DOES LEGAL REGULATION HAVE A FUTURE?

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Introduction

When Isaac Pitblado practised law, legal regulation was much simpler. In 1890 Pitblado became a member the 13-year-old Law Society of Manitoba. Like all Canadian law societies it was an association of lawyers, whose primary purpose was to advance the best interests of the profession. To call it a regulator would not be an accurate description. Pitblado witnessed the adoption of first and very basic canons of ethics from the CBA in 1920, but by the time a formal Code was adopted in 1987, he had long ceased practising. Pitblado did not know a world of mandatory insurance, client compensation, real trust account regulation, law corporations, limited liability partnerships or almost anything today associated with regulation of the profession. For most of his career, regulation of the profession, if it existed, dealt only with admission to the profession and getting rid of the bad lawyers.

The world of Pitblado’s practice was also simpler. It was a world of paper; the typewriter was state-of-the-art technology in the latter part of his career. Lawyers moved within the province by train. A case at the Supreme Court of Canada would take several weeks given the travel involved and if one went to the Privy Council, as much as two months might be required. Laws were largely inaccessible. Case law, if published, became public months or years after decisions were made.

I could romanticize about Pitblado’s era – a kinder and gentler time – one in which my own father began his practice. But I won’t. The world has changed exponentially since his time. Changes in the world in the last one hundred, fifty or ten years are way too many to recount. It is rapidly changing still, but the issue for this discussion is whether legal regulation – conducted in the public interest – has kept up. So that brings me to the topic at hand: the future of legal regulation.

In what follows, because time is limited, there are of necessity many generalizations. My comments, though they are critical, relate to institutions, which law societies are, not individuals. One problem with any analysis of legal regulation in Canada is there are 14 unique organizations with different capacity, resources, knowledge and skills. Because a pan-Canadian review must look at the largest and the smallest, the strongest and the weakest, I attempt to draw conclusions based on what most do or do not without always referencing the exceptions.
Much has been written on the model of legal regulation that has evolved in Canada. Scholars such as Harry Arthurs\(^1\), Richard Devlin\(^2\), Philip Gerrard\(^3\), Noel Semple and others\(^4\) have written critically about our past and present model of legal regulation. They have discussed its faults and even predicted its demise. I do not intend to review that work, but by sharing the observations of one who has been a legal regulator for close to 30 years, I offer perspectives of changes regulators must respond to. In summary form I will try to critique the state of professional regulation of lawyers. I then offer thoughts on the changes that are vital if law societies are to continue, in the long term, to fulfil a vital public role.

**The changing world**

- **The speed of law**  
  Isaac Pitblado practised law at train speed. Lawyers today practice at close to warp speed. Much of what happens to lawyers occurs instantly by email, social media or electronic commerce. Everyone expects every thing now and not tomorrow. The change in culture; the loss of reflection time; the risks associated with instant decision-making are part of our new world.

- **The size of firms**  
  When Pitblado practised, a large firm had 10 lawyers. Most lawyers practised alone; until the 1990s, most lawyers were sole practitioners\(^5\). That is no longer the case. Firms have become larger, multi-jurisdictional and international. There are Canadian law firms with hundreds of lawyers. Some are global partnerships of thousands. Large firms are corporate in their structure, behaviour and governance. Lawyers in these firms often required to adhere to a tightly prescribed law firm image, not dissimilar to what we once thought of employees of IBM. They are expected to follow the firm or corporate creed.

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\(^4\) Pearce, Russell G.; Semple, Noel; and Knake, Renee Newman. (2014). *A Taxonomy of Lawyer Regulation*. Legal Ethics, 16 (2), 258

\(^5\) Interesting observations on this are made by Sopinka J. in his reasons in MacDonald Estate v. Martin, [1990] 3 SCR 1235, 1990 CanLII 32 (SCC)

The legal profession has changed with the changes in society. One of the changes that is most evident in large urban centers is the virtual disappearance of the sole practitioner and the tendency to larger and larger firms. This is a product of a number of factors including a response to the demands of large corporate clients whose multi-faceted activities require an all-purpose firm with sufficient numbers in every area of expertise to serve their needs. With increase in size come increasing demands for management of a law firm in accordance with the corporate model. These changes in the composition and management practices of law firms are reflected in changes to ethical practices of the profession. Some of the old practices have been swept aside as anachronistic, perhaps with justification.
Their clients are large corporations. They are mostly cut from the same cloth. For law societies though with big firms can come big problems\textsuperscript{6}, they are not the practices that involve significant regulatory resources.

- **Solos and rural communities under threat**
Solos are becoming or have become rare, more isolated and older. Some have remained as generalists. They serve individuals and many are in the front line in providing access to justice, pro bono and legal aid. Service is focused on basic legal needs. Their practices are primarily consumer focused. Their clients are most often individuals or small business and frequently vulnerable. As important as they are, they are not affordable to most and face the biggest competition from online or alternate legal service providers. They are at the highest risk of being complained about or having claims made against them. They consume a significant percentage of law society resources while delivering fewer and fewer of the legal services.

Across Canada, rural communities have been decimated with losing many services. Economic changes result in loss of jobs without migration following. This has led to population decline and the accompanied loss of services, schools and hospitals. Courts sit less frequently or not at all and legal work diminishes\textsuperscript{7}. Rural practitioners are a threatened species. While their numbers decline, the legal issues of individuals who need a lawyer do not disappear; they must go further to get a lawyer or access legal services differently. For law societies, the impact of these facts on access to justice should be a significant issue.

- **The growth of government and in-house lawyers**
Government law departments have become dominant players in legal services delivery. In most provinces they are the largest law firms. Simultaneously more legal work has moved in-house in corporations. In both instances lawyers practice for their employers. Their focuses and very specialized; their expertise is great; they remain vulnerable to pressures and threats to their independence, in ways not even apparent a few decades ago.\textsuperscript{8}

- **The growth and complexity of law**
In Isaac Pitblado’s day, all the published law of Canada and Manitoba would likely fill only a couple bookshelves. Even when I started practising in 1979, the revised Statues of Canada filled a single shelf. In Pitblado’s day there were only a couple of report series. They were mailed to readers. A diligent lawyer, I suspect Pitblado was one, read every published decision. Can you imagine that today? The amount of law and case law

\textsuperscript{6} The Law Society of Upper Canada’s involvement and sanctioning of senior partners of the firm Lang Michener in the late 1980s is but one example. For commentaries on the case, see: Christopher Moore, The Law Society of Upper Canada and Ontario’s Lawyers, 1797-1997. p. 326ff, Bruce Livesey, When Temptation Bites, \url{http://www.canadianlawyermag.com/author/heather-gardiner/when-temptation-bites-755/}

\textsuperscript{7} A longtime sole practitioner in Antigonish, N.S. (not far from where Pitblado lived) once shared with me the fact that over a period of less than ten years, all local work for the national banks had been moved to ‘Mississauga’, or wherever the banks had centralized mortgage and financing work.

\textsuperscript{8} Andrew Martin and Candace Telfor, “The ethical obligations of government lawyers: The impact of the Honour of the Crown”, to be published, presented at CALE Conference, October 28, 2017

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has not only proliferated exponentially, but the complexity of the law is mind boggling. One only must think about the contracts of adherence presented to us every day to which we readily and without reading press “I agree” on our phones to contemplate this complexity and realize how law is changing so rapidly. Remember the smartphone is only 10 years old. Add that CanLII now hosts over a million cases and tens of thousands are added annually. Keeping current is a near impossibility to ask of lawyers. The issues of competence and how lawyers maintain it has been a key area of law society activity, most recently with the near national adoption of mandatory continuing professional development, an area that has seen significant, though not dramatic, regulatory initiatives.

Those heavily involved in the high-tech start-up sector has said that the hardest thing to find is a lawyer who understands the legal framework that new industries require. The challenges of understanding intellectual property, issues involved in coding, the property issues in products developed through multi-party collaboration, the intricacies of crypto currency (Bitcoin) and the implementations of online/e-commerce are huge and if not now, they shortly will be the daily bread of lawyers. Based on how the marketplace is unfolding, it is easy to predict that lawyers generally won’t be the ones to become knowledgeable about these legal issues. As a profession, our collective resistance to technology does not bode well. So someone else will do this work. An understanding of the implications of this will be significant for law societies, especially when the void grows because lawyers allow it to.

These “someone elses” – call them alternative legal service providers – are now part of the landscape. A small business in Brandon that wants a shareholder agreement can get it from multiple online sources including Google for free, or from Legal Zoom or Rocket Lawyer for a few dollars. One area where disruption is almost guaranteed is in wills. Online will preparation is common and is now offered by Quicken, the software that has revolutionized do-it-yourself accounting and tax preparation. What TurboTax has done to H&R Block and accountants will, with high certainty, be done to lawyers in wills and other areas.

- The access to justice crisis
I do not suspect that an access to justice crisis was a factor influencing lawyers in Isaac Pitblado’s time. Law was primarily a tool for the privileged, for land owners and businesses. Except for criminal and conveyancing law (there was almost no divorce in his time), individuals did not use lawyers. Now the reach of law into everyone’s life every day is our reality, with legal issues affecting Canadians as never before. The “access to justice crisis” as described by Chief Justice McLachlin and many others

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10 There is no justice without access to justice: Chief Justice Beverley McLachlin, https://www.law.utoronto.ca/.../there-no-justice-without-access-justice-chief-justice-be

now consumes time and resources of legal regulators who seek to address the iceberg of unmet legal needs – 85% of Canada’s legal needs are not met or serviced by lawyers. This problem is accentuated by the profession being focused on this but governments are not, at least in any concerted way\textsuperscript{12}. It is difficult to predict what the impact of this worsening situation will be. It is clear the courts cannot deal with it effectively (they are starved for resources); Legal Aid is maxed out (uses every resource it has) and does little civil work outside of the family law realm; and in government, ‘justice’ never stacks up in importance to health and education, where the most public money is spent. Because of that it is easy to predict the private sector will create products to fill the void, because there is money to be made. If nature abhors a vacuum, this deficit in legal services for most Canadians is huge. Sometimes, law societies advocate quietly for change\textsuperscript{13} but because they are regulators more than anything else, there are not effective lobbyists.

I could describe a myriad of other changes such as the aging demographic of the profession in many parts of the country, the increasing sophistication of client expectations, the growth of in-house counsel, the significant growth of the number of lawyers in government, and the impact of mobility and globalization. These internal changes reinforce we are in a period of unprecedented and rapid change profoundly impacting the profession. Some know that and are endeavoring to respond to the new world. Others are ostrich-like, with their heads in the sand. Legal regulators, although there have been many ‘future of law’\textsuperscript{14} studies, remain largely unresponsive to the rapid pace of change impacting the profession for which they are responsible. This is true although there are several ongoing projects across the country, which have been or are slow to take root.\textsuperscript{15}

**The Canadian regulators’ dilemma**

Though law society regulation is not anything like it was when Isaac Pitblado practised, it has evolved nowhere near as much as the profession it oversees. The 1960s and 1970s (that’s 40 to 50 years ago) saw the high-water mark in the expanse of vital regulatory programs – mandatory liability insurance, client compensation/reimbursement funds, trust account oversight, lawyer referral systems and professional bar admission programs. Other than introducing mandatory continuing

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\textsuperscript{12} Many local examples, such as the BC Civil Resolution Tribunal, give some sign of some government interest but it is very local and episodic.

\textsuperscript{13} One current example is the work of LSBC in the area of legal aid - https://www.lawsociety.bc.ca/our-initiatives/legal-aid-and-access-to-justice/

\textsuperscript{14} Futures: Transforming The Delivery Of Legal Services In Canada , Canadian Bar Association, 2014, http://www.cba.org/CBAMediaLibrary/cba_na/PDFs/CBA%20Legal%20Futures%20PDFS/Futures-Final-eng.pdf

professional development in this decade and mobility earlier this century, there have not been major changes in legal regulation over the past 30 years. There has been much tinkering but little redesign.

That has not been the case in England\textsuperscript{16} or Australia, where legal regulation became a significant political issue and governments determined they must step in to modernize or revolutionize legal regulation. Here is not the place to address the changes made in those countries; however, they have resulted in several significant developments and concepts require mention\textsuperscript{17}. These include:

- a focus on clients as consumers;
- committing to proactive regulation\textsuperscript{18};
- using risk of harm as the basis for regulatory decision-making
- a focus on regulating the entity in which lawyers practise;
- eliminating monopolies and opening up legal service delivery to others, some of which may not be owned by lawyers;
- simplifying the rules that govern lawyers and law firms;
- creating a uniform law for regulating lawyers across several states and territories;
- having a board of directors made up of skilled individuals chosen through a process that focuses on the public role they play; and
- requiring law firms to adhere to specific standards with compliance officers fronting the firm’s responsibility in both financial and practice matters.

In Canada though legal regulators have flirted with some of these concepts, for the most part they regulate as they have for decades.

- They set very prescriptive rules in both our Codes and law societies.
- They wait for lawyers to make mistakes then they pounce on them.
- They have perfected the art of reinventing the wheel, with each law society and territory developing its own variation on most regulatory themes.
- Every province and territory does the same thing, yet they do it alone (the Prairies are a notable exception).
- Lawyers, elected in the political processes, with a small percentage of public representatives, govern the profession (a shout-out for the Law Society of Manitoba’s most recent establishment of appointed lawyer benchers).
- There are no position descriptions, qualifications, skills or attributes for benchers. Popularity and notoriety seem to be the two most important characteristics, with the fact ‘no one else will do it’ being a deciding factor in many rural regions.

\textsuperscript{16} \url{http://www.legalservicesboard.org.uk/about_us/history_reforms/index.htm}


\textsuperscript{18} See Paul Philip, Proactive Risk Based Regulation at the SRA, unpublished paper presented at the International Conference of Legal Regulators, Singapore, October, 2017

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- Our regulatory bodies are managed by lawyers, most of whom have no formal management training and have managed nothing else. They learn on the job. This applies at every level of the organization.
- Lawyers’ self-interest continues to play a role, from minor to significant, in what law societies do. They often continue to act more like bar associations when they have dinners, meetings at expensive resorts, give awards or pursue issues when pressed by lawyers’ groups. One only need read the election materials from lawyers running for the office of Bencher to see how candidates pander to this mindset. It is not uncommon for benchers’ meeting agendas to involve issues where it is not the public interest at stake but lawyers’ self-interest, although it is often masked in public-focused language.\(^\text{19}\)
- Law societies do not have, and do not use, significant data or information about the profession or the legal marketplace to set policy or influence decisions. They have almost no facts and figures about what lawyers do, how effective they are, what their services cost, or how well their clients are served. They know little about what is new or innovative. They don’t know what it costs to deliver legal services. They know nothing about the economics of the profession\(^\text{20}\).
- Law societies’ most public work in complaints and discipline is almost reactive. They wait for complaints to come, then they investigate and usually dismiss the complaint\(^\text{21}\) or provide minor sanction. The regulators know little about the effect or impact of this work on either lawyers or complainants. For organizations in the business of overseeing lawyer performance, law societies know little about why lawyers behave as they do. Because they do not engage knowledge or skills from human resource management, psychology or other behavioral sciences in undertaking their work, how can they realistically be expected to manage or moderate lawyer conduct?
- Law societies benefit greatly from non-lawyer participation in governance through lay benchers or public representatives. As with elected benchers, in most provinces no skills matrix is applied when they are selected. Law societies have no overall sense of the skills required to effectively regulate; the same is true for the process by which lay benchers are appointed. They seek and frequently appoint good people but this is good luck rather than good design. The problem is exacerbated when the appointment is made by government and the societies take whomever they are given.
- Law societies have yet to embrace the need for equity and diversity in all aspects of their work. This goes far beyond supporting efforts to increase the number of lawyers from racialized and indigenous communities. Bencher tables are not diverse and do not reflect the community. Staff of law societies, especially in the leadership and professional ranks, are not diverse and do not model the


\(^{20}\) This can be contrasted with the detailed research agenda of the Solicitors Regulation Authority, which focuses on all of these things. See: [https://www.sra.org.uk/risk/outlook/risk-outlook-2017-2018.page](https://www.sra.org.uk/risk/outlook/risk-outlook-2017-2018.page)

\(^{21}\) In most law societies about 60% - 70% of complaints are dismissed without any action by the society other than, for some of them, to engage a lawyer in responding to a complaint.
aspirations law societies say they have for law firms and the profession. Many law societies do not actively engage with communities historically discriminated against and have had laws that actively do that or have failed to prevent it. That is especially true for indigenous peoples, though some early responses to the TRC suggest this may be changing.

Piling on to this list would do little. It is clear law societies, responsible for public interest regulation in the 21st century, for the most part use early to mid-20th century approaches, tools and attitudes to their work. Individually and collectively, they have not committed to modernization. Because they remain so strongly invested in approaches developed 50 years ago; because they are so steeped in the myth that lawyer control is the only way to preserve lawyer independence; and because they have failed to recognise the impact of the changes happening around them they have generally failed to adopt modern management or business practices, that directly impacts how they regulate. They fail to use sophisticated planning, technology or organizational effectiveness tools. Because they are lawyer-driven organizations law societies are very conservative and have done little more to embrace change than large portions of the profession have.

There is a huge disconnect between, on the one hand, the transformation overtaking the legal profession and the public they serve and the delivery of legal services and the way Canadian law societies do their work. Law societies have been fortunate that a disaster has not struck. However, just as it is predictable that a lawyer somewhere will steal money or there will be a very large insurance claim or any of dozens of things that happen daily will happen again, it can be predicted that one law society, as a professional regulator, will make a catastrophic mistake. It will cater to large firm interests. It will ignore warning signs and fail to address significant misconduct. Its internal processes will fail to protect clients. It will become insolvent or close to that and lawyers will refuse to bail it out through huge fee increases.

It is easy to foresee most law societies continuing to ignore and failing to address the access to justice crisis. Then a government, maybe acting collectively (as in Australia) or the media will take notice and our reputations will be attacked and possibly shattered. Then someone, perhaps an activist non-lawyer Minister of Justice, will ask why law societies are allowed the form of professional self-regulation that has failed to keep up with the rapidly changing world to remain as it is.

What must law societies do?

Though my theory is that if things remain as they are, a catastrophic failure by a law society is likely – it might not be inevitable. Illness can be mitigated by healthy living. Can improvements in law society regulation and governance hygiene make for a
healthier form of oversight and immunize law societies from their largely self-inflicted deficiencies?

Because I believe in the value and importance of an independent legal profession, as a constitutional norm, to preserve the rule of law and be a protector of vital democratic values and institutions, it is crucial that lawyers do what is necessary to ensure a

[96] Clients — and the broader public — must justifiably feel confident that lawyers are committed to serving their clients’ legitimate interests free of other obligations that might interfere with that duty. Otherwise, the lawyer’s ability to do so may be compromised and the trust and confidence necessary for the solicitor-client relationship may be undermined. This duty of commitment to the client’s cause is an enduring principle that is essential to the integrity of the administration of justice. In Neil, the Court underlined the fundamental importance of the duty of loyalty to the administration of justice. The duty of commitment to the client’s cause is an essential component of that broader fiduciary obligation. On behalf of the Court, Binnie J. emphasized the ancient pedigree of the duty and wrote that it endures “because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained”: para. 23 (emphasis added). This unequivocal and recent affirmation seems to me to demonstrate that the duty of commitment to the client’s cause is both generally accepted and fundamental to the administration of justice as we understand it.

[97] The duty of commitment to the client’s cause is thus not only concerned with justice for individual clients but is also deemed essential to maintaining public confidence in the administration of justice. Public confidence depends not only on fact but also on reasonable perception. It follows that we must be concerned not only with whether the duty is in fact interfered with but also with the perception of a reasonable person, fully apprised of the relevant circumstances and having thought the matter through. The fundamentality of this duty of commitment is supported by many more general and broadly expressed pronouncements about the central importance to the legal system of lawyers being free from government interference in discharging their duties to their clients. In Andrews v. Law Society of British Columbia, the court took up the theme in these words:

... in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. [p. 187]

[98] In Attorney General of Canada v. Law Society of British Columbia, the Court said this:

Stress was rightly laid on the high value that free societies have placed historically on . . . an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state. [p. 887]


[99] Similarly, in Peartman v. Manitoba Law Society Judicial Committee, the Court took up the theme in these words:

An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society. [Emphasis added; para. 1.]

[100] I conclude that there is overwhelming evidence of a strong and widespread consensus concerning the fundamental importance in democratic states of protection against state interference with the lawyer’s commitment to his or her client’s cause.

[101] Various international bodies have also broadly affirmed the fundamental importance of preventing state interference with legal representation. The Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders state that “adequate protection of the human rights and fundamental freedoms to which all persons are entitled . . . requires that all persons have effective access to legal services provided by an independent legal profession”: U.N. Doc. A/CONF.144/28/Rev.1 (1991), at p. 119. Similarly, the Council of Bars and Law Societies of Europe’s Charter of Core Principles of the European Legal Profession emphasizes lawyers’ “freedom . . . to pursue the client’s case”, including it as the first of 10 “core principles” (p. 5 (online)). The
model of professional regulation exists that will perpetuate these values. The models that have developed in England and parts of Australia may be appropriate to their circumstances but in Canada, our long tradition of lawyers regulating lawyers, at least in a modified way, is at least as good as all the alternatives. The vital role of lawyers in society has the greatest likelihood of being maintained by an enhanced model of professional and independent regulation of the legal profession.

So how do law societies get there?

Self-directed and internal changes are essential to ensure regulation of lawyers remains part of the profession’s public service obligation and that law societies can appropriately and satisfactorily fulfil their mandates to promote the rule of law and the public interest in competent, ethical and accessible legal services. I propose ten sometimes radical changes needed now. This is not a time for complacency as the risk is that law societies may be more like Eastman Kodak, which failed to recognize the threat of digital photography, than Apple, which embraced the challenge and revolutionized photography and so much more.

Here is my list:

1. The bencher table must be realigned so selection of those responsible for governance is no longer predominantly the result of a political process. There must be a clear articulation of the skills and attributes needed by a law society’s board of directors, with open and fair processes to populate these bodies with lawyers and others with those requisite skills and attributes. This change will break the focus of lawyer self-interest that afflicts so many law societies today. It will also lead to improved governance processes, as it will allow for and should lead to the professionalization of board work with focuses of strategy and oversight.

2. Law societies must recognize that lawyers do not possess many skills required to effectively carry out all their work. They must set out to change the nature of the skills and qualifications of law societies’ staff. They need economists and psychologists and business planners and psychometricians and educators and writers to work in various positions. Only then will they address the significant

   International Bar Association’s *International Principles on Conduct for the Legal Profession*, adopted in 2011, also emphasize committed client representation as the first principle governing lawyers’ conduct: “A lawyer shall maintain independence and be afforded the protection such independence offers in giving clients unbiased advice and representation” (p. 5 (online)).

   [103] The duty of commitment to the client’s cause ensures that “divided loyalty does not cause the lawyer to ‘soft peddle’ his or her [representation]” and prevents the solicitor-client relationship from being undermined: *Neil*, at para. 19; *McKercher*, at paras. 43-44. In the context of state action engaging s. 7 of the *Charter*, this means at least that (subject to justification) the state cannot impose duties on lawyers that undermine the lawyer’s compliance with that duty, either in fact or in the perception of a reasonable person, fully apprised of all of the relevant circumstances and having thought the matter through. The paradigm case of such interference would be state-imposed duties on lawyers that conflict with or otherwise undermine compliance with the lawyer’s duty of commitment to serving the client’s legitimate interests.

failure of law societies to collect data, make evidence-based decisions, design better models to improve lawyer behaviour and in effect, operate like the sophisticated regulators required by both the public and the profession.

3. Provincial and territorial boundaries must be breached by law societies. There is a need for uniform rules across the country. Avoid the notion that “we do things differently here.” Mobility of lawyers and inter-jurisdictional law firms are harbingers that the legal profession is a national profession. Though in another context I have advocated the Law Society of Canada as an ideal model, absent this radical solution, regulators must shed their local and often parochial attitudes to embrace consistency and uniformity in law society programs as the Prairie law societies have done with CPLED and has been done with CanLII. Then in Canada there will not be eight or nine bar admission programs, four insurance regimes with local and different claims management, 14 client compensation funds, 14 trust account oversight programs, and separate loss prevention, ethics advice, practice management and a myriad of other programs. Imagine the benefit that could be derived if all the resources to develop individual programs in each province were pooled. There are only 100,000 lawyers in Canada; are 14 distinct and autonomous regulators required?

4. Preventing harm must be the basis for law societies’ public interest mandate. That requires understanding of what causes harm, and how to manage and mitigate those risks. Risk-focused regulation must become the basis for what law societies do. With that fundamental shift, law societies can focus their resources on regulating proactively so they undertake work aimed to avoid harm. They could then stop25 or reduce regulating in areas where, though they have always been there, little or no real risk of harm to the public is apparent.

5. Law societies should regulate the entities that control how law is practised and legal services delivered. That must be so in both the proviate and public sectors, for we cannot assume that ministers of justice are any more effective at upholding high ethical standards than is any other politician. Though individual lawyers will continue to decide about their files, it is well known their law offices and their client departments set the tone for how they practise. Large, medium and small law firms are responsible for and manage the trust accounts and all trust transactions. They dictate what type of work is done and what clients lawyers may represent. They develop and enforce policies that affect how services are delivered and what they charge for them. They train and supervise support staff. They procure and manage the technology along with the security for client information to maintain confidentiality. They provide much of the continued professional development for lawyers and staff. When law societies focus on regulating law firms, they can better articulate what firms must address, and to develop the oversight tools that will ensure they do it.

6. Law societies must focus on regulation and be seen only as regulators. In doing so they must expand their focuses to areas long ignored, such as the work of crown attorneys and in-house lawyers. Issues that promote the success and

25 There are numerous examples such as the regulation of firm names and letterhead, or the highly prescriptive trust regulation when firms use their trust accounts only for retainers. The Code of Professional Conduct is full of highly prescriptive rules for lawyers that may suggest desirable behavior may not be required for all.
reputation of the profession should be largely left to bar and lawyer associations. Though there may be blurred lines, law societies must shed all signs of schizophrenia that comes from want to be liked by the profession and focus exclusively on public interest regulation. If the promotion of the public interest cannot be articulated in a law society activity, it should not be done. Effective and professional regulation will provide its own rewards. Law societies can then downsize and become more focused on what is needed to promote and protect the public interest.

7. Law societies should actively work to eliminate the lawyers’ monopoly on providing legal services and seek to expand opportunities for others, perhaps in both a regulated and unregulated environment, so more legal services are available to more Canadians. The 85 per cent unmet legal services iceberg metaphor that Jordan Furlong has so effectively captured in previous presentations is an indictment of our present model. Though I might not use a naturopathic doctor or Chinese herbal medicine, this doesn’t mean that others should not be able to do so. The same is true in law. Law societies must be the champions for breaking down barriers that prevent effective alternatives to traditional lawyers from taking root and flourishing.

8. My former colleague, Allan Fineblit QC, used to say that law societies have their structures backwards. Their greatest public focus is on kicking people out of the profession. It should be on getting them in and starting them on the right foot. Nowhere in Canada can you open a restaurant or a corner store without many permits, detailed inspections and assurances that no harm will be caused to the public by that new business. Yet a person can be called to the bar and open a practice the next day. That lawyer could accept a retainer on a first-degree murder charge the day after or commence a real estate practice where large sums pass through a trust account. Regulators must be clear that the commencement of the delivery of legal services to the public has significant and onerous responsibilities. They must ensure that new lawyers and new firms are capable, qualified and ready to shoulder their responsibilities. They must clarify that practising law is a privilege, not a right that comes with a law degree and a call to the bar. A long-term return will result from putting the emphasis up front – the fence at the top of the cliff26 – with a notion this is not a one-time immunization but is about engaging differently with the profession so the ideas and standards developed at the outset of practice are maintained throughout careers. Law societies will in this way work with the profession to ensure better performance throughout the careers of lawyers, so they hopefully will need fewer ambulances at the bottom of the cliff when lawyers fail and fall.

9. Law societies that purport to have the public interest as their primary mandate must be much more open and transparent about what they do. A cursory examination of law society websites shows how opaque they are and how the public cannot fathom what is done and, more important, how law societies make decisions. They mostly communicate about bad things, i.e., discipline, and rarely

26 Richard Susskind, The End of Lawyers?: Rethinking the nature of legal services, 2010, Oxford University Press
speak about – let alone make readily accessible – the many positive things they do. But openness is about more than communication. It is about being very clear regarding law societies processes, their policies, the decision-making matrices and their agendas. It also requires that law societies report to the public on what they do, how they do it and how they could do it better.

10. Law societies as regulators must be much more active in advancing substantive equality, diversity and inclusiveness in the profession. They must be visible leaders in reconciliation with the Indigenous peoples and the First Nations. All colonial power was exercised through law. All discrimination was perpetuated by lack of legal protections. For law and lawyers to play the vital role they do in society; for the rule of law to be upheld and advanced; for the legal profession to reflect the country’s population, law societies must change to ensure they look and behave differently.

Conclusion

I see this as required for legal regulation by law societies to have a future. It needs radical transformation to be both relevant to and a leader for an independent legal profession. To remain law societies must recognize that changes in client expectations and legal services delivery require them to quickly adopt processes, structures and approaches that are flexible and able to change as the circumstances require. Leadership requires law societies to clearly articulate their role and that of the profession in promoting and upholding the rule of law, and the need for all to have access to affordable legal services. It means speaking truth to power. It means envisioning where the profession is going because the regulator has the facts on which to base its forecasting. It means ensuring that regulation, so vital to promoting the public interest, is appropriate, proportionate and meets those objectives.

My purpose is not to predict whether there will be movement for change among the 14 Canadian legal regulators. They are at very different places, with very different resources and capacities. Yet regardless of their size or the circumstances of the lawyers for whom they are responsible, they face the same pressures and threats.

I said at the outset these would be the observations of someone who has spent nearly 30 years doing this work and who shortly will not be doing it any longer. My intent in presenting these thoughts is not to indict anyone – a risk that comes with the broad and necessarily imprecise descriptions I have offered of both the problems and potential solutions. If I have offended, I am sorry.

Thanks to the organizers of this wonderful set of lectures and discussions for allowing me to share my thoughts. I asked this question at the outset – Does Legal Regulation have a future? In my effort to provide an answer my thoughts are offered hoping the profession and decision makers will ponder the question and then perhaps agree that
significant change is required. Only then can they take up the cause and pursue the vital role of promoting the public interest and modernize our profession’s regulation.