Lawyering in Canada in the 21st Century

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LAWYERING IN CANADA IN THE 21ST CENTURY

by
H.W. Arthurs*

Legal practice is shaped by its social, political and economic environment. Canada's "new economy" of decreasing state regulation, globalization, computerization and changes in information technology, and the shift from manufacturing to the service sector has grave — largely negative — implications for the future of law and lawyers.

Moreover, the profession is fragmented and stratified. It comprises multiple constituencies — solo practitioners, large corporate firms and specialists — with differing demographics and professional roles, which are implicated in varying degrees in the "new economy". As a result, they experience the restructuring of professional knowledge, governance, ethics and culture in ways so diverse as to put in question the prospects of a common professional future.

INTRODUCTION

Law is a profession and an intellectual discipline which is profoundly engaged with the here and now, and which often seeks for authority and legitimacy in a real or imagined past. Too seldom does it speculate about the future in a systematic and open-ended fashion. However, when such speculation does occur, it is often fuelled by the suspicion that the future will be very different from the past. It is the purpose of this paper to test that suspicion as it applies to the practise of law. More accurately, the paper

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proposes a framework within which evidence for and against the prospects of dramatic change can be analysed as it becomes available.

Alas, not much evidence is available. Despite some important recent studies,\(^1\) we still know far too little about what the Canadian legal profession is or does. In consequence, we are driven by default to borrow from the rich literature produced by scholars around the world\(^2\) and especially in the United States,\(^3\) with the inevitable risk that Canadian life may come to imitate American art. On the other hand, we have no alternative: anecdotal evidence will not do; wishful thinking will not do; and assumptions about the future resembling the past or present will not do - even if such assumptions were based on accurate information, as they are not. To illustrate: we have only the sketchiest notion of who pays which lawyers how much to do what kind of work. We will therefore be hard pressed to understand the effect of changes in the structure of the Canadian economy upon the economic prospects of various types of legal careers. Another illustration: everyone knows our population is aging; no one knows what this is likely to imply in terms of the shifting demand for particular kinds of legal services, and whether or to what extent aggregate demand is likely to increase or decrease. These illustrations serve as a confession that this study does not make good the serious deficit of sociological and economic research which might help to inform serious speculation about the future; it suffers from the same shortcomings it criticizes.

Nonetheless, this study aims at least to organize an agenda for speculation. It does so first by adopting an external perspective: how are long-term changes in the Canadian state, society and economy altering the environment of legal practice and the market for legal services? Second, it adopts an internal perspective: how does the political economy of the legal profession itself shape the consequences of these external changes for different kinds of legal practices and practitioners? And finally, it briefly considers the implications derived from both perspectives for certain institutions which we regard as central to our professional identity and highly influential in the shaping of professional practice: knowledge, governance, ethics and culture.

**THE EXTERNAL PERSPECTIVE: THE CHANGING ENVIRONMENT OF LEGAL PRACTISE\(^4\)**

The central premise of this paper is that some of the most important

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1 See e.g., H. Arthurs, R. Weisman & F. Zemans, "The Canadian Legal Profession" (1986)
5 These ideas are developed at greater length in H. Arthurs & R. Kreklewich, "Law, Legal Institutions and the Legal Profession in the New Economy" (1996) Osgoode Hall L.J.
factors affecting the future of legal practise are environmental, which is to say that they are by definition largely beyond the control of the profession as a whole, let alone individual practitioners. This is not to propose, however, that the profession — or important elements within it — should or will remain passive in the face of change. No doubt it will argue for changes which serve its interests or advance its ideals; it will try to adapt to change so as to minimize negative consequences; and it will attempt to take full advantage of any positive developments. That much said, the direction, extent, velocity and complexity of environmental change are largely beyond the profession's control. It will generally be in a position of reacting to, or at best anticipating, change, rather than shaping it.

However, change does not proceed according to a master plan nor is it driven by the incontestable forces of nature. Many factors will shape our new environment; many actors and interests promote change or resist it; many contradictory tendencies become manifest. In understanding the complexity and indeterminacy of change lies the profession's best chance of surviving and adapting to the new environment.

(a) The changing role of the state

While the profession prides itself on its autonomy from, even its adversarial relationship with, the state, it is in fact deeply implicated in the policies and institutions of government. The state directly subsidizes large areas of legal practise through the legal aid system. Indeed it is the primary source of funding in some areas of practise, such as criminal law and refugee law. Large numbers of lawyers work in state institutions as legislators, legal practitioners, judges, administrators and adjudicators, and in other capacities. And the government employs private practitioners to provide it with a wide variety of legal services. Direct or indirect expenditures by the state on lawyers' services of all kinds must surely account for a significant proportion of the total income of the profession. However, the state's greatest impact on legal practise is indirect rather than direct in the sense that much of the profession's work on behalf of non-governmental clients is concerned with resisting, avoiding or complying with state legislation and administrative action. For these reasons changes in the nature and extent of state activity will have profound effects on the profession.

The dominant role of the state in the political economy of the profession is a central premise of any attempt to predict what legal practise will look like in the 21st century. We seem to be in the midst of a paradigm shift — a fundamental change in our understanding of the structure and function of state institutions and of the appropriate relationship between the state and

5 This is but one example of the pressing need for better information. We need past and present statistics on how many lawyers work in the public sector and how many private practitioners provide services to government. What is their collective income? What percentage does this represent of the total income of the legal profession? What trends in government expenditure for legal services can be observed? What kinds of services are provided by public and private sector lawyers and is the pattern changing? What shifts have occurred as between law-trained and other providers of such services? Virtually every "factual" statement about legal practise in this study requires better documentation than presently exists.
civil society. Two contrary trends are visible. On the one hand, we are witnessing a dramatic retrenchment of the state; on the other, we seem to be experiencing the "juridification" of virtually everything.

As for the retrenchment of the state, the signs are obvious in Canada and in most advanced economies: significant cut-backs in public expenditure in reaction to real or perceived fiscal crises; reduced taxation designed to promote economic growth; the consequent shrinkage of the welfare state; deregulation of large spheres of social and economic activity; privatization of state functions and state-owned enterprises; disenchantment with state programs by clienteles and professionals who were their primary proponents; and declining citizen participation in political life and increasing antipathy to "the government". While some of these signs represent no more than the ebb and flow of electoral politics, others are being installed as permanent features of the institutional landscape: constitutional, legislative or politically-imposed requirements for a balanced budget; referenda, polls, electronic "town meetings" and other forms of direct democracy which might reinforce grass roots resistance to state action; and quasi-constitutional arrangements which may have the effect of discouraging regulatory initiatives, including the devolution of governmental resources and power, the expansion of judicial review and treaties, foreign and domestic, which forbid measures which interfere with the free flow of international and inter-provincial trade.

Whatever their rationale or intrinsic merit, many of these developments have potentially serious negative implications for the legal profession. Financial constraints lead to down-sizing of government legal staffs, shrinking legal aid budgets and fewer retainers for outside counsel. Reduced taxes diminish the demands of clients for legal strategies of tax avoidance. Deregulated industries no longer need expert advice on how to navigate around regulation, and no longer need to pay the extravagant cost of such advice. The disenchantment of clienteles and advocates may signal the decline of the clinic movement and other forms of public sector advocacy. Popular antipathy to politics and government may lead many lawyers to conclude that they should not pursue their careers in the public sector. Governments lacking the will or means to intervene in the economy have less need of lawyers. So do the citizens they govern.

True, there are counter-trends. All legal changes — layoffs, reduced tax burdens, deregulation — entail transitional measures, such as legislation, lobbying, test-case litigation, and severance agreements, which may generate at least short-term work for lawyers. Some changes — privatization, decentralization — may shift jobs from one sphere to another but could increase the aggregate amount of legal work rather than decrease it. And in defiance of the general trend towards declining levels of state activity, we are seeing an increase in social control measures in certain areas: more vigorous policing and a more punitive approach to criminal law, a harder line on welfare fraud, immigration and registration of firearms. These measures generate legal work although, because of cutbacks in legal aid, more prosecutors are likely to benefit than defence counsel.

Of all the counter-trends, none is more likely to be significant in the long
run than juridification — the tendency to use formal legal procedures and legal institutions to resolve conflict and decide controversies. In the public sphere, juridification is rooted not only in the enhanced role of the courts under the Charter, but also in the long-term tendency of the courts to expand their power to review administrative action and even, on constitutional grounds, to require that certain matters reside within the competence of section 96 courts rather than elsewhere. The combined result of these developments is that lawyers are used both more extensively (in labour arbitration, for example) and intensively (in criminal law, for Charter arguments, for example) and the aggregate demand for legal services increases.

In the private sphere, the effects of juridification are not quite as clear. In part to forestall state regulation, in part to maintain positive relations with their clients and employees, many corporations and other large private sector organizations are establishing “codes of conduct”, and private forums to deal with violations, such as ombudsmen, complaints bureaux, and appeal bodies. Likewise, universities, hospitals, and professional bodies have created, in effect, indigenous regimes of law. These indigenous regimes do not automatically increase the need for lawyers: in fact, if legal representation were to become commonplace, their rationale — the avoidance of public regulation and conventional litigation — would disappear. On the other hand, perhaps the long-term picture will be different. In a thoroughly juridified society, aggrieved “litigants” may come to feel that unless they are afforded legal representation, they cannot have confidence in the outcome; if that happens, they will begin to take their complaints to more conventional forums where legal representation is almost certain to be required.

Finally, although state courts are the very exemplars and prime movers of juridification, they are also the focus of important initiatives to reduce litigation. These initiatives stem from three quite different concerns. First, there is a sense that litigation is not the best way to resolve certain kinds of social conflict, such as family disputes, where the adversary system exacerbates the damage done by the underlying conflict. As non-adversarial procedures become more common, lawyers lose part of their control and revenue potential to other professionals, such as counsellors and mediators, who can perform such procedures at least as effectively and efficiently. Second, as state institutions, courts are being forced to constrain their expenditures. As the system is starved of resources to build new courthouses, appoint new judges and hire additional public officials such as prosecutors, delays occur and public confidence is undermined. Thus, courts are under pressure to introduce more efficient procedures, such as case-flow management, diversion, pretrial conferences, mediation and other forms of alternative dispute resolution, all of which are designed to allow the courts to process more disputes at less cost. This they may or may not do, but to the extent they succeed, such measures have the incidental effect of reducing the time spent by, and revenue generated for, litigation counsel. Third, the high cost and low yield of litigation in some busy sectors of state adjudication — automobile accidents and accidents at work — have led to the
introduction of no-fault insurance schemes. These schemes have greatly
reduced, though not wholly eliminated, the need for lawyers, not least by
opening up the possibilities of representation by paralegals, agents and the
parties themselves.

To summarize: in general, state activity generates lawyers’ income, and
a decline in state activity is likely to have serious adverse effects upon the
market for legal services. Thus ironically, despite a tendency in our society
towards juridification, the civil justice system may represent a shrinking
source of opportunities for lawyers. In only a few areas is the retreat of the
state likely to provide additional short term, and possibly long term, oppor-
tunities for lawyers.

(b) The changing nature of the economy

Although the profession is deeply implicated in the state, the private
sector is the primary source of its clients and income. It is therefore very
sensitive to fluctuations in the general economic prosperity of the commu-
nity it serves. This is borne out by casual observation of the effects of the
business cycle on particular types of legal practise. When the housing
market is in decline, lawyers who practise conveyancing are hit; when the
economy is expanding, lawyers who do corporate and commercial work for
small family firms and large conglomerates become very busy; bankruptcy
and insolvency practise deflates and inflates as credit eases and tightens.

It is also important to understand that the demand for legal services not
only changes in aggregate size from time to time; it is fundamentally rede-
finied, over the long term, by a fundamental shift in the deep structures of
the economy. We are in the midst of such a shift. Technology has brought
about, or at least made possible, profound changes in the modes of produc-
tion of both goods and services, and therefore in the nature and organization
of work, strategies of management, and the structures of capital. While it
is impossible, and arguably unnecessary, to provide a detailed account of
such changes in the context of this paper, it is important to identify the ways
in which economic restructuring has affected the future of legal practise.

From the early twentieth century, and especially after 1945, the emer-
gence of mass production industries in Canada — although smaller, later
and less deeply rooted than in many other advanced economies — led to the
emergence of a significant work force of skilled and semi-skilled workers,
especially in the industrial heartland of Ontario. These workers became an
important market for goods and services, including legal services. Techno-
logical change and increased capitalization of the extractive industries in
other parts of Canada produced comparable workforces and similar markets
elsewhere. Furthermore, the expansion of corporate activity, government
services and higher education, especially in the 1950s and 1960s, began to
generate a relatively affluent class of knowledge workers and managers
with legal needs.

However, from the 1970s onwards, the economy began to change with
resulting changes in the labour market, and hence the legal services market.

6 See generally Stager, supra note 1 at 232.
Industrial expansion began to falter and the resource sector experienced repeated crises; technological change — especially computerization — displaced many industrial workers while enhancing the skills level and market value of a minority; much routine clerical work was eliminated while non-standard jobs in the service sector provided the major element of growth in employment. Each of these changes has undermined demand for legal services by individual clients: fewer can afford to buy houses, cottages and major consumer goods; fewer can afford lawyers to handle their wills and family disputes; fewer have savings, investments and insurance policies which might generate work for lawyers. On the other hand, with increasing corporate concentration through mergers and acquisitions, increasing taxation and regulation, and increasing technological innovation, the demand for legal services by business, government and institutional clients has grown apace. These developments explain several shifts within the profession: away from small towns, small firms and general practise, towards big cities, large firms and specialization. Now further changes are under way and they will have important consequences.

For example, industrial production is increasingly built around “flexible manufacturing”: new technology makes possible rapid retooling and greater responsiveness to signals from the marketplace; product runs are shorter, model variations proliferate and quality concerns are more prominent; production levels fluctuate but inventories of parts and finished product are greatly reduced; robotic machinery requires the employment of a smaller but more skilled workforce; and firms reduce their core operations while expanding and intensifying their relationship with external suppliers and contractors who, in effect, enable the firm to meet their fluctuating requirements for specialized goods and services.

Consider some of the implications of flexible manufacturing for the legal services market. Quite apart from the shrinkage in the industrial workforce, whose possible effects were considered previously, lawyers are offered a new set of opportunities. Property rights in new robotic devices and software must be protected and licensed; financing for new plants and machinery must be arranged; new types of individual and collective labour contracts must be negotiated; agreements with suppliers and contractors must be drafted and enforced. New technology does not always function well: suppliers may have to be sued (and defended); consumer claims may have to be resisted (and pursued); environmental regulators may have to be pacified (and mobilized). In short, changes in the structure of manufacturing are likely to produce legal consequences and, ultimately, a demand for legal services.

Without attempting a similar detailed analysis of the fluctuating fortunes

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7 P. Drucker, “The Age of Social Transformation” (1994) 274:5 Atlantic Monthly 53 estimates that during the past forty years, employment in industry has fallen by half, from 40% to 20% of the labour force. Will Hutton, a British author, argues that over the past twenty years, the percentage of workers in all sectors with anything resembling secure tenure of employment has fallen to about 40% of the workforce, with a further 30% having only a tenuous hold on employment, and the remaining 30% essentially consigned to permanent unemployment and dependency.
of Canada's primary industries, telecommunications, health care, family structures, banking practise, or the demographics and economics of new immigrant communities, it is clear that any and all of these have the capacity to affect the legal services market positively, negatively, or in both directions. However, when developments in the private sector are considered in the context of retrenchment in the state sector, the intensification of past trends seems the likeliest outcome. Precarious small enterprises, unemployed workers, estranged spouses and impoverished pensioners are likely to figure less and less prominently in the clientele of Canadian lawyers; large companies, financial institutions, and technologically sophisticated businesses are likely to constitute an increasingly important source of legal custom. On the other hand, as the following discussion of global and regional economic regimes will propose, it is quite possible that the expansion of certain sectors of the Canadian market for legal services may not generate work for Canadian lawyers.

Finally, for reasons explored below, even if the aggregate demand for legal services in Canada does increase, the consequences of this increase are likely to be experienced quite differently by lawyers in different kinds of practises.

(c) Changes in global and regional economic regimes

This discussion of the effect of economic change on the legal services market has not so far directly addressed the consequences of globalization or of Canada's participation in a regional free trade pact, the NAFTA. Globalization involves the relatively free movement of goods, services, capital and information (but usually not people) across national boundaries. Within the general context of globalization, three important trade blocs are emerging — in Europe, North America and the Asia-Pacific region — in which regional economic integration is proceeding apace. In Europe, economic integration is built on a foundation of supranational political institutions; in North America, economic integration has limited institutional expression, no overt political dimension, but considerable political consequences; and in the Asia-Pacific region, in both the dominant and emerging economies, integration appears to depend largely upon private arrangements within a facilitative framework of government policies.

What has all this to do with Canada law and Canadian lawyers?

Canada's economy depends upon the strength of our exports, especially to the United States, and upon our ability to attract and retain foreign investment, especially from the United States. As a result, as global free trade and regional economic integration proceed apace, decisions of great importance to Canada are made abroad.

Some of these decisions are grounded in treaties — the GATT, NAFTA, the International Copyright Convention — which commit us to removing barriers to trade, and to harmonizing our laws with those of our prime

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8 See below at 18 "The Internal Perspective: The Political Economy of the Canadian Legal Profession".
trading partners or the global trading community as a whole. Harmonization, however, is not what it might appear. Canadian law does not become a major factor in shaping a world consensus; rather Canadian law is recast to conform to a consensus which, not by coincidence, often resembles the legal arrangements which prevail in dominant economies, and which therefore tend to favour companies based in those economies. Thus, trade liberalization treaties in general, and conventions for legal harmonization in particular, have several important consequences. They narrow the range of policy options open to Canadian legislators. They liquidate — or at least dilute — the valuable intellectual capital of Canadian lawyers, as represented by their knowledge of what is distinctive in our system. And ultimately, as legal systems converge, they create a global market for legal services, in which Canadian lawyers will have to compete with foreign lawyers, even for Canadian clients.

Some decisions are taken by foreign investors and businesses. If they are concerned about Canada’s legislation or policies or economic environment they can decide to withhold or withdraw investment from Canada. This “exit” option has always been available, but its attractiveness has been enhanced by four developments. First, because of the dismantling of tariff and non-tariff barriers under GATT and NAFTA, companies need no longer have a significant corporate presence in Canada to gain entry to the Canadian market. Second, the globalization of production — made possible by new technology and the changing rules of international trade — has led many firms to lower their costs by shifting production from Canada to other countries. This is true of Canadian-based as well as foreign-based transnationals. Third, improvements in information technology have made it feasible for transnational companies to centralize many management functions — research and development, design, finance, human resources, even sales — which previously were located locally. Consequently, important decisions affecting corporate operations in Canada are being made less frequently by Canadian-based executives. Fourth, under competitive pressures, corporations of all types have opted for “flatter” or “leaner” management; as a result, some Canadian subsidiaries of U.S. firms have been folded back into their parent firms, and their Canadian operations are now controlled by American-based directors and managers.

The result of these four developments can fairly be described as the “hollowing out” of the Canadian corporate community. If it continues, it will have important implications for Canadian lawyers. Decisions no longer taken in Canada on the basis of domestic law or policies will not require Canadian lawyers to provide inputs in the form of technical legal expertise, policy advice, or liaison with government officials and other influential actors. Firms no longer operating in Canada have no further need — or at least much less need — of Canadian lawyers to negotiate contracts or deal with regulatory bodies. And if there is a decline in the number of Canadian subsidiaries of large transnational companies, there are likely to be fewer opportunities for Canadian lawyers to serve as their directors, or to draft wills, obtain divorces and convey houses for their well-paid senior executives. When Canadian lawyers are retained, they are more likely to be
instructed by managers based abroad, unfamiliar with Canada’s political and legal culture, and unconcerned that outcomes should be consistent — or appear consistent — with Canadian interests and values. This may well confront Canadian lawyers with ethical dilemmas in matters such as labour relations, where our law and culture vary considerably from those in the United States. Finally, corporate contributions to Canadian life more generally are likely to decline, when companies no longer have a Canadian base. Like all corporations, transnationals tend to “give at home”, to direct their charitable contributions and support for culture and research to agencies and institutions based near their head offices or primary markets. The result of the decline of corporate largesse in Canada will be less employment and more pro bono work for Canadian lawyers in the not-for-profit sector.

To recapitulate these suggestions in relatively temperate language, globalization is likely to have adverse effects on the market for high quality, sophisticated legal services in Canada. No doubt, some Canadian firms will try to offset these effects by “going global”, by opening offices abroad. In some cases, this strategy may succeed. However, the comparative advantage of Canadian law firms is based on their affinity to Canadian-based clients, and there are relatively few such clients engaged in global business activities of any scale. Furthermore, the costs of running a foreign practise are formidable, the risks are large, and Canadian firms will have to weigh carefully the advisability of competing with the dominant established American and English firms.

What is left, then, by way of strategy options for large Canadian law firms? First, they can move more aggressively into the international sphere, despite the risks, perhaps specializing in countries where they may be able to exploit special trading or investment relationships (such as Hong Kong, Cuba or Chile) or to take advantage of Canada’s somewhat lower cost structures to compete with the firms which presently dominate the global market for legal services. Second, they can form alliances with, or become absorbed into, existing global law firms. As the experience of comparable Canadian accounting firms suggests, this may well be a logical strategy. Or third, they can restructure themselves by reducing their size, overheads, profits and fees, so as to enable them to compete more effectively for a different clientele, such as mid-sized Canadian companies.

THE INTERNAL PERSPECTIVE: THE POLITICAL ECONOMY OF THE CANADIAN LEGAL PROFESSION

Law Society membership lists and Statistics Canada data may allow us to put crude numbers beside an abstraction we call “the legal profession” or “Canadian lawyers”. However, when we try to make this abstraction corporeal, to draw a life-like portrait which reveals who Canadian lawyers are, what jobs they do, on whose behalf, at what cost and with what consequences, it becomes clear that there is no such thing as a single legal profession or a typical lawyer. There are many legal professions; there is an enormous variety of lawyer types.

As a matter of casual observation, we know that some lawyers are gener-
lists and some specialists. They practise in small towns, suburban shopping malls, inner city clinics, government offices, corporate law departments, boutiques devoted to selected fields of law, mid-sized commercial firms and large legal conglomerates. They serve the mightiest interests and the poor and downtrodden. Some lawyers’ practises yield a bare subsistence income, and some enormous profits. In short, the profession is quite markedly fragmented according to practise specialty, location, size of firm, clientele and affluence. However, what is not always understood is that the profession is not only fragmented, but stratified. These various types of practises yield quite different levels of professional satisfaction, financial reward and public esteem. Furthermore, they are not randomly populated by male and female lawyers, lawyers of different races, ethnicities and religions, or lawyers who come from different social and academic backgrounds. On the contrary, there are some relatively clear connections between a lawyer’s type of practise and her or his personal and social characteristics.

Two types of practises have attracted considerable attention in the American literature on fragmentation and stratification; comparable Canadian data suggest that while the situation is not identical, some conclusions drawn from the American data are pertinent to Canada.

(a) Solo practise and small partnerships

Solo practice and small partnerships were once the dominant mode of professional practise. However, especially in urban and suburban settings, solo practitioners and small firms now comprise much of the profession’s lower stratum. Most of them are general practitioners serving individuals and small businesses. Most of their clients are not particularly affluent, and do not have complicated legal problems (or if they do, cannot afford to have them solved). Except in two circumstances, such lawyers are unlikely to earn large incomes from their practises: first, with the help of paraprofessionals, they may be able to process high volumes of relatively simple matters, such as conveyancing or debt collection; second, legal aid may subsidize their practise in certain areas such as family, criminal or immigration law. Otherwise, their main hope of larger incomes may be to turn to business investments, sometimes in partnership with clients, or to complement their professional activities with ancillary functions such as money lending or mortgage brokering.

Obviously, then, solo practitioners are vulnerable to fluctuations in the business cycle, the real estate market, and legal aid budgets. At the same time, they often lack the financial flexibility to absorb the increasing costs of practise, including law society fees, insurance premiums, libraries, information technology, and other costs of doing business. Moreover, they

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may be unwilling or unable to invest in improving their own professional prospects. They cannot afford to turn away other clients if they wish to specialize nor can they take time off from their practice to acquire additional credentials which might enable them to adapt to changing client needs. And it is not just their economic position which is precarious. They are viewed as somewhat peripheral to the profession: they do not do cutting-edge or complex work or serve prestigious clients; they seldom attract public or professional acclaim; and they are infrequently elected to important positions within the profession, or appointed to the bench.

Moreover, there is some evidence that solo practitioners are more likely than most to find themselves involved in disciplinary proceedings, whether because of who they are and what they do, or because of discriminatory enforcement of the profession's ethical code. Finally, even though solo practitioners may in fact derive quite reasonable incomes and great personal satisfaction from their legal practices, they increasingly — and accurately — perceive themselves to be marginalized within the profession. This provokes, in turn, angry protests at bar meetings and benchers' elections, and a rejection of the noblesse oblige rhetoric and policies favoured by elite lawyers.

Who is recruited into the ranks of this professionally peripheral and modestly remunerated group? Members of immigrant groups, Jews and Catholics, graduates from less prestigious law schools, or those with middling and less-than-middling grades are all disproportionately represented. And once recruited, they seldom move upwards into more privileged and prestigious practice roles or, more accurately perhaps, they continue to be excluded for the same reasons which led to their exclusion in the first place.

(b) Large corporate law firms

At the other end of the spectrum — as measured by income, reputation, conditions of practice, professional challenge, and clientele — are the large corporate law firms. These firms are almost inevitably located in well-appointed facilities in metropolitan centres — especially Toronto, Montreal, Calgary, and Vancouver. They serve mostly institutional clients, such as corporations and governments, predominantly in complex business litigation, regulatory proceedings or transactions involving considerable sums of money. Most partners within the firm are specialists; they work collaboratively with each other and with outside experts such as accountants; and they are well supported by associates and juniors, librarians, paraprofessionals, clerical staff and technicians. Because of the high profile of their clients and cases, their technical virtuosity as specialists, and their secure financial base, lawyers from these firms are usually over-represented in the ranks of the judiciary, governing bodies, and professional pantheons. They thus tend

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to wield considerable formal and informal power within the profession. And
finally, because they themselves are somewhat insulated from professional
frustration and economic insecurity, they are more likely to espouse an
ideology of high-minded professionalism and less likely to be subject to
disciplinary scrutiny or sanctions.

In principle, these firms are meritocracies: they profess to hire the best
and the brightest recruits, train them well, and provide opportunities and
rewards commensurate with performance. One would therefore expect that
the membership of these firms would be more heterogeneous than is in fact
the case. Although there has been discernible progress towards the merito-
cratic ideal over the past twenty or thirty years, women, Jews, Catholics,
mature students, members of visible minorities and recently arrived immi-
grant groups are apparently still not being hired in proportion to their num-
bers in the eligible cohort of graduating law students; white Protestant
males apparently continue to be preferred for partnerships.13

However, these large law firms have been undergoing rapid change, and
are now experiencing stressful challenges.14 Over the past generation or so,
they have grown larger and larger, as the result of hirings and of mergers
and alliances with local firms, as well as those located in other cities and
provinces. They have grown more complex, sophisticated, powerful and
affluent. However, all of this has left them exposed to various problems.

Expansion has apparently weakened the formal authority structures of
these firms, and attenuated their informal culture, as evidenced by an unprec-
edented number of frauds and scandals. During periods of economic expan-
sion, especially during the mid- to late-1980s, firm earnings rose dramati-
cally, as did operating costs, individual lawyers' salaries and the value of
partnerships. This has produced unsustainable expectations of ever-rising
affluence, and in turn obsessive preoccupation with the "business" aspects
of practise. These firms have become more and more capital intensive, due
to the high cost of rents, libraries, computers etc., thus rendering them vul-
nerable to being squeezed between fluctuating revenues and high fixed
overheads. These concerns have given rise to business strategies which have
proved to be stressful and divisive. Profits and salaries have stopped rising;
competition is fierce; internal conflicts are leading to the dissolution of firms
or the defection of disgruntled members; young lawyers are disaffected. Of
particular interest in the present context is the emergence of a large "under-
class" of lawyers (their deprivation is relative, not absolute) who will never
progress beyond subordinate and "non-tenured" positions with the firm. This
"underclass" is populated disproportionately by women.15

But despite all their difficulties, the large firms continue to dominate the
profession, to offer the highest rewards and, arguably, the greatest profes-
sional challenges. It is from this position of relative strength that they will
confront a rapidly changing external environment which will have serious
consequences for them.

13 See Hagan & Kay, supra note 1 at 74.
14 Daniels, supra note 12; Hagan, Huxter & Parker, supra note 9.
15 Hagan & Kay, supra note 1.
Between solo practise and large corporate law firms lie a number of distinct professional strata. While — except in relation to gender — their characteristics are not as well documented as those of the lawyers in the two strata mentioned above, it is clear that each can be distinguished by the clientele it serves, by its special expertise, by its distinctive firm structures, cultures and rewards, and of course, by the special demographic characteristics of lawyers practising in that stratum. So stratified is the profession, in fact, that it appears to have no common present. By extension, it is not likely to share a common future. This point becomes particularly important in developing predictions and prescriptions for different groups in the profession even for the mid-range, the next twenty years or so. We have discussed solo practitioners and those in prestigious, large firms; a few further examples suffice:

(c) Family lawyers

Twenty years ago, say, the practise of family law was essentially in its infancy. The field was only beginning to generate the intellectual and ideological preoccupations which would lead to the reshaping of the law of matrimonial property, to new initiatives in child advocacy and alternative dispute resolution, to development of a legal framework for non-marital and same-sex spousal relationships, and to substantive legal changes which have produced something like consensual divorce. Twenty years hence, it is easy to imagine that many of these changes will have disappeared from view. Radical reduction of legal aid funding for family law cases, the reassertion of conservative “family values”, the aging of the baby boom generation, the decline in the birth rate, and the gradual impoverishment of the middle class will all have consequences for the future practise of family law.

(d) Public law practise

Less than twenty years ago, we adopted the Charter, with important consequences for legal practise in many sectors. A high profile, though relatively small, sub-profession of Charter experts emerged, funded by both government and advocacy groups; Charter arguments and doctrine virtually created the practise specialties of immigration and refugee law, reconstituted the practise of criminal law, and infiltrated employment law and many other specialties; and Charter discourse led to changes in legal culture and citizen expectations, which in turn prompted many government agencies, universities, and even corporations to codify their internal law and shift from informal to formal modes of decision-making.

However, the process of juridification, of which the Charter was both a consequence and a cause, has reached the point where questions are being asked. Who has actually benefitted from this onset of law, lawyering and...
legal values — and who has lost? How many women, how many aboriginal communities, how many welfare recipients, how many accused persons have actually been empowered by Charter values and Charter litigation, as opposed to other contemporaneous social and political developments? And at what cost in terms of excessive stress on the legal aid system, of the forced redeployment of funds within welfare budgets from benefits to administration, of inhibitions on regulatory initiatives and strategies resulting from the direct and indirect effects of the Charter? The point is not to predict repeal of the Charter, much less to advocate it. Rather it is to say that more and more questions need to be asked; that we will need empirical evidence to answer them; and that some kind of consensus may possibly develop to the effect that the Charter costs too much and delivers too little. If this happens, we may well see fewer Charter challenges (by advocacy groups: but perhaps more by corporations), a less interventionist Supreme Court, a gradual shift in legal-cultural values, and in the end, significant shrinkage in the scope of legal practise in all those specialties which expanded during the first two decades of the Charter.

(e) The law of the New Economy

By contrast, we can imagine that during the next twenty years, the complexification and intensification of global trade relations, exponential growth in new technologies and forms of intellectual property, the proliferation of corporate networking arrangements, privatization and deregulation, and other developments characteristic of the New Economy will create a significant and profitable market for sophisticated legal services to create and manage what amount to private regimes of governance in the business sector.¹⁸ This opportunity can be seized by Canada’s large corporate law firms if they are able to accomplish two fundamental changes. First, they must reposition themselves within the global economy as an independent force or, more likely, as units closely associated with the large transnational law firms based in the United States and Europe. Second, they must be willing and able to integrate their expertise concerning techniques of governance with substantive knowledge of business practise and technology; this requires that they become competitors, partners or integral components of the major multi-disciplinary international consulting firms which already dominate this market.¹⁹ In short, their best chance is to cease to be solely Canadian and to cease to be merely law firms.


(f) Responding to the legal needs of middle-class clients

Although the market for lawyers' services may shrink overall, for reasons canvassed above, small- and middle-sized businesses and individuals of limited or moderate means will still require routine legal services of various kinds.\(^{20}\) There will be a three-way competition to meet these needs. Solo practitioners and small-to-middling firms, will continue to offer their services in something resembling the traditional fashion. This will enable them to exploit their comparative advantage: their ability to offer personalized and convenient service, their connections with local bureaucracies and elites, and their expertise in a limited number of specific fields. Competing with these traditional providers will be multi-location legal service firms. Concentrating on standard transactions, computerized, with offices in high-traffic locations, able to afford advertising in order to generate high volumes of clients with basic needs and limited resources, their special appeal will be that they offer easily accessible and reliable service at low prices. Such firms might operate independently or under franchise or as part of a multi-faceted service provided by credit unions and trust companies, or in conjunction with paralegal firms and tax preparers. Indeed, given the current tendency towards privatization, it is even possible to imagine that legal service firms will be allowed to bid on the supply of services to low-income groups which is now provided by public clinics funded by legal aid. Conceivably, running alongside these commercial providers, and operating in a similar fashion, will be not-for-profit plans established by affinity groups such as labour unions.

A third option would be for individuals to make their own wills, incorporate their own companies, handle their own conveyancing transactions or sue to collect their own small debts. This would be the logical outcome of several converging or mutually reinforcing trends. First, self-help "how-to-do-it" manuals of all kinds — including legal manuals — have been growing in popularity. Second, with available technology, individuals can secure increasingly detailed and specific legal information and advice on-line or through pay-per-call telephone services, without ever entering a lawyer's office or retaining a lawyer. Third, in order to reduce costs and increase efficiency, some state functions are being redesigned so that citizens ("customers") can interact directly or through computer technology with government systems; land registration is a case in point. And fourth, deregulation may either eliminate some administrative systems, or simplify them to the point where they can be navigated without the intervention of lawyers by reasonably sophisticated clients, such as mid-sized businesses.

Thus, competition in this staple sector of the legal services market will probably be considerable. At the very least, over the next twenty years private practitioners will be less likely to dominate it than they have in the past.

(g) Civil litigation

Civil litigation provides a final example. While the traditions of the

\(^{20}\) See e.g. C. Seron, "Managing Entrepreneurial Legal Services: The Transformation of Small-Firm Practice" in Nelson et al, supra note 3.
English bar have helped to shape our legal consciousness and culture, we can anticipate that its influence will wane considerably in the future. Litigation as we know it — adversarial confrontation in open court — seems to be if not an anachronism, at least a last resort. The courts cannot possibly provide efficient debt collection through conventional proceedings: some form of summary procedure, usually in small claims court, seems the best alternative. Businesses involved in important controversies may sue, but obviously prefer to negotiate, mediate or arbitrate, if possible. Workers' injuries are likely to remain within the domain of a special compensation or insurance system, despite the problems such systems are encountering in Ontario and elsewhere. Automobile litigation has been radically reduced, or totally eliminated, by the introduction of no-fault insurance. And while there are a few counter-examples — the proliferation of wrongful dismissal suits, for example — the long term trend seems to be that important areas of disputing are more and more frequently resolved outside the civil courts.

What indications are there that the next twenty years might witness a reversal of this trend? Not many. There seems little hope that the courts under present management (and even less under judicial management) will be able to reduce costs and delays to the point where civil litigation is affordable and expedient. In fact, the whole thrust of reforms to date is to reduce the role of counsel, to truncate trials and to reduce the numbers of appeals. This is especially true of the extraordinary measures, now being mooted in England, to shift control of the litigation process from the parties to the court. Such measures might indeed improve the cost effectiveness of litigation (if anything will) but if so, a secondary outcome will surely be a commensurate reduction in both the role and the revenue of litigators. Essentially, then, court reform does not promise to enhance the prospects of the civil litigation bar.

However, it is just possible that litigators may be the beneficiaries of massive deregulation and privatization. Many claims and disputes now channelled into administrative proceedings and negotiated amongst agencies of the state will have to be settled elsewhere. Complaints about discrimination, environmental damage, unsafe products or consumer fraud could conceivably be remitted to the courts, whence they were plucked for good and proper reasons over the past century or two. This would indeed provide new opportunities for litigators. However, such developments are neither wholly probable nor likely to be wholly profitable. On the one hand, it is not clear that governments unfavourable to conventional forms of regulation by administrative agencies would willingly accept court intervention in the marketplace. On the other, at the moment a good many lawyers spend a great deal of their time in administrative proceedings; if deregulation proceeds apace, and controversies are moved into the courts, it is not at all clear that they would be net beneficiaries.

(h) The consequences of differentiation and stratification

I have tried to show how dramatic and rapid environmental changes are affecting the market for legal services. Because of the radical differentiation of practise roles within the profession, and because of stratification, the consequences of these changes are likely to be experienced very differently by different groups within the profession. I have also suggested that the profession has relatively little ability to affect the general direction and speed of change, and must therefore adapt to it, taking advantage of inevitable counter-trends and ambiguities. In the final section of the study, I will try to show how these external and internal perspectives on the future of legal practise also implicate certain changes in the institutions which now define and direct the profession.

KNOWLEDGE, GOVERNANCE, ETHICS, CULTURE

The very concept of a profession" is based on the premise that its members possess expertise, skills and knowledge, which others do not. On this premise rests the claim to a monopoly of professional practise, the requirement of a professional governing body to regulate the monopoly, a code of professional ethics to ensure that knowledge is used for the benefit of the client, and a professional culture, the shared values, symbols and practises which bind together those who have a common base of knowledge. One important implication of this study is that changes in the profession wrought by external and internal forces are further diluting whatever common knowledge base legal practitioners may once have shared. In an alternative interpretation, what is becoming more obvious is the fact that lawyers have not for a very long time, if ever, shared much in the way of common knowledge. Whether the change is in the reality or the perception, however, the conclusion must be that the significant regulatory structures of professional practise which are based on knowledge — professional governance, culture and ethics — are increasingly problematic.

(a) Knowledge

I have argued elsewhere that the exponential growth of legal knowledge, combined with the diversification and stratification of legal practise, ensures that no lawyer will ever be able to master all legal knowledge. Knowledge is therefore rationed on the basis of what lawyers want to know, need to know and can afford to know in their practises.23 This observation, quite innocuous in itself, might lead to a radical conclusion: that we should overtly acknowledge the falsity of the proposition that lawyers constitute a


single profession, with a common educational credential, a standard model of professional training and an all-purpose license to practise.

For example, lawyers who perform routine services for lower and middle class clients have spent, typically, seven or eight years of post-secondary education and training before entering practise. This is an excessive investment in intellectual capital, which many will never be able to amortize without charging fees which the market will no longer bear. On the other hand, in many areas paraprofessionals can (and do) perform most of the routine work over which fully qualified lawyers claim an exclusive monopoly. We should therefore seriously consider two complementary measures: reducing the educational and training qualifications required of lawyers who wish to practise exclusively in these areas, and extending the right to practise to both qualified lawyers and trained paraprofessionals. At the other end of the scale, because the future of large law firms lies in their willingness and ability to compete globally, and to work with other professionals in interdisciplinary practises, it would also seem that many lawyers are under-qualified. Graduate degrees, intensive and specialized CLE programs and other forms of preparation for this type of practise may be the answer; a standard three year law degree followed by on-the-job training and a brief period of articles is clearly not. Nor is it difficult to imagine that specialists and general practitioners might be better prepared for their future work than they are at present. Preparation might involve academic work in the social sciences, advanced and specialized law courses, or skills training for specific professional roles.

The critical point is that lawyers destined for radically different professional roles should not receive a single, undifferentiated and random preparation for their professional futures. Essentially, we have to move from a unified model of legal education to a pluralistic model. However, abandonment of a single path to legal practise does not imply abandonment of liberal education or of the intellectual mission of law schools. Indeed, it may indeed require considerable enhancement of those activities, given that the mandate of law schools is not to replicate today’s lawyers but to create tomorrow’s legal administrators, critics, and intellectuals as well as legal practitioners. Moreover, law schools will surely be expected to take the lead in developing a legal literature which will help lawyers to shape, understand and function in their various roles within a knowledge-based economy and a rapidly changing society.

This new approach to education and training will not work unless it is complemented by new arrangements for competence testing, licensing and relicensing and continuing education. These arrangements must not only ensure that practitioners are able to do the work for which they are licensed, but also that they have the opportunity to requalify for other practise roles at various moments in their careers.

(b) Governance

Ultimately, the diversification of practise roles brings into question the continued prospects for a single professional governing body. At least in regard to the larger provinces, this is a less radical proposition than it might seem.
Already, the profession is deeply divided over appropriate regulatory strategies on a wide range of issues ranging from specialist accreditation to advertising to malpractice insurance to mandatory CLE to legal aid. These divisions manifest themselves in intense political activity within the profession, in hotly contested benchers' elections, petitions and protest meetings, even threats of civil disobedience and law suits. This political activity to some extent emanates from the wide disparities of philosophical and ideological positions which one would expect to find in any large group of articulate individuals. But to a much greater extent it stems from the fact that groups of lawyers in different practise situations have different economic interests, that such interests are directly implicated in each new regulatory initiative of the governing body, and that vindication of these interests requires that the group gain control or influence within the governing body.

At the least, this politicization of the profession puts governing bodies on notice that they are going to have to change considerably. This could presage the introduction of formal arrangements whereby different interest groups within the profession are regulated by local or sectoral bodies with devolved powers, or are accommodated by direct representation of practise-based constituencies within the governing body. At the extreme, if conflict grows sufficiently strong, and if it is perceived to affect the public interest, the profession could even forfeit its system of unitary self-government and its monopoly over legal practise, in favour of a new complex of regulatory bodies with specific occupational mandates, such as those which exist in the health professions for medical specialists and generalists, nurses, and laboratory technicians.

Conceivably, in the spirit of a new competitive economy, professional governance could also be threatened by the retrenchment of state regulatory functions. As the experience of the English legal professions should remind us, ideological opposition to state intervention in the marketplace logically extends to intervention by bodies — like the professions — which exercise delegated state powers. At a minimum, it would be surprising if globalization and regional economic integration did not soon produce pressures for law societies to adopt more liberal attitudes concerning the admission to practise of lawyers from other jurisdictions. At a maximum, many functions now falling within the bar’s statutory monopoly over legal practise may in the future be performed by business consultants, real estate agents, tax preparers, paraprofessionals, accountants and other specialists.

(c) Ethics

One of the prime justifications for professional self-government is that only members of a profession are deemed to have the necessary knowledge to establish and enforce standards of competence and ethical behaviour. While governing bodies have indeed adopted codes of professional responsibility,24 and other rules of conduct principally concerned with financial

24 The Canadian Bar Association exerted a leading influence by its adoption of a Code of Professional Conduct in 1974 (revised 1988). This Code has been enacted by most provin-
accountability, they have enforced these only sporadically and selectively. This selectivity is evidence of an "ethical economy" at work within a governing body which has limited energy, resources and credibility to invest in the exercise, and which consequently focuses on those areas of ethical concern which are most likely to yield the greatest advantage for the least difficulty.25

"Concern" and "advantage", however, are terms which draw their meaning from specific contexts. Thus, financial malfeasance and other breaches of fiduciary duty are not only a criminal offence and a civil wrong; they are a serious political concern for the profession. Vigorous enforcement of ethical norms concerning honesty is almost universal because it is perceived to yield an important advantage to the profession, by preserving public confidence in lawyers and public support for professional self-government. However, violations of such ethical precepts as the lawyer's responsibility to advance the administration of justice and the cause of law reform are apparently not a concern, and are seldom if ever the subject of enforcement proceedings. (Oddly, governing bodies have been extremely slow to articulate and enforce a duty of competence — proclaimed for the first time only in 1974 — although it is the very essence of the profession's claim to monopoly, autonomy and privilege.)

Overall, then, there is considerable variability in the enforcement of ethical norms which are supposed to govern legal practise. This variability has been, and clearly will be, affected by anticipated changes in the environment of practise and the formal and informal structures of the profession. A few examples make the point. Studies show that enforcement strategies focus on elements of the profession deemed "marginal", or at least on elements where serious violations have previously come to light.26 They also show that patterns of enforcement are closely tied to fluctuations in the business cycle. If these patterns persist, we can anticipate continuing — even increased — surveillance of lawyers in solo practise and small firms, who will be experiencing the dual pressures of a shrinking demand for their services and — for the foreseeable future — adverse economic conditions. However, we have also begun to observe what would once have been considered a relatively rare occurrence: discipline of members of large and prestigious firms. All indications are that such occurrences will become more and more frequent. These firms are under great and growing pressure, for reasons suggested above, at the very moment when their own internal accountability systems are experiencing extreme strain.

A second example relates to the belated, but growing, recognition that professional competence will have to be taken much more seriously than it has been to date. This change in the ethical economy of the profession is


26 Supra note 11.
attributable to several causes: the increased complexity of legislation which makes errors easier to commit, define and detect; the greater sophistication of clients — especially corporate and institutional clients which now have in-house lawyers and often are represented by several firms in Canada and abroad; increased competitiveness amongst law firms which threatens to dissolve previous tacit understandings about mutual tolerance for error; and the horrific expense of malpractice insurance, which can only be reduced — if at all — by better policing of competence, by better educational programs, and by closer surveillance.

A third example relates to the legal profession’s ethical responsibilities for pro bono work. Four forces are on a collision course: legal aid funding is being greatly reduced; funding for community organizations is being reduced or eliminated; the ability of ordinary citizens to pay for legal services has been constrained by a decline in the earning power of working- and middle-class citizens; and rights-based claims and entitlements have greatly increased since the advent of the Charter. If the profession is not willing or able to provide advocacy services for people who have rights but cannot afford to pay to enforce them, both the profession and the legal system as a whole will experience a serious crisis of public confidence.

To conclude with a general point: the ethical economy of the profession is intertwined with its political economy, which in turn is profoundly affected by changes in its external environment.

(d) Culture

Governing bodies are formally responsible for the regulation of professional practise: within the scope of their statutory authority, they admit and disbar; they educate and exhort; they legislate and speak as the official voice of the profession. But it would be foolish to pretend that no sparrow falls without the knowledge of the governing body, that no norms of conduct exist save for those they proclaim, that no system of sanctions or rewards influences lawyers’ conduct except those which bear an official imprimatur. To the contrary: it is the governing body which occupies a marginal role in directing professional behaviour, albeit a role which becomes more central at the two defining moments of entry to and exit from practise.

Like all other groups, like society as a whole, the behaviour of lawyers is shaped by what might be called “culture”. The term is vague, to be sure, and has been hotly debated in the literature. However, without rehearsing that debate, for present purposes it is sufficient to understand the concept of “professional culture” as the complex of shared values, symbols and behaviours which serve both to define membership of the group and to set it off from other groups.

For the Canadian legal profession, the real (or imagined) culture of the English bar is the point of reference (not to say reverence). We all recognize the power of the bar’s ability to secure a high degree of cultural conformity as manifest in its professional customs and conventions, ideology, geographic concentration in chambers in or adjacent to the Inns of Court, dress and formal speech, shared understanding of law and legal knowledge,
concentration on advocacy and legal opinions, relations with clients and so on. Indeed, if there is any legal profession whose “culture” can be identified with some precision, it is surely this one. Accordingly, in the case of the English bar, culture can be seen as an important vehicle for the transmission of values and the regulation of behaviour.

However, it would be a mistake to imagine that the Canadian legal profession bears much resemblance to the English bar. Geographic and functional dispersal and stratification, especially in the larger provinces, obviously dilutes the power of the professional culture. Law Societies try to fill the void; provincial or national lawyer’s groups try to shape a broad Canadian or provincial legal community. But distance, diversity and stratification often confound these efforts.

There is, however, a positive aspect to the absence of a common culture: diversity and stratification account for the presence of multiple sub-cultures within the Canadian legal profession. Labour or securities or criminal lawyers in metropolitan centres to some degree constitute distinct sub-cultures; lawyers who practise in small towns — whether in Alberta or Nova Scotia or Quebec — constitute another; law firms are distinctive sub-cultures in themselves, at least up to the point at which their large numbers and extreme specialization become divisive. Each of these sub-cultures provides a degree of internal cohesion and regulation within the specialty, community or firm. Thus, articling and the first years of practise have traditionally been the definitive socializing experience for young lawyers; professional courtesies in a small town or within a firm make professional life more efficient and pleasant; recognition of the probity or expertise of leading lawyers establishes a hierarchy of moral and professional authority within a practise specialty; fees for particular transactions in a given local or specialized legal services market are regulated by an informal consensus concerning what is appropriate or extortionate.

At the same time, sub-cultures have their negative aspects. They may be exclusionary, and thus complicate attempts to promote greater equity and equality within the profession. They may sharpen parochial divisions within the profession over the adoption of new policies. They may rally around their own errant members to shield them from client complaints or even from discipline by the governing body. And they may resist the introduction of new models of practise which are perceived to threaten their shared interests.

Legal subcultures are likely to both proliferate and dissolve as the pace of change quickens and as divisions within the profession deepen. Subcultures are threatened by growth as middling law firms merge into large ones and as towns become cities, by the intensification of competition amongst lawyers of all kinds, by the dilution of rapidly expanding local legal communities, by the arrival of multi-location legal service firms and “branch-plants” of metropolitan law firms, by the diversity of perspectives and styles

27 It is sobering to realize that there are now several Canadian law firms whose membership is larger than that of some provincial law societies. See generally R. Daniels (1993), supra note 12.

28 See R. Daniels (1992), supra note 12 at 822 et seq.
introduced into settings where lawyers work closely with paraprofessionals and members of other professions.

Not least, subcultures are threatened by changes in demography. These changes — the result of changes in Canadian society — involve the increasing numbers of women, members of visible minorities, and mature graduates who have arrived in law as a second career. These individuals represent not only a significant proportion of law graduates, but a significant new source of talent, experience and potential clients. Their presence confronts the profession with the need to seriously address issues of stratification and discrimination. If it fails to address these issues, it will likely find itself embroiled in both internal and public controversies. If it does address them, it will have to attempt the difficult task of reinventing some aspects of traditional legal professional culture, including the central concept of “career”, and systems of recruitment and reward which reinforce that concept. Despite some genuine attempts to deal with demographic diversity issues in a constructive and principled way, the prospects for reforms are not optimal at a time when most of the profession is experiencing extreme pressures and disorienting changes.

Finally, whether my diagnosis of the causes and consequences of change is accurate, a considerable re-structuring of legal practise is already under way. Law firms — large or small — can be seen as devices to organize the human and physical resources necessary to render legal service of high quality to clients at a price which they are willing and able to pay, at a profit and under working conditions which the members and employees of the firm deem acceptable. The present discontents of the profession suggest that these diverse — often incompatible — objectives are not being achieved within existing firm structures. Insufficient return on investment, a perceived decline in the quality of life, excessive overheads, questionable professional behaviour and dissatisfied clienteles are all evidence that some elements of the law firm equation are out of balance.

Perhaps there is nothing that a healthy dose of general prosperity would not cure. But if by chance prosperity should turn out not to be imminent or permanent, it is possible to imagine that radical changes in the structure of practise will be attempted. These are likely to draw inspiration from corporate strategies which are common throughout the new economy: consolidation, downsizing, globalization.

The question, then, is whether the profession’s subcultures can remain sufficiently stable and long-lasting to enable them to continue to perform their traditional roles of instructing, mentoring, censuring, defending, nurturing and regulating their members. If not, there will be a tendency to look to formal institutions — law schools, governing bodies, outside regulatory bodies — to perform this indispensable work of subcultures. There is no evidence that these institutions will be equal to the challenge.

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