

# It's About Time: Some Thoughts About Women in Canada's Legal Profession

Beth Bilson, Q.C.  
College of Law, University of Saskatchewan  
Chair, Canadian Bar Association Standing Committee on Equity

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## Introduction

When the forebears of today's women lawyers in Canada – Clara Brett Martin in Ontario, Mabel Penery French in New Brunswick and British Columbia, Annie Langstaff in Quebec -<sup>1</sup> waded into battle against the united front of male legaldom, they were making claims that were so novel that they were seen as irrational. The proposition they presented – that women should take their place as peers in the legal profession – was regarded by judges and the legal establishment as offensive or risible. Though they were ultimately successful in gaining entry for women,<sup>2</sup> this success did not initially result in any massive influx of women into the profession.<sup>3</sup>

By the mid-1970s, however, significant numbers of women were graduating from Canadian law schools and taking their place in the legal profession. In most Canadian law schools today, a little over half of the students are women, and women make up approximately one-third of the nation's lawyers.<sup>4</sup>

Though the issue of whether women are legitimately present in the legal profession has been more or less laid to rest, recent studies make it clear that there are still challenges for women who choose law as a profession, and that law practice, particularly in private law firms, is still not an entirely hospitable environment to women. Because there have been significant numbers of women in the profession for over twenty-five years now, it has been possible to examine the situation of women in the legal profession in ways which are statistically meaningful, and to produce a picture of how women are experiencing their legal careers.

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<sup>1</sup> For a summary of the efforts of these and other early women lawyers, see Joan Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: UBC Press, 2001) at 1-8; see also Mary Jane Mossman, "The First Women Lawyers: 'Piecemeal Progress and Circumscribed Success'" (2007) 45 *Osgoode Hall L.J.* 380; Fiona M. Kay, "Crossroads to Innovation and Diversity: The Careers of Women Lawyers in Quebec" (2001-2002) 47 *McGill L.J.* 699 [Kay, "Crossroads"].

<sup>2</sup> In the case of Quebec, this did not take place until 1941.

<sup>3</sup> In 1951, women made up only 3% of the legal profession, and in 1971, 5%; see Brockman, *supra* note 1 at 8.

<sup>4</sup> See Fiona M. Kay and Elizabeth Gorman, "Women in the Legal Profession" (2008) 4 *Ann. Rev. Law Soc. Sci.* 299 at 300. The figures vary somewhat from province to province; see Kay, "Crossroads," *supra* note 1 at 705 fn. 27, which shows the situation in 1999; Kay indicates that the proportion of women in the two legal professions in Quebec is the highest in Canada at around 40%, with the rate among notaries at around 43%.

Women lawyers themselves have long had the sense, based on anecdotal evidence, that women leave the practice of law in disproportionate numbers to men, that they gravitate from private practice to corporate or public sector settings, that they are underrepresented at the partnership level, and that they find the search for work-life balance frustrating and stressful. All of these impressions have been confirmed to some degree by more systematic study, but these studies also add nuances to the picture, and those nuances are in some ways more disturbing.

### **A Statistical Sketch**

Many of the studies that have been done examine the situation of women lawyers in Ontario and much of the work has been commissioned by the Law Society of Upper Canada.<sup>5</sup> Sociologist Fiona Kay and her colleagues have done a longitudinal examination of a sizeable sample of Ontario lawyers over the period from 1990 to 2002, and have examined a number of dimensions of the experience of women in the profession in that province;<sup>6</sup> the period of twelve years between the first and last surveys permitted an interesting analysis of the career paths of the men and women who provided data.

This study does confirm many of the impressions that women lawyers had formed. The information gathered in 1990 indicated that 5.8% of the male lawyers in the sample and 8.4% of the women lawyers were no longer engaged in the practice of law; by 2002, the numbers had changed to 11.3% of men and 21.3% of women, confirming that women are more likely than men to exit from the profession. The study also showed that women are more likely to be government lawyers than men (16.4% of women as compared to 11.6% of men), and marginally more likely to be corporate counsel (6.8% of women compared to 5.5% of men). Almost equivalent proportions of men and women are employees or associates of law firms, but men are far more likely to be partners than women (33.8% of men compared to 15.2% of women). Men are more likely to be sole practitioners than women (20.9% of men compared to 15.2% of women). Oddly enough, at least in Ontario in 2002, women were more likely to be judges than men.<sup>7</sup>

The study done by Kay on the professions in Quebec produced a similar kind of picture in relation to these issues, based on a single survey done in 1999. According to that study, 10.2% of the men and 15.0% of the women were associates or employees in law firms, while 30.7% and 12.7% of the women were partners. The proportion of government

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<sup>5</sup> I am making the assumption that, although there would be some differences in the experience of women in other provinces (and it might be instructive to conduct a study in a jurisdiction smaller than Ontario, Quebec or British Columbia), many of the features described in relation to Ontario would be reproduced elsewhere. This seems to be confirmed by the work of Joan Brockman in B.C. and Fiona Kay's study of the Quebec profession; see Brockman, *supra* note 1 and Kay, "Crossroads," *supra* note 1.

<sup>6</sup> See Fiona M. Kay, Christi Masuch and Paula Curry, *Turning Points and Transitions: Women's Careers in the Legal Profession: A Longitudinal Survey of Ontario Lawyers 1990-2002* (Toronto: Law Society of Upper Canada, 2004); see also Michael Ornstein, *A Report to the Law Society of Upper Canada: The Changing Face of the Ontario Legal Profession, 1971-2001* (Toronto: Law Society of Upper Canada, 2004). Jean McKenzie Leiper, *Bar Codes: Women in the Legal Profession* (Vancouver: UBC Press, 2006) provides qualitative data through extensive interviews.

<sup>7</sup> See Kay, Masuch and Curry, *ibid.* at 20 for all of these figures.

lawyers was more striking – 18.4% of men compared to 30.0% of the women respondents, while the difference in the proportion of sole practitioners was more marginal (18.7% of men compared to 17.3% of women).<sup>8</sup>

In terms of the kind of law practiced, the Ontario study indicated that men were more likely to have a general practice or to practice in the areas of real estate, criminal law, corporate and commercial law, wills and estates and civil litigation, while women were more likely to practice family law, administrative law or labour relations; the margins were most significant in family law and civil litigation.<sup>9</sup> Men spend more of their time doing promotion and client development work and “practicing law,” while women spend proportionally more of their time teaching, doing legal research or other “uncompensated law-related work.”<sup>10</sup>

With respect to their earnings, more women than men are in all earnings categories from “less than \$30,000” to “\$80,000-\$89,999” and also in the “\$100,000-\$149,999” category. A significantly larger proportion of men than women are in the “\$200,000-\$299,999” and “\$300,000 +” categories.<sup>11</sup> With the exception of judges, the earnings of women are lower than those of men in all job categories listed.<sup>12</sup>

To this point, the empirical data may not surprise those whose information has taken the form of folklore. There are, however, some other kinds of data in the Ontario study which may be somewhat more unexpected.

The mean hours worked and hours billed showed no statistically significant differences for men and women, though women were more widely dispersed across the billing categories, showing both a higher proportion of very low and very high billings, whereas men were more closely clustered around the mean.<sup>13</sup> The figures in the study also show that there is very little difference between women and men as to the proportions of time they spend with individual as opposed to institutional clients, or in the proportion of time they spend with clients they have brought into the firm as opposed to existing clients of the firm.<sup>14</sup>

The Ontario studies examined work history of lawyers in the sample, and found that while 63% of men were in the same job they had held six years earlier, this was true of only 44% of women.<sup>15</sup> Over their whole work history, women are significantly more likely to change jobs or to leave the legal profession altogether.<sup>16</sup> Women are

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<sup>8</sup> Kay, “Crossroads,” *supra* note 1 at 718.

<sup>9</sup> Kay, Masuch and Curry, *supra* note 6 at 25. A significantly larger proportion of women than men are shown as practicing “other” areas of law, but it is difficult to know what this means.

<sup>10</sup> *Ibid.* at 26.

<sup>11</sup> *Ibid.* at 29.

<sup>12</sup> *Ibid.* at 31.

<sup>13</sup> *Ibid.* at 35-36.

<sup>14</sup> *Ibid.* at 40-41.

<sup>15</sup> *Ibid.* at 60.

<sup>16</sup> *Ibid.* at 63-65. Indeed, the numbers may underestimate the numbers leaving the profession as there is less likelihood that the absent lawyers will respond to a survey.

considerably more likely to move into government employment in their later positions, and men are more likely to move to a partnership in a law firm when they change jobs.<sup>17</sup> In any hiatus between professional positions, men were considerably more likely to be travelling, furthering their education or unemployed, while women were more likely to be looking after children.<sup>18</sup>

One result the Ontario researchers found slightly anomalous was that, despite the existence of differences between men and women which might be expected to have a negative impact, on aggregate measures of overall job satisfaction, there was very little difference between men and women.<sup>19</sup> On closer examination, the researchers concluded that this might be explained by differences in the way in which men and women responded to dissatisfaction with the negative aspects of their jobs. Men tended to protest things they experienced as negative and to become more aggressive, while women tended to internalize their dissatisfaction rather than express it openly, and to become more passive and compliant. In fact, when the overall category of job satisfaction was deconstructed, women reported higher levels of depression and despondency, more concern about the consequences for their children of their working conditions, and a more pronounced feeling of powerlessness.<sup>20</sup> These signs that more women than men experience their jobs in a negative way are consistent with the data mentioned earlier concerning the higher rates at which women seek other jobs or leave the profession.

## **Sources of Dissatisfaction**

### **a) The Toll on Private Life**

The question of work-life balance is perhaps the gender-related issue that has attracted the most attention recently. Before turning to that issue, however, I would note some striking findings from the Ontario studies concerning a related issue. The figures in the Ontario studies show that approximately 90% of the men in the sample were married or in a relationship, compared to 79% of women. Women were more likely to be widowed, divorced or separated or to have never married or cohabited. Men in the sample were also significantly more likely to have children, and likely to have more children.<sup>21</sup>

Though the significance of these figures has not been fully analyzed, they seem to suggest that more women than men regard it as necessary to make a choice between pursuing a career in the legal profession and having a family. On this phenomenon for women in the workforce generally, one scholar commented:

[Women's] "choice" to remain childless reflects their knowledge that marriage generally hurts women's careers. In sharp contrast, men need not remain childless

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<sup>17</sup> *Ibid.* at 65.

<sup>18</sup> *Ibid.* at 67.

<sup>19</sup> John Hagan and Fiona Kay, "Even Lawyers Get the Blues: Gender, Depression and Job Satisfaction in Legal Practice" (2007) 41 *Law and Soc. Rev.* 51. See also Kay, "Crossroads," *supra* note 1 at 735-36.

<sup>20</sup> *Ibid.*

<sup>21</sup> Kay, Masuch and Curry, *supra* note 6 at 55.

to protect their ability to perform as ideal workers. In fact, marriage enhances their ability to do so, as is evidenced by the fact that ambitious young men are pressured to marry, that 95% of men in management do marry, and that marriage generally enhances men's careers. That ambitious women often are forced to choose between work and family, while ambitious men are not, is a dramatic illustration that men and women face profoundly different "choices."<sup>22</sup>

In a more personal tone, one lawyer interviewed as part of a research study said:

I thought when I was younger that I'd feel ripped off and deprived if I didn't have children. I thought ideally the only way to do it was to have children before I went to law school or reach a position of financial security in which I could do it. I was idealistic about what my ability would be, about being able to find part-time work and that sort of thing. There's just no time, and I cannot perceive a point in time when there will be time or when I'll be sufficiently financially stable to take the time off to have children.<sup>23</sup>

It has been noted – and this is a correlation that would repay careful examination – that having children in itself is positively associated with attaining partnership in a law firm.<sup>24</sup> Thus, for larger numbers of men, having children has positive weight in career advancement, whereas for larger numbers of women it does not.

For women who do have children, it is clear that the effort of accommodating family and professional demands is a stressful one. A number of studies have paid careful attention to what women lawyers say about their experience in this regard.<sup>25</sup> The tone of some of these interviews is captured in the following comment by a woman practicing family law in a medium-size firm:

Even in my own household, although we're both lawyers and we both probably work about the same number of hours and we're both very involved at home and with the kids...the person they call for in the night when they're sick, is Mom... in terms of the truly nurturing stuff, I do so much more of that and so I'm the one they cling to and whine to – they're getting better – but the "holding on to Mom on the leg issue at the door" – "Don't go, Mom, don't go!" That didn't happen to Dad.<sup>26</sup>

The data gathered in the Ontario studies indicated that women devote significantly more hours to child care than men, and that the hours women with children spend in paid work

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<sup>22</sup> Joan Williams, "Gender Wars: Selfless Women in the Republic of Choice" (1991) 66 New York U. L. Rev. 1559 at 1597-98, as quoted in Brockman, *supra* note 1 at 182.

<sup>23</sup> Brockman, *ibid.* at 186.

<sup>24</sup> Fiona M. Kay and John Hagan, "Cultivating Clients in the Competition for Partnership: Gender and the Organizational Restructuring of Law Firms in the 1990s" (1999) 33 Law & Soc. Rev. 517 at 540 [Kay and Hagan, "Cultivating Clients"].

<sup>25</sup> See e.g. Brockman, *supra* note 1; Leiper, *supra* note 6; Kay, Masuch and Curry, *supra* note 6.

<sup>26</sup> Leiper, *ibid.* at 114-15.

are somewhat lower than those of men, particularly when there are school age children in the home,<sup>27</sup> consistent with findings in earlier studies in B.C. and Alberta.<sup>28</sup>

In a series of reports commissioned by the Law Society of Upper Canada and sponsored by Ontario law firms, Catalyst, an international consulting firm, studied the experience of men and women lawyers in balancing their personal and professional lives. They found that roughly half of the lawyers surveyed were satisfied with the working environment in their law firms, but that over half of those who were satisfied found it difficult to manage their work and personal or family responsibilities; nearly two-thirds of all lawyers in law firms expressed this difficulty.<sup>29</sup> More than one-half of partners and two-thirds of associates reported that they often or very often put work ahead of their personal or family life.<sup>30</sup> Female associates expressed particularly low satisfaction with their ability to manage work and family or personal responsibilities.<sup>31</sup>

With respect to supports and benefits in place in law firms to assist lawyers in balancing work and personal life – flexible or part-time work options, parental leave, child care benefits, daycare facilities and so on - the Ontario study indicated that, although many firms had gradually introduced some of these benefits over time, there was in fact a decrease between 1996 and 2002 in the degree to which these benefits were available.<sup>32</sup>

Though it has always been inferred that there is a link between the difficulties for women of juggling their careers and their family responsibilities and the relatively high level of movement of women to alternative careers or out of the profession, this link has been somewhat difficult to confirm directly. In one of the Catalyst studies, however, the data seems to suggest that the hypothesis is correct. For over 80% of female associates studied, “an environment more supportive of my family and personal commitments” was given as a reason for choosing to work at another law firm.<sup>33</sup> Another study found that

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<sup>27</sup> Kay, Masuch and Curry, *supra* note 6 at 56-57.

<sup>28</sup> Brockman, *supra* note 1 at 187-88. In a large national study carried out in 2001 under the auspices of Health Canada, the results indicated that women continued to bear a larger share of responsibility for child care than men, and that little had changed in this regard over the previous decade; see Linda Duxbury and Chris Higgins, *The 2001 National Work-Life Conflict Study: Report One* (Ottawa: Health Canada, 2002).

<sup>29</sup> Catalyst, *Beyond a Reasonable Doubt: Creating Opportunities for Better Balance* (Toronto: Catalyst, 2005) at 6 [Catalyst, “Creating Opportunities”].

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.* at 10. The Catalyst work also indicated that one-third of the male lawyers studied had a spouse or partner who did not work outside the home (compared to one in thirteen women); see Catalyst, *Beyond a Reasonable Doubt: Lawyers State their Case on Job Flexibility* (Toronto: Catalyst, 2006) at 6 [Catalyst, “Lawyers State Their Case”].

<sup>32</sup> Kay, Masuch and Curry, *supra* note 6 at 52.

<sup>33</sup> Catalyst, “Creating Opportunities” at 16. It might be noted that only for male partners was “increased compensation” more often cited as a reason for moving to another law firm than “an environment more supportive of my family and personal commitments;” female partners and male associates also rated the latter more highly than “increased compensation.” Indeed the majority of the male and female associates and female partners indicated that they would be willing to take a reduction in compensation to have more time to accommodate personal and family responsibilities. See also Janice Mucalov, “Family Values,” *National*, June 2005.

men were far less likely to cite the search for work-life balance as a reason for leaving a position.<sup>34</sup>

## **b) Income and Career Advancement**

I alluded earlier to the findings in the Ontario study that the average earnings for women are lower than for men in all categories of law occupations (with the exception of judges). The differences are greatest in the sole practitioner category, but also striking in the industry or corporate counsel and employee or associate of law firm categories.<sup>35</sup> The possibility that men and women who were part of this sample had different lengths of experience may, of course, have affected these findings somewhat, but the existence of a gender-based wage gap is not as such surprising given the stubborn endurance of such a gap across all sectors of Canadian employment.

Though higher levels of education, and increasing lengths of work experience, have had some effect in narrowing the gender wage gap between men and women, statistics focusing on women with higher levels of education have demonstrated a somewhat puzzling phenomenon; even though the gap between men and women in the early years following post-secondary education has narrowed, women start to lose ground within a period of several years.<sup>36</sup> Recent work by Statistics Canada comparing the earnings of women with and without children found that women with children earned less than childless women in every age group, and the gap widened for women who interrupted their participation in the workforce. Strikingly, the gap was particularly wide for highly-educated women.<sup>37</sup>

The Ontario studies also, as we have seen, confirmed the impression that women are less likely than men to become partners than men.<sup>38</sup> Impressionistic explanations for this have included differences in hours billed, clients brought into the firm and service to institutional clients, although, as the Ontario study indicated, the actual differences in these factors are relatively minor.<sup>39</sup> In any case, it has been found that women get less of a return on these variables than men, and that there are important “human capital” factors such as time and networking opportunities that are also significant in partnership decisions.<sup>40</sup> Some research has suggested that law firms hold women and men to different standards in considering candidates for partnership:

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<sup>34</sup> Brockman, *supra* note 1 at 53.

<sup>35</sup> Kay, Masuch and Curry, *supra* note 6 at 31. The difference in average earnings of sole practitioners is interesting, raising the question of what differences there are in the type and conditions of practice of men and women who describe themselves as sole practitioners.

<sup>36</sup> Ross Finnie and Ted Wannell, “The Evolution of the Gender Earnings Gap Amongst Canadian University Graduates” Statistics Canada, Analytical Studies Branch Research Paper Series, Catalogue No. 11F0019MIE – No. 235, 2004.

<sup>37</sup> Xuelin Zhang, “Earnings of Women with and without Children” Statistics Canada, *Perspectives on Labour and Employment*, March 2009.

<sup>38</sup> Kay, Masuch and Curry, *supra* note 6 at 20.

<sup>39</sup> *Ibid.* at 35-41. There are some variations in the results of studies of the hours women lawyers work in comparison to men; see Kay and Gorman, *supra* note 4 at 309.

<sup>40</sup> Kay and Hagan, “Cultivating Clients,” *supra* note 24.

This did not mean that women were better rewarded than men; men with low scores on social and cultural attributes still had better partnership chances than did women with exceptionally high scores. Thus, Kay & Hagan's results suggest that women had to demonstrate their affinity with firm culture and their ability to form valuable social ties, whereas men's capacities in these areas were taken for granted. In addition, children have a positive impact on men's promotion chances but none on women's, suggesting that firms interpret parenthood as signaling stability and work commitment for men but not for women.<sup>41</sup>

### c) The Nature of the Work

Closely tied to questions of income and advancement are issues about the legal areas women practice in and the kind of work they do. As we have seen, a larger proportion of men than women practice in certain areas such as real estate and civil litigation, while a much larger proportion of women than men work in family law.<sup>42</sup>

The reasons for this uneven incidence of men and women across the range of practice areas are not altogether clear. No doubt part of it can be attributed to the actual affinities of women for particular kinds of legal issues, clients or approaches, though the question of whether there is any pronounced difference between male and female approaches to law remains controversial.<sup>43</sup> Though the hypothesis that women are directed into certain areas of practice early in their careers based on more stereotypical considerations has not been completely tested, there does seem to be some support for this theory.<sup>44</sup> What links there might be between the areas of law practiced and the career paths of women lawyers is not clear, though it has been argued that the kind of stereotyping which leads women into certain areas of law may be correlated to the kind of value attached to those areas when it comes to assessing the contributions lawyers have made to their firms. Certainly, it has been pointed out that areas like family law are less remunerative for law firms, and, to the extent this is a consideration in assessing the work of lawyers, the segregation of women into particular legal areas will have an impact.

It is also difficult to calculate directly the effect on the career advancement of women of the differences in the kinds of tasks assigned to or undertaken by men and women. The Ontario study indicated that men, for example, spend a larger proportion of their time on promotion and client development, while women spend more time on "uncompensated law-related work."<sup>45</sup> A more subtle influence on the trajectory of women's careers may be the sorting and stereotyping that goes on when individual tasks are allocated or files are assigned. A woman who returns from maternity leave may be excluded from particular opportunities based on unspecified concerns – which may be well-intended –

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<sup>41</sup> Kay and Gorman, *supra* note 4 at 310 [citations omitted].

<sup>42</sup> Kay, Masuch and Curry, *supra* note 6 at 25.

<sup>43</sup> Kay and Gorman, *supra* note 4 at 315-19.

<sup>44</sup> Brockman, *supra* note 1 at 58. Wilson J. raised this issue in *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

<sup>45</sup> Kay, Masuch and Curry, *supra* note 6 at 26.

about intruding on family life or making the transition back to work too stressful.<sup>46</sup> Thus, the kind of “penalty” that attaches to a woman for indulging in maternity leave may have a continued effect through informal practices that she may not be aware of or have a chance to respond to.

#### **d) The Glass Half Full**

The studies referred to earlier provide strong indications that women continue to face discrimination and its adverse consequences as members of the legal profession – notwithstanding their significant numbers and their increasing participation in a variety of legal careers. They are more likely to change jobs, to have more jobs and to leave the profession than their male counterparts. Despite these phenomena, however, research has shown that men and women generally have similar levels of job satisfaction and a positive orientation towards their chosen profession. This apparent dichotomy is not completely understood, although there may be clues in the intrinsic interest and variety of legal work,<sup>47</sup> the availability of a range of career options, or the relatively high returns to women financially compared to other professions.<sup>48</sup> A less encouraging explanation would be that women have such low expectations that satisfaction is relatively easy to achieve.<sup>49</sup>

#### **Strategies for Change**

Until recently women were not numerous enough in the legal profession, and had not been there long enough in significant numbers, to make it possible to develop a clear picture of the career patterns and status of women lawyers. Though many questions remain to be answered, there is now a relatively extensive and rich body of research concerning these issues, which has meant that it is possible to turn to formulating strategies to support and encourage women, and to confront the issues of recruitment and retention that have become so prominent.

It is not possible in a paper of this scope to address in detail all of the strategies that have been proposed and it is far too early to assess what impact any of these ideas might have in eliminating the barriers women still face in embarking on and advancing through a legal career. It is possible, however, to describe some of the strategies that have been identified.

*Flexible Working Arrangements.* Though the Catalyst studies found that work-life balance is identified as a priority issue for many lawyers, it is particularly important to women. Catalyst found clear links between the views of associates on work-life culture

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<sup>46</sup> Julius Melnitzer, “Legal Profession Grapples with Motherhood: Failed to Adapt to Record Number of Women Entering Law” Financial Post, April 8, 2009.

<sup>47</sup> Kay and Gorman, *supra* note 4 at 317.

<sup>48</sup> On the last point, see *ibid.* at 311-12.

<sup>49</sup> *Ibid.* at 317. Kay and Gorman also point to research suggesting that women’s job satisfaction is related to particular aspects of practicing law, in particular the interest in the subject matter and their connections with colleagues and clients, but not to income, opportunities for advancement or job security.

issues and their intention to remain in their current employment.<sup>50</sup> The studies also found that there was significant support, particularly among women, for flexible working arrangements – including flexible working hours, a compressed work week, part-time work, job-sharing and telecommuting - to ameliorate work-life balance concerns. At the same time, the majority of respondents feared that requesting an opportunity to enter into more flexible work arrangements would impact negatively on their careers.<sup>51</sup> Many perceived a lack of support among the leadership of their firms for addressing the work-life balance issue.<sup>52</sup> Catalyst suggested a fruitful approach to this may be to present law firms with business-based reasons for making greater efforts to address the work-life balance concerns of lawyers, focusing particularly on the costs to firms of losing lawyers.<sup>53</sup> The conclusion of the Catalyst reports was that the increased use of flexible working arrangements was a promising avenue for addressing the work-life-balance challenges facing lawyers, but that greater efforts would have to be made to ensure that the career prospects for lawyers who avail themselves of such arrangements are not adversely affected.

*Paid Maternity Leave.* The availability of maternity leave, and the level of income for such leave vary widely across Canada. For employee lawyers, provincial labour standards legislation may specify minimum periods of maternity leave – and other kinds of parental leave (except in British Columbia and Newfoundland and Labrador where lawyers are excluded from the statutes) and benefits may be available under federal Employment Insurance (EI) legislation to for part or all of the leave period; indeed EI may provide benefits for a longer period if an employee is granted maternity leave in excess of the provincial minimums. Some legal employers, including law firms, have policies giving employees additional leave, and “topping up” the benefits provided through EI. In many cases, however, firms do not have formal policies, or it is unclear what they are.<sup>54</sup>

Outside firm policies, EI benefits and labour standards provisions are not available to partners or other self-employed lawyers. In 2005, the Barreau du Québec instituted a parental leave program to provide funding for parental leave for lawyers who did not have access to other parental leave benefits; a year later this was rendered unnecessary because the government of the province put in place a program of parental leave benefits for self-employed persons. A related program introduced by the Barreau was the “Bébé Bonus” which provided for the refund of Barreau fees to new parents.

In 2007, the Law Society of British Columbia implemented a pilot program to provide loans of up to \$8000 to solo practitioners who take maternity leave. A working group

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<sup>50</sup> Catalyst, *Beyond a Reasonable Doubt: Building the Business Case for Flexibility* (Toronto: Catalyst, 2005) at 7 [Catalyst, “Business Case”].

<sup>51</sup> Catalyst, “Lawyers State Their Case,” *supra* note 31 at 11.

<sup>52</sup> Catalyst, “Creating Opportunities,” *supra* note 29 at 28-29.

<sup>53</sup> Catalyst, “Business Case,” *supra* note 50. Catalyst calculated the average cost to a firm when an associate departs as \$315,000; see *ibid.* at 14.

<sup>54</sup> Kevin Marron, “The Parental-Leave Pickle,” *Canadian Lawyer*, June 2008. The article reports that a lawyer conducting an informal survey on behalf of her law firm to get some examples of parental leave policies was “shocked” to discover “not only that most firms didn’t have a policy but also that most female associates didn’t know and were afraid to ask.”

recommended to the Law Society of Upper Canada that a program of parental leave benefits of up to \$9000 be put in place for lawyers in firms of five lawyers or less where they had no access to other benefits.<sup>55</sup> The working group also recommended a pilot project to promote and support practice locums for maternity leave or other purposes.<sup>56</sup>

The Standing Committee on Equity of the Canadian Bar Association commissioned a study in 2007 of the potential cost of extending EI maternity and parental leave benefits to self-employed Canadians. This research has been used as a basis for initiating contact with the Hon. Diane Finlay, the minister responsible for EI, to press for changes in the EI system.

Whatever range and combination of benefits is ultimately available, the leave system can be of limited effectiveness if law firm culture transmits the message that leave will have an adverse impact on a lawyer's legal career or prospects for advancement.<sup>57</sup>

*Other Family-Related Support.* The studies carried out in Ontario indicated that the benefits provided by legal employers had generally declined over the period from 1996 to 2002. This did not mean that there was a huge difference in the benefits related specifically to family-related support, as these benefits were available to a very small number of lawyers in both periods.

Some law firms do recognize the corporate benefit of providing family related benefits. For example, the Toronto office of Blake, Cassels & Graydon is one of twenty-four Toronto firms who have an arrangement with a child care service to provide high quality emergency child care when unexpected child care needs arise. Blakes subsidizes the service for employees, which is seen as good for both the firm and the employees.<sup>58</sup>

*Career Support.* A number of the strategies that have been proposed to address the situation of women in the legal profession rest on the premise that women lawyers can benefit from career supports specifically targeted at their needs. Such strategies may include mentoring and networking programs, programs aimed at providing women with advice about how to develop business or take advantage of career opportunities, and the compilation or creation of resources such as written materials, videos or Web sites.

Mentoring and networking programs for women lawyers have been established in many jurisdictions under the auspices of legal organizations such as law societies or the CBA.

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<sup>55</sup> Retention of Women in Private Practice Working Group, *Final Report* (Toronto: Law Society of Upper Canada, 2008) at 105-14.

<sup>56</sup> *Ibid.* at 102-05. The advantage of the locum project was described in the *Final Report* as not only being of benefit to sole practitioners and members of small firms who are concerned about maintaining their practice during maternity leave, but as a source of part-time legal employment that might in itself be an attractive career option for women.

<sup>57</sup> See Bob Tarantino, "Paternity Leave for Lawyers in Canada – Two Solitudes," online: <http://www.cba.org/CBA/practicelink/BWL/paternity.aspx> for a discussion of the importance of law firm culture in relation to paternity leave.

<sup>58</sup> Kristin Goff, "Child Care Service There when Nanny Isn't" *Ottawa Citizen*, April 6, 2005; Mucalov, *supra* note 33.

The Women Lawyers' Forum, for example, works at both national and provincial levels to foster mentoring relationships and networking opportunities for women. Some legal employers also recognize the value of mentoring and assign mentors to young women entering the legal profession.

As a result of the recommendations of the Ontario working group,<sup>59</sup> the Law Society of Upper Canada established the Justicia Think Tank, which includes “representatives from medium- and large-sized law firms committed to identifying and adopting principles and best practices that promote the retention and advancement of women in the private practice of law;”<sup>60</sup> at the time the announcement of its creation was made, the think tank had been endorsed by 40 Ontario law firms. The think tank was committed to setting and meeting goals in four areas: tracking demographics; flexible work arrangements; networking and business development; and mentoring and leadership skills development for women.

The working group also recommended the establishment of a leadership and development institute, and the development of a range of resources online and in other formats to provide women with opportunities for professional development and practical advice geared to their needs.

Two years ago, the Standing Committee on Equity of the CBA released an *Equity and Diversity Guide*, which includes facilitator's guides, a statement of equity principles, a set of videos (one of which focuses on gender issues) and a list of resources. A pilot project is currently under way with a group of large Toronto law firms to develop training in the use of the guide for law firms and other legal organizations. The Guide is designed to assist law firms and legal organizations in examining their own practices with a view to identifying and removing features that have a discriminatory effect.

*Demographics.* Demographic change in the legal profession is not really a strategy, but the alterations now occurring in the demographic profile of the legal profession may yet have more impact on the status of women lawyers than many of the equity-based arguments and initiatives we have been examining. Statistics Canada has reported that “court personnel,” a category that includes lawyers and judges, is aging more dramatically than the Canadian workforce as a whole. Almost one-fifth of workers in this category are 55 years of age or older, which means that high rates of retirement can be anticipated over the coming years.<sup>61</sup> Given the extensive education necessary to become a lawyer, they cannot be replaced quickly. Law firms and other legal employers are already becoming aware of the recruitment and retention implications of demographic change, and sophisticated employers are examining the factors that affect the decisions of younger lawyers to choose or remain with a particular organization. This is happening at a time when a majority of law school graduates are women. As younger lawyers, among

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<sup>59</sup> *Supra* note 55.

<sup>60</sup> Law Society of Upper Canada, “Media Release: Law Society Launches Cutting-Edge Think Tank to Retain and Advance Women in Legal Profession” October 14, 2008.

<sup>61</sup> Mathieu Charron, Racha Nemr and Roxan Vaillancourt, “Aging of Justice Personnel” *Juristat*, March 2009.

them many women, place a priority on work-life balance and on greater flexibility in their working lives, the “business case” for addressing many of the issues that have had a negative impact on women becomes stronger.

## **Conclusion**

It cannot be said that there is overwhelming evidence of the imminence of such a change, though my impression is that in the discourse of the law firm, there is an increasing awareness that traditional approaches to recruitment and retention are falling short in an environment where young lawyers searching for jobs have greater bargaining power, where (it has been suggested) younger lawyers place less priority on financial gain as an incentive, and where there are increasing numbers of women – and women’s voices in senior positions – reiterating their concerns. It is three decades since significant numbers of women began taking their place in the legal profession, and, as we have seen, their numbers have not translated into equity or into a profession that seems able to respond effectively to their needs. In many ways, the drifting away of women from the profession in general and private practice in particular is an eloquent statement of their disillusionment and frustration with a profession that required sacrifice and effort to enter.

On the other hand, the presence of large numbers of women in the legal profession now permits systematic research to be done of the kind I have alluded to in this paper, and this in turn can form the basis of evidence-based conclusions and new initiatives designed to support and assist women lawyers, and to assist the law firms and legal organizations within which they work.

It is, of course, impossible to capture all of the reasons why women are drawn to the legal profession and why they remain with it or leave it. It is difficult to articulate the mix of factors that would capture “what women want.” An informant in one study did perhaps capture much of it:

It’s more important to me to just continue to develop my career so that I’m always challenged, I’m always doing a good job, I always care about what I’m doing and obtain gratification from it – and I always have time to spend with my family.<sup>62</sup>

Though the legal profession hasn’t quite managed to get this formula right, it is surely possible to imagine it happening!

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<sup>62</sup> Leiper, *supra* note 6 at 163.