a request made on a webpage. However, this rule does not apply where a specific fee quotation is provided through a website inquiry based on an actual assessment of the work

and disbursements required for the transaction provided that full disclosure is made of the anticipated types of disbursements and other charges which the consumer would be required to pay in addition to the quoted fee.

[4] Where a lawyer chooses to advertise a price for the completion of a residential real estate transaction, the lawyer should ensure that all relevant information is provided. For example, the permitted disbursements should not be set out in small print or in separate documents or webpages. Particular care should be taken with mass advertising where consumers will not have the opportunity to read and understand all of the details of the price. Lawyers should take into account the general impression conveyed by a representation and not only its literal meaning.

[5] The price in paragraph (a) of Rule 4.2-2.1 is an all-inclusive price. The only permitted exclusions from the price are the harmonized sales tax and permitted disbursements specifically mentioned in the subrule. Fees paid to government, municipalities or other similar authorities for due diligence investigations are permitted disbursements as fees charged by government. For greater certainty, the all-inclusive price is required to include overhead costs, staff costs, courier costs, bank fees, postage costs, photocopy costs, third party conveyancer's title and other search or closing fees and all other costs and disbursements that are not permitted disbursements specifically mentioned under the subrule.

Reasonable Fees and Disbursements

3.6-1 A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

3.6-1.1 A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

Commentary

[1] What is a fair and reasonable fee will depend upon such factors as

- (a) the time and effort required and spent,
- (b) the difficulty of the matter and the importance of the matter to the client,
- (c) whether special skill or service has been required and provided,
 - (c.1) the amount involved or the value of the subject-matter,
- (d) the results obtained,
- (e) fees authorized by statute or regulation,
- (f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency,
- (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment,
- (h) any relevant agreement between the lawyer and the client,
- (i) the experience and ability of the lawyer,
- (j) any estimate or range of fees given by the lawyer, and
- (k) the client's prior consent to the fee.

[2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and

interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

[4] A lawyer should be ready to explain the basis of the fees and disbursements charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

[4.1] A lawyer should inform a client about their rights to have an account assessed under the *Solicitors Act*.

[4.2] Lawyers must comply with the provisions of Rules 4.2-2 and 4.2-2.1 regarding advertising of fees.

**VERSION MONTRANT LES MODIFICATIONS AU CODE DE DÉONTOLOGIE
CONCERNANT LA PUBLICITÉ DES HONORAIRES, ET LES HONORAIRES ET DÉBOURS
RAISONNABLES**

TEXTE EN ROUGE : CHANGEMENTS PROPOSÉS EN JUIN 2017

**TEXTE EN BLEU : CHANGEMENTS SUPPLÉMENTAIRES PROPOSÉS EN SEPTEMBRE
2017**

Publicité des honoraires

4.2-2 L'avocat peut annoncer ses honoraires pour des services juridiques aux conditions suivantes :

- a) l'annonce des honoraires indique de façon suffisamment précise les services compris pour chaque prix indiqué ;
- b) l'annonce des honoraires indique si d'autres montants, tels que les débours, **les frais payables à des tiers** et les taxes, sont facturés en sus ;
- c) l'avocat s'en tient strictement aux frais annoncés dans toutes les circonstances applicables.

4.2-2.1 L'avocat peut annoncer un prix pour agir dans une opération immobilière résidentielle si :

- a) Le prix comprend tous les honoraires pour services juridiques, débours, frais payables à des tiers et autres montants à l'exception de la taxe de vente harmonisée et des débours permis suivants : droits de cession immobilière, droits d'inscription de documents gouvernementaux, droits imposés par le gouvernement, frais Teranet, **cout du certificat d'information d'un condominium, paiement pour lettres d'avocat de créanciers concernant des exécutions envers des noms similaires et primes d'assurance de titre ;**
- b) La publicité énonce que la taxe de vente harmonisée et les débours permis mentionnés au paragraphe a) de la présente règle ne sont pas compris dans le prix ;
- c) L'avocat adhère strictement aux prix annoncés pour chaque transaction ;
- d) Dans le cas d'une transaction d'achat, le prix comprend le prix pour agir à la fois dans la transaction d'achat et une transaction hypothécaire ;
- e) Dans le cas d'une transaction de vente, le prix comprend le prix pour agir dans la mainlevée de la première hypothèque.

Commentaire

[1] L'avocat qui accepte de fournir des services conformément à un prix annoncé est tenu de fournir ses services juridiques selon la norme d'un avocat compétent. Les clients ont droit à la même qualité de services juridiques, que les services soient fournis en vertu d'un prix annoncé ou autre.

[2] Les exigences énoncées à la règle 4.2-2.1 visent à assurer que les prix annoncés par les avocats pour des opérations immobilières résidentielles sont clairs pour les consommateurs et sont comparables. La règle s'applique lorsque l'avocat annonce un prix pour agir dans une vente, un achat ou un refinancement de résidence.

[3] La présente règle s'applique à toutes les formes d'annonces de prix, y compris dans les médias traditionnels, sur Internet, sur le site Web de l'avocat et dans des listes standardisées de prix. Donner un prix sur un site Web équivaut à annoncer ses prix, que ceux-ci soient annoncés sur un site Web ou seulement disponibles en réponse à une demande faite sur un site Web. Cependant, cette règle ne s'applique pas si une estimation spécifique des honoraires est fournie par suite d'une demande sur le site Web selon une évaluation réelle du travail et des débours requis pour la transaction, pourvu que soient divulgués les débours prévisibles et autres frais que le consommateur devrait payer en sus des frais estimés.

[4] Si l'avocat décide d'annoncer un prix pour faire une opération immobilière résidentielle, l'avocat devrait s'assurer de fournir tous les renseignements pertinents. Par exemple, les débours permis ne devraient pas être énoncés en petits caractères ou dans des documents ou pages Web séparés. Il faut porter une attention particulière à la publicité de masse où les consommateurs n'auront pas la possibilité de lire et de comprendre tous les détails du prix. Les avocats devraient tenir compte de l'impression générale transmise par une annonce et non seulement sa signification littérale.

[5] Le prix faisant l'objet du paragraphe a) de règle 4.2-2.1 est un prix forfaitaire. Les seules exclusions permises sont la taxe de vente harmonisée et les débours permis spécifiquement mentionnés dans le paragraphe. Les frais payés au gouvernement, aux municipalités ou à toute autre autorité semblable pour des enquêtes de diligence raisonnable sont des débours permis à titre de droits imposés par le gouvernement. Pour plus de certitude, le prix forfaitaire doit nécessairement comprendre les frais d'administration, de personnel, de messagerie, les frais bancaires, postaux, de photocopie, de recherche de titre ou autre recherche effectuée par un praticien tiers, les frais de clôture et autres dépenses et débours qui ne sont pas spécifiquement mentionnés dans ce paragraphe.

Honoraires et débours raisonnables

3.6-1 L'avocat ne doit pas demander ni accepter des honoraires et des débours qui ne sont ni justes ni raisonnables et qui n'ont pas été divulgués en temps utile.

3.6-1.1 L'avocat ne peut percevoir d'intérêts sur les comptes en souffrance qu'aux conditions fixées par la loi, notamment par la Loi sur les procureurs.

Commentaire

[1] Le calcul d'honoraires justes et raisonnables tient compte des facteurs suivants :

- a) le temps et les efforts consacrés à l'affaire ;
- b) la difficulté de l'affaire et son importance pour le client ;
- c) la prestation de services inhabituels ou exigeant une compétence particulière ;
- c.1) les montants en cause ou la valeur de l'objet du litige ;
- d) les résultats obtenus ;
- e) les honoraires prévus par la loi ou les règlements ;
- f) les circonstances particulières, comme la perte d'autres mandats, les retards de règlement, l'incertitude de la rémunération et l'urgence ;
- g) la probabilité, si divulguée au client, que l'avocat ne puisse accepter d'autre travail s'il accepte ce mandat ;
- h) toute entente pertinente entre l'avocat et le client ;
- i) l'expérience et l'aptitude de l'avocat ;
- j) toute estimation ou échelle d'honoraires donnée par l'avocat ;
- k) le consentement préalable du client relativement aux honoraires..

[2] Le rapport de confiance qui existe entre l'avocat et son client exige la divulgation complète de tous les éléments de leurs rapports financiers et interdit à l'avocat d'accepter le moindre honoraire caché. L'avocat ne peut, à l'insu de son client et sans son consentement, recevoir pour ses services une rétribution quelconque (honoraires, gratifications, frais, commissions, intérêts, escomptes, primes de représentation ou de promotion, etc.) des mains d'un tiers. De même, lorsque ses honoraires ne lui sont pas payés par le client, mais, notamment, par un bureau d'aide juridique, un emprunteur ou un représentant successoral, toute rétribution supplémentaire doit être approuvée par ces personnes.

[3] Avant ou dans un délai raisonnable après le début d'un mandat, l'avocat devrait donner au client autant de renseignements que possible par écrit concernant les honoraires, les débours et les intérêts, selon ce qui est raisonnablement possible compte tenu des circonstances, incluant le calcul qui permettra de fixer les honoraires.

[4] L'avocat devrait être en mesure d'expliquer le calcul des honoraires et des débours demandés au client. Ceci est particulièrement important pour les honoraires et les débours que le client ne pourrait pas raisonnablement prévoir. En cas de situation inhabituelle ou imprévisible pouvant avoir une incidence importante sur le montant des honoraires ou des débours, l'avocat devrait tout de suite expliquer la situation au client. L'avocat devrait confirmer par écrit à son client la teneur de toute discussion concernant les honoraires au fur et à mesure de la progression de l'affaire et peut réviser l'estimation initiale des honoraires et des débours.

[4.1] L'avocat devrait informer son client de son droit de demander la liquidation de son compte conformément à la *Loi sur les procureurs*.

[4.2] Les avocats doivent respecter les dispositions des règles 4.2-2 et 4.2-2.1 à l'égard de la publicité des honoraires.

VERSION « AU PROPRE » DES MODIFICATIONS AU CODE DE DÉONTOLOGIE CONCERNANT LA PUBLICITÉ DES HONORAIRES ET LES HONORAIRES ET DÉBOURS RAISONNABLES

Publicité des honoraires

4.2-2 L'avocat peut annoncer ses honoraires pour des services juridiques aux conditions suivantes :

- a) l'annonce des honoraires indique de façon suffisamment précise les services compris pour chaque prix indiqué ;
- b) l'annonce des honoraires indique si d'autres montants, tels que les débours, les frais payables à des tiers et les taxes, sont facturés en sus ;
- c) l'avocat s'en tient strictement aux frais annoncés dans toutes les circonstances applicables

4.2-2.1 L'avocat peut annoncer un prix pour agir dans une opération immobilière résidentielle si :

- a) Le prix comprend tous les honoraires pour services juridiques, débours, frais payables à des tiers et autres montants à l'exception de la taxe de vente harmonisée et des débours permis suivants : droits de cession immobilière, droits d'inscription de documents gouvernementaux, droits imposés par le gouvernement, frais Teranet, cout du certificat d'information d'un condominium, paiement pour lettres d'avocat de créanciers concernant des exécutions envers des noms similaires et primes d'assurance de titre ;
- b) La publicité énonce que la taxe de vente harmonisée et les débours permis mentionnés au paragraphe 4.2-2.1 ne sont pas compris dans le prix ;
- c) L'avocat adhère strictement aux prix annoncés pour chaque transaction ;
- d) Dans le cas d'une transaction d'achat, le prix comprend le prix pour agir à la fois dans la transaction d'achat et une transaction hypothécaire;
- e) Dans le cas d'une transaction de vente, le prix comprend le prix pour agir dans la mainlevée de la première hypothèque.

Commentaire

[1] L'avocat qui accepte de fournir des services conformément à un prix annoncé est tenu de fournir ses services juridiques selon la norme d'un avocat compétent. Les clients ont droit à la même qualité de services juridiques, que les services soient fournis en vertu d'un prix annoncé ou autre.

[2] Les exigences énoncées à la règle 4.2-2.1 visent à assurer que les prix annoncés par les avocats pour des opérations immobilières résidentielles sont clairs pour les consommateurs et sont comparables. La règle s'applique lorsque l'avocat annonce un prix pour agir dans une vente, un achat ou un refinancement de résidence.

[3] La présente règle s'applique à toutes les formes d'annonces de prix, y compris dans les médias traditionnels, sur Internet, sur le site Web de l'avocat et dans des listes standardisées de prix. Donner un prix sur un site Web équivaut à annoncer ses prix, que ceux-ci soient

annoncés sur un site Web ou seulement disponibles en réponse à une demande faite sur un site Web. Cependant, cette règle ne s'applique pas si une estimation spécifique des honoraires est fournie par suite d'une demande sur le site Web selon une évaluation réelle du travail et des débours requis pour la transaction, pourvu que soient divulgués les débours prévisibles et autres frais que le consommateur devrait payer en sus des frais estimés.

[4] Si l'avocat décide d'annoncer un prix pour faire une opération immobilière résidentielle, l'avocat devrait s'assurer de fournir tous les renseignements pertinents. Par exemple, les débours permis ne devraient pas être énoncés en petits caractères ou dans des documents ou pages Web séparés. Il faut porter une attention particulière à la publicité de masse où les consommateurs n'auront pas la possibilité de lire et de comprendre tous les détails du prix. Les avocats devraient tenir compte de l'impression générale transmise par une annonce et non seulement sa signification littérale.

[5] Le prix faisant l'objet du paragraphe 4.2-2.1 a) est un prix forfaitaire. Les seules exclusions permises sont la taxe de vente harmonisée et les débours permis spécifiquement mentionnés dans le paragraphe. Les frais payés au gouvernement, aux municipalités ou à toute autre autorité semblable pour des enquêtes de diligence raisonnable sont des débours permis à titre de droits imposés par le gouvernement. Pour plus de certitude, le prix forfaitaire doit nécessairement comprendre les frais d'administration, de personnel, de messagerie, les frais bancaires, postaux, de photocopie, de recherche de titre ou autre recherche effectuée par un praticien tiers, les frais de clôture et autres dépenses et débours qui ne sont pas spécifiquement mentionnés dans ce paragraphe.

Honoraires et débours raisonnables

3.6-1 L'avocat ne doit pas demander ni accepter des honoraires et des débours qui ne sont ni justes ni raisonnables et qui n'ont pas été divulgués en temps utile.

3.6-1.1 L'avocat ne peut percevoir d'intérêts sur les comptes en souffrance qu'aux conditions fixées par la loi, notamment par la Loi sur les procureurs.

Commentaire

[1] Le calcul d'honoraires justes et raisonnables tient compte des facteurs suivants :

- a) le temps et les efforts consacrés à l'affaire ;
- b) la difficulté de l'affaire et son importance pour le client ;
- c) la prestation de services inhabituels ou exigeant une compétence particulière ;
- c.1) les montants en cause ou la valeur de l'objet du litige ;
- d) les résultats obtenus ;
- e) les honoraires prévus par la loi ou les règlements ;
- f) les circonstances particulières, comme la perte d'autres mandats, les retards de règlement, l'incertitude de la rémunération et l'urgence ;
- g) la probabilité, si divulguée au client, que l'avocat ne puisse accepter d'autre travail s'il accepte ce mandat ;
- h) toute entente pertinente entre l'avocat et le client ;
- i) l'expérience et l'aptitude de l'avocat ;
- j) toute estimation ou échelle d'honoraires donnée par l'avocat ;
- k) le consentement préalable du client relativement aux honoraires..

[2] Le rapport de confiance qui existe entre l'avocat et son client exige la divulgation complète de tous les éléments de leurs rapports financiers et interdit à l'avocat d'accepter le moindre honoraire caché. L'avocat ne peut, à l'insu de son client et sans son consentement, recevoir pour ses services une rétribution quelconque (honoraires, gratifications, frais, commissions, intérêts, escomptes, primes de représentation ou de promotion, etc.) des mains d'un tiers. De même, lorsque ses honoraires ne lui sont pas payés par le client, mais, notamment, par un bureau d'aide juridique, un emprunteur ou un représentant successoral, toute rétribution supplémentaire doit être approuvée par ces personnes.

[3] Avant ou dans un délai raisonnable après le début d'un mandat, l'avocat devrait donner au client autant de renseignements que possible par écrit concernant les honoraires, les débours et les intérêts, selon ce qui est raisonnablement possible compte tenu des circonstances, incluant le calcul qui permettra de fixer les honoraires.

[4] L'avocat devrait être en mesure d'expliquer le calcul des honoraires et des débours demandés au client. Ceci est particulièrement important pour les honoraires et les débours que le client ne pourrait pas raisonnablement prévoir. En cas de situation inhabituelle ou imprévisible pouvant avoir une incidence importante sur le montant des honoraires ou des débours, l'avocat devrait tout de suite expliquer la situation au client. L'avocat devrait confirmer par écrit à son client la teneur de toute discussion concernant les honoraires au fur et à mesure de la progression de l'affaire et peut réviser l'estimation initiale des honoraires et des débours.

[4.1] L'avocat devrait informer son client de son droit de demander la liquidation de son compte conformément à la *Loi sur les procureurs*.

[4.2] Les avocats doivent respecter les dispositions des règles 4.2-2 et 4.2-2.1 à l'égard de la publicité des honoraires.

FOR INFORMATION

2017 LAWYER ANNUAL REPORT

90. The amended 2017 Lawyer Annual Report (LAR) is shown at [TAB 5.5.1](#) for the Committee's information.

Rationale

91. Subsection 5(1) of By-Law 8 requires that every licensee file a report with the Law Society by March 31 of each year, in respect of the licensee's professional business during the preceding year; and the licensee's other activities during the preceding year related to the licensee's practice of law or provision of legal services.

Substantive Amendments

92. The substantive amendments to the 2017 LAR [TAB 5.5.1](#) are described below:
- a. Section 1 – Identification, Somali has been added to the languages in question 4.
 - b. The Demographic Survey has been removed from Section 1 and will now exist as a separate section. It has been renamed "Demographic Information". The new Demographic Information section will become Section 2, and all other sections will be renumbered.
 - c. The introduction to the Demographic Information section will be updated to include information about the intended future changes to the 2018 Annual Reports (see text below):

The Law Society is committed to promoting equality and diversity in the legal professions and to enhancing legal services provided by and for Indigenous, Francophone and equality-seeking communities. The questions in this section will help the Law Society to better understand demographic trends, to develop programs and initiatives within the mandate of the Law Society and to promote equality and diversity in the professions. The questions are voluntary and the information collected in the 2017 annual reports will be kept confidential. The information will only be available in aggregate form and will not be used to identify the demographic identity of individual lawyers and paralegals.

***Notice:** The Final Report of the Challenges Faced by Racialized Licensees Working Group (Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions), adopted by Convocation on December 2, 2016, contains recommendations that will impact the use of the demographic information collected in the future.*

Recommendation 4 – Measuring Progress through Quantitative

Analysis: Beginning with the 2018 annual reports (completed in 2019), in support of the goal of achieving greater equality, diversity and inclusion in the legal professions and to measure progress towards this goal, information collected from these questions from lawyers and paralegals in a legal workplace of 25 licensees or more will be shared with the workplace in a manner consistent with best practices for such disclosure that protects individual lawyers and paralegals, to enable the workplace to compare the information collected about the workplace with the aggregate demographic information collected from the professions as a whole through these questions. The information collected for licensees in legal workplaces of less than 25 licensees will continue to be available only in aggregate form and will not be used to identify the demographic identity of individual lawyers and paralegals. To implement this process, in 2019, following collection of the information from lawyers and paralegals who complete the questions for the 2018 reporting year, the Law Society will prepare a profile of each legal workplace of at least 25 licensees and provide it to the legal workplace and confidentially to each lawyer and paralegal in the workplace.

Recommendation 5 – Measuring Progress through Qualitative Analysis:

Beginning in 2018, and every four years afterwards, the Law Society will ask licensees to voluntarily answer inclusion questions about their legal workplace. Licensees will be asked questions about their experience in the workplace, including questions about career advancement opportunities, feelings of belonging and experiences of discrimination. The Law Society will compile the results and in legal workplaces of 25 licensees or more, a summary of the information gathered will be provided to the workplace.

- d. In Question 3 of the Demographic Information section, the answer options have been changed to match the Census Canada options.
- e. Mandatory referral fee questions have been added at the end of Section 3 – Individual Practice Activities (see text below):

In 2017, the Law Society introduced several new requirements with respect to referral fees, including setting a cap on referral fees, introducing new client transparency and reporting requirements, and introducing new record keeping requirements. Starting with the 2018 Lawyer Annual Report, lawyers will be asked further questions relating to referral fees paid and received.

A “referral fee” includes any financial or other reward for the referral of a matter whether the referral fee is direct or indirect and whether the referral fee is past, current or future. However, a referral fee does not include a referral of other work by the licensee who received the referral.” (Rules of Professional Conduct, Rule 3.6-6.0)

a) In 2017, did you pay any referral fees?

Yes No

b) In 2017, did you receive any referral fees?

Yes No

- f. Questions about licensees' obligations to support equality, diversity and inclusion have been added to Section 3 – Individual Practice Activities immediately following the new referral fee questions. A new box has been added with introductory text about these questions (see text and questions below):

The Final Report of the Challenges Faced by Racialized Licensees Working Group, adopted by Convocation on December 2, 2016, contains recommendations that have resulted in new questions that must be completed by all licensees. Please see the Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions report for more information.

Recommendation 3 – The Adoption of Equality, Diversity and Inclusion Principles and Practices

13. Statement of Principles

14. Human Rights/Diversity Policy Declaration

13. STATEMENT OF PRINCIPLES DECLARATION

I declare that I abide by a Statement of Principles that acknowledges my obligation to promote equality, diversity and inclusion generally, in my behaviour towards colleagues, employees, clients and the public.

Yes No

If “No”, provide an explanation below.

14. HUMAN RIGHTS/DIVERSITY POLICY DECLARATION

Please answer the following:

To the best of my knowledge:

- I am a licensee in a legal workplace of nine (9) or less licensees.
- I am a licensee in a legal workplace of ten (10) or more licensees.
- I am a licensee in a legal workplace of ten (10) or more licensees employed by a non-licensee.

Section 1 – To be completed by licensees in a legal workplace of ten (10) or more licensees.

- a) Are you the licensee representative responsible for developing, implementing and maintaining the legal workplace's human rights/diversity policy?

Yes No

If “Yes” to a), answer b).

If “No” to a), answer e).

- b) I declare that a Human Rights/Diversity Policy is developed, implemented and maintained and that it addresses fair recruitment, retention and advancement in the legal workplace

Yes No

If “Yes” to b), answer c).

If “No” to b), answer d).

- c) As the licensee representative please indicate below the licensees (name and Law Society Number) for whom you are making this declaration.

- d) Provide an explanation below.

- e) Indicated below is the licensee representative responsible for developing, implementing and maintaining the legal workplace’s human right/diversity policy.

Licensee Name: _____

Law Society Number: _____

Section 2 – To be completed by licensees in a legal workplace of ten (10) or more licensees employed by a non-licensee.

- a) I acknowledge that my employer has developed, implemented and maintains a Human Rights/Diversity Policy and that it addresses fair recruitment, retention and advancement in the legal workplace.

Yes No

If “No” to a), answer b).

- b) I acknowledge my individual obligation to have a Human Rights/Diversity Policy that addresses fair recruitment, retention and advancement in the legal workplace.

Yes No

If “No” to b), answer c).

- c) Provide an explanation below.

- g. A new validating question has been added to Section 4 – Financial Reporting. The following question will appear as question 2(b):

Will you be filing the financial information on behalf of other lawyers and/or paralegals?

Yes No

- h. In Section 4 – Financial Reporting, changes have been made to the preamble to question 6 regarding the removal of question 7 (see text below):
- o The question asking you to report all non-mixed trust (individual client) accounts (formerly Question 7) has been removed from the 2017 annual report. You must still report all mixed trust accounts in Question 6. Information concerning mixed trust accounts is shared with the Law Foundation of Ontario. In addition, the opening or closing of all trust accounts, mixed and non-mixed, must be immediately reported to the Law Society pursuant to subsection 4(1)5 of By-Law 8 (<http://www.lsuc.on.ca/trustaccounts/>).
- i. Question 7 in Section 4 – Financial Reporting has been removed. All subsequent questions have been renumbered. Question 7 asked licensees to report on a yearly basis all non-mixed trust (individual client) accounts. In addition to the yearly reporting of this information through the LAR, licensees are also required to immediately report the opening and closing of all trust accounts pursuant to By-Law 8. This information is now independently collected using the By-Law 8 Form. The removal of this question does not impact yearly reporting of mixed trust accounts through the LAR.
- j. Due to changes in the Teranet system, Question 3(d)(i), Section 5 has been updated to make reference to the use of new RSA tokens (see text below):

I declare that I complied in 2017 with my professional obligations to not permit anyone to use my lawyer’s e-reg™ diskette/key/RSA token number and to not disclose to anyone my personalized e-reg™ pass phrase, as set out at Rule 6.1-5 of the *Rules of Professional Conduct* (“Rules”) and at subsection 6(2) of By-Law 7.1.



The Law Society of
Upper Canada

Barreau
du Haut-Canada

2017 Lawyer Annual Report

Introduction Page

YOUR 2017 LAWYER ANNUAL REPORT IS DUE MARCH 31, 2018.

This report is based on the calendar year ending December 31, 2017, and is due by March 31, 2018. Failure to complete and file the report within 60 days of the due date will result in a late filing fee and a summary order suspending your licence until such time as this report is filed and the late filing fee is paid.

Your responses to Sections 1 and 5 will be shared with the Lawyers' Professional Indemnity Company (LAWPRO), which may rely on this information for the purposes of your professional indemnity insurance.

Your responses to Section 4, relating to mixed trust accounts, will be shared with the Law Foundation of Ontario (LFO).

GUIDE: For definitions or assistance in completing this report, please review the enclosed Guide or visit the Law Society's website at www.lsuc.on.ca.

FINANCIAL FILING DECLARATION (FFD): Only the Designated Financial Filing Licensee for each firm needs to complete the Financial Filing Declaration. A single Financial Filing Declaration is required from each firm. The Financial Filing Declaration is found within Section 4.

If you require filing assistance, contact By-Law Administration Services at (416) 947-3315 or at (800) 668-7380 ext. 3315 or by email at bylawadmin@lsuc.on.ca



The Law Society of
Upper Canada

Barreau
du Haut-Canada

2017 Lawyer Annual Report

Section 1 – LICENSEE IDENTIFICATION AND STATUS

1. Licensee Status as at December 31, 2017

The Law Society's records show your status on December 31, 2017 as follows:

Status: _____

Is this status for December 31 correct? Yes No

If "No", select the correct status from the options below. Choose only one status (your status on December 31, 2017) regardless of changes during the 2017 calendar year. Your response to this question will not be used to change your status. To review or update your current status, you must use the Change of Information portlet in the LSUC Portal. By-Law 8 requires licensees to notify the Law Society immediately after any change in status or contact information.

Practising Law/Providing Legal Services

- Sole Practitioner in Ontario
- Partner in a Law Firm/Professional Business in Ontario
- Employee in a Law Firm/Professional Business in Ontario
- Associate in a Law Firm/Professional Business in Ontario
- Employed in Education in Ontario
- Employed in Government in Ontario
- In-House
- Legal Aid or Clinic Lawyer
- Not in Ontario

Not Practising Law/Not Providing Legal Services

- Employed in Education in Ontario
- Employed in Government in Ontario
- Otherwise Employed in Ontario
- Not in Ontario
- Suspended

Not Working

- Retired or Not Working
- Temporary Leave of Absence
- Parental Leave
- Not in Ontario



The Law Society of
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2017 Lawyer Annual Report

2. Bencher Election Privacy Option (non-mandatory response)

During the bencher election, many candidates want to communicate with voters by email.

Check the box if you give the Law Society permission to provide your email address for bencher election campaigning purposes:

3. Provision of Legal Services in French (non-mandatory response)

a) Can you communicate with your clients and provide legal advice to them in French?

Yes No

b) Can you communicate with your clients, provide legal advice to them, and represent them in French?

Yes No

4. Other Languages (non-mandatory response)

ASL or LSQ (Sign Language)

Albanian

Arabic

Bulgarian

Cantonese

Croatian

Czech

Danish

Dutch

English

Estonian

Finnish

French

German

Greek

Gujarati

Hebrew

Hindi

Hungarian

Italian

Japanese

Korean

Latvian

Lithuanian

Macedonian

Mandarin

Norwegian

Persian

Polish

Portuguese

Punjabi

Romanian

Russian

Serbian

Slovak

Slovene

Somali

Spanish

Swedish

Ukrainian

Urdu

Yiddish

Other – Please specify: _____



The Law Society of
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2017 Lawyer Annual Report

Section 2 – DEMOGRAPHIC INFORMATION (SELF-IDENTIFICATION QUESTIONS)

The Law Society is committed to promoting equality and diversity in the legal professions and to enhancing legal services provided by and for Indigenous, Francophone and equality-seeking communities. The questions in this section will help the Law Society to better understand demographic trends, to develop programs and initiatives within the mandate of the Law Society and to promote equality and diversity in the professions. The questions are voluntary and the information collected in the 2017 annual reports will be kept confidential. The information will only be available in aggregate form and will not be used to identify the demographic identity of individual lawyers and paralegals.

Notice: *The Final Report of the Challenges Faced by Racialized Licensees Working Group (Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions), adopted by Convocation on December 2, 2016, contains recommendations that will impact the use of the demographic information collected in the future.*

Recommendation 4 – Measuring Progress through Quantitative Analysis: *Beginning with the 2018 annual reports (completed in 2019), in support of the goal of achieving greater equality, diversity and inclusion in the legal professions and to measure progress towards this goal, information collected from these questions from lawyers and paralegals in a legal workplace of 25 licensees or more will be shared with the workplace in a manner consistent with best practices for such disclosure that protects individual lawyers and paralegals, to enable the workplace to compare the information collected about the workplace with the aggregate demographic information collected from the professions as a whole through these questions. The information collected for licensees in legal workplaces of less than 25 licensees will continue to be available only in aggregate form and will not be used to identify the demographic identity of individual lawyers and paralegals. To implement this process, in 2019, following collection of the information from lawyers and paralegals who complete the questions for the 2018 reporting year, the Law Society will prepare a profile of each legal workplace of at least 25 licensees and provide it to the legal workplace and confidentially to each lawyer and paralegal in the workplace.*

Recommendation 5 – Measuring Progress through Qualitative Analysis: *Beginning in 2018, and every four years afterwards, the Law Society will ask licensees to voluntarily answer inclusion questions about their legal workplace. Licensees will be asked questions about their experience in the workplace, including questions about career advancement opportunities, feelings of belonging and experiences of discrimination. The Law Society will compile the results and in legal workplaces of 25 licensees or more, a summary of the information gathered will be provided to the workplace.*

1. Are you Francophone?

- Yes No I do not wish to answer

2. Do you consider yourself to be an Indigenous person? (select all that apply)

- First Nations, Status Indian, Non-Status Indian
 Inuk (Inuit)
 Métis
 Other – Specify _____
 No, not an Indigenous person
- I do not wish to answer



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3. Which of the following best describes your racial or ethnic identity? (select all that apply)

- Arab
- Black
- Chinese
- Filipino
- Japanese
- Korean
- Latin American
- South Asian (e.g. East Indian, Pakistani, Sri Lankan, etc.)
- Southeast Asian (e.g. Vietnamese, Cambodian, Laotian, Thai, etc.)
- West Asian (e.g. Iranian, Afghan, etc.)
- White
- Other – Specify _____

I do not wish to answer

4. What is your religion or creed? (select all that apply)

- Atheist
- Buddhist
- Hindu
- Jewish
- Muslim
- Protestant
- Roman Catholic
- Other Christian, such as Eastern Orthodox and Ukrainian Catholic
- Sikh
- Other religion – Specify _____
- No religion

I do not wish to answer

5. Are you a person with a disability?

- Yes No I do not wish to answer



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6. Are you transgender, transsexual, gay, lesbian or bisexual? (select all that apply)

- Transgender
- Transsexual
- Gay
- Lesbian
- Bisexual
- Other – Specify _____
- No

- I do not wish to answer

For further information or inquiries about the Law Society's initiatives to promote equality and diversity in the profession, please contact the Equity department:

Telephone: 416-947-3315
Fax: 416-947-3983

Toll-free: 1-800-668-7380
Email: equity@lsuc.on.ca



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Section 3 – INDIVIDUAL PRACTICE ACTIVITIES

To be completed by all lawyers.

Some of the terms and phrases in this section are described in the Definitions area of the Guide.

NOTES ABOUT THIS SECTION:

- For further assistance in completing this section, refer to The Bookkeeping Guide for Lawyers available on our website at www.lsuc.on.ca.
- * Refer to the Guide for definitions.

1. Cash Transactions

All lawyers must report on large cash transactions regardless of jurisdiction of practice.

- a) Did you receive cash* in an aggregate amount equivalent to \$7,500 CDN or more in respect of any one client file in 2017?

Yes No

If “Yes” to a), answer b).

- b) Was the cash solely for legal fees and/or client disbursements*?

Yes No

If “No” to b), answer c).

- c) Provide full particulars below with respect to compliance with Part III of By-Law 9 (Cash Transactions).

2. Trust Funds/Property – 2a), 2b) and 2c) must be answered.

- a) In 2017, did you receive* trust funds* and/or trust property* on behalf of your firm in connection with the practice of law in Ontario?

Yes No

- b) In 2017, did you disburse* (payout), or did you have signing authority to disburse, trust funds* or trust property* on behalf of your firm in connection with the practice of law in Ontario?

Yes No

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c) In 2017, did you hold* trust funds* or trust property* on behalf of your firm in connection with the practice of law in Ontario?

Yes No

3. Estates and Power(s) of Attorney – 3a), 3b) and 3c) must be answered.

a) i) In 2017, did you act as an estate trustee* in Ontario?

Yes No

If “Yes” to i), answer ii), iii) and iv).

ii) Were you an estate trustee* only for related* persons in Ontario?

Yes No

iii) In 2017, the total number of estates in which you were an estate trustee* was:

_____ N/A

iv) As estate trustee* for any estate, did you receive*, hold*, or disburse* estate funds or estate property?

Yes No

If “Yes” to iv), answer v), vi) and vii).

v) The total dollar value as at December 31, 2017 of all separate* bank accounts and investments* for the estates referred to in iv) was:

\$ _____ N/A

vi) Were books and records maintained in accordance with By-Law 9, or other applicable rules/statutes?

Yes No N/A

vii) Was the total dollar value indicated in v) recorded in the firm’s accounting records?

Yes No N/A

If “No” to vii), answer viii).

viii) Provide an explanation below.



b) i) In 2017, did you exercise a power of attorney* for property in Ontario?

Yes No

If “Yes” to i), answer ii), iii) and iv).

ii) Did you exercise the power(s) of attorney* for property only for related* persons in Ontario?

Yes No

iii) In 2017, the total number of persons for whom you exercised a power of attorney* was:

_____ N/A

iv) In exercising the power(s) of attorney* for any person, did you receive*, hold*, or disburse* the donors’ funds or property?

Yes No

If “Yes” to iv), answer v), vi) and vii).

v) The total dollar value as at December 31, 2017 of all separate* bank accounts and investments* for the power(s) of attorney* referred to in iv) was:

\$ _____ N/A

vi) Were books and records maintained in accordance with By-Law 9, or other applicable rules/statutes?

Yes No N/A

vii) Was the total dollar value indicated in v) recorded in the firm’s accounting records?

Yes No N/A

If “No” to vii), answer viii).

viii) Provide an explanation below.

c) i) In 2017, did you control* estate assets (exclude estates where you acted solely on the sale of real property and paid the net proceeds to the estate trustee(s)), as a solicitor, and not as an estate trustee, in Ontario?

Yes No



If “Yes” to i), answer ii) and iii).

ii) Total number of estate files identified in i) is:

iii) As a solicitor, did you receive*, hold*, or disburse* estate funds or estate property?

Yes No

If “Yes” to iii), answer iv), v) and vi).

iv) The total dollar value as at December 31, 2017 of all separate* bank accounts and investments* for the estate files referred to in iii) was:

\$ _____ N/A

v) Were books and records maintained in accordance with By-Law 9?

Yes No N/A

vi) Was the total dollar value indicated in iv) recorded in the firm’s accounting records?

Yes No N/A

If “No” to vi), answer vii).

vii) Provide an explanation below.

4. Borrowing from Clients – 4a) and 4b) must be answered.

Note: If your borrowing was/is from a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, answer “No” to a)i) and “N/A” to a)ii).

See Section 3.4 of the *Rules of Professional Conduct*.

a) i) At any time in 2017, were you personally indebted to a person or organization who, at the time of borrowing, was a current or former client of you or the firm through which you practised law?

Yes No



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If “Yes” to i), answer ii) and iii).

ii) Was the client or person a related* person as defined in the *Income Tax Act* (Canada)?

Yes No N/A

iii) Provide full particulars below. Include the name of the lender and of the borrower, the amount of the loan, the security provided, and particulars of independent legal advice or independent legal representation obtained by the lender.

b) i) At any time in 2017, was your spouse or a corporation, syndicate or partnership in which either you or your spouse has, or both of you have, directly or indirectly, a substantial interest, indebted to a person or organization who, at the time of borrowing, was a current or former client of you or the firm through which you practised law?

Yes No

If “Yes” to i), answer ii).

ii) Provide full particulars below. Include the name of the lender and of the borrower, the amount of the loan, the security provided, and particulars of independent legal advice or independent legal representation obtained by the lender.

5. Mortgage Transactions

In 2017, did you either directly or indirectly through a related person* or corporation*, hold* mortgages or other charges on real property in trust for clients or other persons?

Yes No



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6. Private Mortgages – 6a) and 6b) must be answered.

Refer to the Guide for Private Mortgage reporting information.

a) In 2017, did you act for a lender, lending money through a mortgage broker?

Yes No

b) i) In 2017, did you act for, or receive money from, a lender who was lending money secured by a charge, or charges, on real property, except for transactions listed in subsection 24(2) of By-Law 9? (Note: For the exception in subsection 24(2)(a)(i), funds loaned through RRSPs and RSPs belong to the plan holder, not the financial institution.)

Yes No

If “Yes” to i), answer ii) and iii).

ii) In 2017, approximately how many private mortgage* loans were advanced?

iii) In 2017, the approximate total dollar value of private mortgage* loans advanced was:

\$ _____

7. Client Identification – All lawyers must answer questions 7a) and 7b).

a) i) In 2017, when you provided professional services to clients, did you obtain and record identification information for every (each) client and any third party, in accordance with Part III of By-Law 7.1?

Yes No N/A

If “No” to i), answer ii).

ii) In 2017, when you provided professional services to clients, were you exempt from the requirement to obtain and record identification information for every (each) client and any third party, in accordance with Part III of By-Law 7.1?

Yes No N/A

If “No” to ii), answer iii).

iii) Provide an explanation below.



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- b) i) In 2017, when you engaged in or gave instructions in respect of the receiving, paying or transferring of funds, did you obtain and record information to verify the identity of each client, and additional identification information for a client that is an organization, and any third party, in accordance with Part III of By-Law 7.1?

Yes No N/A

If “No” to i), answer ii).

- ii) In 2017, when you engaged in or gave instructions in respect of the receiving, paying or transferring of funds, were you exempt from the requirement to obtain and record information to verify the identity of each client, and additional identification information for a client that is an organization, and any third party, in accordance with Part III of By-Law 7.1?

Yes No N/A

If “No” to ii), answer iii).

- iii) Provide an explanation below.

8. Pro Bono Legal Services

(Pro bono legal services means the provision of legal services to persons of limited means or to charitable or not-for-profit organizations without the expectation of a fee from the client.)

- a) Did you provide pro bono legal services in Ontario in 2017?

Yes No

If “Yes” to a), answer b) and c).

- b) How many hours did you devote to pro bono legal services in Ontario in 2017?

- c) Did you provide pro bono legal services for Pro Bono Ontario (PBO) sponsored programs?

Yes No

9. Membership in other Regulatory Bodies

- a) Are you now a member of another professional/regulatory/governing body in any jurisdiction?

Yes No



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If “Yes” to a), answer b).

- b) Please identify the professional/regulatory/governing body.

10. Condominium Deposits

A “Condominium Deposit” under section 81 of the *Condominium Act, 1998* includes all money together with interest earned on it as soon as a person makes a payment,

- (a) with respect to reserving a right to enter into an agreement of purchase and sale for the purchase of a proposed unit;
(b) on account of an agreement of purchase and sale of a proposed unit; or
(c) on account of a sale of a proposed unit

but does not include money received on account of the purchase of personal property included in the proposed unit that is not to be permanently affixed to the land; or as an occupancy fee under section 80(4) of the *Condominium Act, 1998*.

- a) In 2017, did you receive*, hold* or disburse* Condominium Deposits under section 81 of the *Condominium Act, 1998*?

Yes No

If “Yes” to a), answer b), c) and d).

- b) I declare that I complied with my obligations for the receipt, holding, and release of Condominium Deposits as set out in Section 81 of the *Condominium Act, 1998*.

Yes No

- c) Total Condominium Deposits held in trust as at December 31, 2017:

\$ _____ N/A

- d) Was the total dollar value indicated in c) recorded in the firm’s accounting records?

Yes No N/A

11. Self Study

The annual minimum expectation is 50 hours of self-study. For the purposes of this section, self-study means self-directed reading or research using print materials, electronic or otherwise. CPD hours must be reported in the CPD section of the LSUC Portal by December 31st of each calendar year.

- a) Did you undertake any self-study during 2017?

Yes No



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If “Yes” to a), answer b) to d).

If “No” to a), you may provide an explanation in the area at the end of this section.

b) Approximate total number of self-study hours spent on **file specific** reading or research: _____

c) Approximate total number of self-study hours spent on **general** reading or research: _____

d) Indicate below the tools used, overall, for all types of self-study. Check all that apply:

Printed Material

Internet

Other

12. Referral Fees

In 2017, the Law Society introduced several new requirements with respect to referral fees, including setting a cap on referral fees, introducing new client transparency and reporting requirements, and introducing new record keeping requirements. Starting with the 2018 Lawyer Annual Report, lawyers will be asked further questions related to referral fees paid and received.

A “referral fee” includes any financial or other reward for the referral of a matter whether the referral fee is direct or indirect and whether the referral fee is past, current or future. However, a referral fee does not include a referral of other work by the licensee who received the referral. (*Rules of Professional Conduct*, Rule 3.6-6.0)

a) In 2017, did you pay any referral fees?

Yes No

b) In 2017, did you receive any referral fees?

Yes No

The Final Report of the Challenges Faced by Racialized Licensees Working Group, adopted by Convocation on December 2, 2016, contains recommendations that have resulted in new questions that must be completed by all licensees. Please see the *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions* report for more information.

Recommendation 3 – The Adoption of Equality, Diversity and Inclusion Principles and Practices

13. Statement of Principles

14. Human Rights/Diversity Policy Declaration



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13. Statement of Principles Declaration

I declare that I abide by a Statement of Principles that acknowledges my obligation to promote equality, diversity and inclusion generally, in my behaviour towards colleagues, employees, clients and the public.

Yes No

If “No”, provide an explanation below.

14. Human Rights/Diversity Policy Declaration

Please answer the following:

To the best of my knowledge:

- I am a licensee in a legal workplace of nine (9) or less licensees.
- I am a licensee in a legal workplace of ten (10) or more licensees.
- I am a licensee in a legal workplace of ten (10) or more licensees employed by a non-licensee.

Section 1 – To be completed by licensees in a legal workplace of ten (10) or more licensees.

- a) Are you the licensee representative responsible for developing, implementing and maintaining the legal workplace’s Human Rights/Diversity Policy?

Yes No

If “Yes” to a), answer b).

If “No” to a), answer e).

- b) I declare that a Human Rights/Diversity Policy is developed, implemented and maintained and that it addresses fair recruitment, retention and advancement in the legal workplace.

Yes No

If “Yes” to b), answer c).

If “No” to b), answer d).

- c) As the licensee representative please indicate below the licensees (name and Law Society Number) for whom you are making this declaration.

Law Society Number

Licensee Name

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d) Provide an explanation below.

e) Indicated below is the licensee representative responsible for developing, implementing and maintaining the legal workplace's human rights/diversity policy.

Licensee Name: _____

Law Society Number: _____

Section 2 – To be completed by licensees in a legal workplace of ten (10) or more licensees employed by a non-licensee.

a) I acknowledge that my employer has developed, implemented and maintains a Human Rights/Diversity Policy and that it addresses fair recruitment, retention and advancement in the legal workplace.

Yes No

If “No” to a), answer b).

b) I acknowledge my individual obligation to have a Human Rights/Diversity Policy that addresses fair recruitment, retention and advancement in the legal workplace.

Yes No

If “No” to b), answer c).

c) Provide an explanation below.

15. Additional Information

If required, use the area below to provide further information or comments about your Individual Practice Activities.

Law Society Number

Licensee Name

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Section 4 – FINANCIAL REPORTING

To be completed by all lawyers who:

- As at December 31st, were sole practitioners;
- As at December 31st, were partners, employees, associates and counsel of law firms;
- As at December 31st, were employed by Legal Aid Ontario and were responsible for general*, trust* and/or mixed trust accounts; and
- Throughout the filing year, held client monies or property from a former legal practice in Ontario.
- The term “employee” means employed in a practising status, for which professional liability insurance coverage is required. This section does not apply to a lawyer working at a law firm in a non-legal capacity (e.g. chief operating officer, continuing professional development coordinator, etc.).

NOTES ABOUT THIS SECTION:

- The question asking you to report all non-mixed trust (individual client) accounts (formerly Question 7) has been removed from the 2017 annual report. You must still report all mixed trust accounts in Question 6. Information concerning mixed trust accounts is shared with the Law Foundation of Ontario. In addition, the opening or closing of all trust accounts, mixed and non-mixed, must be immediately reported to the Law Society pursuant to subsection 4(1)5 of By-Law 8 (<http://www.lsuc.on.ca/trustaccounts/>).
- For further assistance in completing this section, refer to The Bookkeeping Guide for Lawyers available on our website at www.lsuc.on.ca.
- * Refer to the Guide for definitions.

1. Trust and General (Non-Trust) Accounts – 1a) and 1b) must be answered.

a) During the filing year, did either you or your firm operate a trust* or mixed trust* account in Ontario?

Yes No

b) During the filing year, did either you or your firm operate a general* (non-trust) account in Ontario?

Yes No

If “Yes” to a), proceed to question 2.

If “No” to a) and “Yes” to b), proceed to question 4, and then proceed to Section 5.

If “No” to both a) and b), proceed to Section 5.

2. Trust Account Information

a) During the filing year, were you a sole practitioner, or were you the lawyer responsible for filing the trust* account information on behalf of other licensees in Ontario?

Yes No

b) Will you be filing the financial information on behalf of other lawyers and/or paralegals?

Yes No

If you are reporting financial information on behalf of other licensees, you must also submit a Financial Filing Declaration (FFD). Sole practitioners practising alone in Ontario do not need to file an FFD.



If “Yes” to 2.a), proceed to questions 4 through 11.

If “No” to 2.a), complete the Designated Financial Filing Option (question 3) below.

3. Designated Financial Filing Option

This option is available to you if you are not responsible for filing trust account information.

Indicate on lines a) and b) below who will be reporting the firm’s financial information on your behalf, then proceed to Section 5.

ENTER DESIGNATED FINANCIAL FILING LICENSEE’S NAME & LAW SOCIETY NUMBER

a) **FINANCIAL FILING LICENSEE’S NAME:** _____

b) **Law Society Number:** _____
(e.g. 12345A or P12345)

The Designated Financial Filing Licensee that you have named is responsible for submitting the Financial Filing Declaration to report the firm’s financial information on your behalf. Your Lawyer Annual Report will not be considered complete without the submission of the **Financial Filing Declaration by the licensee you have named. If you are unable to obtain the Financial Filing Licensee’s Law Society Number, as you are no longer employed by the firm, please enter “unknown” in question b).**

4. Firm Records

Were financial records for all your firm’s trust* accounts (mixed*, separate*, estates, power(s) of attorney* and other interest generating investments*) and/or general* (non-trust) bank accounts maintained throughout the filing year, on a current basis, in accordance with all applicable sections in By-Law 9?

Yes No

If “No” to 4, indicate below which areas were deficient and provide an explanation for each.

**COMPLETE THIS CHART ONLY IF YOU ANSWERED “NO” ABOVE
COMPLETE ONLY THOSE AREAS WHERE YOU WERE DEFICIENT**

By-Law 9: Financial Transactions and Records	By-Law 9 Sections 18, 19, 19.1 & 20 (Maintain)	By-Law 9 Section 22 (Current)	Explanation for Deficiency
1. Trust Receipts Journal <i>Subsection 18(1)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
2. Trust Disbursements Journal <i>Subsection 18(2)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
3. Client’s Trust Ledger <i>Subsection 18(3)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
4. Trust Transfer Journal <i>Subsection 18(4)</i>	<input type="checkbox"/>	<input type="checkbox"/>	



5. General Receipts Journal <i>Subsection 18(5)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
6. General Disbursements Journal <i>Subsection 18(6)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
7. Fees Book or Chronological Billing File <i>Subsection 18(7)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
8. Trust Bank Comparison ** <i>Subsection 18(8)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
9. Valuable Property Record <i>Subsection 18(9)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
10. Source documents including deposit slips, bank statements and cashed cheques <i>Subsection 18(10)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
11. Electronic Trust Transfer Requisitions and Confirmations <i>Subsection 18(11) and Section 12 (Form 9A)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
12. Teranet Authorizations and Confirmations <i>Subsection 18(12) and Section 15 (Form 9B)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
13. Duplicate Cash Receipts Book for all cash received <i>Section 19</i>	<input type="checkbox"/>	<input type="checkbox"/>	
14. Records for mortgages held in trust <i>Section 20</i>	<input type="checkbox"/>	<input type="checkbox"/>	

** Trust comparisons are to be completed within 25 days of the effective date of the monthly trust reconciliation.

5. Comparison of Trust Bank Reconciliations and Trust Listing of Client Liabilities as at December 31, 2017.

a) Fill in the fields below.

Trust Reconciliation and Comparison	December 31, 2017 Balances
i) The total dollar value of mixed* trust bank accounts	\$
ii) The total dollar value of separate* interest bearing trust accounts or income generating trust accounts/investments*	+\$
iii) The total dollar value of separate* estate and/or power of attorney* accounts and investments* Include the total dollar value indicated in Section 2, questions 3a)v, 3b)v and/or 3c)iv) (if any)	+\$



iv) TOTAL of i) to iii)	=
v) Total outstanding deposits (if any)	+
vi) Total bank/posting errors (if any)	+/-
vii) Total outstanding cheques (if any)	-
viii) Reconciled Bank Balance	=
ix) Total Client Trust Liabilities (Client Trust Listing)	-
x) Difference between Reconciled Bank Balance and Total Client Trust Liabilities	=

If there is a difference between the Reconciled Bank Balance **viii)** and the Total Client Trust Liabilities **ix)**, provide a written explanation below.

6. Mixed Trust Accounts

- This question must be answered if you operated a mixed trust account at any time during the filing year (2017 calendar year).
- A licensee who receives money in trust for a client shall immediately pay the money into an account at a chartered bank, provincial savings office, credit union or a league to which the *Credit Unions and Caisses Populaires Act*, 1994 applies or registered trust corporations, to be kept in the name of the licensee, or the name of the firm of licensees of which the licensee is a partner, through which the licensee practises law or provides legal services or by which the licensee is employed, and designated as a trust account.
- A mixed trust account is a trust account holding, or intended to hold, trust funds for more than one client. Mixed trust accounts are governed by subsection 57(1) of the *Law Society Act*, which requires any interest payable on a mixed trust account to be paid to the Law Foundation of Ontario.
- A mixed trust account may include a special mixed trust account designated as the lawyer's Electronic Registration Bank Account (ERBA) for the purposes of Teraview.

Financial Institution Name	Transit Number	Account Number	Branch Address	Account Holder Name
<i>SAMPLE</i> <i>Royal Bank of Canada</i>	<i>0652</i>	<i>1234567</i>	<i>123 Main Street</i> <i>Oakville, ON L6J 7M4</i>	<i>Smith Jones LLP</i>



i)	Has this financial institution (at any time) been directed to pay interest on this account to the Law Foundation of Ontario?	<input type="radio"/> Yes <input type="radio"/> No
ii)	Was this account opened during the filing year?	<input type="radio"/> Yes <input type="radio"/> No
	If "Yes" to ii): Date account was opened:	 ____ / ____ MM / DD
iii)	Was this account closed during the filing year?	<input type="radio"/> Yes <input type="radio"/> No
	If "Yes" to iii): Date account was closed:	 ____ / ____ MM / DD
iv)	If the account was closed, was the balance of the closed account transferred to the Law Society of Upper Canada's Unclaimed Trust Fund?	<input type="radio"/> Yes <input type="radio"/> No
v)	Was there at least one transaction in this account during the filing year?	<input type="radio"/> Yes <input type="radio"/> No

If you are filing your Lawyer Annual Report by paper and you have multiple mixed trust accounts, please contact By-Law Administration Services at bylawadmin@lsuc.on.ca or (416) 947-3315 for an additional form, or enter the information in the space provided at the end of this Section.

7. Answer all questions as at December 31, 2017.

- a) i) What is the total number of mixed* trust bank accounts referred to in 5(i)?

- ii) Of the total mixed* trust bank account balance recorded in 5(i), what is the estimated value of estate assets?

\$ _____
- b) What is the total number of separate* interest bearing trust accounts or income generating trust accounts/investments* referred to in 5(ii)?

- c) What is the total number of separate* estate and/or power of attorney* accounts and investments* referred to in 5(iii)?

8. Overdrawn Accounts

- a) During 2017, did your records at any month end disclose overdrawn clients' trust ledger account(s)?

 Yes No



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If “Yes” to a), answer b).

b) Were the account(s) corrected by December 31, 2017?

Yes No

If “No” to b), answer c) and d).

c) The total dollar value of overdrawn clients’ trust ledger account(s) as at December 31, 2017 was:

\$ _____

d) The total number of overdrawn clients’ trust ledger account(s) as at December 31, 2017 was:

9. Outstanding Deposits

a) During 2017, did your records at any month end disclose outstanding trust account deposits, not deposited the following business day?

Yes No

If “Yes” to a), answer b).

b) Were the account(s) corrected by December 31, 2017?

Yes No

If “No” to b), answer c) and d).

c) The total dollar value of outstanding trust account deposits as at December 31, 2017 was:

\$ _____

d) The total number of outstanding trust account deposits as at December 31, 2017 was:

10. Unchanged Client Trust Ledger Account Balances

a) Were there client trust ledger account balances that were unchanged* (i.e. had no activity) for the entire year?

Yes No

If “Yes” to a), answer b), c) and d).

b) The total dollar value of these account balances as at December 31, 2017 was:

\$ _____



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- c) The total number of client trust ledger accounts that remained unchanged* for the entire year as at December 31, 2017 was:

- d) Were any of the unchanged* client trust ledger account balances for the registration of mortgage discharges?

Yes No

If “Yes” to d), answer e).

- e) The total number of unchanged* client trust ledger account balances held for the registration of mortgage discharges was:

11. Unclaimed Client Trust Ledger Account Balances

- a) Of the amounts identified in question 11, were any unclaimed* for two years or more? (Refer to Section 59.6 of the *Law Society Act*)

Yes No N/A

If “Yes” to a), answer b) and c).

- b) The total dollar value of the unclaimed* client trust ledger account balances was:

\$ _____

- c) The total number of unclaimed* client trust ledger accounts was:

12. Additional Information

If required, use the area below to provide further information about your Financial Reporting (Section 3), including details of any additional trust or mixed trust accounts.



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Section 5 – AREAS OF PRACTICE

NOTES ABOUT THIS SECTION:

- Where exact information is not available to respond to the questions under this heading, provide your best approximation.
- In estimating the approximate percentage of time in each question, your response should include:
 - a. time spent by non-lawyer staff on your behalf, and
 - b. your docketed and undocketed time, combined.
- If you were engaged in the practice of law* other than in private practice, unless otherwise noted, your responses should be based upon the whole of your practice, whether for your employer or others.
- Do not include ADR or litigation activities in the categories of “Corporate/Commercial Law” and “Real Estate Law” for the first two questions in this section. ADR and litigation activities should be reflected under “ADR/Mediation Services” and “Civil Litigation” respectively for these noted categories.
- In the category of “ADR/Mediation Services” for the first two questions in this section, indicate the percentage of time spent as a mediator or other role as an intermediary.
- * Refer to the Guide for definitions.

1. Canadian Law Practice – Ontario

a) Did you practise law relating to Ontario in 2017?

Yes No

If “Yes” to a), answer b).

b) Describe that portion of your law practice most directly relating to Ontario, by indicating the approximate percentage of time devoted by you while resident in Ontario in 2017 to each area of law listed below:

Aboriginal Law	_____ %	ADR/Mediation Services (see Notes 5 & 6 above)	_____ %
Administrative Law	_____ %	Bankruptcy & Insolvency Law	_____ %
Civil Litigation – Plaintiff	_____ %	Civil Litigation – Defendant	_____ %
Construction Law	_____ %	Corporate/Commercial Law (see Note 5 above)	_____ %
Criminal/Quasi Criminal Law	_____ %	Employment/Labour Law	_____ %
Environmental Law	_____ %	Family/Matrimonial Law	_____ %
Franchise Law	_____ %	Immigration Law	_____ %
Intellectual Property Law	_____ %	Real Estate Law (see Note 5 above)	_____ %
Securities Law	_____ %	Tax Law	_____ %
Wills, Estates, Trusts Law	_____ %	Workplace Safety & Insurance Law	_____ %
Other	_____ %		



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Total: _____%

Question 1b) must total 100%.

2. Canadian Law Practice – Other than Ontario

a) Did you practise law relating to Canadian jurisdictions other than Ontario in 2017?

Yes No

If “Yes” to a), answer b) and c).

b) Describe that portion of your law practice most directly relating to Canadian jurisdictions other than Ontario, by indicating the approximate percentage of time devoted by you while resident in Ontario in 2017 to each area of law listed below.

Aboriginal Law	_____%	ADR/Mediation Services (see Notes 5 & 6 above)	_____%
Administrative Law	_____%	Bankruptcy & Insolvency Law	_____%
Civil Litigation – Plaintiff	_____%	Civil Litigation – Defendant	_____%
Construction Law	_____%	Corporate/Commercial Law (see Note 5 above)	_____%
Criminal/Quasi Criminal Law	_____%	Employment/Labour Law	_____%
Environmental Law	_____%	Family/Matrimonial Law	_____%
Franchise Law	_____%	Immigration Law	_____%
Intellectual Property Law	_____%	Real Estate Law (see Note 5 above)	_____%
Securities Law	_____%	Tax Law	_____%
Wills, Estates, Trusts Law	_____%	Workplace Safety & Insurance Law	_____%
Other	_____%		
Total:	_____%		

Question 2b) must total 100%.

c) What percentage of your total Canadian law practice relates most directly to Canadian jurisdictions other than Ontario?

_____%



3. Details of Real Estate Practice

a) Did you act on a real estate transaction in 2017?

Yes No

If “Yes” to a), answer b), c) and d).

b) Of the time you devoted to your overall real estate practice in 2017, what approximate percentage of the time related to:

Purchases and mortgages	_____%	Sales	_____%
Development/land use	_____%	Residential landlord/tenant	_____%
Commercial leasing	_____%	Mortgage remedies work	_____%
Other	_____%		
Total:	_____%		

The total for the 7 rows should be 100%.

c) Of the time you devoted to conveyancing-related work, including mortgage work in 2017, what approximate percentage of the time related to:

Residential urban (i.e. within town/ city limits)	_____%	Residential non-urban	_____%
Commercial	_____%	Industrial	_____%
Other	_____%		
Total:	_____%		

The total for the 5 rows should be 100%.

d) Real Estate Declaration – To be completed by all lawyers who acted on a real estate transaction in 2017.

i) I declare that I complied in 2017 with my professional obligations to not permit anyone to use my lawyer’s e-reg™ diskette/key/RSA token/RSA token number and to not disclose to anyone my personalized e-reg™ pass phrase, as set out at Rule 6.1-5 of the *Rules of Professional Conduct* (“Rules”) and at subsection 6(2) of By-Law 7.1.

Yes No

ii) I declare that I complied in 2017 with my professional obligations to directly supervise non-lawyers to whom I assign permissible tasks and functions and to not assign to non-lawyers tasks requiring a lawyer’s skill or judgment, as set out at Section 6.1 of the *Rules* and in Part I of By-Law 7.1.

Yes No



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iii) I declare that I complied in 2017 with my professional obligation to not act for both a transferor and a transferee in the transfer of title to real property, as set out at Rule 3.4-16.7 of the *Rules*, except in the limited circumstances set out at Rule 3.4-16.9.

Yes No

iv) I declare that I complied in 2017 with my professional obligation, when acting in permissible circumstances for both a borrower and a lender in a mortgage or loan transaction, to disclose in writing to the borrower and lender, before the advance or release of mortgage or loan funds, all material information that is relevant to the transaction, as set out at Rule 3.4-15 of the *Rules* and discussed further in the Commentary to the rule.

Yes No

v) I acknowledge my professional obligation, in the practice of real estate law, to not act or do anything or omit to do anything to assist a client, a person associated with a client or any other person to facilitate dishonesty, fraud, crime, or illegal conduct, as set out at Rules 3.2-7 and 3.2-7.1 of the *Rules*, and discussed further in the Commentary to the rules, which I have read. I am aware that the Law Society and LawPRO offer many resources about real estate fraud, including the Law Society's [Update on Mortgage Fraud](#) and webpage entitled [Fighting Real Estate Fraud](#), and LawPRO's [Fraud Fact Sheet](#) and webpage entitled [Avoid a Claim](#).

Yes No

vi) I declare that I complied with my obligation under the Electronic Land Registration Agreement to obtain evidence of proper authorization from the owner of the land or holder of an interest in the land that has directed the registration, prior to the submission of the document for registration in the electronic land registration system.

Yes No

4. Allocation of Practice

This question is to be completed by all lawyers practising law but not in private practice in 2017. Complete this question only if you engaged in the practice of law* in respect of Ontario law (whether Provincial or Federal) during the course of your employment or engagement. Complete this question in respect of such services, regardless of where you were resident. "Employer" includes a corporation or other entity employing you, as well as affiliated, controlled, and subsidiary companies of that corporation or other entity. "Affiliated", "controlled" and "subsidiary" companies are as defined in the *Securities Act*, R.S.O. 1990, c.S.5.

What approximate percentage of the time spent practising law was devoted to:

a) The practice of law for outside third parties on your employer's behalf (e.g. employer's clients, customers, etc.)



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b) The practice of law for outside third parties not on your employer's behalf

c) The practice of law directly for your employer

Total:

The total for the 3 rows should be 100%.



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Section 6 – CERTIFICATION AND SUBMISSION

I am the lawyer filing this 2017 Lawyer Annual Report. I have reviewed the matters reported and the information contained herein is complete, true and accurate. I acknowledge that it is professional misconduct to make a false or misleading reporting to the Law Society of Upper Canada.

Signature

____ / ____ / ____
DD MM YYYY