The cost of family law legal services in Canada: a historical and critical analysis of lawyers' business decisions

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One of the most enjoyable parts of my work on this thesis was interviewing the lawyers who agreed to participate in my research. Their recollections deepened my understanding of the day-to-day practice of law in the 1970s and, I hope, will do the same for the reader. What I do not include in the thesis, however, are the parts of the interviews that expressed the sincere empathy of these lawyers for their clients, which was always combined with a great sense of humour about the human condition. In my experience, these are the character traits of all individuals who successfully dedicate their careers to working in family law.

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Abstract

This is a study of lawyers' business decisions and the implications of those decisions for access to legal advice and representation in family law. Changes to law office management and the adoption of hourly billing practices, occurred just as family law became a specialized practice area following the enactment of the *Divorce Act* in 1968. This analysis of the history of pricing legal services in the 1960s and 1970s demonstrates that the high cost of legal services today is the result of choices made by members of the legal profession in the past.

Today, one of the central themes in the "access to justice" scholarship in Canada – client-centered justice – glosses over the importance of lawyers' agency. Concurrently, the scholarship on the legal marketplace or the "business of law" primarily addresses large, elite corporate firms, excluding the business practices of many lawyers who provide personal legal services, such as family lawyers.

The Canadian organized bar's current approach to legal expense insurance for family law is illustrative of the problem with ignoring the agency of lawyers. The organized bar has not adequately educated lawyers on entering into a relationship with the legal expense insurance industry as an intermediary in billing between lawyer and client. Instead, the focus has been on educating the public to create demand for legal expense insurance.

Résumé

Cette étude analyse les décisions d'affaires d'avocats et les conséquences de ces décisions en matière d'accès à la justice en droit familial. Des changements dans l'administration des bureaux d'avocats, comme par exemple la tarification horaire, ont eu lieu juste au moment où le droit familial devenait une pratique spécialisée suite à l'adoption de la Loi sur le divorce, 1968. Une analyse historique de la tarification des services juridiques dans les années 1960 et 1970 démontre que le prix élevé des services juridiques aujourd'hui résulte de choix faits par les membres de la profession juridique dans le passé.

Aujourd'hui, l'un des thèmes principaux abordés dans la littérature concernant l' « accès à la justice », soit la justice centrée sur la personne ou le client, ignore l'importance du rôle de l'avocat. Concurremment, la littérature sur le marché juridique ou la profession juridique concerne principalement les grands cabinets d'avocats spécialisés en droit corporatif, et exclut les pratiques d'affaires des avocats offrant des services juridiques personnels, tels que le droit familial.

L'approche actuelle du Barreau canadien en matière d'assurance frais juridiques pour des services de droit familial constitue un exemple qui illustre le problème qui surgit quand on ignore le rôle de l'avocat. Le Barreau n'éduque pas les avocats à

propos de la possibilité de faire affaires avec des compagnies offrant l'assurance frais juridiques en tant qu'intermédiaire dans la facturation entre l'avocat et le client. L'accent est plutôt mis sur l'éducation du public afin de créer une demande.

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Introduction

This is a study of lawyers' business decisions and the implications of those decisions for access to legal advice and representation. I examine the choices of the lawyer as a businessperson in the area of family law, where litigants without lawyers are increasingly a matter of concern for scholars, judges and the organized bar.[1]

Too often, the legal profession and legal scholarship keep the 'business of law' separate from 'access to justice'. One of the implications of this separation is that certain practice areas dominate the discourse in each of these fields. Personal legal services, such as family law and criminal law, are almost exclusively studied as 'access to justice' issues. By contrast, the discourse about the business practices of lawyers is oriented towards the corporate legal market. The general themes in each of these areas are unsurprising under the circumstances; it makes sense that when the legal profession talks about access to justice it would look to areas where there

[1] See, for example, Rachel Birnbaum, Nicholas Bala & Lorne Bertrand, "The Rise of Self-representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants" (2012) 91 Can Bar Rev 67; John-Paul E Boyd & Lorne D Bertrand, *Self-Represented Litigants in Family Law Disputes: Contrasting the Views of Alberta Family Law Lawyers and Judges of the Alberta Court of Queen's Bench*, online: Canadian Research Institute for Law and the Family <http://www.crilf.ca/Documents/Self-represented%20Litigants%20-%20Views%20of%20Judges%20and%20Lawyers%20-%20Jul%202014.pdf>; Jona Goldschmidt & Loretta Stalans, "Lawyers' Perceptions of the Fairness of Judicial Assistance to Self-Represented Litigants" (2012) 30 Windsor YB Access Just 139; Jaime Sarophim, "Access Barred: The Effects of the Cuts and Restructuring of Legal Aid in B.C. on Women Attempting to Navigate the Provincial Family Court System" (2010) 26 Can J Fam L 451; Hon Jennifer Blishen, "Self-Represented Litigants in Family and Civil Law Disputes" (2006) 25 Can Fam LQ 117; Carol Cochrane, "A Family Law Practitioner's Guide to Dealing with the Self-Represented Litigant" (2006) Can Fam L Q 131.

is significant unmet need and where many are unable to afford to hire a lawyer. Corporate commercial law dominates in the study of the legal marketplace because of the prominence of large, elite corporate firms and the work they do.

In this thesis I will explain the significance of looking at the business practices of family lawyers, an area of law typically ignored when the profession analyses the business of law. In localizing the topic to the business of family law I discover the strong interconnections between the business decisions of lawyers and access to justice. Further, my approach uncovers how the agency of lawyers can be obscured by discourses related to both access to justice and business of law studies. To be clear, when I discuss the agency of lawyers I mean this in the collective sense. In the first part of this thesis I describe how the legal profession in Canada has made collective choices about how to do business. Today, these decisions continue to be made collectively, whether through the formal institutions of law societies and bar associations or informally as lawyers learn from the practices of their peers.

In Part One I describe the history of the market related to family law legal services in Canada. I focus on the decade following 1968, in which the federal government first provided for divorce and its corollary relief uniformly throughout Canada. The main arc of this narrative demonstrates how lawyers encountered a new legislative environment in family law just as the North American legal profession collectively took up strict timekeeping and billable hours as law office management techniques. I use academic scholarship, judicial decisions, continuing legal education materials, organized bar publications, newspapers and interviews

with lawyers who practiced family law in the 1970s as source material to recreate a sense of how these lawyers chose to do business.

In Part Two, I apply this historical analysis of family lawyers to inform a reading of the current wave of "access to justice" projects in Canada, most prominently the Canadian Bar Association's "Envisioning Equal Justice Project." My conclusion is that the discourse surrounding these projects usually fails to acknowledge the choices that lawyers make, such as the decision to adopt hourly billing. Instead, the issue of the price of legal services is most often described by referring to litigants' insufficient financial means. By describing the problem as a lack of means, these projects focus on solutions that direct government resources into legal aid or accommodating self-represented litigants in court.[2] The advantage to historicizing how lawyers have made business decisions in the past is that it draws attention to the agency of lawyers in how they have charged their clients. This historical perspective reminds us that the price of legal services should not be taken as a fixed system and that lawyers were, and are, active agents in adopting the methodology used to calculate their price.

In Part Three I address the historical connection between the practice of family law and how the legal profession adopted hourly billing as an opportunity to critically reflect on how the legal profession and legal scholars frame the issues of the business of law today. I use the example of "client-led innovation" to explore the value of consciously connecting the practice of family law and the business of law.

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[2] To be clear, I am not arguing against the goal of directing government funds into the formal institutions of the family law system. This is obviously necessary. See, for example, DA Rollie Thompson, "No Lawyer: Institutional Coping with the Self-represented" (2001) 19 Can Fam LQ 455.

Legal scholarship about the business of law and Canadian legal professional publications increasingly use the concept of client-led innovation to describe changes to the environment in which lawyers' make business decisions. By addressing this discourse using the practice of family law in Canada, I argue that the concept of client-led innovation is not a helpful or accurate way to describe what influences the business decisions of family lawyers. I show how today's discourse about client-led innovation assumes a context of sophisticated, corporate clients in a global market for legal services.

In Part Four, I apply these insights to a brief analysis of the innovation of legal expense insurance and the practice of family law. The concept of legal expense insurance has been canvassed in Canada as an access to justice solution.[3] In 2013, the Canadian Bar Association (CBA) set a target that 75% of "middle income Canadians" would have legal expense insurance by 2030.[4] Despite this attention, I am somewhat skeptical of the potential for legal expense insurance in family law even if it is arguably a promising business solution to the problem of access to lawyers in family law. This skepticism flows from the way that the organized bar in Canada has approached the idea. The CBA has conducted public education campaigns about legal expense insurance, encouraging both their members and the general public to purchase coverage. Referencing the CBA's historical efforts to

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[3] See, for example, Sujit Choudhry, Michael Trebilcock & James Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expenses Insurance" in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).
[4] Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice Report: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013), 29 [CBA, *Reaching Equal Justice*].

educate lawyers about law office management in the 1970s from Part One, I will explain that there is an important difference between encouraging demand for legal expense insurance and educating lawyers about entering into business relationships with legal expense insurance companies.

Notes on Methodology

Exclusive look at family law

Many North American studies on the legal profession use parameters such as geography,[5] gender,[6] or ethnicity.[7] In this study I will approach the issue from a different perspective by looking at a specific practice area – family law. In some scholarship the justification for focusing on a specific practice area relates to the purpose of identifying the community practices of lawyers who work in the area under study.[8] In their edited collection on lawyers' ethical decision making, American scholars, Leslie Levin and Lynn Mather argue that it is important to study lawyers in the context of their practice areas because "each practice area has its own

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[5] See, for example, Terence C Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (Chicago: University of Chicago Press, 1987) (Chicago 9 Bar Association); John P Heinz & Edward O Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York: Russell Sage Foundation, 1982).

[6] See, for example, Jean McKenzie Leiper, *Bar Codes: Women in the Legal Profession* (Vancouver: University of British Columbia Press, 2006).

[7] See, for example, Susan Lewthwaite, "Reconstructing the Lives and Careers of Lawyers: Ethelbert Lionel Cross, Toronto's First Black Lawyer" in Constance Backhouse & W Wesley Pue, eds, *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009), 193.

[8] See Leslie C Levin & Lynn Mather, eds, *Lawyers in Practice: Ethical Decision Making in Context* (Chicago: University of Chicago Press, 2012); Lynn Mather, Craig A McEwen & Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (New York: Oxford University Press, 2001); Leslie C Levin, "Specialty Bars as a Site of Professionalism: The Immigration Bar Example" (2011) 8 St Thomas L Rev 194 [Levin, "Specialty Bars"].

particular norms and challenges, shaped not only by substantive, procedural, and ethical legal rules, but also by clients, practice organizations, economics, and culture."[9] Here I localize a discussion about the business practices of lawyers to the specific practice area of family law.

I have chosen to focus on family law as opposed to another area of law, such as criminal law, because of both the unique issue of self-representation in family courts[10] as well as the relative lack of attention to how this problem is affected by the business decisions of lawyers.

Historical Methodology

I use a historical methodology in Part One to emphasize how the business practices of lawyers today, such as the billable hour, were in fact chosen practices rather than inevitable and obvious evolutions in the profession of law. One of the important questions when adopting a historical methodology in legal scholarship is the use and selection of sources. Traditionally, legal historians have studied a particular case or legal doctrine.[11] Here, however, I look at the business practices of family lawyers during a particular period of time. Legal historian Sir John Baker describes the work of legal history in the following terms: "we need to be able to switch our minds over to the same thought processes as the lawyers of the period in

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[9] Leslie C Levin & Lynn Mather, "Why Context Matters" in Levin & Mather, *supra* note 8, 3 at 3.

[10] As opposed to criminal law where the accused have a right to counsel.

[11] See, for example, AW Brian Simpson, *Leading Cases in the Common Law* (Oxford: Clarendon Press, 1995); RCB Risk, G Blaine Baker, Jim Phillips, eds, *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press, 2006).

which we are working – and, of course, to be able to switch back again."[12] Taking Baker's advice, I have looked for evidence of how lawyers thought about their business decisions in places that are unusual for legal scholarship. Both then and now, the venues for formally sharing information about business practices are the conferences and seminars organized by law societies and bar associations in Canada. For historical research, these sources serve as a useful proxy for the mentalities of lawyers at the time. These materials show us what lawyers were willing to write publicly about their business practices.

Qualitative empirical research

Another useful way to find out what lawyers thought about their business practices in the 1970s is to ask them directly. I conducted seven open-ended interviews with lawyers and judges who practiced family law in the late 1960s and early 1970s. As a reference point, I used Alice Woolley's 2005 article, "Evaluating value: a historical case study of the capacity of alternative billing methods to reform unethical hourly billing."[13] In her case study, she conducted interviews with eleven provincial law society members. Borrowing from Woolley's methodology, I asked my interviewees about their billing practices and I preserved each interviewee's anonymity.[14] I chose to take a different approach, however, in the types of lawyers that I chose to interview. Most importantly, all of the lawyers I interviewed practiced family law post-1968 and pre-1980. Woolley does not report on her

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[12] Sir John Baker, "Reflections on 'Doing' Legal History" in Anthony Musson & Chantal Stebbings, eds, *Making Legal History: Approaches and Methodologies* (Cambridge: Cambridge University Press, 2012) 7 at 9.
[13] (2005) 12 Intl J Leg Prof 339.
[14] *Ibid* at 357n14.

interviewees' areas of practice, other than noting "their practices represent the full spectrum of legal services except criminal law."[15]

My selection of interviewees also differed from Woolley's in that I placed less importance on notoriety while choosing whom to interview. Woolley describes her interviewees as "senior lawyers … [with] distinguished legal careers which included, *inter alia*, being founders and/or managing partners of their firms, benchers or presidents of their provincial law societies, and/or being of high repute in the profession. All were men and all were based in major urban centres…most had spent a significant, part of their careers in large firms".[16] For the interviews I conducted I purposely included women (two) and men (five), and those who had practiced in a variety of firm platforms (from solo practice to a firm of thirty lawyers, in the relevant time period). The lawyers I interviewed practiced in Alberta, British Columbia, Saskatchewan, Manitoba, Ontario and Quebec during the period under study.[17] It was irrelevant whether each interviewee had a leadership role or a high profile in the organized bar. At the time of the interviews, five interviewees were lawyers in private practice and two were members of the judiciary. Both of the judges I interviewed had primarily practiced family law before joining the bench. Of the five lawyers in private practice, three were still practicing family law exclusively or substantially when I conducted the interviews.

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[15] *Ibid* at 342.
[16] *Ibid*.
[17] The other provinces and territories were not purposely excluded. The lawyers I contacted in the provinces included in this study were simply quicker to respond to my interview request.

The way in which I use the results of the interviews in this thesis is dependent on the way I structured the interview project. I conducted seven interviews with individual lawyers and judges, a very small group. Thus, the interview data is useful for limited purposes. I use the date to create a richer sense of the time I am studying by illustrating my points with the personal experiences of lawyers who worked in family law at that time. The interviews are also useful for supporting or creating doubt about conclusions drawn from text sources. Furthermore, these interviews are useful for raising lines of inquiry for future research.[18]

I also purposely included lawyers in my research because of the importance of fact checking with practitioners when making claims about the day-to-day practice of law.[19]

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[18] The only example of interviews on law office management I have found is a column, "Law Firm Profiles" in the American Bar Association's publication, *Legal Economics*. While the column was meant to be recurring it was only published once. The lawyer interviewed was a sole practitioner and the interview contains information about his timekeeping practices, overhead and other law office matters. See "Law Firm Profiles" (1975) 1 Legal Econ 26.

[19] For another example of collaboration between the researcher and the subjects of study, see W Wesley Pue, (1995) "In Pursuit of Better Myth: Lawyers' Histories and Histories of Lawyers" 33 Alta L Rev 730 at 734: Pue invited all of the provincial law societies, including the Federation of Law Societies, to participate in his research process through a mail survey. He then used the source material provided by the law societies in his review of how the concept of "history" is utilized in the documents produced by these institutions about the legal profession in Canada.

Part One: The New Market for Family Law Legal Services in Canada Following the *Divorce Act, 1968*

In this part I take a historical approach to the business decisions of family lawyers. I describe the business practices of lawyers and the experiences of family lawyers in the period following the enactment of the *Divorce Act, 1968*.[20] To inform my description I use both textual sources, including scholarship on the history of the legal profession in Canada, judicial decisions, newspapers and publications produced by the CBA, provincial bar associations and provincial law societies as well as interviews that I conducted with seven lawyers who practiced family law during the late 1960s and into the 1970s. These lawyers shared a variety of experiences. Their memories provide a rich sense of the period in my study.

The *Divorce Act, 1968*, is a useful starting point in the history of family lawyers in Canada. H. W. Arthurs describes the decades following the Divorce Act, 1968, as the "infancy" of family law.[21] Prior to 1968, avenues for divorce and its corollary relief varied considerably from province to province. [22] Most drastically, some Canadians were entitled to divorce granted by their province, while others required Parliamentary approval.[23] The 1968 *Divorce Act* provided, for the first time, uniform

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[20] S.C. 1968, c. 24.
[21] HW Arthurs, "Lawyering in Canada in the 21st Century" (1996) 15 Windsor YB of Access Just 202 at 215
[22] Wendy Owen & JM Bumsted, "Divorce in a Small Province: A History of Divorce on Prince Edward Island from 1833" (1991) 20 Acadiensis 86 at 86: "The history of divorce in Canada is a veritable quagmire of inconsistencies and contradictions – constitutional, legal and moral…Although the common law and Anglo-Canadian legislation did provide some common thread to the experience of divorce, at least outside of Quebec, it is impossible to deal sensibly with much of its history except on a province-by-province basis."
[23] *Ibid*.

access to divorce for all Canadians. This opportunity for the Canadian population was also an opportunity for lawyers, whether new or experienced, to specialize in a rapidly expanding practice area. As I will describe below, the concept of specialization was new to lawyers at this time. The *Divorce Act, 1968*, created a market for lawyers' services in the area of family law that was much larger than before. The number of divorces more than doubled between 1968 and 1969, from 11,343 to 26,093, and by 1974, it was 45,019.[24]

In addition to the significant legislative reform in family law, there was another phenomenon underway in 1960s and 1970s – the transformation of the legal profession's office management practices. One such practice, the careful recording of time and billing clients on the basis of an hourly rate, became standard for lawyers over the course of this period.

The academic scholarship about the history of hourly billing in North America gives several possible explanations for the shift to this billing method from the 1950s to the 1970s. American scholars Shepard and Cloud provide an economics based explanation – hourly billing was a rational fee arrangement from the perspective of lawyers and clients because broadened discovery rules provided the impetus for lawyers to minimize their risk by charging clients hourly.[25] For Canadian scholar Alice Woolley the explanation is *ex post facto*. She argues that the

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[24] RD Fraser, "Section B: Vital Statistics and Health," in Statistics Canada, *Historical Statistics of Canada*, No 11-516-X (Ottawa: Government of Canada, 1999), series B75-81, online: Statistics Canada <http://www.statcan.gc.ca/pub/11-516-x/pdf/5500093-eng.pdf>.

[25] George B Shepherd & Morgan Cloud, "Time and Money: Discovery Leads to Hourly Billing" (1999) 1999 U Ill L Rev 91.

adoption of hourly billing, regardless of the reasons for its origins,[26] increased the transparency of the lawyer-client fee relationship and represented an important ideological shift from the lawyer as elitist, disinterested professional to the lawyer as a modern technician.[27]

This study takes an approach distinct from placing the shift to hourly billing into a theoretical framework about economic efficiency or about the ideology of professionalism. The approach here is to describe what the historic record says about the process of the shift to hourly billing and what this shift may have been like for a distinct group within the Canadian legal profession – family lawyers.

[26] Alice Woolley even comments that the shift seems "almost wholly inevitable": Woolley, *supra* note 13, 345.
[27] *Ibid*.

Profiles of Lawyers Interviewed·

Lawyer #1 (L1)
Called to the bar 1968
Articled and practiced for first three years at large firm (25 lawyers)
Started a small law firm (4 lawyers) after three years of practice

Lawyer #2 (L2)
Called to the bar 1969
Articled and practiced for one year at small firm (4-6 lawyers)
Started a small law firm (2 lawyers) after one year of practice

Lawyer #3 (L3)
Called to the bar 1978
Articled and practiced for first three years at small firm (6-9 lawyers)

Lawyer #4 (L4)
Called to the bar 1972
Articled at large corporate firm (30 lawyers)
Practiced at small firm (6 lawyers) for first two years of practice

Lawyer #5 (L5)
Called to the bar 1974
Articled at mid-size civil litigation firm (13 lawyers)
Practiced at large firm for first year (25 lawyers)
Started solo practice in second year of practice

Lawyer #6 (L6)
Called to the bar 1971
Law clerk
Articled and practiced for first five years at mid-sized firm (8-10 lawyers)
Started a small law firm (2 lawyers) after five years of practice

Lawyer #7 (L7)
Called to the bar 1976
Articled in government
Practiced at a large firm (12-15 lawyers) for two years
Started small law firm (2 lawyers) after two years of practice

· The size of the firm (small, mid-sized, large) in this table is based on each interviewee's description of firm size.

The Beginnings of 'Law Office Management' in Canada

The scholarship on the history of law firms in Canada has focused primarily on the study of individual urban law firms over the course of decades.[28] G. Blaine Baker's study of law firms in Montreal in the 1800s, however, is unique because he specifically looks at the business practices of the lawyers under study. According to Baker, lawyers in Montreal in the 1800s ran "their legal businesses in such informal, rudimentary, and sometimes antiorganizational ways."[29] They calculated their fees using a mix of "a monetary percentage of the transaction at hand with a standard rate per longhand folio (100 words) of documentary legal text."[30] They often accepted payment "in kind", ranging from payment in the form of "heating fuel" to "shares in incorporated companies."[31] The accounting methods were most often "random running tallies of disbursements, investment income, work done on files, and partial payments scrawled on the back of related documents."[32]

These unsystematic business practices were not unique to Montreal lawyers. The first attempt to provide lawyers with advice on managing a law office in Canada was a monthly column written by Halifax lawyer, Reginald V. Harris, from 1907 to 1909 in the CBA's monthly journal, *The Canadian Law Times*. Harris published these

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[28] Carol Wilton, ed, *Inside the Law: Canadian Law Firms in Historical Perspective* (Toronto: Osgoode Society, 1996) [Wilton, *Inside the Law*]; Carol Wilton, ed, *Beyond the Law: Lawyers and Business in Canada, 1830 to 1930* (Toronto: Osgoode Society, 1990); G Blaine Baker, "Ordering the Urban Canadian Law Office and its Entrepreneurial Hinterland, 1825 to 1875" (1998) 48 U Toronto LJ 175.
[29] Baker, *supra* note 28.
[30] *Ibid* at 194-195.
[31] *Ibid* at 195.
[32] *Ibid* at 213.

materials in book form in 1910.[33] Harris insisted on "the absolute necessity of proper accounting methods in a successful law business."[34] To show why his methods were needed, Harris gave his readership an account of some typical law offices in Canada. In one of Harris's examples, the lawyer made no record of the time spent on a particular file and would simply guess at the time spent on the matter.[35] In terms of records kept, Harris considered that the majority of lawyers in Canada used an accounting system that listed letters, interviews and attendances in one "day-book" for the whole firm.[36] The bookkeeper then recorded entries from the day-book into a ledger, and each lawyer used the ledger to determine the client's bill at the end of the file. Harris also noted that most lawyers rendered their accounts every three to six months rather than when they sent a reporting letter to the client.[37]

In 1914, *The Canadian Law Times* published further advice to Canadian lawyers about "Practical Business Systems Adapted for Use in Law Offices." The author, J. Howard Patterson argued "[t]here is no reason why the time taken up in handling each item of business should not be considered carefully by a lawyer when making out his bills."[38] Patterson described a rudimentary version of a docket sheet

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[33] Reginald V Harris, *Hints and Suggestions on the Organization of a Legal Business*, (Toronto: Carswell Company, 1910).
[34] *Ibid* at 2.
[35] *Ibid* at 2, 107.
[36] *Ibid* at 108.
[37] *Ibid* at 116.
[38] J Howard Patterson, "Practical Business Systems Adapted for Use in Law Offices" (1914) 34 Can L Times 479 at 479.

for recording time and a system for remembering appointments called the "office tickler."[39]

Harris and Patterson published their advice for running a law office in the first two decades of the twentieth century but it was rare for lawyers and law firms at that time to spend significant time and money on office management and careful records of their work for clients. A number of changes, however, began to take place in the 1960s and 1970s.

Beginning in the mid-1960s, the Canadian legal profession began to rapidly expand in numbers.[40] In 1950 there were approximately 9,000 lawyers in Canada; [41] by 1982 there were approximately 39,000.[42] Most of the growth occurred in the 1970s; during this decade the lawyer population in Canada doubled.[43] Legal historian Carol Wilton describes the expansion of the legal profession as part of changes that started at the end of World War Two in Canada, including increased wealth and a larger role for government.[44]

The legal profession did not increase in population size alone; firms also started to become larger in size. Historian Christopher Moore describes exponential

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[39] *Ibid* at 481.
[40] HW Arthurs, R Weisman & FH Zemans, "The Canadian Legal Profession" (1986) 11 American Bar Foundation Research Journal 447 at 450.
[41] John P Nelligan, "Lawyers in Canada: A Half-Century Count" (1950) 28 Can Bar Rev 727 at 728. In this survey they did not obtain statistics on the area of practice – likely the notion of specialization is not very important.
[42] Arthurs, Weisman & Zemans, *supra* note 40 at 458.
[43] David AA Stager with Harry W Arthurs, *Lawyers in Canada* (Toronto: University of Toronto Press, 1990), 142.
[44] Carol Wilton, "Introduction: Inside the Law – Canadian Law Firms in Historical Perspective" in Wilton, *Inside the Law*, *supra* note 28, 3 at 38 [Wilton, "Introduction].

growth in the size of the largest firms in Canada between the 1950s and 1970s.[45] Carol Wilton writes that during the 1970s, "five firms (four of them in Toronto) expanded from approximately fifty to about a hundred lawyers" and that ten firms, mostly in Alberta and British Columbia, reached fifty lawyers.[46]

By the end of the 1950s, firms were beginning to implement systematic approaches to billing practices.[47] For example, Vancouver law firm Bull, Housser instituted an hourly fee scale for its lawyers in 1957, which was calculated on the basis that half of the hourly rate was meant to cover overhead expenses.[48] In his historical study of Bull, Houser Reginald H. Roy describes how the idea for hourly billing was implemented after three of the firm's lawyers attended a seminar about timekeeping in eastern Canada.[49]

During the 1960s and 1970s law firms were also just beginning to experiment with assigning the tasks of office management to support staff or to an individual lawyer or team of lawyers. British Columbia judge, the Hon. Wendy G. Baker, who was called to the bar in 1978, describes the lawyers who volunteered or were selected to manage the firm as doing so "off the corner of their desks, while also

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[45] Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997), 267. See also Wilton, "Introduction", *supra* note 44 at 30.
[46] Wilton, "Introduction", *supra* note 44 at 38.
[47] Woolley, *supra* note 13 at 346-9.
[48] Wilton, "Introduction", *supra* note 44 at 32; Reginald H Roy, "Law on the Pacific Coast: Bull, Houser and Tupper, 1945-1990" in Wilton, *Inside the Law*, *supra* note 28, 498 at 505.
[49] Roy, *supra* note 48 at 505. Roy does not tell us which seminar these lawyers attended.

carrying a full caseload."[50] One lawyer I interviewed described the role of managing partner at his small firm of four lawyers in the 1970s as a role that they "were all trying to shrug [off] on each other" (L1). Hiring an employee for the position of 'office manager' only became more common in the 1970s and it was usually only a full-time position in the larger firms.[51]

The lawyers that I interviewed described their strategies to manage their accounting in the 1970s in two ways: using a chartered accountant or bookkeeper on a part-time basis (L1; L2; L4; L5; L6) or having a full-time office manager (at a small firm of 6-9 lawyers) (L7). Two of the lawyers I interviewed practiced with another lawyer who had experience doing the accounts themselves (in one case the lawyer had been a "legal secretary" before going to law school) (L2; L6). Another lawyer I interviewed was at a firm where one secretary managed the accounts for family law cases and another secretary managed the firm's other practice areas (L5).

Law firms also began testing out new technologies around this time. The first law firms to use "word-processing equipment", such as electric typewriters, were doing so in the late 1950s and early 1960s, and by 1985, 80% of law firms were using this technology.[52] This new technology changed the environment in which lawyers completed their everyday tasks, such as letter writing and time recording (L1; L3).

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[50] Hon Wendy G Baker, "Structure of the Workplace or, Should We Continue to Knock the Corners Off the Square Pegs or Can We Change the Shape of the Holes?" (1995) 33 Alta L Rev 821 at 828.
[51] Pat Hunter "Report Suggests Smaller Law Firm More Cost Efficient", *Canadian Bar National* 3 (June/July 1977) 8; ME Mullagh, "The Law Firm in British Columbia: Economics, Organization, Size and Composition" (1977) 11 L Soc'y Gaz 270 at 287.
[52] Wilton, "Introduction", *supra* note 44 at 32 and 53n132; Stager & Arthurs, *supra* note 43 at 181; see also Moore, *supra* note 45 at 265

While optimistic at first, during the 1970s the organized bar began to show concern in its formal publications, identifying increased overhead costs and a slow down in the economy as problematic for the profession as a whole.[53] The fear that lawyers' incomes were not keeping up with the rate of inflation was primarily imported in the United States, where it was a topic of much discussion in the 1960s following the publication of a pamphlet by the American Bar Association's Special Committee on Economics of Law Practice titled, "The 1958 Lawyer and his 1938 Dollar."[54] Yet, in the 1950s and 1960s lawyers' incomes in Canada were rising and any decline in the 1970s can be attributed to the dramatic increase in the number of lawyers during that decade.[55]

The CBA reacted to the changes in the profession, technology, and the increased size in law firms by taking a role in educating lawyers about practice management.[56] One of the lawyers I interviewed (L1) said that, in contrast to the provincial law societies, the CBA "led the way on law firm management and law firm practice."

During the 1970s, the CBA established formal committees to address the issue of law office management. The CBA formed the Law Office Economics and

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[53] "Management – the forgotten science" (1970) 1 Can Bar J 11 at 11; "What's Ahead..As B.C. Sees It", *Canadian Bar National*, 3 (July 1976) 12.
[54] American Bar Association's Special Committee on Economics of Law Practice, "The 1958 Lawyer and his 1938 Dollar" (St Paul, MN: American Bar Association, 1958).
[55] Moore, *supra* note 46 at 308; David AA Stager & David K Foot, "Changes in Lawyers' Earnings: The Impact of Differentiation and Growth in the Canadian Legal Profession" (1988) 13 Law & Soc Inquiry 71 at 80.
[56] See Stephanie Chipeur, "The Advice Lawyers Give Themselves: The Canadian Bar Association's Campaign for Timekeeping in the Mid-Twentieth Century", online: (2014) Intl Journal of the Legal Prof, DOI: 10.1080/09695958.2014.933109 <http://www.tandfonline.com/toc/cijl20/current#.U9l42I1dVxI>.

Management Section and the Special Committee on Law Office Management Seminars in 1972.[57] The Chair of the CBA's Committee on Law Office Management Seminars, Toronto lawyer Ian W. Outerbridge, Q.C., led out a "National Travelling Road Show" on law office management, which was presented to the western provinces in December 1971 and to Quebec and the Maritimes provinces in March 1973.[58] The CBA also created a National Professional Services Committee in 1975, led by Vancouver lawyer Ronald C. Bray, "designed to improve the practical operation of legal practices through the application of improved techniques and services."[59]

The CBA described its office management courses as directed at lawyers practicing on their own or in a small law firm setting.[60] Those organizing and leading out in these seminars expressed the concern that only a few law firms were using "financial budgeting to analyze, plan and forecast the operation of the firm."[61] Halifax lawyer Peter Green told lawyers that "[o]ne of the fundamentals of law office economics is timekeeping for billable hours spent on clients' legal work."[62] At the

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[57] Canadian Bar Association, *The 1973 Year Book of the Canadian Bar Association and the Minutes of Proceedings of its Fifty-Fifth Annual Meeting, held at Vancouver, British Columbia, August 27th to August 30th, 1973* (Ottawa: National Printers Limited, 1973), 273-5 [CBA, *1973 Year Book*].
[58] Canadian Bar Association, *The 1972 Year Book of the Canadian Bar Association and the Minutes of Proceedings of its Fifty-Fourth Annual Meeting, held at Montreal, Quebec, August 28th to August 31st, 1972* (Ottawa: National Printers Limited, 1972), 97-8 [CBA 1972 Year Book]; CBA, *1973 Year Book*, *supra* note 57 at 274-5.
[59] "Professional Services Committee is Formed" *Canadian Bar National*, 2 (October 1975) 8.
[60] "CLE Announces Plans for 1974-75 Program" *Canadian Bar National*, 1 (September 1974) 8; "CBA Films Show Ways to Profits" *Canadian Bar National*, 1 (September 1974) 10.
[61] Peter G Green, "Lawyer 'weakest link'", *Canadian Bar National* 5 (March 1978) 8.
[62] *Ibid*.

joint Economics and Management Conference in 1972 organized by the national bar associations in the United States and Canada, Pennsylvania lawyer Mitchell W. Miller argued that setting fees in advance, looking to minimum fee schedules or estimating fees were practices of the past and "deprived" lawyers of the "financial benefits" they deserve.[63] He argued that lawyers must adopt timekeeping and hourly rates instead.

The idea that lawyers need to 'manage' the business aspects of the practice of law was new to Canadian lawyers in the 1960s and 1970s. In the rest of Part One, I describe the atmosphere in which the legal profession in Canada considered law office management, specifically focusing on the following issues: inflation, changes to the way lawyers were taxed, practice area specialization, expanded legislative regimes, lawyer advertising, taxation of lawyers' accounts and fee schedules or tariffs. I explain how each of these issues relates to the development of law office management and to the specific context of lawyers practicing family law post-1968. I conclude with specific information about how family lawyers in the 1970s were pricing legal services.

Practice area specialization and lawyer advertising

While the legal profession in Canada was undergoing significant changes in the areas of law office management, significant legislative reform took place in areas

[63] Len Webster, "The Economics and Management Conference" (1972) 3 Can Bar J 23 at 28-29; Mitchell W Miller, "A Systematic Approach to Time Control", as reprinted in *Bar Admission Course, 1979-80: Law Office Administration* (Toronto: Law Society of Upper Canada, 1979), 171 at 175.

such as tax, labour, securities, investment, and, most importantly for the present study, divorce.[64]

There are different explanations in the academic literature about the significance of practice area specialization in the 1970s. Carol Wilton describes the "sheer volume of business activity, the increasing size and complexity of transactions, and the development of new areas of specialization" as "among the factors which encouraged law-firm expansion."[65] By contrast, Dale Brown, in an essay on large firms in Manitoba, argues that "law-firm growth and increased specialization became the natural consequences of the growing complexity of legal regulation."[66] Christopher Moore argues that in the atmosphere of legislative reform in the 1970s lawyers simply "had to specialize."[67] Regardless of the causal connections, the interactions between increased government regulation and practice area specialization among lawyers were an important part of Canadian lawyers' experiences in the 1970s.

The CBA recognized that family law was becoming a specialized area of practice in 1967 by creating a Special Section on Family Law led by Toronto lawyer James C. MacDonald.[68] One of the questions that I asked all of the lawyers I interviewed was how they came to self-identify as lawyers specializing in the area of family law. One lawyer that I interviewed said that he began to specialize in family

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[64] Moore, *supra* note 44 at 266.
[65] Wilton, "Introduction", *supra* note 44 at 29.
[66] Dale Brown, "Dominant Professionals: The Role of Large-Firm Lawyers in Manitoba" in Wilson, *Inside the Law*, *supra* note 28, 394 at 402.
[67] Moore, *supra* note 45 at 266
[68] Canadian Bar Association, *The 1967 Year Book of the Canadian Bar Association and the Minutes of Proceedings of its Forty-Ninth Annual Meeting, held at Quebec City, Quebec, September 4th to 9th, 1967* (Ottawa: National Printers Limited, 1967).

law after his employer decided that it made business sense to get involved in the area of family law with the arrival of the *Divorce Act, 1968* and the anticipated increase in divorces (L2). This lawyer told me: "I was given the responsibility of looking after and getting ready for the [*Divorce Act, 1968*]…and then when it came into effect I had a number of files all ready to go." According to L2, prior to 1968, family law "was a much more difficult area to deal with – you had to prove adultery, you had to have investigation, evidence of the adultery – and a lot of firms just didn't want to be in that area of the law." Similarly, L1 described how as a new lawyer in 1968, the divorces of his employer firm's corporate clients came "filtering down" to him because "nobody else was doing any [divorces]".

The federal government continued to legislate reform in the area of family law with subsequent amendments to the *Divorce Act*[69] and the provincial governments, save for Quebec,[70] began to legislate in the area of matrimonial property in the late 1970s.[71] While the *Divorce Act, 1968*, made divorce easier and thus led to a huge increase in the divorce rate, the provinces' matrimonial property legislation had a

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[69] For a description of these amendments and a history of divorce law in Canada see Kristen Douglas, "Divorce Law in Canada" (Ottawa: Library of Parliament, 2001), online: Government of Canada < http://publications.gc.ca/Collection-R/LoPBdP/CIR/963-e.htm>.

[70] In Quebec reform of family law and matrimonial property regimes took place in 1969 and 1970. See John EC Brierley, "Recent Reforms in Quebec Matrimonial Property Law" (1971) 1 RFL 418.

[71] *Family Relations Act*, R.S.B.C. 1979, c. 121 (British Columbia); *The Matrimonial Property Act*, R.S.A. 1980, c. M-9 (Alberta); *The Matrimonial Property Act*, S.S. 1979, c. M-6.1 (Saskatchewan); *The Marital Property Act*, S.M. 1978, c. 24 (Manitoba); *Family Law Reform Act*, R.S.O. 1980, c. 152 (Ontario); *Marital Property Act*, S.N.B. 1980, c. M-1.1 (New Brunswick); *Matrimonial Property Act*, S.N.S. 1980, c. 9 (Nova Scotia); *Family Law Reform Act*, S.P.E.I. 1978, c. 6 (Prince Edward Island); *The Matrimonial Property Act*, S.N. 1979, c. 32 (Newfoundland); *Matrimonial Property Ordinances*, R.O.N.W.T. 1974, c. M-7 (Northwest Territories); *Matrimonial Property and Family Support Ordinances*, O.Y.T. 1979 (2nd), c. 11 (Yukon).

dramatic effect on the complexity of family law matters because of the new corollary relief available. One of the lawyers I interviewed was called to the bar the same year as the new property legislation came into force in her province and described the legislation as a "great equalizer" because lawyers young and old were all learning it together (L3).

The organized bar began to collect information on specialization in the profession. In Ontario, for example, a survey of lawyers in 1977 found that 84% of them "concentrated in a single area of law."[72] The CBA, the Federation of Law Societies and the provincial law societies commissioned the first survey of the Canadian legal profession that identified lawyers by practice area. This survey found that family lawyers accounted for 7% of all lawyers in Canada in 1978-1979.[73]

Provincial law societies began to consider specialist certification for lawyers practicing substantially in certain fields, including family law. In part, this development was related to the debate within the profession about advertising. Increasingly, lawyers wanted to be able to advertise and indicate their practice specialty in their ads. Other than increasing their business, lawyers justified this as a service to the public.[74] It was not only lawyers that made this argument. For example, in 1978, Ellen Roseman, a reporter for the *Globe and Mail*, wrote an article arguing that lawyers ought to be able to advertise. [75] She conducted "an experiment"

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[72] Stager & Arthurs, *supra* note 43 at 197.
[73] Earl Berger Limited, *Survey of Canadian Lawyers #1 1978-79* (Toronto: Earl Berger Limited, 1979), ES-7.
[74] RF MacIsaac, "The Age of Specialization" (1971) 2 Can Bar J 4.
[75] Ellen Roseman, "Shopping Around for Lawyer Difficult as Some Won't Give Fees", *The Globe and Mail* (24 April 1978), P26.

of calling ten lawyers in Toronto about the cost of a divorce to demonstrate that lawyer advertising was a "consumer rights" issue.

Specialization in family law was one of the first practice areas to be recognized by the provincial law societies. In 1977, the Law Society of British Columbia began a pilot program offering certifications for specializations in four practice areas: criminal, family, immigration, and wills and trusts.[76] The Law Society of Upper Canada began to consider allowing lawyers to register as specialists in 1978 and to advertise their specialty.[77] While Ontario, and the other provinces, began to allow advertising by the end of the 1970s[78] the actual implementation of the specialist program by the Law Society of Upper Canada did not take place until 1987 and family law was one of the first designations offered.[79]

Inflation and Tax Reform

The organized bar and those advertising to lawyers used the phenomenon of inflation in the 1970s to argue for changes in practice management. One of the reasons that law office management methods were becoming important for lawyers

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[76] "Pilot Program to Certify Legal Specialists", *Canadian Bar National* 4, (June/July 1977) 1.
[77] Jeff Sallot, "Ontario Lawyers Study Details of Advertising Their Specialties", *The Globe and Mail* (24 June 1978) P5; "Law Societies Launch Specialization Study" *Canadian Bar Bulletin* (September 1973) 7 (the law societies in Ontario and Alberta had previously studied the certification of specialists in the areas of the taxation and criminal law in 1973 and reported to the Federation of Law Societies of Canada).
[78] Albert J Hudec & Michael J Trebilcock, "Lawyer Advertising and the Supply of Information in the Market for Legal Services" (1982) 20 U Western Ontario L Rev 53; "Lawyers Across Canada Push for End to Regulation Against Taking Out Ads", *The Globe and Mail* (19 January 1979) P9; "Lawyer Wins Fight on Right to Advertise" *The Globe and Mail* (14 April 1979) P3; "Lawyers to advertise" *The Globe and Mail* (26 June 1979) P8.
[79] Stager & Arthurs, *supra* note 43 at 200.

was the new (and temporary) anti-inflation regulations in Canada – pursuant to the *Anti-Inflation Act*, passed by the federal government in 1975.[80] Under this legislation, lawyers were required to file complex returns with the Anti-Inflation Board (AIB). However, lawyers were told that they could avoid this filing and use a simpler form if they were able to "evidence a general pattern as to the way in which fees are determined, involving some systematic approach for particular matters, and can establish that such pattern has been followed since the imposition of controls."[81]

The AIB ceased operating in 1979, but before this time one company took the opportunity to market its services by referencing the AIB's requirements. Along with ads for dictaphones, legal secretary handbooks, chartered accountants and office space, some of the most prominent ads in the CBA's monthly magazine, *Canadian Bar National*, were produced by Safeguard Business Systems.[82] Safeguard produced a "one-write" accounting product that allowed lawyers to use carbon copy technology for their bookkeeping.

In 1976 Safeguard's ads quoted from the AIB's "SPECIAL REPORT TECHNICAL BULLETIN No. A1-15-P May 7, 1976 Page 11" explaining that professional fees are based on two factors, "fee rates" and "time", and that "time factor is not subject to control". [83] By this Safeguard was telling lawyers that if they keep a record of their time, using Safeguard's product, their income will not be

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[80] 1974-75-76 (Can.), c. 75.
[81] "Lawyers' Income up 14.5% - AIB Report", *Canadian Bar National* 4 (February 1977) 1.
[82] These ads were also prominent in *Canadian Lawyer*, which was started in 1977 by Thomson Reuters. See "About Us", online: Canadian Lawyer <http://www.canadianlawyermag.com/about-us.html>.
[83] Safeguard Business Systems (advertisement), *Canadian Bar National* 3 (August 1976) 5, 8.

limited because the amount of time that lawyers could charge a client for would not be capped by the AIB's regulations.

Some of the lawyers I interviewed referenced this product while describing their office methods in the 1970s (L1; L4; L6). According to L1, for law office management in the 1970s "everything was done on a one write carbon paper system." Specifically, L1 described recording his time for his employer firm with "tickets on a board with carbon paper. You would do the time tickets and you would submit the time tickets and the accounting department would then take the time tickets and enter them on the file's ledger card."

Another of Safeguard's recurring ads in the *Canadian Bar National* told lawyers:

> **Jon. K. recently increased income in his practice by nearly 30%** because he projected his effort and recognition of that effort is what most impressed his clients. Projecting his effort was facilitated simply and efficiently by the **Safeguard Chargeable Time System for Lawyers**. By this system, records of time spent on matters to be billed are maintained by a simple, single entry that automatically creates (1) a client's charge slip and (2) a control journal. As a result, Jon. K. found that charges weren't forgotten, unprofitable work was quickly brought to attention and fees to his clients could reflect substantive detailing accordingly. Contact us! We'll be happy to introduce you to the Safeguard Chargeable Time System for Lawyers and facilitate a substantial increase in your income too.[84]

Safeguard was not only advertising to, but also attempting to educate, lawyers. In another recurring ad in 1975 Safeguard described it's "Time Inventory

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[84] Safeguard Business Systems (advertisement), *Canadian Bar National* 2 (April 1975) 11 [emphasis in original] (Safeguard advertised that it had offices in Mississauga, Vancouver, Calgary, Edmonton, Saskatoon, Winnipeg, Toronto, Hamilton, Kitchener, London, Ottawa, Montreal, Halifax, and St. John's).

System", explaining that "inventory" is the lawyer's "unbilled docketed hours."[85] The same ad told lawyers that because they "now pay taxes on an accrual basis, the Safeguard Time Inventory System can save you tax dollars. It ensures that your unbilled hours are properly docketed and permits interim billing which improves your cash flow."[86] This ad referenced changes to the *Income Tax Act* in 1972[87] which meant that lawyers would be taxed on what they had billed clients in a given tax year rather than only on what they had been actually paid. Safeguard was telling lawyers that if they used their product they would be able to ensure that they were being paid what they had actually billed and therefore taxed on what they actually received. One of the lawyers I interviewed identified the changes to how lawyers were taxed in 1972 as an explanation for why law firms took up new accounting and management strategies (L6).

Taxation of accounts

As part of the changes to practice management and billing methodologies, the organized bar began to reflect on strategies for communicating the price of their services to clients. There were conflicting reports at the time about the methods that

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[85] Safeguard Business Systems (advertisement), *Canadian Bar National* 2 (August 1975) 13.
[86] *Ibid*.
[87] *Income Tax Act*, SC 1970-71-72, c. 63, s. 34(1) (the accrual method: "[i]n computing the income of a taxpayer for a taxation year from a business that is a profession, the following rules apply:…(b) every amount that becomes receivable by him in the year in respect of property sold or services rendered in the course of the business shall be included"); *Income Tax Act*, RSC 1952, c. 148, s. 85F(1) ("[f]or the purpose of computing the income of a taxpayer for a taxation year from a business of the following description, namely: (a) farming, or (b) a profession, the income from the business for that taxation year may, if the taxpayer so elects be computed in accordance with a method (hereinafter in this section referred to as the 'cash' method)").

lawyers were actually using to communicate with clients about fees. A survey of the British Columbia legal profession in 1977, which claimed to be the largest of its kind in Canada, found that most of the firms interviewed discussed fees with their clients in advance and would send interim bills.[88] The survey results also found that 60% of the firms used a timekeeping system to keep track of their billable hours and that this practice was most common amongst "metropolitan firms."[89] However, in 1978 the CBA conducted a Gallup Poll and found that 63% of the respondents who had hired a lawyer in the past had not discussed the fees with their lawyer.[90] The CBA's Professional Organizations Committee also conducted a "small household survey" in 1978 and found that "about 65% of the sample did not discuss fees with their lawyer prior to his engagement. Indeed, 47% of the sample *never* discussed fees at all with their lawyer."[91]

Canadian lawyers in the 1970s were not uniformly in the practice of giving clients a written explanation of fees at the outset of a file or requiring a client to sign an agreement regarding fees. Some of the lawyers I interviewed described informing clients of the price of their services in the 1970s as a verbal agreement alone (L1; L6; L7). Without careful records of what was agreed to regarding the fees, however, lawyers began to realize that they were at risk if the client later sought to

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[88] Hunter, *supra* note 51 at 8; Mullagh, *supra* note 51 at 275.
[89] Mullagh, *supra* note 51 at 282.
[90] Hudec & Trebilcock, *supra* note 78 at 60.
[91] Michael J Trebilcock, Carolyn J Tuohy & Alan D Wolfson, *Professional Regulation: A Staff Study of Accountancy, Architecture, Engineering and Law in Ontario prepared for The Professional Organization Committee* (Toronto: Ministry of the Attorney General of Ontario, 1979), 301.

challenge the bill.[92] One of the lawyers I interviewed described the late 1970s and early 1980s as follows:

> for years we didn't have a lot of problems and then…people in the community became very knowledgeable about how to tax a lawyer's bill. And you only go through that once or twice and you smarten up and learn you better have [clients] sign and acknowledge what the terms of the contract are going in. Because the taxing officers in court would usually say well if it isn't documented … the lawyer loses and client wins (L2).

Some of the leading cases on determining a reasonable fee for the taxation of lawyers' fees in Canada are from the 1970s and were written by Taxing Officer W.C. McBride.[93] Each of these decisions involved a client who had engaged a lawyer for a family law matter. McBride's reasons impart his skepticism about lawyers using time as the sole determinate of the price of legal services. In his 1971 taxation decision in a family law case, McBride wrote:

> one of the dangers of keeping detailed dockets is that one might become mesmerized by the ticking of the clock and come to value the expenditure of time to the exclusion of all other factors that should bear on the assessment of a reasonable fee for solicitors' services. It is not true that a solicitor has only time to sell and whoever was the author of that inanity has little to be proud of … But a solicitor, a competent solicitor, has knowledge, advice, expertise and experience with which to embellish the passage of raw time. It is these factors that weigh more heavily when fees are being considered, rather than how much time was lavished on the client's affairs.[94]

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[92] Lucy Bender & Edwin G Upenieks, "De-Mystifying Solicitor-Client Assessments: What They Never Taught You in Law School" (Presentation for Young Lawyer's Division East-Ottawa, March 11, 2009), online: Lawrence, Lawrence, Stevenson LLP < http://www.lawrences.com/uploads/publications/De-Mystifying.pdf>.
[93] *Re Solicitors* [1971] 3 O.R. 470 [*Re Solicitors* (1971)]; *Re Solicitors* [1972] 3 O.R. 433 [*Re Solicitors* (1972)]. The Ontario Court of Appeal adopted McBride's eight factors for consideration on assessment in *Cohen v Kealey & Blaney*, [1985] W.D.F.L. 1978, which is still cited in taxation cases today.
[94] *Re Solicitors* (1971), *supra* note 93 at para 11.

In another taxation case involving a family law matter in 1972, McBride set out the eight factors for determining the appropriate price of legal services, the first being "time expended by the solicitor."[95] In this decision McBride softened his approach to time-based billing and wrote that time is not "the overriding factor" or "the most important" but that "there are comparatively few cases where the time factor can be completely ignored."[96]

The way that lawyers reacted to the increased taxation of their bills was to start to be more formal about how they advised the client of their fee. One of the lawyers I interviewed specifically referenced the increased taxation of lawyers' bills as the reason that he began to require client's to sign formal retainer letters (L3).

The provincial law societies and the bar associations began to encourage or require their members to put their fees in writing for clients, either in the form of a signed contract or a letter explaining in detail how the client would be charged.[97] The organized bar also reached out to the public to explain what to expect from a lawyer when negotiating the price of legal services. For example, in a 1976 interview the Globe and Mail, Claude Boisvert, a Syndic (disciplinary officer) with

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[95] *Re Solicitors* (1972), *supra* note 93 at para 8 (the eight factors being "1. The time expended by the solicitor. 2. The legal complexity of the matters dealt with. 3. The degree of responsibility assumed by the solicitor. 4. The monetary value of the matters in issue. 5. The importance of the matters to the client. 6. The degree of skill and competence demonstrated by the solicitor. 7. The results achieved. 8. The ability of the client to pay") [*Re Solicitors* (1972)].

[96] *Ibid* at para 9.

[97] Wayne Clark, "Lawyer: 'I've Succeeded When Both Sides Hate Me'" *The Globe and Mail* (5 June 1976), A14-5; John Beaufoy, "Taxing matters: client use of taxation officers to assess lawyers' bills", *Canadian Lawyer* 15:4 (May 1991) 23-5; Marcel Strigberger, "Chop-chop (Assessment of solicitor-client accounts)" (1989) 8 Adv J 25 at 25-6

the Barreau du Quebec from 1971 to 1979, advised the public to get their legal fees "in writing."[98]

It does not appear to be coincidental that McBride's taxation decisions were in the area of family law. In a 1973 appeal from a taxation proceeding involving a divorce file, Justice Gillis of the Nova Scotia Supreme Court wrote:

> probably there is no area, at the present time, in the whole of the practice of law and the operation of the courts where the integrity of the Bar and, indeed, at times of the court is more called into question than in the matter of divorce costs.[99]

One of the lawyers I interviewed described family law, in particular, as the area where there were the most complaints about legal fees (L3). The Quebec Bar Association reported in 1976 that the majority of complaints about family lawyers (which represented half of the total complaints) were about the cost of fees.[100] In 1983 a family lawyer in Ontario, Ellen M. Macdonald, presented at a continuing legal education seminar advising that though it "may be unique to a Family Law Practice … all accounts … should be drawn with the expectation or consideration that the account may be taxed by the client."[101]

The concern with increased recordkeeping, as a part of getting fees in writing, was an important part of the changes to law office management in the 1970s. As discussed above, the organized bar was training lawyers in timekeeping and, in part,

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[98] Clark, *supra* note 97; "Quebec lawyer dies at 42", *The Montreal Gazette* (17 April 1979) 30.
[99] *Jones v Jones* (1973), 10 RFL 295 at paras 4-5 [*Jones*].
[100] Clark, *supra* note 97.
[101] Ellen M Macdonald, "How to Draw the Bill" in Law Society of Upper Canada, *Solicitor and Client Costs: Toronto, Friday, June 3, 198345]* (Toronto: Law Society of Upper Canada, 1983), A-1 [Macdonald, "How to Draw the Bill"].

McBride's skepticism about detailed dockets[102] reflected a broader debate about the shift in the ways that lawyers billed their clients. By 1980, law societies in Canada began to offer formal services to lawyers on starting a law practice and the increased requirements of recordkeeping. In Ontario, for example, the Law Society of Upper Canada started the Practice Advisory Service for lawyers. The head of this service, an experienced lawyer, would conduct interviews at the lawyer's offices. Over its first three years the service had provided 250 of these interviews.[103] In British Columbia, as another example, the director was a chartered accountant rather than a lawyer and the service was meant for young lawyers and instructed them on adopting office systems.[104]

Fee schedules or tariffs

In the 1970s, the legal profession across North America debated the legality and utility of fee schedules published by local bar associations. In 1975, the United States Supreme Court found that mandatory minimum fee schedules were illegal price-fixing in the case of *Goldfarb v. Virginia State Bar*.[105] The American county bar associations that published these schedules responded to the allegation of price fixing by arguing that the schedules were only advisory. However, the United States

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[102] *Re Solicitors* (1971), *supra* note 93 at para. 11.
[103] Canadian Bar Association, *Maximizing Return on Effort Through Efficient Management: Law Office Management Seminar: Presented by the Canadian Bar Association-Ontario, Continuing Legal Education*, *Held Friday, Jan. 21st, 1983* (Toronto: Canadian Bar Association, 1983), 1.
[104] "New Service to update law office operations", *Canadian Bar National* 6 (January 1979) 20.
[105] 421 U.S. 773 (1975).

Supreme Court found that the threat of disciplinary action was sufficient to dissuade lawyers from charging below the prices listed in the schedule.

Historian Christopher Moore writes that in Ontario the county law associations (and not the provincial law society) began publishing these schedules in 1899 and that they "remained basic to Ontario legal economics until the 1970s."[106] Taxing officer McBride also wrote a 1969 decision holding that county fee schedules are not binding on taxing officers.[107] A 1970 *Globe and Mail* editorial described minimum fee schedules as "objectionable because they are self-serving but also because there is no uniformity about them." [108] This editorial quoted McBride from a 1969 taxation decision involving a mortgage transaction:

> It seems to me to be beyond controversy that a minimum tariff is not designed to benefit clients as a class or the public generally. These tariffs are formulated by the members of the bar in each county, or their representatives. One need not drink very deeply at the well of cynicism to entertain at least a fleeting suspicion that those who have formulated these tariffs and have been responsible for their amendment from time to time may perhaps have been at least marginally motivated by a barely discernible degree of professional self-interest, usually less euphemistically referred to as greed, among the working classes.[109]

In response to the Globe and Mail's scathing editorial, W.L.N. Somerville, the CBA's Vice-President for Ontario wrote a letter maintaining that

> county and district law associations in each of the counties and districts of the Province of Ontario are purely voluntary associations … The county and district law associations have no binding legal force or effect … Such tariffs are at most analogous to suggested retail price lists.[110]

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[106] Moore, *supra* note 45 at 149.
[107] *Re Solicitors* [1969] 1 O.R. 737.
[108] "Disputing Lawyers' Fees" *The Globe and Mail* (17 June 1970) P6.
[109] *Re Solicitors* [1970] 1 O.R. 407 at para 12.
[110] WLN Somerville, Letter to the Editor, *The Globe and Mail* (18 June 1970) P6.

In the summer of 1975, just after the US Supreme Court released its decision in *Goldfarb*, the *Canadian Bar National* featured a story discussing the use of fee schedules in Canada.[111] In the story, the President of the York County Bar Association in Ontario was quoted as saying that the schedules "are not intended to be regarded as minimums, but are only a guide to the profession and the public."[112] The story also quoted Donald S. Thorson, Federal Deputy Minister of Justice, arguing that "[f]ixed tariffs have been part of the Canadian scene for many years and they don't come under the Combines Act as it now stands."[113] By contrast, taxing officer McBride was quoted in the story stating that the fee schedules were unlawful price-fixing and that though "solicitors are not obliged to follow the schedules, they may justify stiff charges by telling clients they must abide by it."[114]

McBride softened his tone in a taxation decision involving a real estate matter in 1978, McBride wrote:

> I am not offended by the reference to the York County tariff because it is now put forward more as a list of suggested retail prices than as a rigid, enforceable minimum, and illegal, tariff, as in the past. In either guise it offers little assistance to a taxing officer.[115]

In Canada prosecution of law societies pursuant the *Combines Investigation Act* (later the *Competition Act*), occurred in the mid-1980s. In the cases of *R. v. Law Assn.*[116] and *R. v. Kent County Law Assn.*[117] the federal government pursued

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[111] "Urges Fees Abolition", *Canadian Bar National* 2 (August 1975) 9.
[112] *Ibid*.
[113] *Ibid*.
[114] *Ibid*.
[115] *Re Aylesworth, Thompson and Staseson* [1978] 3 A.C.W.S. 225 at para 4.
[116] (1988), 21 C.P.R. (3d) 528.

prosecution of the county law associations under section 32 of the *Combines Investigation Act*, which prohibited "conspiring, combining, agreeing or arranging, together and with one another, or with other persons, to prevent, or lessen, unduly, competition in the supply of a product."[118]

Ontario lawyer Milton Zwicker was a prominent leader in teaching lawyers the new techniques of law office management. Zwicker was appointed Vice-Chairman of the CBA's Law Office Economics and Management Section in 1978 and he wrote the "Management Focus" column for the CBA's magazine *National* for several years. Zwicker linked his opposition to the fee schedules to the new techniques of law office management that he was recommending to lawyers. In 1973, Zwicker argued that minimum fee schedules "appear to have been designed by those who where inefficient and had lost their ability to practice law efficiently and profitably."[119] He blamed minimum fee schedules for contributing to high costs and he argued that the use of hourly fees schedule would be cheaper for the client and would make lawyers more efficient.[120] As Chairman of Law Office Economics and Management Section of Ontario in 1975 Zwicker stated that his section predicted that there would be an increase in the call to eliminate the tariffs after the US Supreme Court's decision in *Goldfarb v. Virginia State Bar*.[121] Zwicker said that his section planned to study how to "bill and operate" without tariffs.[122]

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[117] [1988] O.J. No. 2965.
[118] *Ibid* at para 5.
[119] Milton W Zwicker, "Time, Tariffs and Tolls" (1973) 4 Can Bar J 11 at 11-2.
[120] *Ibid*.
[121] "Law Office Management Section Schedules Active Year" *Canadian Bar National* 2 (November 1975) 11.
[122] *Ibid*.

The parameters of the tariff debate were similar in the other Canadian provinces. For example, the *Canadian Bar Bulletin* reported that the annual meeting of the Manitoba Bar Association 1970 one lawyer, William Ireland, argued, "I don't think tariffs are realistic in this day and age. It's based on lawyers being mechanics but we all know that much more is now involved. Lawyers have to price their services on a time basis and tariffs just don't fit the job."[123]

None of the lawyers I interviewed reported to me that they referred to a tariff for billing their family law work. The only evidence I found of the use of tariffs in family law is a 1976 *The Globe and Mail* article reporting on a survey conducted by the Canadian Broadcasting Corporation finding that there was a suggested fee schedule in Newfoundland that included a "'suggested' $70-an-hour rate for an uncontested divorce." [124] While some of the family lawyers I spoke to used tariffs for their other practice areas, including wills, estates and real estate, they were not used in family law (L3; L7).

The price of family lawyer legal services

While there is no precise historical record on the ranges and ways that family lawyers were charging their clients, there is some evidence of what it actually cost to hire a lawyer to obtain a divorce in the 1970s. One lawyer described the pricing of legal services in family law as looking to "the going rate in the community" as opposed to referring to a tariff (L7).

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[123] "Bear-pit discussion considers competitive pricing for service" *Canadian Bar Bulletin* (July/August 1970) 6.
[124] Clark, *supra* note 97.

It was common for lawyers to offer clients flat fees for uncontested divorces at the time. In 1976, Montreal lawyer David Appel wrote in *The Globe and Mail's Weekend Magazine* that the average cost for an uncontested divorce was $570 in Quebec and $400 for the rest of Canada.[125] For Ellen Roseman's 1978 experiment in calling Toronto lawyers for price quotes, as discussed above, she found that three of the lawyers would not quote a price at all and that the rest quoted her a range from $300 to $500 for an uncontested divorce. Roseman reported on the variances between the prices she was quoted, writing:

> One lawyer told me his fee was $450 plus $150 for disbursements (out-of-pocket expenses); another said that for $450 he'd throw in the disbursements because there was little paperwork involved. There seemed to be no relation between the size of the firm and the rate: a lawyer in a one-man office told me his overhead was low and then quoted a price of $500.[126]

The lawyers I interviewed reported that for uncontested divorces they remembered charging $200 to $250 (L4), $500 (L1; L2), $350 to $500 (L7), $750 (L3; L5), $600 to $1000 (L6). These numbers are similar to the results of a 1980 survey of Canadian law firms, conducted by legal consulting firm Altman & Weil in cooperation with the CBA, finding that the average flat fee in Canada charged for an uncontested divorce was $482 ($486 in the West, $484 in Ontario, $542 in Quebec and $426 in Atlantic Canada).[127]

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[125] David Appel,"Alternatives: On Divorcing Yourself" *The Globe and Mail* (5 June 1976) A22.
[126] Roseman, *supra* note 75.
[127] Altman & Weil, *Economic Survey of Canadian Law Firms* (Ardmore, PA: Altman & Weil, 1980), 31; R Paul Beckmann, "Hourly Rates and Other Numbers" in *Lawyers' Fees: Materials Prepared for a Continuing Legal Education Seminar held in Vancouver, B.C., November 1981* (Vancouver: Continuing Legal Education Society of British Columbia, 1981), 20.

For contested divorces, however, the cost was significantly higher. One of the lawyers I interviewed (L7) reported that she would quote clients in the range of $10,000 for a contested divorce. Family lawyers interviewed for a *Globe and Mail* article in 1976 described the cost of contested cases ranging from $15,000 to $40,000.[128] These amounts are remarkable given that in 2014 the Canadian Lawyer's national survey of legal fees found that the national fee range for contested divorces in Canada is between $5,735 and $39,522.[129]

Just when new legislation in the area of family law was attracting some lawyers to a new market in the 1970s, the high cost of legal fees for obtaining a divorce became a matter of concern for members of the legal profession, from politicians to the judiciary. In 1971, the Minister of Justice, John Turner, wrote to the CBA about the "'high' cost of uncontested divorces in Canada."[130] The CBA asked Alberta judge (and former President of the CBA), the Hon. W.K. Moore to write a report and offer recommendations before the CBA would take an "official stand."[131] Moore's report concluded "this was essentially a problem for the Law Societies."[132] In the 1973 Nova Scotia taxation case referred to above, Justice Gillis wrote:

> I think high divorce costs are the subject of extreme public dissatisfaction and disappointment with the Bar and the court. A judge can understand that disappointment on the part of the public by review of what appears to this Judge, at least, as outrageous demands for costs in divorce proceedings.[133]

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[128] Clark, *supra* note 97.
[129] Michael McKiernan, "Canadian Lawyer's 2014 Legal Fees Survey: The Going Rate" *Canadian Lawyer* (June 2014), online: Canadian Lawyer <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2014/cljune14legalfees.pdf>.
[130] CBA 1972 Year Book, *supra* note 58 at 98.
[131] *Ibid*.
[132] *Ibid* at 99.
[133] *Jones*, *supra* note 99 at paras 4-5.

At the CBA's annual meeting in 1976, a family lawyer from Toronto reported that the public was "disgusted and aggravated" by the "high cost" of family law matters.[134]

Simultaneous to the public debate about the cost of legal services in family law, lawyers who practiced in this area began to experiment with the new billing strategies. American academic, Barbara Glesner Fines, argues that hourly billing allowed family lawyers "to charge for their services in a way that could sustain a practice limited only to family law and provide a comfortable income."[135] Many of the lawyers I interviewed remembered the introduction of provincial matrimonial property legislation as an important influence on their billing practices. For them this was when the "real change in fees" occurred (L7) along with a "real explosion" in litigation (L2). For one lawyer (L1), the new property legislation led him to increase the formality of his approach to billing, including the adoption of written retainers. Similar to L1, L2 described improving his recordkeeping after the introduction of provincial property legislation because "you have to consider a way to keep track on what you are doing for them because [clients began to] demand a lot more service and … you've got to figure out a way to make sure they pay for it."

Some of the lawyers I interviewed connected the new practice of hourly billing to the conflict of family law proceedings. L2 reported that he started hourly billing

> in the early 70s when it became obvious that family law was going to be a lot more litigious. And we had to devise a system where you got

[134] "Divorce on Demand Said 'Legal Nightmare'" (1976) 3 Can Bar J 12.
[135] Barbara Glesner Fines, "Fifty Years of Family Law Practice – The Evolving Role of the Family Law Attorney" (2012) 24 J Am Acad Matrimonial L 391 at 407.

> regular bills out to the clients so that they could see what it's costing and what was being done on their behalf.

L1 said that he would usually quote clients a flat fee but would warn them that if "it's going to be a fight I'll keep track of my time and charge…as we go". For L2, who was called in 1978, an hourly fee was the only practice she ever used to bill clients and, for her, the "only time you would risk, and I use that very deliberately, risk using a flat fee was if you were very certain that everything else was sorted out."

Another lawyer (L6) reported that after the division of matrimonial property became available, the number of divorces increased because "because there was a source of funding to feed them" and that "a lot of lawyers rushed into [family law practice] because you [could] make money at it now." While none of the lawyers that I interviewed reported charging their clients a percentage of the amount obtained in the property settlement, a few indicated that this was the practice of some of their peers (L5; L7). L7 reported that:

> things were largely unregulated and left to the whim of the individual lawyer in terms of billing on the property side. They ranged from rigorous application of time billing to percentages of the recovery to just sort of a bandit kind of approach depending on what the results were. And we were also at that point in an era of incredible inflation with family homes so the fees ended up being dramatically higher than they had been because people were dividing up these lucrative, all of the sudden, family homes.

There is little record of law office management educational materials specifically directed at family law lawyers. And none of the lawyers I spoke with had any recollection of specific advice for a family law practice. The Law Society of Upper Canada published a brief paper about "Costs and the Husband" in 1974

written by Toronto lawyer Barry S. Wortzman.[136] Relying on Justice Gillis' decision in *Jones v. Jones*, Wortzman advised lawyers about how to calculate their legal fees when representing a husband in a divorce matter. Wortzman's reason for differentiating price based on whether one was representing a husband or a wife was that the husband would be "obliged to pay maintenance for the benefit of his wife and children and the costs of his wife [in the divorce proceeding]."[137] In addition to the usual factors to keep in mind (as set out in McBride's taxation decisions in Ontario), Wortzman offered eight factors for the family lawyer to consider:

> (i) the solicitor should keep accurate and complete time records;
> (ii) time devoted to telephone attendances with the client which do not advance his interest relative to the issues in the action should not be charged at the full rate, or at all;
> (iii) as soon as is practicable, the solicitor should initiate settlement discussion in respect of financial issues in an effort to lower the costs;
> (iv) in addition to the factors normally taken into account, in arriving at a fee, the solicitor should take into account the immediate and continuing effect of the husband's obligation to maintain his wife and children;
> (v) at the time of his retainer and thereafter, as required, the solicitor should frankly and fully discuss the entire matter of costs, including his own and those payable to the wife;
> (vi) the solicitor should render interim bills;
> (vii) whenever possible, the solicitor should delegate work that does not require his personal involvement; and
> (viii) in drawing his bill, the solicitor should keep in mind that he may have to justify same upon a taxation.

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[136] Barry Wortzman, "Costs and the Husband" in *Family Law* (Toronto: The Law Society of Upper Canada, 1974), N-1.
[137] *Ibid*.

Further materials produced specifically for family lawyers do not appear until the 1980s.[138] Ottawa family lawyer Glen Kealey[139] prepared a seminar in 1983 advising family lawyers about how to collect legal fees. Kealey provided the following advice:

> Screen your clients. Do not expect your client to pay you if the client had not paid previous solicitors. If a client is not settlement oriented beware of ever collecting a proper fee. *There is a modest maximum level of payment for fees in contested domestic disputes beyond which most clients cannot pay*. Assume you will not be paid a proper fee in a contested custody action … . Obtain a substantial initial retainer…Interim bill regularly … Consider obtaining a direction that any sale proceeds or the settlement or judgment proceeds be paid to your firm in trust. [emphasis added]"[140]

For a 1985 seminar of family law issues organized by the CBA, lawyers, B. Thomas Granger and Margaret A. McSorley, advised that when explaining fees to a client they must remember that the types of clients that seek family law assistance have likely never seen a lawyer before, other than perhaps in a real estate matter.[141] At the same seminar, lawyer Alan Poole[142] argued that in his experience "there is

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[138] This is in contrast to the work of the American Bar Association, which organized a program on "Guides for Practice and Better Economics For the Family Lawyer" in 1967 at its annual meeting (see "Honolulu Economics Program" (1967) 19 Legal Economics News 3).

[139] Kealey had experience with the difficulty of collecting fees in family law. In 1983, the same year that he presented a seminar on collecting legal fees, Kealey's bill to a client was reduced from $22,000 to $0 by taxation officer E.F. Conover on the basis of "incompetence". (See *Kealey v. Stone* [1983] O.J. No. 1344; "Lawyer won't appeal cancellation of $22,000 divorce fee", *Ottawa Citizen* (25 January 1985) B2.)

[140] Glen Kealey, "How to Collect a Proper Fee" in *Support, Enforcement, Costs, Fees* (Ottawa: Nova Workshops, 1983), 88-9.

[141] B Thomas Granger & Margaret A McSorley, "How to Get Paid" in *Family Law: Bread and Butter: How to Get Paid and Other Vital Issues* (Toronto: Canadian Bar Association, 1985), 5.

[142] Poole argued in front of McBride in *Re Solicitors* (1971), *supra* note 94.

hardly ever any need to send a detailed bill to the client. "[143] By contrast, in materials for a 1983 seminar on collecting fees, lawyer Ellen M. Macdonald wrote:

> I am aware that certain of my colleagues in the profession take the attitude that because of time constraints … detail is not desirable. The result is that, the solicitor with this view tends to prepare a rather 'bald' account with a note that if particulars of attendances are required that they will be produced. I am of the view that this is not satisfactory in litigation matters but particularly in Family Law matters.[144]

One of the techniques used by presenters at CBA or law society seminars on collecting fees was to provide templates or sample client letters to explain best practices.[145] With her 1983 seminar materials, Ellen Macdonald provided a sample memorandum that explained fees to clients.[146] In 1989 seminar materials for the Law Society of Upper Canada, Toronto family lawyer Malcolm Kronby included a sample letter for clients explaining fees.[147] Kronby actually quoted to clients the eight factors to be considered in determining fees from taxing officer McBride's 1971 decision.[148]

Conclusion

It is difficult to pinpoint the exact methods by which lawyers first learn how to bill clients or make deliberate changes to their business practice later their careers. Rather than making an argument about what caused or what explains the

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[143] Alan FN Poole, "Your Bills: The Final Pieces of Advocacy", in *Family Law: Bread and Butter: How to Get Paid and Other Vital Issues* (Toronto: Canadian Bar Association, 1985), 8.
[144] Macdonald, "How to Draw the Bill", *supra* note 101 at A-8.
[145] Chipeur, *supra* note 56 at 7.
[146] Macdonald, "How to Draw the Bill", *supra* note 101 at A-10.
[147] Malcolm C Kronby, "The Family Law Perspective" in *Legal Fees: How to Set Them, How to Collect Them* (Toronto: Law Society of Upper Canada, 1989), E-2.
[148] *Ibid*.

changes to law office management in 1970s, I have presented several of the issues that were subject to lively debate amongst lawyers in Canada, and specifically how those issues were relevant to those beginning to specialize in family law.

The family lawyers I spoke with reported a multitude of influences on their business practices and so perhaps it would be artificial to reduce the changes to the profession in 1970s to one explanation, such profit motive or client demand. Instead, this focused historical approach to the business practices of lawyers in the 1970s is designed to emphasize that it was lawyers making these decisions in the context of the demands of their practice area(s). Further, it was the organized bar, primarily the CBA, that took a leadership role in guiding lawyers in these changes to their business practices. In the next parts I take these lesson and apply them to the some of the important debates for the Canadian legal profession today.

Part Two: How 'People-Centered' Access to Justice Overlooks the Agency of Lawyers

In Part One, I described the atmosphere in which family lawyers, along with the rest of the Canadian legal profession, adopted hourly billing and other new law office business practices. Part of this story was the discussion within the profession, and amongst the public, of the high cost of obtaining a divorce. Today, empirical studies in Canada show that family law is the area of the highest unmet civil legal need and that family courts are where litigants most often appear without a lawyer.[149] Simultaneously, other empirical work concludes that the cost of a lawyer is the most common reason why individuals with legal problems do not hire a lawyer.[150]

In this next part, I look at how the Canadian legal profession is responding to statistics about self-representation and unmet legal need in a variety of reports and

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[149] Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010), 11; Canadian Bar Association, *Underexplored Alternatives for the Middle Class*, at 3-4, online: Canadian Bar Association <http://www.cba.org/CBA/advocacy/pdf/MidClassEng.pdf> [CBA, *Underexplored Alternatives for the Middle Class*]; The Law Foundation of British Columbia, *Poverty Law Needs Assessment and Gap/Overlap Analysis* (Vancouver: The Law Foundation of British Columbia, 2005), 3.

[150] Dr Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants*, (May 2013) at 8, online: The Law Society of Upper Canada <http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf>; The University of Toronto Faculty of Law Middle Income Access to Civil Justice Steering Committee, "Background Paper", online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/documents/conferences2/AccessToJustice_LiteratureReview.pdf> [Middle Income Access to Civil Justice Steering Committee].

initiatives that identify 'access to justice' as their aim. One of the striking themes in these reports is the focus on empowering individuals with legal needs to resolve their own legal problems. Even though many of these reports are produced by the organized bar, they tend to avoid critical engagement with agency of lawyers and the price of legal services. The cost of legal fees are described with reference to potential client's lack of means rather than the result of a lawyer's decision about how to do business. The significance of taking the historical approach in Part One of this thesis is to emphasize that the price of legal services and the way they are calculated are not fixed – they are the result of choices that lawyers have made and continue to make about how to charge their clients.

The discourses concerning self-help legal strategies and the unaffordability of legal services frame both the problem and the solution in terms of the agency of litigants. I will argue that this approach obscures the agency of lawyers in determining the cost of legal services and in potentially creating or ameliorating the increasing number of self-represented litigants.

First, I will give a brief chronology of the scholarship on access to justice in Canada and I will describe how current efforts have been contrasted to those in the past as moving away from the formal institutions of law towards a society-based understanding. Next, I will set out a critique of the current access to justice initiatives, where I will explain some of the consequences of a "people-centered" focus. By recommending strategies to empower litigants with access to legal information and other self-help mechanisms, these access to justice initiatives

ignore the responsibility of lawyers in both the creation and solution of self-representation.

Access to justice "waves"

Canadian scholarship on "access to justice" usually characterizes the concept as evolving – moving from narrow to broad, from a focus on formal legal institutions to a society-based conception of justice.[151] Roderick A. Macdonald describes the history of the scholarly literature on access to justice in Canada in terms of five "waves": 1) access to lawyers and courts (1960-1970); 2) institutional redesign (1970-1980); 3) demystification of law (1980-1990); 4) preventative law (1990-2000); 5) proactive access to justice (2000 onwards).[152] This last wave, "proactive access to justice", is about empowering citizens to fully participate in the institutions "where law is debated, created, found, organized, administered, interpreted and applied."[153]

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[151] Albert Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid within an Access to Justice Framework* (Ottawa: Department of Justice Canada, 2004), online: Department of Justice Canada <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_5/rr03_5.pdf>; Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W A Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005), 19 [Macdonald, "Scope, Scale and Ambitions"]; Ab Currie, "Riding the Third Wave – Notes on the Future of Access to Justice" in *Expanding Horizons: Rethinking Access to Justice in Canada, Proceedings of a National Symposium* (Ottawa: Department of Justice Canada, 2000), 37 [Currie, "Riding the Third Wave"].

[152] Macdonald, "Scope, Scale and Ambitions", *supra* note 151 at 20-23 (Macdonald borrows the language of "waves" from Mauro Cappelletti and Bryant Garth as articulated in their edited collection, *Access to Justice: A World Survey*, vol 1 (Milan: Sitjoff and Noordhoff, 1978)).

[153] *Ibid* at 23.

This evolution of the concept of access to justice in legal scholarship is not just historical but also a normative shift. It reflects a critique of how formal law, legal institutions and legal professionals monopolize justice.[154] Scholars, including Macdonald, encourage understandings of actual human relationships and conflict rather than a narrow focus on how those relationships are interpreted by legal expertise.[155]

Prominent voices in Canadian legal institutions have adopted this academic critique of narrow understandings of access to justice. For example, Patricia Hughes, the Executive Director of the Law Commission of Ontario, has been explicitly critical of the history of access to justice initiatives by Canadian law commissions.[156] She argues that contemporary law commissions ought to take a broad approach to the concept of access to justice by, for example, recognizing the importance of studying the "non-legal realm" and including public consultation.[157]

Other leaders of the legal profession have been less critical, but have embraced a shift away from the formal justice system. The Action Committee on Access to Justice in Civil and Family Matters, convened by Chief Justice Beverly

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[154] Roderick A Macdonald, "Access to Justice and Law Reform #2" (2001) 19 Windsor YB Access Just 317 [Macdonald, "Law Reform #2"]; William E Conklin, "Whither Justice? The Common Problematic of Five Models of 'Access to Justice'" (2001) 19 Windsor YB Access Just 297; Roderick A Macdonald, "Theses on Access to Justice" (1992) 7 CJLS 23 [Macdonald, "Theses"]; William E Conklin, "'Access to Justice' as Access to a Lawyer's Language" (1990) 10 Windsor YB Access Just 454; Roderick A Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor YB Access Just 287 [Macdonald, "Access to Justice and Law Reform"]

[155] Macdonald, "Law Reform #2", *supra* note 154 at 325; Kent Roach & Lorne Sossin, "Access to Justice and Beyond" (2010) 60 UTLJ 373 at 376-379; Patricia Hughes, "Law Commissions and Access to Justice: What Justice Should We Be Talking About" (2008) 46 Osgoode Hall L J 773.

[156] Hughes, *supra* note 155 at 780-781.

[157] *Ibid*.

McLachlin in 2013 and chaired by Justice Thomas Cromwell, recommended a "more expansive, user-centered vision of an accessible civil and family justice system."[158]

In 2013 the CBA released its *Reaching Equal Justice Report* ("Equal Justice Report"), which is one of the many reports that the CBA has produced as part of the "Envisioning Equal Justice Initiative" that it launched in 2012. This report described the "access to justice waves" from 1960-2000 in terms of the actual agendas of governments and other legal institutions (see fig. 1). The Equal Justice Report is not openly critical of previous waves; instead, the Report states that the projects of earlier decades were "never finished".[159]

Figure 1: Image from the CBA's 2013 Reaching Equal Justice Report, p. 58

The Equal Justice Report identified a new "wave" in the 2010s, which it identifies as "'Putting the Client at the Centre' – helping people to solve their legal problems".[160] The language of "client-centered"[161], "user-centered"[162] and "people-

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[158] Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013), 2 [Action Committee, *Access to Civil & Family Justice*].
[159] *Ibid*, 58.
[160] CBA, *Reaching Equal Justice*, *supra* note 4 at 58.
[161] Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words*

centered"[163] justice has become dominant in the Canadian legal professions' access to justice discourse – empowering individuals by allowing them to act for themselves within the justice system. The CBA described these goals as "improving legal capability" and teaching law as a "life skill."[164] In the summer of 2014, the CBA's Access to Justice Committee resolved that

> the Canadian Bar Association urge lawyers to integrate public legal education materials and a legal capabilities approach in the delivery of legal services where appropriate, and to assist public legal education organizations to develop and routinely update their materials.[165]

Both Macdonald and the CBA's Equal Justice Report identify the 1960s as the beginning of the access to justice movement in Canada, when many of the provinces established legal aid programs. The CBA's Equal Justice Report refers to the current "client-centered" approach as a shift back to the rights-based approach of the 1960s and 1970s in contrast to the court and costs focus of the 1980s to the 2000s.[166]

The shift away from a "lawyer-centered" to a "client-centered" or "people-centered" perspective is described positively and as an approach that will lead to substantively just outcomes.[167] There are concerning, and perhaps unintended,

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(April 2013) at 10, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf> [Family Justice Working Group, *Meaningful Change*].

[162] Action Committee, *Access to Civil & Family Justice*, *supra* note 158 at 2.

[163] CBA, *Reaching Equal Justice*, supra note 4 at 10.

[164] *Ibid*.

[165] Canadian Bar Association, "Resolution 14-07-A, Improving Legal Capabilities" (2014), at 30, online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/pdf/ResolutionA2014.pdf> (this resolution will be discussed at the CBA's annual meeting in August 2014).

[166] CBA, *Reaching Equal Justice*, *supra* note 4 at 58.

[167] Currie, "Riding the Third Wave", *supra* note 158 at 38-39; Family Justice Working Group, *Meaningful Change*, *supra* note 161 at 10.

consequences to the way in which the lessons of this important critique are being understood and implemented in the Canadian organized bar's current access to justice initiatives. The focus on client-centered justice can gloss over the agency of legal professionals in both creating and solving the systemic legal problems. A people-centered discourse and perspective would not be so problematic if it was not also limiting the range of explanations, solutions and recommendations to the individual alone. My concern is that the organized bar has taken on a people-centered discourse while overlooking how legal professionals bear responsibility for the structure of the system and its access channels.

Next, I set out several recurring themes in the current wave of access to justice scholarship and initiatives. I argue that this wave of people-centered access to justice obscures the responsibility of legal professionals. I conclude that efforts to encourage the legal capabilities of non-lawyers should be coupled with attention to the decisions and motivations of lawyers.

The reports that I analyze in the next part are those that have been produced in recent years by the organized bar, law schools, and various government departments in Canada, including the CBA, the Canadian Judicial Council, the Canadian Forum on Civil Justice, provincial law societies. I only review reports that deal with the civil justice system because of the way access to justice initiatives have separated criminal and civil reform projects.

Self-representation and unmet legal need

One of the most important themes in the recent access to justice wave is the increasing amount of self-represented parties in Canadian courts.[168] This is identified as a problem in family courts in particular.[169] Empirical studies conducted in Canada find that the primary reason for the increasing number of self-represented litigants is high legal fees and that self-represented litigants would prefer to have a lawyer if they could afford one.[170] Further, lawyers have reported that when the other party is self-represented the legal fees of their client are substantially higher than they would be if both parties were represented.[171]

Instead of developing strategies for addressing the identified cause of self-representation – the cost of a lawyer – the access to justice reports focus on methods for improving self-help resources. The arguments about making the system "people-oriented" appear to be a ready response to the reality of increasing self-representation. However, perhaps the realities of self-representation are encouraging a focus on increasing the capacities of self-represented litigants rather

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[168] CBA, *Reaching Equal Justice*, *supra* note 4 at 42.
[169] CBA, *Underexplored Alternatives for the Middle Class* (February 2013), *supra* note 149 at 3-4.
[170] Macfarlane, *supra* note 150 at 8, 83; Middle Income Access to Civil Justice Steering Committee, *supra* note 150 at 9. For a recent American study that supports these conclusions see Judith G McMullen & Debra Oswald. "Why Do We Need a Lawyer? An Empirical Study of Divorce Cases" (2010) 12 J L & Fam Stud 57 at 80.
[171] Lorne D Bertrand, et al, *Self-Represented Litigants in Family Law Disputes: Views of Alberta Lawyers*, (December 2012) at 6, online: Canadian Research Institute for Law and the Family < http://www.crilf.ca/Documents/Self-represented%20Litigants%20-%20Views%20of%20Lawyers%20-%20Dec%202012.pdf>; Birnbaum, Bala & Bertrand, *supra* note 1 at 80.

than prompting the question of whether self-representation is desirable at all.[172] The limited empirical work on self-represented litigants concludes, fairly unsurprisingly, that litigants with lawyers are at an advantage.[173]

Similar to the problem of self-represented litigants, many of access to justice reports cite empirical work on the increasing amount of unmet civil legal needs amongst Canadians.[174] Unmet legal needs are problems that are "justiciable" but for which individuals do not seek out legal assistance or appear in court.[175]

Altogether the focus on self-representation and unmet legal need fits well with the people-centered access to justice approach. The solutions created in this context consider how to empower individuals with legal problems to help themselves. The next section describes the self-help strategies that have been recommended in the recent access to justice initiatives.

Self-help strategies

In response to the marked increase in self-representation, recent access to justice initiatives emphasize the importance of legal information, self-help services

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[172] See Deborah Doherty, "Promoting Access to Family Justice by Educating the Self-Representing Litigant" (2012) 63 UNBLJ 85.
[173] CBA, *Reaching Equal Justice*, *supra* note 4 at 36-37; CBA, *Underexplored Alternatives for the Middle Class*, *supra* note 149 at 14; Rachel Birnbaum & Nicholas Bala, "Views of Ontario Lawyers on Family Litigants without Representation" (2012) 63 UNBLJ 99 at 108; Rebecca L Sandefur, "The Impact of Counsel: An Analysis of Empirical Evidence" (2010) 9 Seattle J Soc Just 51 at 69. See also McMullen & Oswald, *supra* note 170 at 58 (""conventional wisdom in the legal profession says that divorce litigants are better off with lawyers and significantly disadvantaged without lawyers").
[174] Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (2009), online: Department of Justice Canada, <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf >.
[175] *Ibid* at 1.

at court and public legal education.[176] The dissemination of legal information, usually by telephone or online, is a priority of the access to justice agenda.[177] The CBA's Equal Justice Report actually identifies its first reform approach to the problem of self-representation as "reducing the need for representation through enhanced legal information and assistance services."[178]

There is an important qualitative distinction between legal information and legal advice. Legal information can be provided generically through print materials or online to the general public. The provider of the information does not require legal training and does not take on any responsibility for how that information is used by the consumer. This places the onus on the consumer of the legal information to understand the materials. Many of the reports acknowledge that the usefulness of legal information campaigns depends on the literacy of the

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[176] CBA, *Underexplored Alternatives for the Middle Class*, *supra* note 149 at 7-10; Macfarlane, *supra* note 150 at 113-23; Action Committee, *Access to Civil & Family Justice*, *supra* note 158 at 14; British Columbia Ministry of Justice, *White Paper on Justice Reform Part Two: A Timely, Balanced Justice System* (February 2013) at 9, online: British Columbia Attorney General <http://www.ag.gov.bc.ca/public/WhitePaperTwo.pdf>; Access to Family Justice Task Force, *Report of the Access to Family Justice Task Force* (Fredericton: Province of New Brunswick, 2009), 2; Unrepresented Litigants Access to Justice Committee, *Final Report* (Regina: Ministry of Justice and Attorney General, 2007), 5, 8.

[177] Federation of Law Societies of Canada, *Inventory of Access to Legal Services Initiatives of the Law Societies of Canada* (2012) online: Federation of Law Societies of Canada <http://www.flsc.ca/_documents/Inventory-of-Access-to-Legal-AccessLawSocietiesInitiativesSept2012.pdf>; Alison MacPhail, *Report of the Access to Legal Services Working Group* (2012), at 10, online: The Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Access%20to%20Legal%20Services%20Working%20Group.pdf>.

[178] CBA, *Reaching Equal Justice*, *supra* note 4 at 61.

consumer.[179] Legal advice, by contrast, is provided by lawyers and takes into account the particular circumstances of the client. Lawyers are legally responsible for the advice they give.

Another self-help strategy that is identified by these reports is unbundling.[180] By offering piecemeal legal services, lawyers can help otherwise unrepresented litigants with limited aspects of their case, such as drafting or research. The litigant determines when and for what purpose they will engage a lawyer's services. There is wariness about unbundling in the literature for a variety of reasons, including empirical work that has identified little difference between the outcomes for unrepresented litigants and those that have received unbundled legal services.[181]

There is some reported skepticism about self-help strategies and the critiques in Canada happen to come from community consultation reports. An "overarching comment" in submissions made to the BC Public Commission on Legal Aid in 2010 was that legal information is an "inadequate substitute for legal advice

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[179] Ontario Civil Legal Needs Project, *Listening to Ontarians: Report of the Ontario Civil Legal Needs Project* (Toronto: Ontario Civil Legal Needs Project Steering Committee, 2010), 28; Middle Income Access to Civil Justice Steering Committee, *supra* note 150 at 32; MacPhail, *supra* note 177 at 7; CBA, *Reaching Equal Justice*, *supra* note 4 at 44; Leonard T Doust, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* (Vancouver: Public Commission on Legal Aid, 2011), 23.

[180] Unrepresented Litigants Access to Justice Committee, *supra* note 176 at 2.

[181] Jessica K Steinberg, "In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services" (2011) 18 Geo J on Poverty L & Pol'y 453; Ann Juergens, "Valuing Small Firm and Solo Law Practice: Models for Expanding Service to Middle-Income Clients" (2012) 39 Wm Mitchell L Rev 80 at 135; D James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, "The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future" (2013) 126 Harv L Rev 901.

and representation."[182] Beyond concerns about literacy, there was skepticism that unrepresented people can act on the information provided or learn to represent themselves effectively. Another community consultation report identified the apprehension that "[d]evoting already scarce resources to developing self-help tools and initiatives risks detracting from the attention and resources needed for the development and delivery of the full range of legal advice and representation services for people who experience low-incomes and other disadvantages."[183] Another criticism is that focusing on legal information and other modes of self-help is an approach that will "result in second-tier justice for the most marginalized people in Ontario."[184]

Despite the uncertainty about the effectiveness of legal information and self-help as a response to the growing phenomenon of self-representation and unmet legal need, the majority of the access to justice initiatives overwhelmingly identify these strategies as a central part of "people-centered" justice.

The business of law

As noted above, empirical work has identified the cost of legal fees as the most important reason why so many individuals go without legal advice and representation.[185] Given this statistic, it is surprising that recent access to justice initiatives spend so little time exploring the issue of legal fees and the business of

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[182] Doust, *supra* note 179 at 23.
[183] Community Legal Education Ontario, *Tapping the Community Voice: Looking at Family Law Self-Help through an Access to Justice Lens* (2008) at 3, online: Community Legal Education Ontario <http://www.cleo.on.ca/sites/default/files/docs/thinktank.pdf>.
[184] *Ibid* at 4.
[185] *Supra* note 150 and accompanying text.

law. The people-centered approach of these initiatives focuses attention on how to empower an individual to use the justice system without a lawyer. As discussed above, the scholarship on access to justice urges moving away from lawyer-centered approaches. However, if legal fees are creating the problem of self-representation, it is worrisome that there is little to no discussion of the business of law. One of the strategies, instead, has been to explain that part of the problem is that the public is misinformed about how much it will cost to hire a lawyer.

Blaming the misinformed public

Many of the reports identify part of the reason that individuals do not seek out a lawyer when they have a legal problem as a *perception* of the cost of legal fees.[186] The proposed solution to the problem of the perception that the individual will not be able to afford a lawyer has been to educate the public about what it will actually cost to hire a lawyer.[187] This approach continues to solve the access to justice problem through better information provided directly to the public, rather than recommending anything that lawyers ought to be doing.

Some studies do make recommendations about what lawyers could be doing to ameliorate the problem of the perception of high legal costs amongst the public. Dr. Julie Macfarlane, in her 2013 report about the needs of self-represented litigants, writes that lawyers need to be trained "to provide more complete and transparent

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[186] CBA, *Reaching Equal Justice*, *supra* note 4 at 36; Action Committee, *Access to Civil & Family Justice*, *supra* note 158 at 4; Law Commission of Ontario, *Voices From a Broken Family Justice System: Sharing Consultation Results* (Toronto: Law Commission of Ontario, 2010), 20.
[187] Law Commission of Ontario, *supra* note 186 at 62.

information about costs to their clients and before they present them with a bill."[188] However, rather than recommending changes to how lawyers calculate their fees, Macfarlane simply recommends that lawyers ought to inform their clients earlier about the cost of their legal services. Other reports recommend that lawyers be more transparent about their fees.[189] Another study identifies the problem of the public's perception of legal fees as "unreasonable expectations" because of "misinformation".[190]

While all of the studies that discuss access to justice identify legal fees as one of the most important factors they do not spend much time analyzing the issue. This is surprising because of the importance legal scholars have placed on legal fees in access to justice scholarship. Macdonald writes that lawyer's fees are "the single greatest economic barrier" to accessing justice.[191] Kent Roach and Lorne Sossin write that "[a] premise for the crisis of accessible legal services is the high cost of good-quality legal services in the market."[192]

Despite the emphasis on the importance of legal fees in the literature, the current "people-centered" access to justice initiatives do not analyze the issue at great length. The issue of lawyers' fees appears to be a fixed barrier; something to be taken as a given. Commonly, legal fees are described as "unaffordable" or beyond the means of average Canadians.[193] The way that Richard Devlin and Porter

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[188] Macfarlane, *supra* note 150 at 123-4.
[189] Unrepresented Litigants Access to Justice Committee, *supra* note 176 at 2.
[190] Law Commission of Ontario, *supra* note 186 at 20.
[191] Macdonald, "Access to Justice and Law Reform", *supra* note 154 at 301
[192] Roach & Sossin, *supra* note 155 at 386.
[193] CBA, *Reaching Equal Justice*, supra note 4 at 93; Action Committee, *Access to Civil & Family Justice*, *supra* note 158 at 4; Mary Stratton, *Alberta Legal Services Mapping*

Heffernan describe the issue is illustrative: "as fees rise, pro bono and publicly-funded legal aid become more important, as do self-help mechanisms for those litigants unable to secure representation of any kind."[194] The "people-centered" approach is therefore a way of ameliorating the consequences of the high cost of legal services but not, I submit, a way of dealing with the direct cause.

As I have set out above, it is not that the current access to justice initiatives ignore that legal fees are the reason that self-representation is becoming an increasing problem in Canadian courts. Yet these initiatives avoid directly taking up the issues of how lawyers do business and the high cost of legal fees. This may in part be due to how little we actually know about the Canadian market for legal services.[195] There are very few statistics on how lawyers do business in Canada other than relatively small surveys conducted by legal profession publications such as *Canadian Lawyer*. Alan Hutchison describes the situation as a "thick fog around the whole issue of legal fees and lawyers' earnings."[196]

Project: An Overview of Findings from the Eleven Judicial Districts (July 2011) at 43, online: Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/2011/mapping-final-en.pdf>; The Canadian Forum on Civil Justice, *The Cost of Justice: Weighing the Costs of Fair & Effective Resolution to Legal Problems* (2012) online: The Canadian Forum on Civil Justice <http://www.cfcj-fcjc.org/sites/default/files/docs/2012/CURA_background_doc.pdf>.

[194] Richard F Devlin & Porter Heffernan, "The End(s) of Self-Regulation?" (2008) 45 Alta L Rev 169 at 179-180.

[195] CBA, *Reaching Equal Justice*, *supra* note 4 at 36.

[196] Allan C Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (Toronto: Irwin Law), 79.

The agency of lawyers

The argument that recent access to justice initiatives ignore the agency of lawyers is not meant to assign blame to the lawyers who practice law in areas that are most directly implicated when we speak of access to justice – such as criminal or family law. As Macdonald points out, these lawyers already earn less than their corporate counterparts and it seems unreasonable to expect that bear the primary burden of providing cheaper legal services.[197] The problem is one that is collectively the responsibility of the legal profession. Yet, the one lawyer-centered approach found in the access to justice initiatives is an individualistic one – encouraging lawyers to offer more *pro bono* or free legal services.

Recognizing the agency of lawyers cannot be simply about encouraging a "Pro Bono Culture,"[198] because such an approach does nothing to address the underlying structure of the business of law. The business decisions of lawyers are what define the cost of legal services. For lawyers to provide some of those services for free on a discretionary basis does not change anything about how fees are priced. Hourly billing, which was adopted by Canadian lawyers in the 1970s, is still the dominant billing methodology in the majority of practice areas and regardless of the size of firm.[199] There are very few lawyers offering alternative pricing

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[197] Macdonald, "Scope, Scale and Ambitions", *supra* note 151 at 44.
[198] CBA, *Reaching Equal Justice Report*, *supra* note 4 at 113; Unrepresented Litigants Access to Justice Committee, *supra* note 176 at 2.
[199] Ann Macaulay, "The Billable Hour – Here to Stay?" CBA Practice Link (4 October 2012), online: Canadian Bar Association <https://www.cba.org/CBA/practicelink/mf/alternatives.aspx>; Committee on Current Issues in Private Practice and the Future of the Profession, *Lawyers in Private Practice in 2021* (Montreal: Barreau du Québec, 2011), at 54, online: Barreau

arrangements to their clients. One study conducted in Toronto reported that only 5% of the lawyers surveyed offer alternative fee arrangements.[200]

There are hints in the access to justice reports about exploring the way lawyers do business. For example, one empirical study of self-represented litigants reports that "the way in which lawyers are currently offering their services" is part of the problem. [201] Another report on the family justice system in Ontario comments that lawyers "need to explore cheaper ways for their clients to communicate with them." [202] However, as noted above, the people-centered approach to access to justice consistently identifies problems and solutions without reference to lawyers. This is partially in reaction to the history of access to justice scholarship in Canada. However, it is also the result of a conscious effort to move away from an exclusive focus on formal legal actors. What it does not do is reverse the increasing numbers of individuals who do not retain lawyers when confronted with a legal problem.

Along with the few comments on business of law, the access to justice reports contain only one example of a strategy that targets legal fees rather than only self-help strategies. The Law Society of Manitoba has created a pilot project, the Family Law Access Centre", which places the Law Society of Manitoba as an intermediary

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du Québec <http://www.barreau.qc.ca/pdf/publications/avocat-2021-en.pdf> [CPPP]; Michael McKiernan, "Canadian Lawyer's 2014 Legal Fees Survey: The Going Rate" *Canadian Lawyer* (June 2014), online: Canadian Lawyer <http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2014/cljune14legalfees.pdf>.

[200] Middle Income Access to Civil Justice Steering Committee, *supra* note 150 at 70.

[201] Macfarlane, *supra* note 150 at 121.

[202] Law Commission of Ontario, *supra* note 190 at 21.

between family lawyers and clients for the purpose of legal fees.[203] The Law Society pays the lawyer on the client's behalf and then the client pays off this loan to the Law Society over time.[204] This pilot project in Manitoba is the only initiative in Canada identified by the Federation of Law Societies as an alternative billing model strategy in its 2012 report on access to legal services initiatives by Canadian law societies.[205] The Federation identifies the "billable-hours model" as creating "challenges for clients who face uncertainty about the anticipated costs of legal services and potentially extremely high fees".[206] Yet despite this concern there are no other identified initiatives regarding the business of law. Perhaps unsurprisingly, the Federation identifies over twenty initiatives related to self-help and public legal education/information.[207]

Conclusion

The business of law and lawyers' agency is, unfortunately, not a significant part of the current wave of access to justice initiatives. The organized bar appears to view these issues as entirely separate from one another. Concurrently with its "Envisioning Equal Justice Initiative", launched in 2012, the CBA has created a separate "Legal Futures Initiative". While the CBA states that access to justice is a "foundational value" of the work of the Legal Futures Initiative, the CBA does not

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[203] Donna J Miller, "Enhancing Access to Justice: Some Recent Progress in Manitoba" (2013) 36 Man LJ 201 at 218.
[204] MacPhail, *supra* note 177 at 13-14.
[205] Federation of Law Societies of Canada, *supra* note 177 at 16.
[206] *Ibid*.
[207] *Ibid* at 2-6.

reciprocally acknowledge the importance of analysing the business of law in the context of access to justice.[208]

The critique that I have presented here may be criticized for primarily focusing on access to lawyers and thereby returning to traditional ideas about lawyers' monopoly on justice.[209] However, my point is not that the legal profession ought to reorient its justice initiatives such that access to lawyers and official legal institutions is the only goal. Instead I am raising concerns about excessive focus on empowering people to navigate legal institutions and to take responsibility for solving their own legal problems – to the exclusion of acknowledging and critiquing the agency and responsibility of lawyers.

If we ignore the role of lawyers' and their business decisions, we risk missing the motivations for those decisions and obtaining an understanding of whether those decisions are being made in a way that is compatible with the professed goals of increasing access to justice. When the business decisions of lawyers are part of the analysis in developing access to justice strategies, the structural effect of those collective decisions may become part of the potential solution. The historical consequences of how lawyers' have decided to do business shows us that the pricing of legal services is within the agency of lawyers. As a result, access to justice initiatives must explore how the increasing number of self-represented litigants are due to the high cost of legal services.

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[208] CBA, *Reaching Equal Justice*, *supra* note 4 at 10.
[209] See, for example, Macdonald, "Access to Justice and Law Reform", *supra* note 154 at 314-315; Macdonald, "Theses", *supra* note 154.

Part Three: Marginalizing the Market for Personal Legal Services

In Part One I describe the history of the business of law in Canada from the perspective of family lawyers. I contextualize business practice changes that the legal profession adopted, such as hourly billing, within the specific practice area of family law. In Part Two I make the connection between the business decisions of lawyers and present-day "access to justice" issues. I argue that the current discourse about access to justice in Canada marginalizes or ignores the importance of the agency of lawyers and their business decisions.

In this next part, I explore the value of consciously connecting the specificities of certain practice areas and the business decisions of lawyers as I do in the first part of this thesis. Over the past four years, the CBA has been conducting extensive research and consultation with the legal profession about the future of the business of law by way of its "Legal Futures Initiative." My analysis in this part will explicitly engage with the reports that have been produced by the CBA's Legal Futures Initiative thus far.

I will note that the legal profession and legal scholarship have overwhelmingly concentrated their study of the business of law on only one type of law practice – the large, corporate law firm. To some extent, this fixation is self-aware and there is some acknowledgement of the dearth of attention on solo and small practitioners and other practice areas. However, this is often defended or justified on the grounds

that whatever innovations or developments take place for large firms will eventually trickle down to the small firm or solo practitioner.[210]

I will explain why it is important not only to expand the research agenda of business of law studies beyond the large corporate firm but also to tailor an analysis of the business of law with the needs and particularities of a practice area. First, I will show how the academic literature maintains a singular focus on the large, global law firm and the practice of corporate law. Next, I will examine the concept of "client-led innovation". Legal scholarship about the business of law and Canadian legal professional publications increasingly use the concept of client led-innovation to describe changes to the environment for lawyers' business decisions. The idea that clients have influence on the business of law has developed out of the context of sophisticated, corporate clients in a global market for legal services.

In my examination of the "client-led innovation" discourse I will explain how this concept is not a helpful or accurate way to explain the influences on the business decisions of all lawyers. Lawyers that provide personal legal services, usually as solo practitioners or in small firms, do not usually interact with sophisticated clients capable of negotiating their legal fees or developing innovative billing arrangements. Legal work for middle-income and poor clients is often the subject of study in the area of "access to justice," rather than the business of law. I will conclude that failing to study the characteristics of the business of law in the

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[210] Canadian Bar Association Legal Futures Initiative, *The Future of the Legal Profession: Report on the State of Research* (Ottawa: Canadian Bar Association, 2013), 7 [CBA, *Report on the State of Research*].

area of personal legal services will lead to an overstatement of the agency of clients in the legal market.

The focus in the scholarship on large, corporate law firms

Over the last thirty years, the primary focus of the scholarly literature on law firms and the business of law has centered on the large corporate law firm.[211] For example, one of the most influential concepts in the literature on the business of law is Marc Galanter's "tournament of lawyers", which is how Galanter characterizes the typical career path of associates in large firms that are working towards partnership.[212] The tournament necessarily requires large numbers of lawyers in the same practice area – corporate law – and does not reflect the reality for most lawyers beyond the very elite.

Richard Susskind is another prominent scholar on the business of law and he has written extensively on commoditization as the future of legal products in

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[211] See for example, Francisco Reyes & Erik P M Vermeulen, "Company Law, Lawyers and 'Legal' Innovation: Common Law versus Civil Law" (2013) 28 Banking & Finance L Rev 433; John Flood & Peter D Lederer, "Becoming a Cosmopolitan Lawyer" (2012) 80 Fordham L Rev 2513; John C Coates, et al, "Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market" (2011) 36 Law & Soc Inquiry 999; Gillian K Hadfield, "Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets" (2008) 60 Stan L Rev 1689; William D Henderson, "The Globalization of the Legal Profession" (2007) 14 Ind J Global Legal Studies 1; D Daniel Sokol, "Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study" (2007) 14 Ind J Global Legal Studies 5; Brian Uzzi & Ryon Lancaster "Embeddedness and Price Formation in the Corporate Law Market" (2004) 69 American Sociological Review 319; Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Growth and Transformation of the Big Law Firms* (Chicago: University of Chicago Press, 1991); Robert L Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (Berkeley: University of California Press, 1988).

[212] Galanter & Palay, *supra* note 211; Marc Galanter & William Henderson, "The Elastic Tournament: A Second Transformation of the Big Law Firm" (2008) 60 Stan L Rev 1867.

contrast to the "bespoke" legal services of the past.[213] He argues that lawyers will need to "re-invent the way legal services are delivered" to meet clients needs.[214] As lawyers move towards standardized, systematized and "packaged" legal services, with the help of information technology, the cost of legal services will be cheaper for clients.[215]

Certainly there are examples of how technology has influenced the work of family lawyers in Canada and created opportunities for standardization and systematization in the work of family law. The company DIVORCEmate Software Inc. offers computer software that assists lawyers in preparing support calculations and domestic contracts.[216] The calculations prepared through DIVORCEmate's software are routinely accepted as evidence in court of reasonable outcomes for the quantum and duration of child and spousal support.[217]Judges are even prepared to do their own calculations using DIVORCEmate software.[218]

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[213] Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (Oxford: Oxford University Press, 2013) [Susskind, *Tomorrow's Lawyers*]; Richard Susskind, *The End of Lawyers: Rethinking the Nature of Legal Services* (Oxford: Oxford University Press, 2010) [Susskind, *The End of Lawyers*]; Richard Susskind, *Transforming the Law: Essays on Technology, Justice and the Legal Marketplace* (Oxford: Oxford University Press, 2000); Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Oxford: Oxford University Press 1996).
[214] Susskind, *Tomorrow's Lawyers*, *supra* note 213 at xv.
[215] *Ibid* at 28.
[216] DIVORCEmate software, Specialists in Canadian Family Law, online: DIVORCEmate <http://www.divorcemate.com/Home.aspx>.
[217] For example, there are over 400 cases on Westlaw where the court cites DIVORCEmate calculations in making a ruling on child and/or spousal support.
[218] See, for example, *Newcombe v Newcombe*, 2014 ONSC 1094 at para 22; *Brown v Brown*, 2013 NLTD(G) 167 at para 17; *Hadjioannou v Hadjioannou*, 2013 BCSC 43 at para 227.

Susskind admits that the work of oral advocacy will remain the "quintessential bespoke legal service."[219] Yet when he describes this type of work he refers to the litigators in large firms. The work of lawyers in the areas of family and criminal law, for example, is predominately that of oral advocacy. Further, academics that have done empirical studies of the work of family lawyers find that this type of work is highly interpersonal in nature.[220] While Susskind's predictions may apply to the work of large law firms and corporate markets, he ignores how "bespoke" or personal legal services, such as family and criminal law, will remain the primary interaction that most people will have with a lawyer in their lifetime.[221] Susskind describes a continuum of legal work going from the relatively cheap, which he characterizes as "routine and repetitive" to the relatively expensive, which requires personalized "face-to-face" interactions between the lawyer and client.[222] It is precisely the work he describes as appropriately expensive that remains the work of lawyers who provide personal legal services, including family and criminal law.

Susskind and his work have been and will continue to be heavily influential on the CBA's Legal Futures Initiative. Susskind is the "Special Advisor" to the CBA on the future of the legal profession and he prepared a report on "Key Trends in the

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[219] Susskind, *Tomorrow's Lawyers*, *supra* note 213 at 58.
[220] See pp. ____ below; John Eekelaar, Mavis Maclean & Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Oxford: Hart Publishing, 2000); Mavis Maclean & John Eekelaar, *Family Law Advocacy: How Barristers Help the Victims of Family Failure* (Oxford: Hart Publishing, 2009); Mather, McEwen & Maiman, *supra* note 8.
[221] Susskind, *The End of Lawyers*, *supra* note 213 at 229 ("Much of this book is devoted to the transformation of legal services that are delivered to a particular type of client – the substantial enterprise that is of sufficient scale and complexity to merit its own in-house legal department").
[222] *Ibid* at 29-39.

Legal Marketplace" as an initial contribution to the CBA's Legal Futures Initiative.[223] Susskind's mode for analyzing the areas of law where individuals interact with lawyers for personal services is reflected in the CBA's separation of its Futures Initiative from the Equal Justice Initiative.[224]

By contrast, the literature largely ignores the context of solo practice, small firms and practice areas that deal with personal legal services, such as criminal and family law.[225] Susskind has argued that his reason for doing so is that he sees no future for small firms beyond 2020.[226] By exclusively studying large firms that mainly provide legal products to corporations, the analysis, conclusions and predictions for the future of the business of law have little relevance to the realities of the business decisions of lawyers that provide personal legal services. Yet, as mentioned above, some argue that the trends and changes in the corporate market will influence and determine the future for the small firms and solo practitioners that provide legal services to individuals.[227]

There is some explanation and justification in the scholarship for the excessive focus on the large, corporate law firm. For one, authors cite the sheer size of the market for corporate legal products in comparison to the market for personal

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[223] Richard Susskind, *Key Trends in the Legal Marketplace* (Ottawa: Canadian Bar Association, 2012).
[224] See Chapter 7 "Access to Law and to Justice" in Susskind, *The End of Lawyers*, *supra* note 213.
[225] Leslie C Levin, "Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners" (2001) 70 Fordham L Rev 847 [Levin, "Preliminary Reflections"].
[226] Richard Susskind, *Tomorrow's Lawyers*, *supra* note 213 at 57.
[227] CBA, *Report on the State of Research*, supra note 210 at 7.

legal services.[228] Another purported reason for the focus on corporate legal services is the fact that this is an area that has the resources to spend on research.[229] Others argue that the emphasis on large firms is justified by the increasing numbers of lawyers that are practicing in this setting.[230] Yet even if the numbers of lawyers in large firms are increasing, statistics collected in the United States and Canada show that the majority of lawyers practice in small firms or as solo practitioners.[231]

There are consequences to an excessive focus on global corporate legal services. For one, the work of small firms and solo practitioners in the area of personal legal services has been relegated exclusively to the context of access to justice. The legal profession has, as Gillian Hadfield puts it, "defined these markets out of existence."[232] When we look exclusively at personal legal services, such as

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[228] Marc Galanter, "'Old and in the Way': The Coming Demographic Transformation of the Legal Profession and its Implications for the Provision of Legal Services" (1999) 1999 Wis L Rev 1081.
[229] Gillian K Hadfield, "Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans" (2010) 37 Fordham Urb L J 129 at 129 [Hadfield, "Higher Demand, Lower Supply?"].
[230] Kimberly Kirkland, "Ethics in Large Law Firms: The Principle of Pragmatism" (2005) 35 U Mem L Rev 631 at 634.
[231] American Bar Association, *Lawyer Demographics* (2013), online: American Bar Association <http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf>; The Law Society of Upper Canada, *2013 Annual Report*, online: The Law Society of Upper Canada <http://www.annualreport.lsuc.on.ca/2013/en/annual-report-data.html#employment-type-lawyers>; The Law Society of British Columbia, "Quick Facts: About the Profession" (2013), online: The Law Society of British Columbia <http://www.lawsociety.bc.ca/page.cfm?cid=2189&t=About-the-Profession>; Law Society of Saskatchewan, *Annual Report 2013*, at 5, online: Law Society of Saskatchewan <http://www.lawsociety.sk.ca/media/87052/ar2013.pdf>; The Law Society of Manitoba, *2014 Annual Report*, at 8, online: The Law Society of Manitoba, <http://www.lawsociety.mb.ca/publications/annual-reports/2014_Annual_Report.pdf>; CCCP, *supra* note 199 at 61.
[232] Hadfield, "Higher Demand, Lower Supply?", *supra* note 229 at 133.

family law and criminal law, in the context of access to justice, the focus is on the government rather than the business decisions of lawyers. For example, those proposing solutions for increasing access to lawyers identify the public provision of legal services through legal aid rather than how the business of law influences access to legal services for the poor and the middle class.[233] As argued in Part Two, the cost of legal services in these areas is taken as a fixed aspect of the system and there is very little exploration of innovative service delivery.

Another problem is that there is an untested assumption in the scholarship that changes and innovations in the corporate legal world will "trickle down" to other areas of law.[234] There is no empirical data showing how the business of law in the corporate world influences smaller firms and solo practitioners. More importantly, there is no analysis of whether such a trickle down is beneficial to clients or lawyers in the context of personal legal services.

A third consequence of the overwhelming focus on the global, corporate law firm is the effect that this has on legal education.[235] There is a distinct trend in legal education scholarship towards changing the curriculum of law schools to prepare

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[233] *Ibid* at 131; Jack A Guttenberg, "Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give" (2012) 2012 Mich St L Rev 415 at 435-438

[234] CBA, *Report on the State of Research*, *supra* note 210 at 7; Susskind, *The End of Lawyers*, *supra* note 213 at 236 ("In seeking to meet the grave social and economic challenge of providing greater access to justice at less cost to the public purse and the citizen, I therefore hope we can draw on the thinking and practical suggestions made elsewhere in this book in relation to commercial clients").

[235] Carole Silver, David Van Zandt & Nicole De Bruin, "Globalization and the Business of Law: Lessons for Legal Education" (2008) 28 Nw J Int'l L & Bus 399; Neil J Dilloff, "The Changing Cultures and Economics of Large Law Firm Practice and their Impact on Legal Education" (2011) 70 Md L Rev 341.

new lawyers for the demands of a global market for legal services.[236] In response, many of the top law schools in North America are increasingly introducing mandatory courses on globalization and the law in their curriculum.[237]

Finally, there are implications of the focus on large corporate firms in the scholarship for the ways that legal markets are characterized. One of the defining aspects of the literature on global corporate legal markets is the central role that the client plays in changes to how legal services are offered. The globalization of legal services itself is attributed to client demand.[238] The next section explains the

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[236] Silver, Van Zandt & De Bruin, *supra* note 235 at 402; David Van Zandt, "Globalization Strategies for Legal Education" (2005) 36 U Toledo L Rev 213

[237] See, for example, University of Toronto, "Program Requirements", online: University of Toronto Faculty of Law <http://www.law.utoronto.ca/academic-programs/jd-program/program-requirements> ("All students must complete at least one International, Comparative, or Transnational Law (ICT) course to enhance their understanding of the changing global legal order"); The University of British Columbia Faculty of Law, "J.D. First Year Curriculum", online: The University of British Columbia Faculty of Law < http://www.law.ubc.ca/jd-first-year-curriculum> (Recently, UBC Law underwent an extensive curricular reform culminating in a new curriculum which positions the school and its graduates firmly in the 21st century, able to address contemporary global trends in law and society"); Harvard Law School, "J.D. Program", online: Harvard Law School <http://www.law.harvard.edu/academics/degrees/jd/index.html> ("Harvard Law School recently undertook a sweeping overhaul of its first-year curriculum. The new curriculum reflects legal practice in the 21st century, adding courses in legislation and regulation and international and comparative law to the traditional curriculum of civil procedure, contracts, criminal law, property, and torts"). See also Julian Webb, "The 'Ambitious Modesty' of Harry Arthurs' Professionalism" (2006) 44 Osgoode Hall LJ 119 at 137 ("There is an important--and under-explored--nexus between the increasing internationalization of legal business and the internationalization of legal education…[It] shapes what students perceive to be (practically) important or exciting areas of law, and affects demand-led curriculum priorities and hiring practices of the law schools themselves."); Margaret Thornton, "Among the Ruins: Law in the Neo-Liberal Academy" (2001) Windsor YB Access to Just 3.

[238] Flood & Lederer, *supra* note 211 at 2513; Sokol, *supra* note 211 at 22.

concept of "client-led innovation" and how this concept has come to define the method by which legal markets evolve.

Dominance of client led innovation

One of the most prominent features of the scholarship on the business of law is the central role of clients in creating a demand for legal products and how those products are offered – "client led innovation."[239] The CBA's Futures Initiative identifies "client empowerment" as the "most important trend" in the legal marketplace and that power has shifted from the suppliers – lawyers – to clients.[240]

Yet when the legal profession and academic scholarship describe "client-led innovation" there is a specific type of client to which they refer – sophisticated, large corporate clients.[241] These types of clients often have their own in-house legal department and when they hire outside law firms they are able to exercise

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[239] Andrew Zangrilli, "State of the Legal Profession: Client Driven Innovation in Legal Services" (13 May 2008), online: FindLaw <http://articles.practice.findlaw.com/2008/May/13/447.html>; Sean Williams & David Nersessian, *Overview of the Professional Services Industry and the Legal Profession* (2007), at 7, online: Harvard Law School <http://www.law.harvard.edu/programs/plp/pdf/Industry_Report_2007.pdf>; Jerry Van Hoy, "Introduction" in Jerry Van Hoy, ed, *Legal Professions: Work, Structure and Organization* (Oxford: Exlsevier Science, 2001), ix; Zangrilli, *supra* note 239.

[240] Canadian Bar Association Legal Futures Initiative, *The Future of Legal Services in Canada: Trends and Issues* (Ottawa: Canadian Bar Association, 2013), 16 [CBA, *Trends and Issues*].

[241] CBA, *Report on the State of Research*, *supra* note 210 at 8; Gillian K Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98 Mich L Rev 953 at 956 [Hadfield, "The Price of Law"]; Dilloff, *supra* note 235 at 352; Steven L Nichols, "Meeting the Client's Needs: Alternative Billing and Client Communication" in Daniel R Formeller, et al, eds, *Strategies for Growing a Law Firm: Leading Lawyers on Attracting Clients, Recruiting Staff, and Managing Law Firm Development* (Aspatore, 2013), 23 at 25; Gillian K Hadfield, "Legal Infrastructure and the New Economy" (2012) 8 J L & Pol'y for Info Soc'y 1 at 30; Guttenberg, *supra* note 233 at 429; Zangrilli, *supra* note 239.

significant bargaining power in order to obtain the best possible fee arrangement.[242] As a result, clients are identified as being responsible for downward pressure on the cost of legal services.[243] Not only do clients demand lower prices for legal services but they also request alternative fee structures to hourly billing, such as fixed fee arrangements. [244]

The methods by which clients influence billing practices and the cost of legal services are very different in personal legal services, such as family law. The business of one client in personal legal services does not have the same consequence to the lawyer as the business of a large corporation shopping amongst law firms for the best price.[245] Furthermore, because individuals tend to encounter lawyers much less frequently than corporations, individuals do not have the same ability to assess the quality of the legal services they receive in relation to the price.[246]

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[242] Larry E Ribstein, "The Death of Big Law" (2010) 2010 Wis L Rev 749 at 770; Michael Trebilcock, "Regulating the Market for Legal Services" (2008) 45 Alta L Rev 215 at 217 [Trebilcock, "Regulating the Market for Legal Services"]; Geoffrey C Hazard Jr & Angelo Dondi, *Legal Ethics: A Comparative Study* (Stanford: Stanford University Press, 2004), 262.
[243] Sokol, *supra* note 211 at 23 ("clients can play law firms against each other"); Dilloff, *supra* note 235 at 351-352; Hazard & Dondi, *supra* note 242 at 262.
[244] Dilloff, *supra* note 245 at 352-354; Nichols, *supra* note 241 at 25; Ribstein, *supra* note 242 at 770; Guttenberg, *supra* note 233 at 444; Williams & Nersessian, *supra* note 239 at 6; Hutchinson, *supra* note 196 at 81.
[245] Austin Sarat & William L F Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (Oxford: Oxford University Press, 1997), 83 ("Divorce clients are typically the weaker parties in their relationship with their lawyers"); Sokol, *supra* note 211 at 23; Mather, McEwen & Maiman, *supra* note 8 at 90 (lawyers representing individual clients in areas of criminal defense, legal services, family law, and personal injury law more frequently appear to dominate their clients in decision making").
[246] Trebilcock, "Regulating the Market for Legal Services", *supra* note 242 at 218; Hazard & Dondi, *supra* note 242 at 263.

It is in the field of corporate law where most of the scholarship identifies significant client exercised control or influence over the business of law. This is not representative of all areas of law. In an aside in one of the reports of the CBA's Legal Futures Initiative, it is acknowledged that in "certain areas such as criminal, poverty and family law" there is not the same shift in "market power" from lawyer to client that the CBA identifies in other areas.[247] Yet if only certain types of clients – large corporations – are influencing changes to the business of law, those changes may not meet the needs of an individual client who seeks out a lawyers services for a personal matter, such as a divorce.

While the influence of corporate clients in the corporate legal market may be to drive down prices for corporate legal fees, Gillian Hadfield points out that the influence of corporate clients on the price of legal services for individuals is in the opposite direction.[248] Hadfield argues that legal prices are based on consumer-determined value and that corporate clients that are able to pay more than individuals skew the market in favour of higher fees.

As set out in Part Two, current access to justice scholarship tends to emphasize the empowerment of clients and users of the justice system. Similarly, in the analysis of the business of law there is an emphasis on the centrality of clients in the legal marketplaces. Those who are concerned with the future of the business of law, such as the CBA and its Legal Futures Initiative, see the role of the lawyers as responding to client-led demands. By taking this analytic approach, they ignore the

[247] CBA, *Trends and Issues*, *supra* note 240 at 20.
[248] Hadfield, "The Price of Law", *supra* note 241 at 956.

business of law for personal legal services where lawyers, and not clients, define the price of legal services.

The marginalization of personal legal services

As discussed above, while the lawyers and clients of large, corporate firms dominate the scholarship on the business of law, there is very little research and few statistics on the legal market for personal legal services and the business practices of small firms or solo practitioners.[249] The dearth of research and information about small firm and solo practitioner is sometimes dismissed as unimportant on the basis that what happens in the large, corporate market will determine the future of smaller markets. A report prepared by the CBA Legal Futures Initiative on the state of the research into the legal profession argues that even though non-corporate law practice is understudied, technology will "allow the leveling of the playing field to the benefit of sole practitioners, as well as smaller boutique firms" and in any case, the market for smaller firms will shrink due to the availability of online legal information.[250]

To the extent that there has been scholarship on the work of lawyers who work in small firms or as sole practitioners, there is evidence that we should be very careful about generalizing about lawyers as a whole. In their study of the work of divorce lawyers, Lynn Mather, Craig A. McEwen and Richard J. Maiman, look to sociological studies of the legal profession in the United States and conclude "that

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[249] CBA, *Report on the State of Research*, *supra* note 210 at 7; Silver, Van Zandt & De Bruin, *supra* note 235 at 413; Levin, "Preliminary Reflections", *supra* note 225 at 848.
[250] CBA, *Report on the State of Research*, *supra* note 210 at 7.

the work lives, practices, ethical commitments, and reward systems of American lawyers vary significantly, depending on who their clients are." [251] Further, the "separation" between the "work lives" of "lawyers in large law firms and those in small firms or sole practice … differ so dramatically that it is difficult to conceive of any overarching professional identities or ideals that would have practical significance in guiding the choices of all attorneys."[252]

Beyond the importance of the distinct nature of the work of lawyers who work for individuals in small firms or as sole practitioners, not all scholars agree with the prediction found in the report of the CBA Legal Futures Initiative that the market share for small firm and solo practitioners will shrink. [253] Luz Herrara, an American scholar on legal entrepreneurship, argues that the 2008 recession, along with technological advances, will lead to proportionally more lawyers in solo practice than in the past.[254] If research on the future of the business of law exclusively defines markets in terms of large, corporate firms where clients play a defining role, there will be little to no understanding of a significant part of the legal marketplace. Further, the emphasis on the influence of large, corporate clients will serve to further marginalize the interests of clients in the market for personal legal

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[251] Mather, McEwen & Maiman, *supra* note 8 at 7.
[252] *Ibid*.
[253] CBA, *Report on the State of Research*, *supra* note 210 at 7.
[254] Luz E Herrara, "Training Lawyer-Entrepreneurs" (2012) 89 Denv U L Rev 887 at 910 [Herrara, "Lawyer-Entrepreneurs"]; Luz E Herrara "Educating Main Street Lawyer" (2013) 63 J Legal Educ 189 at 199 [Herrara, "Main Street Lawyer"]. See also George Baker & Rachel Parkin, "The Changing Structure of the Legal Services Industry and the Careers of Lawyers" (2006) 84 NCL REV 1635 at 1677 ("[w] find weak evidence of the demise of midsized firms at the expense of large firms and small boutiques")

services. It will also remove responsibility from lawyers for their business decisions by framing these decisions as responses to the demands of clients.

Not only is it important to study the business of law in the context of small firms and personal legal services, it is also important to integrate the scholarship on the business of law and that of access to justice. The CBA's recent research initiatives are illustrative of the consequences of separating these issues. The CBA's Legal Futures Initiative attempts to understand the legal marketplace and predict trends so that lawyers can respond effectively and ensure success. As discussed in Part Two, the CBA has simultaneously, but separately, launched the "Envisioning Equal Justice Initiative". The CBA describes the Equal Justice Initiative as "examining the legal and integrated needs of low-income and middle-class communities in Canada."[255] The separation of the two CBA initiatives reflects the themes identified in this thesis. The CBA's Futures Initiatives does not analyze the business of law in the area of personal legal services, such as family law or criminal law. Instead, these practice areas are relegated to the access to justice concerns of the CBA's Equal Justice Initiative.

The discussion of clients in the CBA's Futures Initiative describes them as sophisticated and emphasizes the growing importance of their market power. This is very different from the type of clients described in the Equal Justice Initiative, where clients are described in terms of their legal needs. The concerns of the Futures Initiative and of the Equal Justice Initiative rarely overlap, other than a brief

[255] Canadian Bar Association, "About Futures" online: Canadian Bar Association <http://www.cbafutures.org/About-the-Initiative>.

acknowledgment that access to justice is one of the underlying values of the Futures Initiative.[256]

One of the benefits of integrating the study of the business of law and of access to justice is evidenced in the work of American legal academic Luz Herrara. Herrara is unique amongst legal scholars because her work focuses on lawyers as entrepreneurs in the context of small firms or as solo practitioners. Because her focus is on young lawyers starting out on their own, instead of in large firms, she takes a very different approach than most of the legal scholarship on the business of law. Herrara highlights the agency of lawyers in the innovation of legal markets. She emphasizes that the onus is on lawyers to "consciously develop business models" to serve clients in overlooked markets.[257]

Herrera criticizes the legal profession for failing to adopt innovations to lower their fee in order to become affordable to more clients.[258] This criticism is in stark contrast to the characterization of clients as pressuring firms to lower their fees in the corporate legal market and being very effective at this strategy.

In the same vein as Herrara, Emily Spieler is another American academic whose work defies the trends in the rest of the scholarship. In her article addressing "The 'Glut' of New Lawyers and the Persistence of Unmet Need," Speiler argues that most law students graduating today will not work in "the large firm world."[259] This is because, this Spieler argues, of "conversations about legal education, the legal

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[256] Herrara, "Training Lawyer-Entrepreneurs", *supra* note 254 at 910.
[257] *Ibid*.
[258] Herrera "Main Street Lawyer", *supra* note 254 at 206.
[259] Emily A Spieler, "The Paradox of Access to Civil Justice: The 'Glut' of New Lawyers and the Persistence of Unmet Need" (2013) 44 U Tol L Rev 365 at 377.

market, legal representation, and access to justice simply should not focus on this sector."[260]

Conclusion

The primary focus in the legal scholarship on large firms and sophisticated corporate clients is a source of concern because of how it may work to undermine lawyers' responsibility for their business decisions. The shift to hourly billing in North American in the 1960s is explained, at least in part, as a client driven innovation.[261] Today, the organized bar and the academic scholarship continue to identify changes to the way legal services are provided as client driven. Yet this picture ignores the personal legal services market, where clients do not exercise significant bargaining power and lawyers practice on their own in or smaller firms.

One of the benefits of the scholarship that takes a broader view of the business of law is that the profession can no longer exclusively attribute changes or innovations in the business of law to client demand. Further research into the areas of law that are usually only described in the access to justice scholarship may further our understanding of the importance of lawyers' business decisions not only to the legal market but to overall justice outcomes.

The concern is that if what is influencing the CBA in the Legal Futures Initiative is exclusively the work of legal scholars like Susskind, then there is a lot that is being overlooked or outright ignored. The resources and creative attention directed to the study of the business of law will remain in the realm of large

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[260] *Ibid*.
[261] Shephard & Cloud, *supra* note 25 at 145; Woolley, *supra* note 13 at 346-9.

corporate law firms and will not be inclusive of practice sizes and types that most individuals encounter. If clients are responsible for changes in the way that legal services are provided in the corporate realm, then who will be responsible for changes in the personal legal services market. I submit that lawyers will be responsible simply as a result of their relative market power over individual clients. Yet, so far, the CBA has had limited focus on to the personal legal services and the small/solo practitioner markets. The specificities of this market are not addressed and it is simply assumed that whatever changes occur in the large corporate firms will just trickle down to these other markets. As I show in Part One, the legal profession has a history of allowing changes to the business of law in the corporate arena to permeate the rest of the profession. Given the concerted effort to debate and plan for the future in the CBA's Legal Futures Initiative there is now an opportunity to do things differently.

Part Four: Family Law, the Canadian Organized Bar and Educating Lawyers about Legal Expense Insurance

Here in Part Four I will return to family law more specifically, after having looked at the broader scholarship on access to justice in Part Two and the business of law in Part Three. Legal expense insurance ("LEI") for family law legal services in Canada is a good illustration of an innovation to lawyers' business practices that may actually address the needs of a family law practice and family law clients. The historical narrative in Part One emphasizes the decisions of lawyers in the context of the organized bar's efforts to educate lawyers about new law office management techniques, including hourly billing. In this final part I will look at how the organized bar in Canada today is approaching the innovation of LEI for family lawyers.

DAS Canada was the first to begin selling a family law insurance product directly to the public in Canada in 2010.[262] The company is a subsidiary of the DAS Group, Europe's largest LEI provider, and is based in Germany. For now, DAS Canada's family law product is limited to advice on the phone through the "Legal Advice Hotline".[263]

First, I will explain why LEI is particularly attractive as an innovation to the business of family law. The argument here is that lawyers, as opposed to self-help and increased public legal information, are important to individuals with family law problems. Next, I will describe the LEI market in Canada and set out how LEI differs between Canada and Europe, (specifically, Germany where the parent company to

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[262] La Capitale General Insurance began selling "Legal Access Insurance" in 1992 but it does not sell a family law product.
[263] DAS Canada, "Products & Services", online: DAS Canada <http://www.das.ca/Products-Services/Frequently-Asked-Questions.aspx>.

Canada's largest LEI provider (DAS Canada) is located). Finally, I will raise concerns about the CBA's public education campaign for LEI and the way in which it avoids actually educating lawyers about the LEI industry as an intermediary in billing between lawyer and client.

Legal Expense Insurance to Improve Access to Family Lawyers

As set out in Part Two, many solutions to solve the problem of "access to justice" in family law focus on self-help strategies and public legal information. I argue that this approach to treating the problems of increasing numbers of self-represented parties and unmet legal needs ignores the agency of lawyers. Contemporaneously, and as discussed in Part Three, the discourse on the future of law and innovative ways of offering legal services often focus primarily on corporate legal work. The innovation of LEI may be an access to justice solution that recognizes the needs of a family law practice. It may also allow the client to benefit from the traditional lawyer-client relationship, while fundamentally changing the financial relationship between the lawyer and client through the intermediation of an insurance company. I described earlier in Part Two how individuals with a lawyer are at an advantage as compared with those without one. Here I will take this argument further and explain the value of legal advice and representation in family law matters specifically.

In the 1950s, American sociologist Talcott Parsons described professionals as "mechanisms of social control" and argued that in one sense lawyers can be said to "socialize" their clients and "bring them into accord with the expectations of full

membership in the society."[264] While Parsons' theory is an outdated and paternalistic account of the lawyer-client relationship, the idea that lawyers can or do provide value to their clients beyond technical skill has been the subject of contemporary scholarship on the legal profession.[265] Increasingly, studies on lawyers have focused on specific practice areas, based on the notion that legal work varies dramatically based on specializations.[266]

In contrast to the work of Richard Susskind, as described above, American academic Ann Juergens, who has over twenty years of experience in clinical legal education, studies the work lives of lawyers beyond the large corporate firm.[267] Juergens argues that "[t]he trend toward commodification and displacement of the client-lawyer relationship by technology is not yet as true in small firms as in large-sized firms … . Small and solo firm lawyers are still largely dependent on ongoing relationships to sustain themselves."[268] In her study of Minnesota lawyers serving "middle-income clients" (which included family lawyers), Juergens found that the lawyers she interviewed most often described the "most important skill for sustaining their practice" as the "ability to build relationships and trust."[269]

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[264] Talcott Parsons, "A Sociologist Looks at the Legal Profession" in Talcott Parsons, ed, *Essays in Sociological Theory* (New York: Free Press, 1954), 382.
[265] See, for example, Sarat & Felstiner, supra note 245; Mather, McEwen & Maiman, *supra* note 8; Robin G Steinberg, "Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients" (2006) 30 NYU Rev L & Soc Change 625; Lynn Mather, "What Do Clients Want? What Do Lawyers Do?" (2003) 52 Emory LJ 1065.
[266] See note 8 *supra*.
[267] Juergens, *supra* note 181.
[268] *Ibid* at 87.
[269] *Ibid* at 110 (the areas of practice of the lawyers included in Juergens's study were ""alternative dispute resolution, bankruptcy, consumer/collection, contracts, criminal defense, disability rights/special education, discrimination/civil rights,

Mavis Maclean and John Eekelaar have produced two major studies of the work of family lawyers in the United Kingdom. Their methodologies in these studies were direct observation of the work of barristers and solicitors, along with in-depth interviews of their subjects. In the first of these (written with Sarah Beinart), *Family Lawyers: The Divorce Work of Solicitors*, Eekelaar and Maclean found that solicitors worked to encourage negotiated settlements, discourage clients from divorce and help their clients to manage their finances during divorce. An important part of their argument was that family solicitors are "in a process of negotiation" with the client from the beginning, well before negotiation with the client's former spouse or partner.[270] This "internal negotiation", as Eekelaar and Maclean call it, is "the lawyer trying to modify the client's expectations."[271] In addition to this negotiation with the client, which is reminiscent of Parson's concept of socialization, Maclean and Eekelaar described what they saw solicitors in family law doing as "the giving of help and support."[272] This support is both emotional (including "reassurance") and practical.[273]

In their subsequent study of barristers, *Family Law Advocacy: How Barristers Help the Victims of Family Failure*, Maclean and Eekelaar describe the family lawyer as a "mentor and guide for the client."[274] More specifically, they found that barristers work to ensure that the client "has had the goings-on explained, been comforted,

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estate planning/probate/elder law, family, general (some combination of many of these), housing, immigration, non-profit organizations, small business formation and other business matters").

[270] Eekelaar, Maclean & Beinart, *supra* note 220 at 76, 81.

[271] *Ibid* at 76

[272] *Ibid* at 81

[273] *Ibid*.

[274] Maclean & Eekelaar, *supra* note 220 at 118.

been protected from hostility from antagonists, been prepared for disappointment in the outcome and, perhaps most important, had his or her viewpoint represented."[275]

In the United States, Lynn Mather, Craig A. McEwen and Richard J. Maiman document the work of family lawyers in their book, *Divorce Lawyers at Work: Varieties of Professionalism in Practice*.[276] While Maclean and Eekalaar's study in the UK is based on their observations of the day-to-day work of lawyers, Mather et al. interviewed lawyers to obtain their perspective on their work and on the skills that make a good family lawyer. Mather et al. found that family lawyers consider what is important in family law to be not so much "technical expertise or formal knowledge" but rather the skills of a "interpersonal communication and negotiation."[277] These lawyers rated "Being a Sensitive Listener to Client" as the most important skill in the day-to-day practice of family law.[278] The importance of listening was not only for the purpose of collecting information to build the case but also "to build a close and trusting relationship with clients"[279] and to provide "emotional support and help."[280]

In their 2010 study of divorce litigants in Wisconsin, Judith G. McMullen and Debra Oswald argue that it is difficult to measure the benefit of being represented by a lawyer in family courts because of the nature of divorce itself.[281] They argue

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[275] *Ibid* at 121.
[276] Mather, McEwen & Maiman, *supra* note 8
[277] *Ibid* at 66.
[278] *Ibid* at 67.
[279] *Ibid*.
[280] *Ibid* at 68.
[281] McMullen & Oswald, *supra* note 170 at 67.

that it is hard to find an "objective measure", such as decree of divorce, award of support or property settlement, custody or length of proceeding, and that this may be because the benefits are "intangible" and that lawyers may "serve a primary role that is more psychological than mechanical, at least for some clients."[282]

These studies (conducted in the UK and the US) evidence the highly interpersonal relationship between the lawyer and client in the area of family law. As discussed in Part Three, legal scholar Richard Susskind has predicted that the future of law will increasingly move away from "bespoke" personal services towards commoditized and piecemeal legal work. Susskind's work on the commoditization of law reflects an exclusively corporate law notion of what legal work requires, such as, for example, online document assembly with minimal lawyer oversight.[283] However, the work of family lawyers cannot be described in this way. As noted earlier, Eekelaar and Maclean described what they saw lawyers in family law doing as mentoring their clients. And in Mather et al's study, family lawyers reported that the most important skill in their work was listening.

The interpersonal work of family law is also reflected in legislation. In Canada, the *Divorce Act* creates a unique duty for family lawyers to discuss reconciliation with their client and to inform their client of "marriage counselling or guidance facilities" to assist with reconciliation.[284] The *Divorce Act* also requires lawyers to encourage their clients to negotiate and mediate support and custody

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[282] *Ibid* at 59, 69.
[283] Darryl R Mountain, "Disrupting Conventional Law Firm Business Models Using Document Assembly" (2006) 15 International J of Law and Information Technology 170.
[284] R.S.C., 1985, c. 3 (2nd Supp.), s. 9(1) [*Divorce Act*].

matters.[285] Lawyers must file a certificate with the court certifying that they have complied with these provisions of the *Divorce Act*.[286]

Given the importance of a personal relationship between lawyer and client in family law, the innovation of LEI appears to be well suited for the area of family law by providing access to lawyers. In the next section I will describe in detail the current market for LEI in Canada and in Europe, where LEI has an increased market share.

Family Law LEI in Canada and Europe

There is significant potential for LEI as a solution to the increasing unaffordability of lawyers for those with family law problems. The academic literature describes LEI as a mechanism "to ameliorate the effects of market failure" just like government-created legal aid programs.[287] DAS, in Canada and in Europe, specifically describes its product as "access to justice."[288] Practically, though, what LEI offers is access to lawyers, both in the form of legal advice and of representation. As I argue below, the LEI model is particularly important for family law legal problems because of the distinct features of the relationship between lawyer and client in this practice area.

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[285] *Ibid*, s. 9(2); The Canadian Bar Association and provincial law societies' professional conduct rules also require lawyers to encourage clients to compromise or settle disputes when possible however the duty created by the *Divorce Act* is the only legislated provision regarding lawyers' obligations in this regard.
[286] *Divorce Act*, *supra* note 284, s. 9(3).
[287] Matthias Kilian & Dr Francis Regan, "Legal Expenses Insurance and Legal Aid – Two Sides of the Same Coin? The Experience from Germany and Sweden" (2004) 11 International Journal of the Legal Profession 233 at 233
[288] DAS, "Home", online: DAS <http://www.das.co.uk/>; DAS Canada, "About Us", online: DAS Canada <http://www.das.ca/About-Us/Overview.aspx>.

Most of the literature on LEI focuses on the European experience since it has only recently entered the North American market.[289] However, the concept of government-provided LEI has been recently canvassed in Canada as an access to justice solution for the middle class.[290]

DAS Canada is not the first company to offer LEI in Canada, but it is the first to include a direct-to-consumer family law product.[291] Other forms of family law LEI that pre-date DAS Canada include products available through group plans such as those for the Canadian Auto Workers' (since 1987) and for Canadian dentists' through their insurer, CDSPI. These plans, however, are available only to a specified membership base and are packaged, at least in the case of dentists, with professional insurance coverage.

The difference in how lawyers' fees are regulated in Canada and Germany may make Canada a less hospitable environment for LEI than Germany. In Germany, legislation sets out a schedule of minimum fees for various types of legal services.[292] While German lawyers are free to charge more than what is set out in the minimum fee schedules, these schedules provide guidance to insurance companies determining the value of services. This is in stark contrast to Canada where, other than the hourly rate, it is difficult to predict a lawyers' fees.

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[289] Canada has a longer history with legal services plans that are offered to particular populations, such as union members or professionals. Legal expense insurance as a standalone direct-to-consumer product is a recent phenomenon in Canada.

[290] Choudhry, Trebilcock & Wilson, *supra* note 3.

[291] Sterlon Underwriting Managers Ltd has been offering PLEI in Canada since 1993. Sterlon Underwriting Managers, "Company Profile", online: Sterlon Underwriting Mangers Ltd <http://www.sterlon.com/company.html>.

[292] This also means that German lawyers are not able to offer legal services pro bono. Kilian & Regan, *supra* note 287 at 239.

In a comparative study of LEI in Germany and Sweden, Matthias Kilian (along with Australian academic Francis Regan) argues that hourly billing, the dominant billing methodology in Canada, makes it "extremely difficult" for LEI insurers to calculate risk.[293] German insurance companies attribute the success of LEI in Germany, where 44% of households have LEI policies,[294] to the regulation of lawyers' fees[295]

One of the consequences of DAS Canada moving to Canada from Germany is that the insurance product is a stand-alone rather than an add-on to a larger plan. In other countries, such as Sweden, LEI is sold as an add-on product and can be available at no extra cost to the plan holder.[296] In Germany, legislation originally prohibited insurance companies from including LEI as an add-on, so over several decades it has developed as a stand-alone insurance product.[297] Since the product is available on its own in Canada, it may require a similar period for the market to develop to the same extent it has in Germany.

In both Canada and Germany the family law products offered by LEI companies are not as extensive as their other offerings. In Canada there is only a telephone hotline for family law information. In Germany the family law product is limited to legal advice only.[298] Kilian and Regan argue that it is rare for LEI plans to cover family law "because insurance principles conflict with the characteristics of

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[293] *Ibid* at 240, 246
[294] *Ibid* at 238.
[295] Matthias Kilian, "Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience" (2003) 30 J of Law & Society 31 at 42
[296] Kilian & Regan, *supra* note 287 at 247.
[297] *Ibid* at 240.
[298] *Ibid* at 238. This is due to the legislative environment

[family law] proceedings."[299] Though their argument may explain why family law coverage is not offered in Europe, there is reason to believe that the conflict they describe is not applicable in Canada. They point out that LEI is usually sold as coverage for the entire family and therefore the policy would have to cover both spouses in case of divorce. This has not been a barrier to the offering of family law coverage under the Canadian Dentists' Insurance Program (CDIP). The CDIP covers "proceedings arising out of divorce or matrimonial matters, subject to a maximum of $3,500 per claim per spouse" after one year of participation in the plan.[300]

Kilian and Regan also point out that "cost-shifting" does not apply in family law proceedings and so insurance companies will not have an opportunity to limit their pay out by claim costs from another party. This is not the case in Canada where parties can claim costs from the other party in a variety of circumstances, even in family law.[301]

Kilian and Regan's third argument is that given the a 40% divorce rate, the "risk pool" is too high for family law coverage.[302] However, as set out above in the example of the CDIP, an insurance company can manage this risk by setting reasonable caps on the total payout for legal expenses for a family law matter.[303] In

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[299] *Ibid* at 242.
[300] Canadian Dentists' Insurance Program, "Legal Expense", online: CDSPI <http://www.cdspi.com/public_html/eng/assets/pdf_eng/bro_legal.pdf>.
[301] Justice Robert J Spence, "A Look at the Evolution of Costs and the Impact of Offers to Settle under the Family Law Rules" (2011) 30 Can Fam LQ 39; Mark Orkin, "Costs in Family Law – Selected Issues" (2002) 20 Can Fam LQ 363.
[302] Kilian & Regan, *supra* note 287 at 242. In any case, a high divorce rate is part of what makes family law LEI so desirable for the consumer.
[303] Paul A Vayda & Stephen B Ginsberg, "Legal Services Plans: Crucial-Time Access to Lawyers the Case for a Public-Private Partnership" in Michael Trebilcock, Anthony

fact, a 2009 *Maclean's* interview with the chief executive officer of the DAS UK Group indicated that when the company began operating it Canada it would offer a family law product for $300/year, which would cover up to $100,000.[304]

Law societies and CBA's approach to legal expense insurance

The impact of LEI for family law legal services in Canada has been minimal thus far.[305] In the working paper on legal expense insurance, prepared for the CBA's Reaching Equal Justice report, DAS CEO Barbara Haynes is quoted as stating, "that conflict of interest concerns and anticipated volume of claims are the reasons why DAS does not cover family law issues."[306]

Even if it may be too early to make any projections about whether DAS Canada could successfully expand its family law product, there is reason to be skeptical about whether LEI will have a meaningful impact on the business of family law.

While the direct-to-consumer market for LEI in Canada is relatively new, the organized bar has been contemplating LEI for several decades. In 1974, the

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Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012), 262.

[304] Kate Lunau, "How to Pay for Some Justice: Legal Insurance Could Be Just What Canadians Need" *Macleans* (5 March 2009), online: Maclean's <http://www.macleans.ca/news/canada/how-to-pay-for-some-justice/>.

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[306] Canadian Bar Association, "Legal Expense Insurance" (2013) Working Paper No 1, online: Canadian Bar Association <http://www.cba.org/CBA/Access/PDF/WorkingPaper1LegalExpenseInsurance.pdf>. This Working Paper provides a footnote for this assertion but the actual text of the footnote is missing from the paper as published online ("[t]hese Working Papers were drafted in preparation for the final Discussion Paper [CBA, *Reaching Equal Justice*, *supra* note 4]…While the Discussion Paper is edited and translated, the Working Papers…have not been, and are provided for additional detail only.")

Canadian Bar National reported on a survey conducted in Ontario by law students at the University of Toronto about the idea of legal expense insurance.[307] The students found that "eight out of ten middle income people were prepared to pay amounts ranging from $1 to $10 a month for legal insurance and six out of ten lawyers said they would be willing to participate in such a plan."[308] In 1975 the Quebec Bar Association proposed a "prepaid-legal insurance scheme" with annual premiums of $100 to $150. "[309] In this same year the CBA formed a Special Committee on Prepaid Legal Services, which "suggested the CBA administer a Prepaid Legal Service plan by contracting out the administrative and underwriting functions, … participate with Government in controlling private insurers, … attempt to influence Government and Regulatory Agencies in this regard."[310] One year later the CBA announced that the idea for its "Prepaid Legal Service" plan would be delayed due to the "anti-inflation guidelines."[311]

In 1989, the CBA endorsed the recommendations of the "Strauss Report"[312] including that the

> CBA both encourage and, if appropriate, sponsor through its Provincial Branches open panel prepaid legal insurance programs based on sound insurance principles to provide for the payment of routine legal services such as will, mortgages,

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[307] "Survey Indicates Prepaid Services Favoured" *Canadian Bar National* 1 (January 1974) 16.
[308] *Ibid*.
[309] "Pre-paid Is Seen in Que." *Canadian Bar National* 2, (June 1975) 1.
[310] "Pilot Prepaid Legal Plan Proposed for Coming Year" *Canadian Bar National* 2, (October 1975) 4.
[311] "Prepaid Services Pilots delayed" *Canadian Bar National* 3 (April 1976) 11.
[312] Albert Strauss, *Recommendations of the Special Committee on the Status of Paralegals to the CBA Council* (Ottawa: Canadian Bar Association, 1989).

> residential property real estate transactions, ***matrimonial agreements*** and similar defined services.[313]

In 2000, the CBA's Young Lawyers' Conference produced a report on "The Future of the Legal Profession", which described a potential "marketing advantage" for lawyers who try out "billing alternatives" including "cooperation in prepaid legal service plans".[314]

The Barreau du Québec began a public information campaign about legal expense insurance in 2003.[315] Today, the CBA, in a partnership with DAS Canada, has been conducting a public education campaign about LEI encouraging the public and their members to purchase coverage.[316] This campaign is based on a resolution made at the CBA's annual meeting in 2012 to "collaborate with legal expense insurance providers" to "communicate to CBA members, government leaders and the public the potential for legal expense insurance to improve access to justice to the middle class in Canada" and to "ask insurance providers to adopt measures to safeguard and inform consumers, and adapt policies to address the legal needs of the Canadian market, requiring family law services to be included at reasonable

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[313] CBA Council Resolution 89-25-A [emphasis added].
[314] Executive Summary of Young Lawyers' Conference, "The Future of the Legal Profession: The Challenge of Change" (Ottawa: Canadian Bar Association, 2000), 2 (the report uses "prepaid legal service plans" and insurance interchangeably).
[315] "The Barreau du Québec", online: Barreau du Québec <http://www.legalinsurancebarreau.com/barreau/>.
[316] Canadian Bar Association, Press Release, "DAS Canada Sponsors Canadian Bar Association Access to Justice Initiative: CBA Targets 75% of Canadians to Adopt Legal Expense Insurance By 2030" (3 September 2013) online: Canadian Bar Association <http://www.cba.org/cba/News/2013_Releases/PrintHTML.aspx?DocId=52970>.

cost."[317] In 2013, the CBA set a target of having 75% of "middle income Canadians" with legal expense insurance by 2030.[318]

The CBA's attempts to promote LEI do not seem to be aimed at actually changing how family lawyers do business. It is one thing for the organized bar to encourage a market for LEI and it is another to educate and encourage lawyers about entering into business relationships with LEI companies.

[317] Canadian Bar Association, "Resolution 12-07-A: Improving Access to Justice through Legal Expense Insurance", online: Canadian Bar Association <http://www.cba.org/CBA/resolutions/pdf/12-07-A-ct.pdf>.
[318] CBA, *Reaching Equal Justice*, *supra* note 4 at 29.

Conclusion

I begin this thesis with a focus on the 1960s and 1970s, a crucial period in the history of the legal profession in Canada. Lawyers were looking at management and accounting practices in a new way and hourly billing became the standard. Lawyers who specializes in family law took up these practices as well. The effects of these modern business practices – especially hourly billing – on the market for family law services were not explicitly considered.

Today the organized bar in Canada has decided to be self-conscious about the business of law, most prominently by way of the CBA's *Legal Futures Initiative*. However, the practice of family law has been largely sidelined in the discourse on the business of law. Family law legal services are only considered in the realm of "access to justice" and the CBA has launched a separate *Envisioning Equal Justice Project* to deal with such issues. As a result, the area of family law is only studied in terms of unmet need and self-representation.

My concern is that, just as in the 1960s and 1970s, the legal profession in Canada risks making collective decisions about the business of law without addressing the implications of those decisions for the public's access to lawyers with respect to legal advice and representation in areas like family law. Even if family law becomes increasingly an area of self-help, there will still be an influence from the legal profession's corporate-centric consideration of lawyers' business practices.

We need to know more about how lawyers make business decisions, particularly in the areas of law where lawyers primarily practice in small firms or as sole practitioners. American academic Ann Juergens has criticized the work of the

Access to Justice Initiative of the US Department of Justice for exclusively looking at "less lawyer-intensive and less court-intensive solutions to legal problems." She does not believe that the bar should "write off lawyer-based solutions for middle income clients."[319] Juergen points out that: "no one imagines lawyers voluntarily making themselves less expensive."[320] Part of my aim in using a historical approach in this study has been to assist in broadening what we imagine lawyers can do. Lawyers have been creative in addressing the business choices they have faced in the past. They will need to be even more creativity today as they address the choices in front of them.

Patricia Hughes makes an excellent critique of the concept of access to justice. Like Professor McDonald, she points out that access to justice is not just about "access to legal system" and the removal of barriers that are created by the cost of legal services.[321] While I agree that this cannot be the main focus it is still undisputable that asking questions about how lawyers calculate their fees is important to the process of increasing access to justice. The subject of how lawyer's bill their clients is a surprisingly unstudied but very central question to be explored, if we want to fully understand the relationship among lawyers, the formal legal system and the Canadian public.

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[319] Juergens, *supra* note 181.
[320] *Ibid*. See also Spieler, *supra* note 259 at 379-80 ("As we think about how to meet the need for legal services, we need to focus more on community law offices and private practitioners. If nothing else, we certainly need to stop thinking that the unmet need for civil legal services for poor or vulnerable populations is, or can be, met by [Law Society Corporation]-funded organizations").
[321] Hughes, *supra* note 155 at 777-8. See also Faisal Bhabha, "Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions" (2007) 33 Queen's LJ 139 at 141.

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