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Bend or Break: Enhancing the Responsibilities of Law Societies to Promote Access to Justice

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We exceed immeasurably the social and cultural worlds that we build and inhabit. There is always more in us, in each of us individually as well as in all of us collectively, than there is or ever can be in them. There is always more that we have reason to value and power to produce than any of these orders of life, or all of them together can contain...

The less a social or conceptual order is designed to open itself up to experimental challenge and revision, the more it will require crisis as the midwife of change. It will break before it bends.

Roberto Mangabeira Unger.¹

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¹ Roberto Mangabeira Unger, *The Religion of the Future* (Cambridge, Mass.: Harvard University Press, 2014) 1, 86.

I. INTRODUCTION

There now appears to be a consensus in Canada that we have a serious access to justice problem. Chief Justices have been vocal.² The Governor-General has made an intervention.³ Legal newspapers and websites have weekly, if not daily, stories on access to justice concerns. There have been several thorough reports which both detail the problems and propose possible paths forward.⁴ And one CEO of a national law firm has lamented that

² Chief Justice Beverley McLachlin, “Justice in our Courts and the Challenges We Face” (Remarks presented at the Empire Club of Canada, Toronto, Ontario, 8 March 2007) online: <<http://speeches.empireclub.org/62973/data?n=1>>; Chief Justice Beverley McLachlin, “A Busy Court, Access to Justice, and Public Confidence” (Speech delivered at the Council of the Canadian Bar Association at the Canadian Legal Conference, Halifax, Nova Scotia, 16 August 2011) online: <<http://www.ipolitics.ca/2011/08/16/beverley-mclachlin-address-to-the-council-of-the-canadian-bar-association/>>; Kendyl Sebesta, “Winkler lectures bar about access to justice”, *Law Times* (2 April 2014), online: <<http://www.lawtimesnews.com/201204022005/headline-news/winkler-lectures-bar-about-access-to-justice>>; Chief Justice Robert Bauman, “Remarks of the Honourable Chief Justice Robert J Bauman” (Speech delivered at the Trial Lawyers Association of British Columbia 2013 Bench and Bar Awards Luncheon, 5 April 2013), online: <<http://www.courts.gov.bc.ca/supreme-court/about-the-supreme-court/speeches/TLABC%20Bench%20Award%20-%20April%205%202013.pdf>>.

³ David Johnson, “The Legal Profession in a Smart and Caring Nation: A Vision for 2017” (Speech delivered at the Canadian Bar Association’s Canadian Legal Conference, Halifax, Nova Scotia, 16 August 2011), online: <<http://www.gg.ca/document.aspx?id=14195>>; Or David William Scott, “Access to Justice in Contemporary Society” (William A Howard Memorial Lecture delivered at the Faculty of Law, University of Calgary, 9 February 2012) [unpublished].

⁴ Action Committee on Access to Justice in Civil and Family Matters, Report, “Access to Civil and Family Justice: A Roadmap for Change” (October 2013), online: <<http://www.cfcj-fcj.org/action-committee>> [Action Committee on Access to Justice, “A Roadmap for Change”]; Canadian Bar Association Access to Justice Committee, Report, “Equal Justice: Balancing the Scales” (November 2013), online: <<http://www.cba.org/CBA/equaljustice/main/>> [CBA, “Equal Justice”]; Canadian Bar Association Legal Futures Initiative, “Futures: Transforming the Delivery of Legal Services in Canada” (August 2014), online: <<http://www.cbafutures.org/The-Reports/Futures-Transforming-the-Delivery-of-Legal-Service>> [CBA, “Futures”].

“access to justice is the legal profession’s equivalent of global warming.”⁵

However, in my opinion, despite all this alarm, attention, and progress, two key components tend to be missing from the analyses: a clearly articulated conception of the ethical identity of a Canadian lawyer, and a sufficiently concrete elaboration of the responsibilities of law societies to help in the resolution of our access to justice problems. I will also argue that both these components are closely connected.

Before I proceed to advance my argument, several caveats are essential. First, I do, of course, realize that access to justice is much more than access to law and/or access to lawyers. But, at the same time, it cannot be denied that the legal profession is one of the determining structural forces in the access to justice problematic. The legal profession cannot be allowed to get off the hook, even by inadvertence. Second, some might ask why am I focusing on law societies, and that I should be paying attention to my own backyard – the law schools’ responsibilities for promoting access to justice. I have been doing that in several recently published essays.⁶ Third caveat: while I am going to be critical of law societies, I do recognize that many individual lawyers, either in their practices or through pro bono, strive hard to enhance access to justice. My concern in this essay is more with institutional responsibility, not individual responsibility. My fourth caveat is that I am focusing on law societies and not the Federation of Law Societies of Canada (FLSC) because

⁵ Julius Melnitzer, “David Scott Warns of Profession’s Global Warming Equal”, *Law Times* (13 February 2012), online: <<http://www.lawtimesnews.com/201202131983/headline-news/david-scott-warns-of-professions-global-warming-equal>>.

⁶ See e.g. Richard Devlin & Jocelyn Downie, “Public Interest Vocationalism: A Way Forward for Legal Education in Canada” in Fiona Westwood & Karen Barton, eds, *The Calling of Law* (Ashgate, 2014) 85 [Devlin & Downie, “Public Interest Vocationalism”]; Richard Devlin & Jocelyn Downie, “Teaching ‘Professionalism in the Public Interest’: Law as a Case Study” in I Wienzock, ed, *Educating Professionals in Ethics and Judgment in a Changing Learning Environment* (Toronto: Canadian Professional Accountants Association, 2015).

a) it is the law societies who have the legislative authority and obligation to govern the legal profession not the FLSC, and b) the FLSC is over extended and under resourced as an organization.⁷

My argument will proceed in three stages. First, I will provide an overview and assessment of the three major access to justice reports that have been recently published. Second, I will outline an account of the ethical identity of a Canadian lawyer and what this says about the access to justice problem. Third, I will propose eight concrete recommendations that law societies should pursue to assist in the resolution of the problems of access to justice.

II. SETTING THE CONTEXT

In the last couple of years there have been three excellent reports addressing the challenges of access to justice: the Action Committee on Access to Justice in Civil and Family Law Matters' *A Roadmap for Change*;⁸ and the Canadian Bar Association's *Equal Justice: Balancing the Scales*,⁹ as well as its *Futures Report*.¹⁰ Each report is based upon strong research; each report is imaginative; and each report is passionately crafted. And, on one level, there is very little with which I disagree. However all the reports lack an adequate vision of what it means to be a Canadian lawyer and, as a consequence, they lack an adequate conception of the concrete responsibilities of the legal profession to promote access to justice. Let me elaborate.

A. A Roadmap for Change

It is important to emphasize some of the highlights of this Report:

⁷ This is not to suggest, however, that the FLSC could not play a facilitative role, which it currently does for example with its *Inventory of Access to Legal Services Initiative of the Law Societies of Canada* (29 September 2014), online: <<http://www.flsc.ca/en/access-to-legal-services/>> [FLSC, "Inventory of Access to Legal Services Initiatives].

⁸ Action Committee on Access to Justice, "A Roadmap for Change", *supra* note 4.

⁹ CBA, "Equal Justice", *supra* note 4.

¹⁰ CBA, "Futures", *supra* note 4.

- It comes with the imprimatur of the Chief Justice of Canada.¹¹
- It insists that we must “think big,”¹² and it demands “a culture shift”, “a fresh approach and a new way of thinking.”¹³
- It cogently identifies the nature, scope and extent of the problems,¹⁴ emphasizing “the broad range of legal problems experienced by the public – not just those that are adjudicated by courts.”¹⁵
- It sensibly articulates a number of guiding principles.¹⁶
- It rationally proposes three distinct clusters of goals: “innovation goals”, “institutional and structural goals” and “research and funding goals.”¹⁷
- It identifies three institutional priorities: the development of an enhanced front end “Early Resolution Services Sector”; the establishment of multi-disciplinary family services; and the creation of Access to Justice Implementation Commissions (AJIC’s)

This is all very positive and energizing. However, in my opinion, the *Report* glosses over two key challenges: a conception of the ethical identity of the lawyers who are meant to engage in this “culture shift...and new way of thinking”; and an articulation of the particular responsibilities of law societies who inevitably are a key institutional and structural player in the pursuit of the *Report*’s goals.

There are approximately 100,000 lawyers in Canada and, for good or bad, they are central players in the access to justice conundrum. Consequently it behooves us to directly address the question of how do lawyers understand their roles and

¹¹ Action Committee on Access to Justice, “A Roadmap for Change”, *supra* note 4 at i.

¹² *Ibid* at v.

¹³ *Ibid* at 6.

¹⁴ *Ibid* at 1-5.

¹⁵ *Ibid* at 2.

¹⁶ *Ibid* at 6-9.

¹⁷ *Ibid* at 10-23.

responsibilities and this, in turn, raises the issue of what is the required ethical identity of a Canadian lawyer. Unfortunately, the *Report* only addresses these questions indirectly, under the rubric “Law School, Bar Admission and Continuing Life Long Learning”:

- Law schools, bar admission programs and continuing legal education providers should put a modern access to justice agenda at the forefront of Canadian legal education. This agenda will be an important part of a new legal reform culture. While law faculties will need to develop their own particular research and teaching agendas, and recognizing that many innovative initiatives have already begun, the following initiatives should be developed and expanded.
- Modules, courses and research agendas focused specifically on access to justice, professionalism, public service, diversity, pluralism and globalization. The needs of all individuals, groups and communities, and in particular self-represented litigants, aboriginal communities, immigrants, other marginalized and vulnerable groups and rural communities should be specifically considered.
- Increased skills based learning that focuses on consensual dispute resolution, alternative dispute resolution and other non-adversarial skills.
- Social, community, poverty law, mediation and other clinical, intensive and experiential programs.
- The theory and practice of family law should be promoted as a central feature of the law school program.
- Research and promotion of different ways of delivering legal services that provide affordable and accessible services to the public as well as a meaningful professional experience for lawyers, including a reasonable standard of living.

Similarly, bar admission programs and continuing legal education providers should promote access to justice as a central feature of essentially all lawyering programs.¹⁸

These are proposals worthy of consideration, but they lack a justification...why? Why should law students and law schools be required to go down these paths? Why should law societies and continuing professional development providers buy into this agenda? The problem is that the *Report* lacks a normative theory of lawyering. It presents us with a fact, an “is”—access to justice is a problem—and assumes that this generates an “ought,” law schools,

¹⁸ *Ibid* at 21–22 (footnotes omitted).

law students, and lawyers, should step up. But the problem is that many lawyers are not stepping up...and they are not likely to in the absence of a conception of the ethical identity of a Canadian lawyer (with its correlative responsibilities) and, importantly, a regulatory authority to promote—indeed enforce—those responsibilities.

This, in turn, connects to my second reservation about the role of law societies in the promotion of access to justice. Here, the *Report* is somewhat stronger. For example it provides:

2.1 Modernize and Expand the Legal Services Sector

Many everyday problems require legal services from legal professionals. For many, those services are not accessible. Innovations are needed in the way we provide essential legal services in order to make them available to everyone. The profession – including the Canadian Bar Association, the Federation of Law Societies of Canada, law societies, regional and other lawyer associations – will, together with the national and local access to justice organizations discussed below (see pt.3.B.5), take a leadership role in this important innovation process. Specific innovations and improvements that should be considered and potentially developed include:

- limited scope retainers - “unbundling”;
- alternative business and delivery models;
- increased opportunities for paralegal services;
- increased legal information services by lawyers and qualified non-lawyers;
- appropriate outsourcing of legal services;
- summary advice and referrals;
- alternative billing models;
- legal expense insurance and broad-based legal care;
- pro bono and low bono services;
- creative partnerships and 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.

2.3 Make Access to Justice a Central Aspect of Professionalism

Access to justice must become more than a vague and aspirational principle. Law societies and lawyers must see it as part of a modern – “sustainable” – notion of legal professionalism. Access to justice should feature prominently in law school curricula, bar admission and continuing education programs, codes of conduct, etc. Mentoring will be important to sustained success. Serving the public – in the

form of concrete and measurable outcomes – should be an increasingly central feature of professionalism.¹⁹

My concern is the tentativeness of these suggestions “should be considered and potentially developed.” In fact, as we will discover in Part IV (of this paper), many of these suggestions are already in place...they have been “considered”, and they have been “developed.” The *Report*, in its conclusion, goes out of its way to emphasize that it is “a roadmap, not a repair manual.”²⁰ This is an evocative metaphor. But if the wheels are off the bus, as much of the *Report* seems to claim, a roadmap is of little use. It is time for someone to get the jack out, change the wheels and get it back on the road. In my opinion, law societies have both the responsibility and authority to do that, and the *Roadmap* could have provided them with greater and more specific directions.

B. CBA Interventions

The CBA, flying under the banner of “Influence, Leadership and Protection”, has been especially vocal on the question of access to justice. It has recently published two reports addressing the issue: *Equal Justice: Balancing the Scales*²¹ and the *Legal Futures Report*.²²

1. *Equal Justice: Balancing the Scales*

This is a well-researched, thoughtful, and engaging report. As an “invitation to envision and act”,²³ and to “think systemically, and act locally”,²⁴ it proposes 31 targets for achieving equal justice within Canada²⁵ with identified timeframes and milestones ranging from 2020 through to 2030. In this regard *Equal Justice* does resemble a repair manual more than a roadmap. This analogy is

¹⁹ *Ibid* at 14-15 (footnotes omitted).

²⁰ *Ibid* at 24.

²¹ CBA, “Equal Justice”, *supra* note 4.

²² CBA, “Futures”, *supra* note 4.

²³ CBA, “Equal Justice”, *supra* note 4 at 1.

²⁴ *Ibid* at 7, 165.

²⁵ *Ibid* at 9.

reinforced by its exhortation to its readers to ask “what can I do, either by myself or working with others to contribute to access to justice?”²⁶

Once again there is much to value in *Equal Justice*:

- The reminder that we need a “people-centered justice system”²⁷
- The articulation of a functional definition of essential legal needs:

those that arise from legal problems or situations that put into jeopardy a person’s or a person’s family’s security - including liberty, personal safety and security, health, employment, housing or ability to meet the basic necessities of life.²⁸
- The recognition that the general public has a holistic view of justice that is larger than lawyers and courts providing legal services.²⁹
- The belief that “law is a life skill”³⁰, and that it is important to enhance peoples’ individual legal capabilities³¹ for example, through the use of public legal education initiatives³² and accessible technologies.³³
- The endorsement of “team delivery of legal services” i.e., the provision of “comprehensive, cost-efficient services through teams of lawyers, other legal service providers (like paralegals) and providers of related services (like social workers).”³⁴

²⁶ *Ibid* at 7 [emphasis in original].

²⁷ *Ibid* at 14.

²⁸ *Ibid* at 9, 92.

²⁹ *Ibid* at 93.

³⁰ *Ibid* at 64.

³¹ *Ibid* at 61.

³² *Ibid* at 66.

³³ *Ibid* at 81.

³⁴ *Ibid* at 95-97.

- Proposals for “incubator programmes” to assist entrepreneurial lawyers develop innovative delivery models and virtual legal practices.³⁵
- Proposals for national benchmarks for legal aid coverage, eligibility and quality of legal services.³⁶
- Recommendations for law schools to enhance their commitment to, and focus on, the challenges of access to justice.³⁷
- The establishment of Access to Justice Commissioners by the federal, provincial and territorial governments.³⁸
- The creation of a Canadian Center for Justice Innovation.³⁹
- Enhanced commitment by the CBA, and its members, to the access to justice agenda.⁴⁰

Despite these strengths, the *Equal Justice* is limited, particularly when it asserts that there is “an evolving consensus on the central directions for reform.”⁴¹ The *Report* frequently acknowledges that the state of access to justice is “abysmal”⁴², that “tinkering is insufficient”,⁴³ that the “system is too badly broken for a quick fix,”⁴⁴ “that people must have access to a lawyer when their situation requires it, regardless of their financial capacity,”⁴⁵ and that we all have a role to play.⁴⁶ However, it has surprisingly little to say concretely about either what it means to be a Canadian lawyer or the responsibilities of law societies as pivotal institutions for the

³⁵ *Ibid* at 99.

³⁶ *Ibid* at 106.

³⁷ *Ibid* at 118-121.

³⁸ *Ibid* at 132-137.

³⁹ *Ibid* at 142.

⁴⁰ *Ibid* at 149-150.

⁴¹ *Ibid* at 5, 93.

⁴² *Ibid* at 6.

⁴³ *Ibid* at 56.

⁴⁴ *Ibid* at 56.

⁴⁵ *Ibid* at 62.

⁴⁶ *Ibid*.

governance of the legal profession and, therefore, the delivery of legal services.⁴⁷ This is curious because the *Report* explicitly calls for “effective leadership”,⁴⁸ and gestures toward “a superhero”,⁴⁹ seemingly through the appointment of “access to justice commissioners” by the federal government and each of the provincial and territorial governments.⁵⁰

The *Equal Justice Report* only devotes slightly more than one page out of a total of 174 pages to the topic of “Regulation and Access to Justice.”⁵¹ However, it merely describes some proposals from three academics (including myself) but it does not seriously pursue any of the proposals except to express reservations about ABSs (Alternative Business Structures).⁵² Conspicuously, this is one of the few sections where the *Report* does not propose “targets, milestones or benchmarks.” By contrast, the *Report* devotes four pages to the responsibilities of law schools, and proposes a comprehensive set of targets, timelines and milestones⁵³, and five pages to the creation of Access to Justice Commissioners.⁵⁴ This lack of attention to the responsibilities of law societies raises a red flag, and suggests that there is little that they need to do. In Part IV, I will suggest otherwise.

2. *Futures: Transforming the Delivery of Legal Services in Canada*

In 2014, the CBA released its *Futures Report* as a “complement”⁵⁵ to its *Equal Justice Report*. The tone and focus of this *Report* comes

⁴⁷ There are several references to the responsibilities of law societies in the context of limited scope retainers/unbundling of legal services, see e.g. *ibid* at 94-95; team delivery of legal services; see e.g. *ibid* at 95- 97; legal practice incubators, see e.g. *ibid* at 99-101.

⁴⁸ *Ibid* at 124, 130.

⁴⁹ *Ibid* at 125.

⁵⁰ *Ibid* at 135-137.

⁵¹ *Ibid* at 103-104.

⁵² *Ibid* at 104.

⁵³ *Ibid* at 118-121.

⁵⁴ *Ibid* at 132-137.

⁵⁵ CBA, “Futures”, *supra* note 4 at 10.

across more as toolkit than either a roadmap or a repair manual. While the first two *Reports* had relatively little to say as to the particular responsibilities of lawyers and law societies to improve access to justice, the *Futures Report* recognizes that these are vital concerns and gives them relatively high prominence. Indeed, there are times when *Futures* verges on the iconoclastic. It suggests that we might need to “cast off outdated attitudes and processes”,⁵⁶ and it asserts that “[n]o idea, no institution, no model, no regulation should be sacrosanct.”⁵⁷ It asks, “What are we waiting for?”⁵⁸

The *Report* identifies several major challenges that will make change inevitable for the Canadian legal profession: the globalization of competition; technological innovation; market liberalization; enhanced competition; changing client expectations; rapidly increasing diversity; and a growing lack of access to legal services.⁵⁹ Ominously, it portends “[t]he legal profession must adapt to...change or be forced to do so by others...or risk being marginalized.”⁶⁰ In response, invoking the tenets of innovation, client-centred responsiveness, and flexibility/choice, it proposes 22 recommendations for a variety of stakeholders⁶¹ and a 10 point “Action Plan” for the CBA itself.⁶² Central to many of these recommendations is a twin focus on increasing access to justice and enhancing diversity within the profession and its governing bodies:

Access to legal services is key to the future relevance of the Canadian legal profession; success should be measured by the ability of legal innovation to both improve existing legal services and to meet unmet legal needs. Finally, the Canadian legal profession needs to be more inclusive and more reflective of Canadian demographics as part of its transformation.⁶³

⁵⁶ *Ibid* at 66.

⁵⁷ *Ibid* at 66.

⁵⁸ *Ibid* at 66.

⁵⁹ *Ibid* at 3, 6-7, 24-25, 34.

⁶⁰ *Ibid* at 10.

⁶¹ *Ibid* at 68-72.

⁶² *Ibid* at 74.

⁶³ See e.g. *ibid* at 10, 14-15, 20, 27, 28.

There are, once again, many strengths in this report:

- It does present an explicit vision of the role and responsibilities of Canadian lawyers and the profession.⁶⁴
- It recognizes that “access to legal services in Canada is a driver of change that may ultimately have the greatest impact”⁶⁵ and that “(i)f the Canadian legal profession cannot ensure that low- and middle-income Canadians have access to affordable, regional, and culturally competent legal services, someone else will. Similarly, if lawyers do not deliver services in ways that meet client expectations, someone else will.”⁶⁶
- It admits that lawyers and the legal profession, as a community and culture, tends to be conservative and risk-averse.⁶⁷
- It invites us to reconceptualise the challenges posed by change as an opportunity for Canadian lawyers to “reassert their relevance and value” and to “to better serve the public interest.”⁶⁸
- It exhorts law societies to significantly reform their regulatory processes and rules to allow for:
 - Alternative business structures.⁶⁹
 - Multidisciplinary practices.⁷⁰
 - Fee-sharing with non-lawyers.⁷¹
 - Entity based regulation, and the development of ethical infrastructures.⁷²

⁶⁴ *Ibid* at 18.

⁶⁵ *Ibid* at 25

⁶⁶ *Ibid* at 25.

⁶⁷ *Ibid* at 26

⁶⁸ *Ibid* at 29.

⁶⁹ *Ibid* at 41-42.

⁷⁰ *Ibid* at 44.

⁷¹ *Ibid* at 42-43.

⁷² *Ibid* at 46.

- A principle-based compliance model to enhance diversity and inclusion in the profession.⁷³
- Enhanced lay representation in the governance of the profession.⁷⁴
- It suggests proposals for the reform of legal education in law schools, pre-call training and continuing professional development.⁷⁵

I will revisit (and endorse) some of these recommendations later in the paper. However, at this point, I simply want to suggest that despite these many strengths, and despite its recognition that “[t]he future for lawyers is as much about ethics and value as it is about economics and value”,⁷⁶ the *Futures Report* does not quite go far enough, either in specifying the particular ethical responsibilities of lawyers or the obligations of the regulators—the law societies—to promote access to justice. It is to each of these topics that the next two sections of this paper turn their attention.

III. THE ETHICAL IDENTITY OF A CANADIAN LAWYER

I have suggested in the previous section that it is not enough to assume or assert that a Canadian lawyer has an obligation to provide access to justice. In the eyes of many, law is a business, and it should be guided by the norms of business.⁷⁷ Consequently, it is important to provide a justification as to why Canadian lawyers have an obligation to contribute to access to justice initiatives and why access

⁷³ *Ibid* at 48-49.

⁷⁴ *Ibid* at 50-51.

⁷⁵ *Ibid* at 54-63.

⁷⁶ *Ibid* at 3.

⁷⁷ See e.g. Jim Middlemiss, “Bombardier general counsel calls on law firms to act more like businesses”, *Financial Post* (4 June 2014), online: <<http://business.financialpost.com/2014/06/04/bombardier-general-counsel-calls-on-law-firmsto-act-more-likes-businesses/>>.

to justice is constitutive of the ethical identity of a Canadian lawyer.⁷⁸

Equal Justice offers almost nothing on the ethical identity of a lawyer. There is a brief reference to a proposal by Professor Elman to develop an “aspirational statement for every law student [which] includes a community service component.”⁷⁹ Later, as an “action” it recommends that “the CBA adopts a statement on ‘The Model Lawyer of Tomorrow’ to encourage and foster dialogue on the role of lawyers in promoting access to justice.”⁸⁰ But that is it. *A Roadmap for Change* is also quite thin on this issue. Beyond several passing references to Professor Farrow’s idea of “sustainable professionalism”⁸¹, very little is proffered.

By contrast, the *Futures Report* does go significantly further. It specifically asserts that lawyers have a “dual imperative”:

Lawyers should remain active and prosper because they bring trust to those they advise through their professional obligations, i.e., to be zealous representatives of their clients, and to protect the rule of law and the administration of the legal system. It is this dual imperative that sets aside lawyers as a profession, rather than as mere providers of legal services. A lawyer’s duty to a client is to protect the client’s interests with candour and confidentiality and without conflict of interest, while concurrently ensuring the integrity of the justice system. Fidelity to law without loyalty to clients is inconsistent with democratic values and the dignity of all members of society. Loyalty to clients without fidelity to law is inconsistent with the lawful ordering of society. The purpose that lawyers serve is to ensure that all members of society may exercise their legal rights and freedoms knowing that this exercise will be honoured by all other members of society and by society itself. Lawyers create positive social change for their clients by crafting structures that provide fair solutions to the problems that clients face, or opportunities that clients wish to seize.⁸²

⁷⁸ See also Alice Woolley, “Imperfect Duty: Lawyers’ Obligation to Foster Access to Justice” (2008) 45:5 *Alta L Rev* 107

⁷⁹ CBA, “Equal Justice”, *supra* note 4 at 120.

⁸⁰ *Ibid* at 121.

⁸¹ Action Committee on Access to Justice, “A Roadmap for Change”, *supra* note 4 at 15, 22; see further Trevor CW Farrow, “Sustainable Professionalism” (2008) 46:1 *Osgoode Hall LJ* 51 at 96.

⁸² *Ibid* at 18.

Later, *Futures* asserts that the legal profession has “a collective obligation to advance the public interest.”⁸³ It then continues, “[a]t their core, lawyers’ professional obligations require them to subordinate their personal interests in the interests of their clients and in the interest of society as a whole.”⁸⁴ While these propositions are promising, they do not quite explain why fostering access to justice is a particular obligation of Canadian lawyers and they do not go far enough to unpack the ethical identity (and responsibilities) of a Canadian lawyer.

In this section, I want to propose a more expansive conception of the ethical identity of a lawyer – public interest vocationalism⁸⁵ and how that is tied to the access to justice imperative. I will first address the idea of vocation, and then outline what I mean by public interest.

A. Vocationalism

“Vocationalism” is derived from the Latin *vocation*, meaning “a calling.” Historically, a vocation has been closely identified with religion—God calling someone into service. However, a review of the literature quickly reveals that “vocationalism” has, over time, been disconnected from its religious connotations and become a much more diverse and protean discourse.

As a discourse, vocationalism has had a significant influence on a number of professions, particularly nursing and medicine, as well as law. From the multi-disciplinary literature on vocationalism, we can identify two main variations in what is seen to be the essence of a vocation—the aspirational and the technical. When one thinks of vocation in its aspirational sense it is normally used in contradistinction to “a job” or “a career”.⁸⁶ Thus deployed, vocation

⁸³ CBA, “Futures”, *supra* note 4 at 40.

⁸⁴ *Ibid.*

⁸⁵ This section draws on Devlin & Downie, “Public Interest Vocationalism”, *supra* note 6. We prefer “public interest vocationalism” to “professionalism” because the latter concept lacks specificity.

⁸⁶ See William Osler, “The Vocation of Medicine and Nursing” in Basil Matthews, ed,

is often aligned with the discourses of goals, values, and norms. The technical conception of vocation takes a different tack. Here “vocation” is identified with practical and functional abilities. In this sense “vocation” is used in contradistinction to “academic”, which is often characterized as abstract, conceptual and theoretical.⁸⁷ Thus deployed, vocation is often aligned with the discourses of skills, competencies, and proficiencies. Professor Downie and I have argued that the distinction between these two conceptions of vocation should not be overblown in the context of the Canadian legal profession. While each of the two conceptions is different, they can be conceived of as complementary rather than contradictory. One can be characterized as the ends (aspirational—the value of the public interest) and the other as the means (technical—the ability to effectively practice law). We should not seek to prefer one over the other but rather we should embrace both and understand them as being not in opposition but rather in creative tension.

B. Public Interest

I locate the “public interest” in the context of the practice of law in Canada, which operates within a regime of delegated self-regulation.⁸⁸ Canada is a federal regime, and the ability to practice law falls under the jurisdiction of the 13 provincial and territorial

Essays on Vocation (London: Oxford University Press, 1919) 119; David Loxterkamp, “Doctors’ Work: Eulogy for my Vocation” (2009) 7:3 *Ann Fam Med* 268; DA Ballantyne, “Medicine: a job or a vocation” (1954) 53:47 *NZ Med J* 293; Manuel Velasco-Suarez, “Evaded Bioethics and the Vocation of Medicine - the Future at Stake” (2000) 53 *Surgical Neurology* 193.

⁸⁷ See e.g. Craig Evan Klafter, “The Influence of Covational Law Schools on the Origins of American Legal Thought” (1993) 37:3 *Am J Leg Hist* 307; Edward Veitch, “The Vocation of our Era for Legal Education” (1980) 44 *Sask L Rev* 19; Andy Boon, “Making Good Lawyers: Challenges to Vocational Legal Education” (Opening Address delivered at the UK Centre for Legal Education Vocational Teachers Forum, University of Westminster, 26 September 2001), online: <<http://78.158.56.101/archive/law/resources/employer-engagement/boon/>>.

⁸⁸ See e.g. Richard Devlin & Albert Cheng, “Re-Calibrating, Re-Visioning and Re-Thinking Self-Regulation in Canada” (2010) 17:3 *IJTL* 233.

governments. Each province and territory has passed legislation making it clear that the practice of law is a privilege, not a right. Each province and territory has delegated to their law societies the authority to regulate the practice of law. In other words, the ability to practice law is a statutorily authorized monopoly to quasi-autonomous law societies. Of crucial importance, this delegating legislation outlines the core function of the law societies. In Nova Scotia, for example, s. 4(1) of the *Legal Profession Act* explicitly provides that the core obligation of the law society (the Nova Scotia Barristers Society) is to “protect the public interest in the practice of law”.⁸⁹ In Manitoba section 3(1) of the *Legal Profession Act* states that the “purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.”⁹⁰ It is this statement of “the public interest in the delivery of legal services,” that lays the foundation for our approach. If the obligation of the law societies is to promote ‘the public interest in the delivery of legal services’ then, of necessity, those who practice law must also be guided by the public interest. Their calling, their vocation, is service to the public interest through the practice of law. Hence my endorsement of “Public Interest Vocationalism” and my suggestion that such vocationalism requires (technical) competencies as well as (aspirational) obligations to promote the public good.

The idea of “the public interest” might strike some as being so amorphous and indeterminate as to provide little guidance for discerning substantive content for a revised conception of vocationalism. I resist such skepticism on two grounds. First, the statutory mandate to promote the public interest concretely rules out certain powerful (and perhaps disturbingly pervasive)

⁸⁹ *Legal Profession Act*, SNS 2004, c 28, s 4(1). Ontario goes even further. Not only is there a duty to “protect the public interest” there is also a “duty to act so as to facilitate access to justice for the people of Ontario.” *Law Society Act*, RSO 1990, L 8, s 4.2.

⁹⁰ *Legal Profession Act*, SM 2002, c 44, s 3(1).

approaches to the practice of law. For example, it makes it clear, at the level of principle, that membership in the legal profession is not just a private preference, a personal career choice, or exercise of an individual's liberty right. Rather, it is a publically conferred privilege, a "public asset" contingent on a larger social calling, which entails the fulfilment of certain obligations.⁹¹

Second, in the Canadian context, I would argue that the public interest in the practice of law can be given substantive content by reference to Canada's constitutional principles and values.⁹² In the course of the last two decades, in a series of decisions, the Supreme Court of Canada has outlined a number of written and unwritten constitutional values including:

- Federalism
- Democracy
- Constitutionalism and the Rule of Law
- Respect for Minorities
- The Honour of the Crown and a Duty of Reconciliation with Aboriginal Peoples
- Respect for the Inherent Dignity of the Human Person
- Commitment to Social Justice and Equality
- Accommodation of a Wide Variety of Beliefs
- Respect for Cultural and Group Identity
- Faith in Social and Political Institutions Which Enhance the Participation of Individuals and Groups in Society.⁹³

⁹¹ See e.g. Richard Devlin, "Breach of Contract?: The New Economy, Access to Justice and the Ethical Responsibilities of the Legal Profession" (2002) 25 Dal LJ 335.

⁹² In making this claim I am drawing on, but significantly expanding beyond Wendal's idea in Bradley Wendal, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010) and the analysis in Alice Woolley, *Understanding Lawyers Ethics in Canada* (Toronto: LexisNexis, 2011). David Wiseman has suggested to me that there may also be arguments based upon sections 7 and 15 of the *Charter* that might impose obligations on law societies to do more to enhance access to justice [e-mail, November 24, 2014]. Such an argument, while intriguing, is beyond the scope of this paper.

⁹³ *R. v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200; *Hunter v Southam*, [1984] 2 SCR 145, 11 DLR (4th) 641; *Reference re Quebec Secession Reference*, [1998] 2 SCR 217, 161 DLR (4th) 385; *Haida Nation*, 2004 SCC 73, [2004] 3 SCR 511.

These constitutional values give content to the concept of the public interest. They provide the juris-generative foundation for public interest vocationalism tailored to the unique history and current context of Canada. Several of these principles—especially the rule of law,⁹⁴ respect for minorities, respect for the inherent dignity of the human person, commitment to social justice and equality, and faith in institutions which enhance participation of individuals and groups in society—dovetail quite closely with the concerns of access to justice. As such, they help us to conceptualize the ethical identity of the contemporary Canadian lawyer, and comprehend how fostering access to justice is a constitutive component of that identity. We are now in a position to turn to the next (and final) stage of my argument, the responsibility of law societies to seriously pursue the access to justice obligation.

IV. THE RESPONSIBILITIES OF LAW SOCIETIES TO ENHANCE THE ACCESS TO JUSTICE AGENDA

The starting point for this part of the argument is that law societies have one primary obligation: to promote the public interest in the delivery of legal services. Moreover, there are strong indications that most law societies do recognize that a key aspect of this obligation is to facilitate access to justice.

As part of my research for this paper, I conducted a survey of all Canadian law societies to collate what they are doing to support or enhance access to justice. I received ten very helpful responses. In addition, and fortuitously, the FLSC produced a second edition of its *Inventory of Access to Legal Services Initiatives* on September 29, 2014.⁹⁵ So there does exist a fairly comprehensive compendium of what the law societies are in fact doing to promote access to justice.

⁹⁴ In *Trial Lawyers of British Columbia v. British Columbia Attorney General*, [2014] SCJ No 59, the majority of the Supreme Court of Canada explicitly linked the rule of law and access to justice. *Ibid* at paras 38-40. See also *Hryniak v Mauldin*, 2014 SCC 7 at para. 1.

⁹⁵ FLSC, “Inventory of Access to Legal Services Initiatives”, *supra* note 7.

- They have all changed their Codes of Conduct to allow for the unbundling of legal services and limited scope retainers.⁹⁶
- The vast majority have representation on their respective provincial or territorial access to justice committees, which bring together various stakeholders “including government(s), the courts, public legal educators, legal aid bodies and others.”⁹⁷
- Most have explored methods by which they can enhance support for small and sole practitioners, especially those who practice in rural or remote areas, or those who serve communities where there are linguistic or cultural barriers.⁹⁸
- A significant number have provided support for, and participated in, public legal education and information initiatives to deliver “easy to find and easy to use information about legal issues.”⁹⁹
- A significant number sponsor, support, or promote programmes that provide summary advice, brief and referral services, either in person, by phone or on-line.¹⁰⁰
- Several have participated in the establishment “self-help services” that are designed to provide some assistance to self-represented litigants.¹⁰¹
- Several encourage, endorse, and support pro bono and low bono initiatives, and some even provide financial assistance.¹⁰²
- A few have engaged in evidence based “legal needs assessments” in an attempt to better identify the realities

⁹⁶ *Ibid* at 19-20.

⁹⁷ *Ibid* at 3-6.

⁹⁸ *Ibid* at 24-28.

⁹⁹ *Ibid* at 7-13.

¹⁰⁰ *Ibid* at 15-17.

¹⁰¹ *Ibid* at 6-7.

¹⁰² *Ibid* at 21-23.

of access to justice, particularly for historically disadvantaged or marginalized communities.¹⁰³

- A couple report that they lobby for enhanced legal aid funding.¹⁰⁴
- One actively promotes legal expense insurance.¹⁰⁵

This survey generates several insights. First, it confirms that law societies recognize the reality of the access to justice challenge and that they accept that they have a responsibility to respond. Second, the investment in, and support of, such a variety of initiatives is to be recognized and applauded. Third, the review does indicate the unevenness of the responses—some provinces and territories appear to be enthusiastic, imaginative and innovative, others seem less motivated. Fourth, the initiatives lack coherence and co-ordination, resulting in a checkerboard system across Canada. Fifth, and finally, all these initiatives are essentially facilitative in nature, they are designed to help lawyers to engage in access to justice initiatives...if the lawyers choose to do so. However, none of the initiatives do anything to suggest that lawyers have an obligation to respond to the access to justice imperative; they do very little to address how engagement with access to justice is constitutive of the ethical identity both of individual lawyers and the profession as a whole. In other words, while these recent initiatives are steps in the right direction, they do not go far enough, nor fast enough.

In the following, I will offer eight proposals that are designed to significantly expand the access to justice repertoire of Canadian law societies.

A. Redrafting Codes of Conduct

A starting point is a consideration of the articulated ethical obligations of Canadian lawyers, to assess how they advance the access to justice imperative.

¹⁰³ *Ibid* at 17-18.

¹⁰⁴ *Ibid* at 21. In fact all law societies probably do engage in such lobbying.

¹⁰⁵ *Ibid* at 20.

The Federation of Law Societies' *Model Code* has been adopted by most provinces, with only relatively minor modifications. What it has to say about access to justice is both revealing and disappointing. The Preface to the *Code* states:

While lawyers are consulted for their knowledge and abilities, more is expected of them than forensic acumen. A special ethical responsibility comes with membership in the legal profession. This Code attempts to define and illustrate that responsibility in terms of a lawyer's professional relationship with clients, the justice system and the profession.¹⁰⁶

This is promising. It continues:

The Code sets out statements of principle followed by exemplary rules and commentaries which contextualize the principles enunciated. The principles are important statement of the expected standards of ethical conduct for lawyers...The Code assists in defining ethical practice...some sections...may be read as aspirational...¹⁰⁷

Again this is very promising. However when we move beyond the Preface to the substance of the *Code*, the promise dissipates.

In the first chapter, Integrity, Commentary 1 states that "collectively lawyers are encouraged the enhance the profession through...b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis."¹⁰⁸ Encouraged...that is it!

In Chapter 4, Making Legal Services Available, Commentaries 1 and 2 address the access to justice concern:

[1] A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programs of public information, education or advice concerning legal matters.

[2] As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages

¹⁰⁶ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, (Ottawa: FLSC, 2014), Preface at 8.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* at 2.1-2, Commentary 1.

lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.¹⁰⁹

Once again, all we have is the language of encouragement, permission, and the “best traditions of the legal profession.” The message is one of chivalry and *noblesse oblige*, not professional ethical identity.

Chapter 5.6 addresses the Lawyer and the Administration of Justice. Once again, the content is disappointing. Commentary [2] asserts that

Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system...¹¹⁰

However, despite this “commitment” to equal justice, the Code fails to give it any substance. And that’s all the Code has to offer on access to justice in its 122 pages, and 7 chapters.

None of the three access to justice reports addresses the Code of Conduct. This silence speaks volumes. However, if a Code of Conduct is designed to articulate the “special ethical responsibilities of lawyers” and if promotion of “the public interest in the delivery of legal services” is the primary responsibility of both lawyers and the law societies, it is profoundly disappointing that law societies would not mandate a commitment to access to justice. It is not that the *Code* does not mandate other responsibilities—it is jam-packed with obligations to clients, to the administration of justice and to the law societies, but it stops short when it comes to access to justice. Thus, at a minimum, I would propose that the *Code* be rewritten to say:

4.1-1 Commentary [1A]

As a matter of public interest, the Law Society requires lawyers to participate in activities or programmes that enhance access to justice.

¹⁰⁹ *Ibid* at 4.1-1, Commentary 1-2.

¹¹⁰ *Ibid* at 5.6-1, Commentary 2.

B. Mandatory Pro Bono

The foregoing suggestion is, obviously, decidedly open-ended. It provides little concrete guidance on how lawyers might foster, or participate in, access to justice initiatives.

More than a decade ago, I wrote an article called “Breach of Contract”, in which I argued that the legal profession had failed to provide access to justice and that one component of a fix would be to have a system of mandatory pro bono.¹¹¹ In that article I mapped out the principled and practical arguments for and against mandatory pro bono targeted to assist marginalized persons or groups, and concluded that a carefully-tailored and nuanced regime of mandatory pro bono was justifiable and achievable. In the interim, the access to justice problem has, as the three reports confirm, got worse. For law societies to continue to ignore this option when all it requires is a relatively small investment of either time or money by its members, suggests that there is still much to be done. Consequently I propose that

Every Canadian lawyer will be required to donate either 50 hours per year or the monetary equivalent of 50 hours (calculated based on her or his hourly rate) to access to justice initiatives.¹¹²

Again, I am not claiming that 5,000,000 hours of legal services (or its financial substitutes) can solve the access to justice challenges for those who are marginalized, but they can go some way towards alleviating part of the problem. And they are certainly not nothing. Furthermore, such a proposal is not as radical as it might seem, because such requirements already exist in some American states¹¹³

¹¹¹ Devlin, “Breach of Contract”, *supra* note 89.

¹¹² Professor David Wiseman has suggested to me that a better approach is to have an “access to justice surcharge [where] the primary duty should be to pay the levy, with hours as a substitute.” [e-mail November 24, 2014] I am disinclined to accept this suggestion for two reasons. First, to prioritize the “levy” tends to commodify the underlying idea of pro bono. Secondly, I believe that some lawyers, once they engage in the pro bono experience, will come to appreciate the professional and personal benefits it might generate.

¹¹³ See e.g. US, State of New York Court of Appeals, *The Amendment of the Rules of the*

and, most recently, the South African *Legal Practice Act* anticipates that lawyers will have to participate in “community service” projects.¹¹⁴

It is worthwhile contrasting my position on mandatory pro bono with the three Canadian Reports. While both the *Roadmap* and *Futures* reports touch upon voluntary pro bono¹¹⁵, they are conspicuously silent on the question of mandatory pro bono. To its credit, the CBA’s *Equal Justice Report* does grasp the nettle of mandatory pro bono, but its response is disappointing. It conceptualizes pro bono as a voluntary and marginal component of the access to justice puzzle assigning it to a “refocused place that better dovetails with what legal aid and the private market provide.”¹¹⁶ In response to an argument by Professor Adam Dodek that codes of conduct need to be revised to make pro bono mandatory, the Report states:

However, unmet legal need and the demand for legal services in Canada far exceeds availability and what can reasonably be provided on a charitable basis. Some question the sustainability of increased dependence on volunteerism by the profession. More fundamentally, the increased emphasis on pro bono services as a solution to the access to justice crisis is seen by some to discourage facing the fundamental inadequacies of our justice system. From this end of the spectrum of views regarding pro bono, the profession’s work in the public good “does nothing to ensure that there is a healthy public commitment” to access to justice, particularly to the disadvantaged, and in fact it can be seen as letting “the government off the hook too easily.” There are many unresolved questions about the extent to which unmet legal needs can reasonably be addressed by pro bono efforts, and the extent to which those efforts are the profession’s responsibility.¹¹⁷

There are at least three problems with this analysis. First, it mischaracterizes pro bono as “charity.” As I and others have argued,

Court of Appeals for the Admission of Attorneys and Counselors at Law, 22 NYCRR § 520.16 (Pro Bono Requirement for Bar Admission); see also Deborah L Rhode, *Pro Bono in Principle and in Practice* (Stanford: Stanford University Press, 2005).

¹¹⁴ *Legal Practice Act* (S Afr), No 28 of 2014, s 29(1).

¹¹⁵ Action Committee on Access to Justice, “A Roadmap for Change”, *supra* note 4 at 14, 16; CBA, “Futures”, *supra* note 4.

¹¹⁶ CBA, “Equal Justice”, *supra* note 4 at 117.

¹¹⁷ *Ibid* at 41 [footnotes omitted].

based upon a public asset theory, pro bono is part of a lawyer's social contract with society.¹¹⁸ Secondly, no one has ever seriously argued that pro bono is a “solution to the access to justice crisis.” Rather, at most, it is identified as one instrument in the toolbox. Third, the argument that it lets “the government of the hook too easily” is politically naïve. The reality is that money is in short supply in governments' coffers and that there are many other pressing demands for these limited funds including health care, education, etc. To resist a universal professional commitment to pro bono on the basis that it legitimizes government underinvestment comes across as petulant—if they won't do it, we won't either. As such, it is hard to square with the promotion of the public interest in the delivery of legal services. Fourth, and confusingly, it should be noted that in its recommendations for reform of legal education, the *Equal Justice Report* does appear to endorse mandatory pro bono when it insists that “by 2020, all graduating law students... (will) have taken some course or volunteer activity that involves experiential learning providing access to justice.”¹¹⁹ This seems contradictory.

One final thought on mandatory pro bono: for those who want to resist the idea, it may not be as draconian as it seems. As I pointed out in the Introduction, many individual lawyers already engage in pro bono activities—all my proposal would do is to provide an acknowledgement of the efforts of those who do, and impose a requirement for the laggards who don't. Such pro bono engagements might also facilitate a culture shift for some law firms, which leads to my next point, the adoption of ethical infrastructures for law firms.

C. Mandatory Ethical Infrastructures

With the increasing influence of the business model of legal practice, many law firms have adopted the practice of appointing a

¹¹⁸ See e.g. Steven Lubet & Cathryn Stewart, “Public Assets Theory of Lawyers' Pro Bono Obligations” (1997) 145 U Penn L Rev 1244.

¹¹⁹ CBA, “Equal Justice”, *supra* note 4 at 121.

managing partner whose primary responsibility is to look after, and preferably enhance, the economic interests of the firm. Such partners sit at the apex of what might be described as the business infrastructure of the law firms.

However we should also embrace a parallel institution within law firms—the ethical infrastructure.¹²⁰ At the apex of this infrastructure, there should be a mandated “ethics partner,” whose primary responsibility is to champion ethics issues within a firm. This responsibility is much larger than current “ethics counsel” which tends to be somewhat reactive, advice-giving on matters such as conflicts of interest. Rather the ethics partner should have two responsibilities—nurturing the growth of an ethical culture and identity for the firm, and serving as a conduit between the law society and the firm by preparing annual reports on their ethical achievements, including, for example, compliance with mandatory pro bono requirements, or other access to justice contributions.

Once again, I want to emphasize that this may not be as radical as it seems, for two reasons. First, ethical infrastructures have already been adopted by a significant number of Australian and American law firms.¹²¹ Secondly, recently the Ethics and Professional Responsibility Committee of the CBA published a *Report and Self Assessment Tool for Evaluating Ethical Infrastructure in Canadian Law Firms*.¹²² The final section of that *Tool* explicitly encourages law firms to address access to justice responsibilities as

¹²⁰ There is a very large literature on ethical infrastructures. See e.g. Ted Schneyer, “Professional Discipline for Law Firms?” (1991) 77:1 Cornell L Rev 10; Susan Saab Fortney, “Systematically Thinking About Law Firm Ethics: Conference on the Ethical Infrastructure and Culture of Law Firms” (2013) 42:1 Hofstra L Rev 1; Elizabeth Chambliss & David B Wilkins, “The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms” (2002) 44 Ariz L Rev 559; Joan Loughrey, “Accountability and the Regulation of the Large Law Firm Lawyer” (2013) 77:5 Mod L Rev 732.

¹²¹ See e.g. Fortney, *ibid*; Chambliss & Wilkins *ibid*.

¹²² Canadian Bar Association, *Ethical Practices Self-Evaluation Tool*, online: <<http://www.cba.org/cba/activities/code/ethical.aspx>>.

part of their mandate.¹²³ While the *Tool* does not go quite as far as I would like, it certainly lays the foundation for a culture shift that can make access to justice a central concern for both law firms and the lawyers who work within those firms.

D. Enhanced Lay Participation in the Governance of the Legal Profession

I do not have a lot of confidence that, given their governance structure, law societies will embrace any of the three foregoing proposals. Several years ago, in a paper that assessed the benefits and disadvantages of self-regulation, I argued in favour of enhanced lay participation in the governance of the Canadian legal profession.¹²⁴ The foundation of that analysis was built on basic participatory democratic principles: if the legal profession is obliged to serve the public interest, then the public must have a voice and vote in the governance of the profession.¹²⁵

At the time some regulators considered this blasphemy...for them, the foundational principle of the independence of the bar meant that only lawyers could govern the profession.¹²⁶ However, the ground seems to have shifted in recent years. In England and Wales,¹²⁷ and California¹²⁸, there have been important governance reforms that require significant lay representation on the governing bodies of their legal professions, as much as 50%. In the last few months, I have heard two senior Canadian regulators publically endorse enhanced lay representation,¹²⁹ although they have done so

¹²³ *Ibid.*

¹²⁴ Richard Devlin & Porter Heffernan, "The End(s) of Self-Regulation" (2008) 45 *Alta L Rev* 169 at para 91.

¹²⁵ See e.g. Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990).

¹²⁶ See e.g. Gordon Turriff, "The Consumption of Lawyer Independence" (2010) 17:3 *IJTL* 283.

¹²⁷ *Legal Services Act, 2007* (UK) c 29, s 2(1).

¹²⁸ US, SB 163, *An Act to Amend Section 6140 of the Business and Professions Code, Relating to Attorneys*, 2011-12, Reg Sess, Cal, 2011, s 1 (enacted).

¹²⁹ Victoria Rees, Nova Scotia Barristers Societies, "Address to Professional Responsibility

in their “personal capacities.” They have been joined by Malcolm Mercer, a senior partner at McCarthys.¹³⁰ Lay participation has also been suggested by the *Futures Report*.¹³¹ Two additional rationales have been proffered to support this change in governance: a) lay representatives bring knowledge and skills that lawyers might not possess, and b) try as we might, human nature is such that it is very difficult for us to transcend our own predispositions, interests, preferences, and biases.¹³²

The point that I want to emphasize here is that if we were to move towards enhanced lay participation in the governance of the profession, we should ensure that lay representatives reflect the diversity of Canadian society—particularly those communities that have been historically excluded or marginalized—so as to ensure that their access to justice needs are brought to the table. While it is true that other professionals such as doctors, engineers, and architects can add new insights and perspectives, we must remember that they are not the ones who have the unmet legal needs that are driving the access to justice dilemma.

E. Expansion of Paralegal Services

Despite the fact that there are now approximately 100,000 lawyers in Canada, many Canadians still cannot find appropriate and affordable legal assistance. In recent years, a couple of provinces, most notably Ontario and British Columbia, have come to accept the legitimacy of paralegals as providers of legal services.¹³³

Class” (delivered at Schulich School of Law, Dalhousie University, September 2014) [unpublished]; Allan Fineblit, Manitoba Law Society, Address (delivered at the Canadian Association of Legal Ethics Conference, Western Law School, October 2014) [unpublished].

¹³⁰ Malcolm Mercer, “Independence and Self-Regulation: I’m OK but I’m Not So Sure About You!” (17 September 2014), *Slaw* (blog), online: <<http://www.slw.ca/2014/09/17/independence-and-self-regulation-im-ok-but-im-not-so-sure-about-you/>>.

¹³¹ CBA, “Futures”, *supra* note 4 at 50-51.

¹³² Mercer, *supra* note 109.

¹³³ FLSC, “Inventory on Access to Legal Services Initiatives”, *supra* note 7 at 13-14.

However, most others do not.¹³⁴ Surprisingly, the three Access to Justice Reports do not have much to say on this issue. While the *Roadmap* seems to explicitly endorse the delivery of legal services by paralegals,¹³⁵ *Equal Justice* has only a few passing references¹³⁶ and *Futures* seems to subsume the paralegal issue into the ABS issue or its proposal for “parallel legal programmes.”¹³⁷ It is time for all law societies to not only permit, but also to encourage, the emergence of paralegal services, and to expand the range of legal services that can be provided by paralegals. Moreover, to the extent that paralegals tend to be more culturally and socially diverse than lawyers,¹³⁸ they are more likely to be in tune with and responsive to those who have unmet legal needs.

There are, of course, legitimate concerns about competence, quality of service, and accountability, but these are not insurmountable. In the last decade Canadian law societies, in collaboration with the FLSC, have put a great deal of effort into enhancing the competency of, and quality of service by, lawyers and have revamped the complaints and disciplinary processes for lawyers.¹³⁹ The embrace of paralegals will not require the re-invention of the wheel. The real sticking point in most provinces seems to be that paralegals are identified as an economic threat to some constituencies within the legal profession. But that, of course, has nothing to do with the public interest in the delivery of legal services.

¹³⁴ *Ibid.*

¹³⁵ Action Committee on Access to Justice, “A Roadmap for Change”, *supra* note 4 at 14.

¹³⁶ CBA, “Equal Justice”, *supra* note 4 at 95, 97, and 104.

¹³⁷ CBA, “Futures”, *supra* note 4 at 42 and 62.

¹³⁸ Anne Vesprey, Comments, (delivered at the Canadian Association of Legal Ethics Conference, Western Law School, October 2014) [unpublished].

¹³⁹ See Federation of Law Societies of Canada, Complaints and Discipline, online: <www.flsc.ca/en/complaints-and-discipline/>.

F. Endorsement of Alternative Business Structures (ABS)¹⁴⁰

The primary models for the governance of Canadian law firms are the sole practitioner, traditional partnership paradigm, or limited liability partnerships. In all cases, only lawyers can own a legal practice. This manifestly monopolistic regime is embedded in codes of conduct through a prohibition on fee-sharing with non-lawyers.¹⁴¹ It is usually justified on the basis of: a) protecting the independence of the legal profession; and b) protecting consumers by ensuring that client interests, not profit interests, come first.

However, in recent years other jurisdictions, first Australia and more recently the U.K. have permitted—indeed, even encouraged—the creation of alternative business structures.¹⁴² These can take many forms but the basic idea is that non-lawyers can own, or invest in, law firms. Advocates of ABSs propose two major advantages—increased possibilities for investment (both financial and technological) coupled with innovation and diversification in the methods of the delivery of legal services. The iconic representation is of course “Tesco law.” The claim is that innovations with ABSs will enhance access to justice.

The three Canadian access to justice reports seem to be all over the map on the desirability of ABSs. The *Roadmap* only has a passing reference to ABSs and leaves it hanging.¹⁴³ The CBA’s *Equal Justice* seems to be ambivalent on this issue. At times it seems to endorse ABSs through its support of “team delivery of services”¹⁴⁴, but at other times it suggests a wait and see strategy: “[m]ore research and evaluation is needed on the access gains by ABS before it can be considered a priority for reaching equal justice.”¹⁴⁵ By contrast, the

¹⁴⁰ For a further discussion of ABS’s see Richard Devlin & Ora Morison, “Access to Justice and The Ethics and Politics of ABS’s” (2013) 91:3 Can Bar Rev 483.

¹⁴¹ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, (Ottawa: FLSC, 2014) Rule 3.6-7.

¹⁴² Devlin & Morison, *supra* note 119.

¹⁴³ Action Committee on Access to Justice, “A Roadmap for Change”, *supra* note 4 at 14.

¹⁴⁴ CBA, “Equal Justice”, *supra* note 4 at 99.

¹⁴⁵ *Ibid* at 104.

Futures suggests that ABSs have a great deal of potential and specifically recommends that “[l]awyers should be allowed to practice in business structures that permit fee sharing, multi-disciplinary practice, and ownership, management and investment other than lawyers or other regulated professionals.”¹⁴⁶

At this time, there is no solid empirical evidence from either Australia or the United Kingdom as to whether ABSs do increase access to justice. Indeed, I suspect that, given the methodological challenges, such an assessment would be very difficult to achieve. One recent paper by Nick Robinson (a Research fellow at the Harvard Program on the Legal Profession) urges caution.¹⁴⁷ On the one hand, he suggests that the benefits of ABS have been “oversold with respect to access to civil legal services for poor and moderate-income populations” and that his “conclusions cast doubt on the ability of a more deregulated legal services market to substantially improve access to legal services.”¹⁴⁸ However, at the end of his paper, he states that”

...the goal should not be deregulation for its own sake, but rather increasing access to legal services that the public can trust delivered by legal service providers who are part of a larger legal community that sees furthering the public good as a fundamental commitment. Carefully regulated non-lawyer ownership may be a part of achieving this larger goal, but only a part.¹⁴⁹

I completely agree. Deregulation via ABSs is not the holy grail of access to justice. I am not suggesting that ABSs are a silver bullet, but they are part of a private sector response that needs to be part of a larger multi-pronged agenda. ABSs do have the potential of enhancing the availability of some legal services, but certainly not all. In that sense they are a useful part of the jigsaw puzzle called

¹⁴⁶ CBA, “Futures”, *supra* note 4 at 33–35.

¹⁴⁷ Nick Robinson, *When Lawyers Don't Get all the Profits: Non-Lawyer Ownership of Legal Services, Access, and Professionalism* (HLS Program on the Legal Profession Research Paper No. 2014-20, Harvard Law School, 2014) online: <<http://ssrn.com/abstract=2487878>>

¹⁴⁸ *Ibid* in Abstract.

¹⁴⁹ *Ibid* at 53.

access to justice. As the following subsections demonstrate, law societies will also need to enhance their regulatory interventions.

G. Recalibrated Regulation: Law Societies as Intermediaries

The previous two examples (paralegals and ABSs) focus on expanding the pool of persons and organizations who can provide legal services, thereby helping to fill the gap between demand and supply. This proposal takes a different tack: it attempts to match up lawyers with potential clients. Here I will briefly suggest two examples.

The first prototype is a pilot project here in Manitoba: The Family Law Access Centre.¹⁵⁰ The key idea is that the law society acts as a conduit between demand (clients) and supply (lawyers). Lawyers who enroll in the programme are guaranteed payment of their fees to a certain limit by the law society. They are matched with clients. The law society collects the fees from the client. This has the potential to be a win-win—the client gets access to a lawyer and the lawyer is guaranteed payment...which is not always a sure thing in family law cases. It is true that the rate the lawyer gets paid by the law society may be lower than the usual market rate, but 2/3 of a loaf is better than no loaf at all. Moreover, it is also true that this might drive down the fees of other family lawyers who have to compete for the same client. But needy family law clients are undoubtedly benefitting.

The second example comes from Quebec. The FLSC *Inventory* describes the programme as “a fixed price mediation service for individuals and for businesses that have a minimum of 25 employees, involved in a business dispute involving a disputed amount of \$35,000 or less. In exchange for 10% of the disputed amount accredited mediators will attempt to resolve the dispute.”¹⁵¹ Once again, this law society sponsored service might drive down the

¹⁵⁰ Law Society of Manitoba Family Law Access Centre, online: <<http://www.lawsociety.mb.ca/for-the-public/family-law-access-centre>>.

¹⁵¹ FLSC, “Inventory on Access to Legal Services Initiatives”, *supra* note 7 at 16-17.

fees in the mediation marketplace, but it does create a somewhat more affordable system. Other law societies could adopt, expand either of these projects, or innovate with other intermediary initiatives.

Both these examples are illustrative not of deregulation in the sense of ABSs, but of a recalibration of the regulatory responsibilities of law societies. So, too, is my final recommendation.

H. The Cost of Legal Services and Financial Transparency in Lawyer's Incomes

The elephant in the room is, of course, the cost of lawyers' services. Some have been candid about this. For example, former Chief Justice Winkler has publically called upon lawyers to "forgo their flashy suits and cars for their 'moral duty' to represent the poor."¹⁵² The *Roadmap* acknowledges that lawyers are expensive,¹⁵³ but does not really tackle the issue directly. The *Futures* Report also accepts that the cost of legal services is part of the problem,¹⁵⁴ and suggests that the most likely solution is to allow for innovation in the delivery of legal services, for example through ABSs.¹⁵⁵ However, *Equal Justice* is somewhat ambivalent on the expensiveness of legal services. Sometimes, it acknowledges "the increasing unaffordability of legal services."¹⁵⁶ However, on several occasions it references "the perceived and/or actual cost of a lawyer's services",¹⁵⁷ the reference to "perceived" suggesting it might not be real! To the contrary, as Professor MacFarlane's work clearly illustrates, cost is the number one reason why people become self-represented litigants.¹⁵⁸

¹⁵² Sebesta, "Winkler lectures bar about access to justice", *supra* note 2.

¹⁵³ Action Committee on Access to Justice, "A Roadmap for Change", *supra* note 4 at 3, 4.

¹⁵⁴ CBA, "Futures", *supra* note 4 at 20, 27, and 32.

¹⁵⁵ *Ibid* at 6, 24, 41, 68.

¹⁵⁶ CBA, "Equal Justice", *supra* note 4 at 93.

¹⁵⁷ See e.g. *ibid* at 36, 97.

¹⁵⁸ Julie MacFarlane, Final Report, "The National Self-Represented Litigants Project:

However, the reason why it is vital for us to address this issue is because there are members of the profession who are in denial. For example, in an interview in March 2013 on CBC Radio on the topic of access to justice, the then-Treasurer of the Law Society of Upper Canada (LSUC) and the current-President elect of the FLSC, Tom Conway, emphasized on several occasions that the problem of access to justice had very little to do with lawyers' incomes.¹⁵⁹ He particularly pointed out that most lawyers in Ontario work in either sole practices or small firms and that the LSUC's "internal research" indicated that their average salary is no more than a senior school teacher: \$85k was his suggested number.¹⁶⁰ This might well be an accurate number for many lawyers in Ontario. But his reliance on this statistic in an attempt to convince the public that lawyers' incomes are not part of the problem opens up several concerns:

- Why does he only talk about this group of lawyers?
- What about the lawyers in other forms of practice?
- When the law librarian at Dalhousie contacted the media relations department at the LSUC to provide verification for Mr. Conway's numbers, they were unable to provide such internal "research" resources.
- What is the average lawyerly income in Ontario? ...in Canada?

Other sources seem to contradict this \$85k number—with an enormous variation. Consider for example the *2014 Salary Guide* produced by Robert Half Legal.

Identifying and Meeting the Needs of Self-Represented Litigants" (May 2013), online: <[http://www.lsuc.on.ca/uploadedFiles/For the Public/About the Law Society/Convocation Decisions/2014/Self-represented project.pdf](http://www.lsuc.on.ca/uploadedFiles/For%20the%20Public/About%20the%20Law%20Society/Convocation%20Decisions/2014/Self-represented%20project.pdf)>.

¹⁵⁹ Interview of Thomas Conway by Michael Enright (31 March 2013) on "The High Cost of Justice" *The Sunday Edition*, CBC Radio, Toronto, CBC Radio Archives, online: <<http://www.cbc.ca/thesundayedition/shows/2013/03/31/legal-access/>>.

¹⁶⁰ *Ibid.*

SALARIES FOR LEGAL PROFESSIONALS IN CANADA

Lawyer	2013	2014	% change
Senior Lawyer (10+ years' exp.)			
Large law firm	\$ 188,250 - \$ 268,750	\$ 192,500 - \$ 282,000	3.8%
Midsize law firm	\$ 144,500 - \$ 208,500	\$ 152,000 - \$ 212,250	3.2%
Small/midsize law firm	\$ 125,000 - \$ 176,000	\$ 128,500 - \$ 185,500	4.3%
Small law firm	\$ 101,250 - \$ 153,500	\$ 106,250 - \$ 156,500	3.1%
Lawyer (4-9 years' exp.)			
Large law firm	\$ 129,000 - \$ 231,750	\$ 135,250 - \$ 240,000	4.0%
Midsize law firm	\$ 108,000 - \$ 196,500	\$ 115,000 - \$ 202,250	4.2%
Small/midsize law firm	\$ 84,250 - \$ 157,750	\$ 89,250 - \$ 160,500	3.2%
Small law firm	\$ 69,250 - \$ 126,000	\$ 73,000 - \$ 130,250	4.1%
Lawyer (1-3 years' exp.)			
Large law firm	\$ 88,250 - \$ 119,750	\$ 90,500 - \$ 124,500	3.4%
Midsize law firm	\$ 71,250 - \$ 107,500	\$ 72,750 - \$ 112,750	3.8%
Small/midsize law firm	\$ 69,000 - \$ 98,750	\$ 70,500 - \$ 103,500	3.7%
Small law firm	\$ 55,000 - \$ 79,500	\$ 56,500 - \$ 83,000	3.7%
First-Year Associate			
Large law firm	\$ 82,750 - \$ 90,000	\$ 84,750 - \$ 92,000	2.3%
Midsize law firm	\$ 64,750 - \$ 78,250	\$ 66,500 - \$ 79,750	2.3%
Small/midsize law firm	\$ 64,000 - \$ 69,250	\$ 65,750 - \$ 70,250	2.1%
Small law firm	\$ 48,500 - \$ 65,750	\$ 50,000 - \$ 66,750	2.2%

However other compensation surveys come up with different numbers,¹⁶¹ although none suggest that Mr. Conway's figure is close to accurate. So now that one of the country's most pre-eminent legal regulators has put the money question on the table, it is time to get some accurate numbers. It is no longer acceptable to rely on methodologically dubious compensation surveys. Let's get

¹⁶¹ See e.g. Christopher Guly, "Salaries to rise in 2011", *The Lawyers Weekly* (3 December 2010), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1302>>; Charlotte Santry, "Survey predicts modest raises for lawyers in 2014", *Canadian Lawyer Magazine* (6 November 2013), online: <<http://www.canadianlawyermag.com/legalfeeds/1775/survey-predicts-modest-raises-for-lawyers-in-2014.html>>; Glenn Kauth, "Survey predicts healthy job, salary environment for mid-sized firms", *Canadian Lawyer Magazine* (6 October 2014), online: <<http://www.canadianlawyermag.com/legalfeeds/2314/survey-predicts-healthy-job-salary-environment-for-mid-sized-firms.html>>;

transparent. So here is a radical proposal: let's include lawyers in sunshine regulations.

There are a number of groups in society who are subject to having their incomes made public—for example teachers,¹⁶² judges,¹⁶³ civil servants (including public sector lawyers),¹⁶⁴ university professors,¹⁶⁵ First Nations chiefs,¹⁶⁶ union leaders¹⁶⁷ and executives of regulated industries such as electricity corporations.¹⁶⁸ The philosophy underlying this legislation not simply that these people are paid directly out of the public purse. The union leaders and executives of regulated corporations are not. University professors' salaries are now largely paid for by student fees, not governments. Rather, the underlying philosophy is a public asset theory—all these actors are the beneficiaries of a public asset and in return the public should know if it is getting value for money. The governing principles are transparency, effectiveness and accountability. The same philosophy and principles can be applied to lawyers: the privilege of the practice of law is a state-conferred public asset: lawyers earn their living because the state has empowered them to do so to the exclusion of all others. So my final proposal is that each year every lawyer must report their law-based income to their law society. The law society can then collate and make public that information (this could be done either by revealing individual names or by the percentages of lawyers in various salary scales). Moreover, if Mr. Conway is right that lawyer's incomes are not part of the problem with access to justice, then the numbers will

¹⁶² *The Public Schools Act*, RSM 1987, c P250, s 16(2); *Public Sector Salary Disclosure Act*, SO 1996, c 1, Schedule A, s 1.

¹⁶³ *Judges Act*, RSC 1985, c J-1, ss 9-22; *The Provincial Court Act*, RSM 1987, c C275.

¹⁶⁴ *Public Sector Employers Act*, RSBC 1996, c 384 s 14.6.

¹⁶⁵ *Public Sector Salary Disclosure Act*, SO 1996, c 1, Schedule A, s 1; *Public Sector Compensation Disclosure Act*, SM 1996, c 60, CCSM c P265, Schedule (f)–(h).

¹⁶⁶ *First Nations Financial Transparency Act*, SC 2013, c 7, s 3.

¹⁶⁷ *Canada Labour Code*, RSC 1985, c L-2, s 110; Bill C-377, *An Act to amend the Income Tax Act (Requirements for Labour Organizations)*, 2nd Sess, 41st Parl, 2013 (first reading in the Senate (17 October 2013)); *Labour Code*, CQLR c C-27, s 47.1.

¹⁶⁸ *Public Utilities Act*, RSNS 1989, c 380, s 34.

bear this out; there is nothing to be concerned about. The general public tends to accept the salaries of teachers because they provide access to education. Why should lawyers be concerned about the transparency of income if we truly believe we are providing effective access to justice?

But here is my prediction: the pattern will be that those lawyers at the lower income scales will be precisely those lawyers who are practicing in those areas of law where access to justice is most challenged, while those in the higher scales will not be. This might generate some very challenging debates within the profession itself. As Brandeis once suggested, sunlight may indeed be the best disinfectant.¹⁶⁹

V. CONCLUSION

The CBA's *Equal Justice Report* is absolutely correct in characterizing access to justice as a "wicked problem",¹⁷⁰ i.e. a problem that requires a multipronged solution. But I also agree with the CBA's *Futures Report* when it calls on us to be iconoclastic and to leave "no idea, no institution, no model and no regulation...sacrosanct."¹⁷¹ My proposals in this paper to enhance the obligations of law societies do not pretend to propose "a solution"; rather they are elements of larger strategy. Many other possibilities need to be considered, proposed, explored and pursued.¹⁷²

However, one thing is certain: the legal profession does play, and it will continue to play, a key role in the delivery of legal services in Canada, and there is no doubt that we are part of the problem in

¹⁶⁹ Louis D Brandeis, *Other People's Money: And how the Banker's Use it* (New York: Frederick A Stokes Company Publishers, 1914) 92.

¹⁷⁰ CBA, "Equal Justice", *supra* note 4 at 124.

¹⁷¹ CBA, "Futures", *supra* note 4 at 66.

¹⁷² See e.g. Andrew Pilliar, "Special Issues on Access to Justice Law and the Business of Justice: Access to Justice and the Profession/Business Divide", (2014) 11:5 JL & Equality 33.

ensuring that there is access to justice for all Canadians. This paper has argued that we have it in us, both individually and collectively, to respond to the crisis of access to justice, but only if we are creative, imaginative, and open to experimentation with the norms, and structures that govern us as a profession, and as a community.