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Continuing Professional Development

Back to the Future: The New Practice of Law

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Law Society of Manitoba

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The New Practice of Law

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INTRODUCTION

Predicting the future is difficult and my track record isn't exactly stellar. I picked Denver to win the 2014 Super Bowl (they lost 43-8). When my law firm met to discuss buying a fax machine in the early 1980s, I was the lone dissenting vote. Who would we fax to after all? The pace of change has accelerated, making the life of futurists even more challenging. That law firm of the 1980s was considered large (at least for Winnipeg) with just under 25 lawyers. Our receptionist answered the phone with the recitation of all of the partners' names: "Buchwald Asper Hentellef Goodwin Greene Zitzerman and Shead".

Last summer I attended a presentation by the managing partner of Norton Rose Fulbright's Calgary office. He had started his career at Ogilvy Renault, which at the time had 61 lawyers, making it the fourth largest law firm in the Commonwealth. His firm today has about 5,000 lawyers located in offices on six continents. Why is the pace of change accelerating? What is driving it? I'd like to point to seven key drivers of change, although there are likely a lot more than that.

1. MOBILITY

Not so long ago (less than 15 years), each Canadian province and territory operated as "fiefdoms". With very few exceptions, only local lawyers were permitted to practice law within our borders. We did allow occasional appearances (for which we extracted large fees) and in some transactional work where it was hard to identify where exactly the transaction was taking place, we turned a blind eye to foreign interlopers from the hinterlands of Alberta or Ontario.

Last October every Canadian provincial law society signed onto the "last spike" of pan-Canadian mobility by bringing the Barreau du Québec into the National Mobility Agreement. This means that most Canadian lawyers can practice in any other Canadian province on a temporary basis (up to 100 days per year) without any fee or even a check-in requirement. This is called temporary mobility. It also means that almost every Canadian lawyer can become fully licensed to practice law in another Canadian jurisdiction after completing a relatively simple reading requirement on local law and practice. While the three territories have agreed to

permanent mobility provisions, they have not yet signed on to the Temporary Mobility Agreement. They will in time.

And there is no going back. Mobility has become mandatory in Canada with the Inter-Provincial Trade Agreement which mandates permanent mobility for most professions and occupations (including lawyers). Mobility just makes sense. Clients' needs cross borders and with the growth of national and regional law firms, it is silly to try and create artificial borders. International firms now practice in Canada. Consider also that the Barreau du Québec has a mobility agreement with France and that France has a mobility agreement with all the other European Union countries. International mobility is on our doorstep and it will be a big driver of change.

2. TECHNOLOGY

A second and related driver of change is technology. This is not about finding more efficient software to run your practice. More and more, for better or worse, Canadians are getting their legal advice from the internet. It is hard, perhaps even impossible, to put up barriers to internet lawyers practising in Canada. Technology also drives change because it facilitates new ways for lawyers to deliver legal services. Later in this paper I will explain some of the new legal services being facilitated by a wired world.

3. COMPETITION REGULATORS

If technology as a driver of change is a bit of a no-brainer, this is likely not on many people's radar screens, at least as a driver of change in the way we deliver legal services.

Competition authorities are paying a lot of attention to professional "monopolies" and wondering if those are anti-competitive in nature. When the legal profession in England lost its right to self-govern, a lot of the attention focussed on a report produced by Sir David Clementi, a former deputy governor of the Bank of England. The report was titled "Review of the Regulatory Framework for Legal Services in England and Wales" and laid out a blueprint for the creation of the Legal Services Board, a new legal services regulator not controlled by lawyers. An often forgotten fact was that Sir David's mandate was to address what was seen as unjustified restrictions on competition in the legal services market. A big driver of Sir David's approach was EU's competition policy under the leadership of Mario Monti, who later went on to become the Prime Minister of Italy.

In 2007 Canada's own competition regulator, the Competition Bureau, wrote a report on self-regulating professions calling for sweeping changes in the way

lawyers (and other professions) are regulated and for the removal of what were seen as barriers to competition in the legal services market.

4. ACCESS

A fourth driver of change is access to legal services. Many Canadians simply cannot access the legal services they need, either because they live in under-serviced communities or because they can't afford to pay for a lawyer. Many of these people have serious legal problems and they often are having to represent themselves.

The Canadian Bar Association recently released a major study on access to legal services titled "Reaching Equal Justice". Another major report by the National Action Committee on Access to Justice in Civil and Family Matters was released in October of 2013. Both reports recommend significant change to address what is perceived as a serious failing in our justice system. Our need to provide access for all Canadians to the legal services they require will drive change.

5. POLITICS

Not all the drivers of change are entirely rational. Ultimately, in a democratic society, subject to the Constitution and to the courts, all authority flows from government. Law societies regulate lawyers because they have been given that right by government. Governments are composed of politicians. Politicians are the elected representatives of their constituents. When problems arise, politicians are often called upon to act. Change can sometimes happen because of one particularly resonant event. This is especially true in the world of 24 hour news where there is a desperate scramble by the media to find stories that resonate or, in some cases, to find ways to make benign stories sound interesting. This combination means that we should expect that we are always one big ugly news story away from government stepping in and making substantial change to the way in which legal services are delivered.

6. VOLUME OF LAW

The sixth driver of change is the volume of law. Here the reference isn't to all those politicians creating a bunch of new laws, but rather to the enormous volume of jurisprudence that emerges every single day in Canada. Partly this arises because of the growth in administrative tribunals. Partly it arises because there are simply more lawyers and more judges, and because we have moved away from a restorative model of criminal justice to a court-based one. The Canadian Legal Information Institute (CanLII) operates a website that attempts to publish the decisions of Canadian courts and tribunals. CanLII adds 9,000 new

cases each month to its collection. The challenge of keeping up-to-date with the volume of law is also a driver of change.

7. CONFLICTS

In 1987 a young lawyer named Kris Dangerfield, who now makes her living as the Senior General Counsel at the Law Society of Manitoba, changed law firms. In doing so she changed the practice of law significantly. The Supreme Court of Canada in *Macdonald Estate v Martin* [1990] 3 SCR 1235 created a new regime around what constitutes a conflict of interest. It put a wee chill over lawyer mobility and the adventure continued in 2002 when the Supreme Court decided *R v Neil* 2002 SCC 70, establishing a strong duty of loyalty to current clients. That decision was further clarified in the Saskatchewan originating case of *Canadian National Railway Company v McKercher LLP* 2013 SCC 39. This line of cases is changing the way lawyers do business, how we organize ourselves, and even how we litigate.

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What are the changes we should expect to see as a result of these seven drivers? More importantly, what does it mean to you and to me?

MCPD

We are entering a world of continuous learning. Most Canadian lawyers are required to take professional development courses after they are called to the Bar. While every jurisdiction has its unique set of rules around mandatory continuing professional development (MCPD), they generally require about 12 hours a year of some form of learning. Some people question if this model makes sense. Put aside the ridiculous fact that mobile lawyers have to cope with 14 different sets of rules that more or less say the same thing. Instead, ask why we are required to do this at all? While it might seem intuitive that if people attend lectures or participate in a webinar they will be better lawyers, there is actually very little evidence to support that conclusion. While it certainly can't hurt, in the future this "bums in seats" methodology of ensuring lawyers' continuing competence may not be sustainable.

Last year I attended a lunch honouring seven Manitoba lawyers who had practised for 50 years. They were all fine fellows (yes, all seven were men), but it occurred to me that in all likelihood the last time they were tested on their knowledge and skills was probably the year JFK was assassinated.

I was telling that story to a friend who is a psychiatrist with a unique sub-specialty. He commented that he had recently had to write an exam to acquire

his sub-specialty designation. He is in his 60s, so naturally I asked when he had last written an exam. "Oh", he replied, "I write an exam every year." It turns out his is a minor hockey referee and is required to write an exam every year to demonstrate he has kept up with changes in the rules and in practice. My niece who has for many years worked part-time as a server at a popular steakhouse tells me that she has to write an annual exam on "steakology" to prove she has kept up on the latest cuts of meat.

I predict our future (yours and mine) will include some system for periodic recertification of lawyers. It may not be annual and it may not be an exam but in a world where at least 9,000 new decisions come out every month, we will need to do more than require lawyers to spend an hour a month dozing off in a stuffy classroom.

BILLING

When I started practising law, lawyers had only recently embraced hourly billing. The results were very positive, at least for the legal profession. In my firm total billings increased by a whopping 25% immediately after the change to billing by the hour. We developed tools to record our time efficiently and to charge for all the time we put into files. Clients rarely liked hourly billing. While they may not have realized it was costing them more, they often felt frustrated by the accumulation of .1 hours for every phone call or form letter. They didn't like the lack of predictability. We no longer quoted $5,000 for a divorce. It would be $250 per hour for as long as it took. Some clients felt that the billable hour rewarded inefficiency.

There are, of course, good arguments for hourly billing. Some say if you need to fix a fee, you may overestimate in order to protect against complex cases. Some say it is an effective tool for managing clients who are inclined to call or email regularly without any good reason.

For better or for worse, in the future the billable hour will likely be gone. It has already started. In-house counsel in large corporations, whose budgets used to be seen as "special" and unrestricted, have, driven by economic realities, become just like every other department. Those general counsel now need to be able to budget accurately for the cost of the outside counsel they hire and they need to stay within that budget. General counsel say they can no longer afford to train junior associates. They are now demanding alternative kinds of fee arrangements and firms that want their business have no alternative but to go along. Many corporations are asking for fixed fees and many have devised value-based billing formulas where they define varying degrees of success on a file and negotiate a fee structure tied to results achieved.

This is not restricted to corporate work. One area where lawyers have always said a flat fee was impossible is family law. The argument is that it is simply too unpredictable. The unpredictable nature of the work has an impact on a client's ability to access the legal services they need. It isn't only the high cost of family law, it is also impossible to make a plan to raise the money necessary to pay for that high cost. If you have no idea how much you will need, it is very hard to go out and raise the money.

Wevorce is a US company that delivers family law services using some innovative technology. Everything they do is on a flat fee basis. It starts with an online questionnaire which Wevorce claims is an excellent predictive tool. It tells them how the case is likely to unfold, what will be the most effective way to find a satisfactory resolution, and they are able to use that data to quote "a fixed fee to the client".

Riverview Law is a UK law firm that is offering many fixed fee services, including in the family law area. For a hilarious 3.5 minute explanation of Riverview's take on billable hours, search for "Cometh the Billable Hour" on Youtube.

EXTERNAL OWNERSHIP

One of the changes that flowed from the work of Clementi and Monti in the UK borrowed heavily from some interesting Australian ideas. Australia had done away with restrictions on the ownership of law practices. Anyone can now participate in the ownership of Australian law firms. The idea was to attract new capital which would fund innovation, which in turn would be good for the public.

One of the first new ownership experiments was the law firm of Slater & Gordon, which became a publicly traded company and raised large amounts of capital through the sale of shares. Slater & Gordon had a business model that involved the aggressive acquisition of law firms throughout Australia and later in the UK. They needed capital to pursue that goal. In 2013 Slater & Gordon topped the list of companies listed on the S&P/ASX 200 as Australia's best performance stock. In the interest of full disclosure, I own, through a mutual fund, a tiny piece of Slater & Gordon…so maybe I'm better at predicting the future than I thought!

In the UK the Legal Services Board began approving alternate business structures in 2012 and since then over 200 licenses have been awarded. These are legal practices with non-lawyer ownership. Some interesting players have entered the field. When alternate business structures were first proposed, critics labelled it "Tesco law" after a chain of UK supermarkets. Tesco did not apply to become an ABS. The Co-op did. They have almost 5,000 retail outlets across the UK that will offer legal services. It gives "clean up in aisle 4" a whole new meaning.

SAGA is another approved alternate business structure. SAGA is the Society for the Advancement of the Golden Age. This not-for-profit offers a variety of insurance-based products to seniors and now will add legal services into their product line. Stobart Group calls itself a "UK leading logistics business", but essentially it is a trucking company. Truckers are generally a group of independent operators with consolidated services provided by a company. Also, truckers have a lot of legal needs. Stobart formed an ABS, Stobart Barristers, which offers access to a network of specialist barristers using a pricing model under which its clients agree and pay a fixed fee through a "pay as you go" model.

While no Canadian jurisdiction currently permits non-lawyer ownership of legal practices, it is only a matter of time. The Law Society of Upper Canada has a task force that is moving rapidly in that direction. Manitoba, Saskatchewan and Alberta are exploring a joint venture into the world of alternate business structures and several other Canadian jurisdictions are looking at it as well. The Canadian Bar Association's Futures Task Force has a working group actively exploring alternate business structures. In the future your legal practice may have some interesting new opportunities to raise capital and bring in on an equity basis some new expertise.

EDUCATION

The way in which we train lawyers is also about to change. For the last 40 years we have had a model that consisted of attending a Canadian law school for three years, articling for about a year, a bar admission course, and some optional continuing professional development offerings. I have already noted the rise of MCPD and boldly predicted its future demise in favour of some form of recertification. Bigger changes are on the horizon. Ontario, faced with an "articling crisis", has created an alternate stream which includes skills training followed by some form of experiential learning. One of the providers of this program is Lakehead University's new law school which plans to incorporate the skills training and practical placements into their three year curriculum. Given that half the legal profession in Canada practices in Ontario and that all of those lawyers are mobile, it should not be a stretch to expect that we will see dramatic change on a similar scale across the country.

There are several other developments in the training of lawyers. The largest source of Canadian articling students today is not a Canadian law school. It is the National Committee on Accreditation which is the Federation of Law Societies of Canada's accreditation body for internationally trained lawyers. By the way, many of those are Canadians who have gone abroad to get their legal education.

Meanwhile, a committee of the Federation of Law Societies of Canada is developing national admission standards. These standards will include a set of

competencies that every new lawyer will need to have in order to be called to the Bar and may include a national exam to test if they really have those competencies.

ODR

I was trained as a litigator and in my mind disputes were resolved by litigation in court. In the future, disputes will be resolved primarily in other ways. Already we see lawyers abandoning the court process where possible. Courts can be slow, expensive and yes, unpredictable. Choosing to settle a dispute using a private arbitrator will generally be faster, cheaper, and because you can pick the arbitrator, less unpredictable.

We have also seen a dramatic growth in administrative tribunals as an efficient way to resolve disputes. Interestingly, most representation at the administrative tribunal level is not done by lawyers. When Ontario decided to license paralegals that work in those administrative tribunals, they were shocked to discover that there were thousands of them.

The future of dispute resolution is not administrative tribunals or arbitration, at least not in the traditional sense. Today, by far, the largest dispute resolution forum in the world is eBay. Users agree to resolve disputes with an online dispute resolution system and while it is “rough justice”, it is a quick and efficient way to resolve disputes involving relatively small amounts of money.

Innovators have begun to offer a wide range of online dispute resolution (ODR) options. Some allow for settlement proposals to be exchanged confidentially and others walk users through a complex and escalating series of online mediation and arbitration processes. While these are not new (Cybersettle was incorporated in 1996), they are becoming more sophisticated and their use has grown exponentially. Other interesting players in the ODR market are Smartsettle (for family law), Modria which bills itself as the “world’s leading online dispute resolution experts”, and Canada’s own eQuibbly.

CONCLUSION

There are many more interesting ideas about what the future of our profession might look like. Will our work disappear to paralegals or to title insurers or perhaps to supermarkets? Will legal insurance ever take off as it has in some European countries? Will we move to a medical model of generalists referring complex work to specialists? Will the face of the legal profession in Canada mirror the population? I consider myself something of an expert on the future of legal practice in Canada and, because of my job, I have a lot of predictive tools at my disposal. If you predict that tomorrow’s weather will be the same as it was

today, you will be right about 50% of the time. If instead you go to university and become a meteorologist and then you buy some very expensive weather forecasting technology, your accuracy in correctly predicting tomorrow's weather will be…about 50%. In that spirit, I boldly predict that the legal practice of tomorrow will either be bitterly cold and snowy or warm and sunny…take your pick.